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22 of 1953

IN THE PRIVY COUNCIL

Council Chamber, Whitehall, S.W 1

Tuesday, 19th May, 1953.

Present:

VISCOUNT SIMON,
LORD OAKSEY,
LORD TUCKER,
LORD ASQUITH OF BISHOPSTONE,
LORD COHEN OF WALME R

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

THE CITY OF WINNIPEG

Appellant

and

THE CANADIAN PACIFIC RAILWAY COMPANY

Respondent

FOURTH DAY

BLAKE & REDDEN,
17, VICTORIA STREET,
WESTMINSTER, S.W.1,
PRIVY COUNCIL AGENTS.

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UNIVERSITY OF LONDON
W.C.1.
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LEGAL STUDIES

14970

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Respondent.

(Transcript of the Shorthand Notes of Marten, Meredith & Co.,
11, New Court, Carey Street, London, W.C.2.).

MR. W.P. FILLMORE, Q.C., MR. G.F.D. BOND, Q.C., (both of the
Canadian Bar) and MR. R.O. WILBERFORCE, instructed by Messrs.
Lawrence Jones & Co., appeared for the Appellant.

MR. C.F.H. CARSON, Q.C., (of the Canadian Bar) MR. FRANK GAHAN,
Q.C., and MR. ALLAN FINDLAY, (of the Canadian Bar) instructed
by Messrs. Blake & Redden, appeared for the Respondent.

FOURTH DAY

MR. FILLMORE: My Lords, in connection with the discussion of clause 4 of the Charter, which appears at page 23 of the appendix, I would like to read Sections 17 and 18, at page 27.

Section 17 provides: "'The Consolidated Railway Act, 1879' in so far as the provisions of the same are applicable to the undertaking authorised by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith".

Section 18 provides: "As respects the said railway, the seventh section of 'The Consolidated Railway Act, 1879,' relating to powers, and the eighth section thereof relating to plans and surveys, shall be subject to the following provisions? I do not think that any of those are material.

We then turn to the Consolidated Railway Act, 1879, which is chapter 9 of 42 Victoria.

VISCOUNT SIMON: That is at page 8 of the appendix, is it not?

MR. FILLMORE: It is partly in the appendix. Under Section 7 the company has power to receive voluntary grants and donations of land or other property; under sub-section (7), to make, complete and keep in repair the railway, and so forth; under sub-section (8), to erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, and from time to time to alter, repair or enlarge the same, which might, of course, include repair shops; under sub-section (9), "To make branch railways, if required and provided by the special Act, and to manage the same, and for that purpose to exercise all the powers, privileges and authorities, necessary therefor, in as full and ample a manner as for the railway"; under sub-section (10), "To construct and make all other matters and things necessary and convenient for the making, extending and the using of the railway, in pursuance of this Act, and of the special Act". Then we pass to sub-section (19), which says: "Any railway company desiring at any time to change the location of its line of railway in any particular part for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting such line of railway, or for any other purpose of public advantage, may make such change" and so forth.

I submit that the Act is the guide to the powers of the railway; the guide to the ordinary operation of the railway.

When we turn to clause 4 of the charter, it reads: "All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them".

I submit that the words "agreed upon, contained or described in the said contract" are words of limitation and clause 4 was to enable the company to construct the railway, to give them all possible powers and authority to enable them to carry out the contract.

What was the contract? The contract was to complete the railway within a certain time, and under clauses 7 and 8 of the

agreement, which will be found on pages 15 and 16 of the appendix, we find that upon completion of the railway it will be turned over to the company (that is, those parts constructed by the Government), "and the company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway". Then clause 8 is: "Upon the reception from the Government of the possession of each of the respective portions of the Canadian Pacific Railway, the company shall equip the same in conformity with the standard herein established for the equipment of the sections hereby contracted for, and shall thereafter maintain and efficiently operate the same".

There is nothing in the contract or the charter or in the Consolidated Railway Act specifically referring to workshops, but, of course, to construct the railway there would have to be workshops. I submit, therefore, that clause 4 simply relates to the works of construction, so that the company would have undoubted power to do everything that they needed to construct the railway.

VISCOUNT SIMON: Clause 4 speaks, amongst other things, of "right, remedy, privilege, and advantage agreed upon". That is agreed upon in the contract?

MR. FILLMORE: Yes, my Lord.

VISCOUNT SIMON: Is not a perpetual exemption from taxation an advantage?

MR. FILLMORE: My observation is that there is nothing in the contract, outside of clause 16, about exemption from taxation.

LORD ASQUITH: Do you need anything more than that? Clause 16 does provide for perpetual exemption.

MR. FILLMORE: Yes, "by any province hereafter to be established". That, therefore, had no application to this part of Manitoba. It does not mention exemption from taxation in connection with any existing province; so that the assumption is natural, as the fact was, that the company would pay taxes in the then established provinces. I submit that there is nothing in the contract, in so far as this part of Manitoba is concerned, about tax exemption or about making agreements with municipalities. That subject is not dealt with in the contract and I submit that the word "useful" here - all those words - must be subject to and read in connection with the concluding words of that sentence, "agreed upon, contained or described in the said contract, are hereby conferred upon the company."

LORD COHEN: I suppose that you would agree, would you not, that the obligation to provide workshops and the like was an obligation contained in the contract?

MR. FILLMORE: Yes, my Lord. They could not build a railway without workshops.

LORD COHEN: That is the first stage. It would follow, therefore, would it not, that on that subject matter the company had power to come to an agreement with the municipality in whose area they wished to erect those workshops?

MR. FILLMORE: They would have a right to take land and buy land, but I cannot see that you could go one step further. I submit that the subject of tax exemption is not covered by clause 4 and it is not covered by the contract, because it relates to the construction and all necessary works in connection therewith.

LORD COHEN: It is rather like which is the cart and which is the horse. I should have thought that the subject matter of the agreement in this case that we are considering was the construction of the workshops. I should have thought that the concession as regards terms was merely an additional advantage which the railway company got out of it; and, in any event, is not the company made prima facie the judge of what is "useful"?

MR. FILLMORE: Yes; I would concede that. The directors have to decide from time to time what is of advantage and what is useful. They have to make bargains relating to the management of the company; but my submission is that to lift the word "useful" out of the context here and say: It was useful to the railway to make such a good bargain, is not what was intended by clause 4; that when you come to bargain with municipalities for tax exemption and when you come to agree that in consideration of such exemption you will forever maintain the workshops in a particular locality, that is foreign to clause 4, because it goes, I submit, one step further than what is contemplated by clause 4. For example, if you can segregate the word "useful" and say that the company can do anything useful in the construction or operating of the railway, then you have a common law corporation. Where would you then impose any limit on what the company could do?

LORD OAKSEY: Because you have imposed a limit that it has to do it for the purposes of maintaining the railway, not for the purpose of something other than the railway, it is not to carry on a drapery business.

MR. FILLMORE: It might be "useful" in connection with the railway to develop mines and to operate smelters, for the exercise of which power the company had their Act amended. It seems to me that it would be very difficult to put a limit on what the company could do by virtue of the word "useful".

VISCOUNT SIMON: In your view, does "useful" mean consistent with the operation of the railway?

MR. FILLMORE: I submit that in clause 4 it means consistent with performing the contract. The contract was (a) to complete the railway as agreed and (b) to forever efficiently operate the same.

VISCOUNT SIMON: I am afraid that I am not following you. Clause 4 divides itself into two, does it not? It begins by talking about "franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use and avail themselves of" and so forth. Then it also refers to "condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon" in the contract. What I want to know is: How do you meet the contention that one of the advantages agreed upon in the contract was perpetual exemption from taxation?

MR. FILLMORE: Not in so far as Manitoba is concerned. Clause 16 relates only to exemption from taxation -----

LORD ASQUITH: You say that it is every form of taxation, except Manitoban?

LORD COHEN: You say that it is exempt only to Dominion taxation and taxation in any new province to be formed after the date of the contract?

LORD ASQUITH: It would at all events exclude an exemption from

Manitoban taxation?

MR. FILLMORE: Manitoba was then an established province, so that clause 16 of the contract has no application to Manitoba.

LORD ASQUITH: It is right, is it not, that it does not exempt, according to you, from taxation in any existing province? It only exempts from taxation by Dominion and any future province? That is your argument, is it not?

MR. FILLMORE: Yes, my Lord.

LORD OAKSEY: Assuming that you are right upon that, it does not really affect the real question, which is whether or not it was a franchise and power necessary or useful to the company when it was constructing its workshops to make this contract for exemption with the City of Winnipeg. Surely it was obviously "useful" to the company, apart from your contention that there might be some change in circumstances.

MR. FILLMORE: Certainly it is an advantage and it is "useful" to a railway company to escape the payment of taxes; but the real point is: Is there anything in the charter or the Railway Act which gave the railway company the power to give the consideration which they agreed to give?

LORD COHEN: From your point of view the exemption from taxation is a red herring across the track. As I have followed your argument, you are saying this: If they merely agreed to build the workshops, without any obligation to maintain them forever, there would have been no objection to their taking this exemption; but the vice of the thing is that they bind themselves to keep their workshops there forever, whatever may be the desirable course to adopt in the future. That is right, is it not?

MR. FILLMORE: Yes, my Lord. I am saying on the word "useful" that it may or may not have been useful in 1881 for the directors of the railway company to covenant that they would forever maintain the workshops within the City of Winnipeg, because that is what they had to agree to do in order to get the tax exemption, and my whole argument from the start has been that that is on the face of it incompatible, not only with the obligation to forever efficiently operate the railway, but it is a covenant of such a nature that the company could not enter into it unless there is clearly power in the charter or in the statute.

VISCOUNT SIMON: I should like to make a note of the suggestion that Lord Cohen made to you. He suggested to you that your contention was that, if the company had merely agreed to build workshops in Winnipeg, there would be no objection - ?

LORD COHEN: If they had agreed to build the workshops in Winnipeg, there would have been no objection to their receiving the benefit of the exemption; but the objection was to their receiving that in exchange for their obligations to keep them there forever. I think that that is what I put.

VISCOUNT SIMON: I think that you told my Lord that you did accept that contention?

MR. FILLMORE: Yes, my Lord.

VISCOUNT SIMON: This is a correct summary of the position: The appellant contends that, if the company had agreed to build workshops in Winnipeg, there would be no objection to the

company receiving the consideration of exemption; but, having agreed to keep them there forever, this was in breach of their duty to manage the railway as efficiently as possible?

MR. FILLMORE: Yes, my Lord. I also put it in another way: that it was a negation, a surrender, a fetter to that extent of their statutory powers. It amounted to an agreement not to exercise their statutory powers, which were to locate the workshops from time to time according to the exigencies of good railway practice. That is the way in which I put it: that the company had no right to abrogate part of its statutory powers, and that it is wrong on the face of it, because the directors in 1881 could not tell and no one can tell today what contingency may arise in the future and what events may make that covenant embarrassing to the railway company.

VISCOUNT SIMON: By their "statutory powers" you mean their power to move the workshops from one place to another?

MR. FILLMORE: Yes; to move the railway; to move the shops. Obviously, if they move the railway or move the shops, they could not maintain them in Winnipeg or, if something happened, such as happened in the case of the Whitby Railway Company, that some other company took it over and they wished to use the shops in use by the other company, they would find that it was embarrassing.

That is my submission on the construction of clause 4, and I submit that it is supported by some statutory authority. I would like to refer to three or four cases on the subject.

LORD COHEN: Are they the cases referred to by Mr. Justice Estey at page 396? That is where he seems to state the argument which you are now addressing to us.

LORD ASQUITH: Cases like York v. Leetham?

MR. FILLMORE: Three of the cases to which Mr. Justice Estey refers I wish to review. I would like to refer to them in order of date.

The first one is The Proprietors of the Staffordshire and Worcestershire Canal Navigation v. The Proprietors of the Birmingham Canal Navigations, which is reported in Law Reports, 1 English and Irish Appeal Cases, page 254. In the statement of facts on page 255 it says: "By an Act passed in 1768, powers were given to certain persons named therein (now represented by the respondents, the proprietors of the Birmingham Canal Navigation), to make and maintain a navigable cut or canal from Birmingham to Bilston, and 'thence to Autherley, there to communicate with the canal now being made between the Rivers Severn and Trent'. Bilston is a township of Wolverhampton, and the appellants threatened opposition to the passing of this Act, whereupon the respondents, in order to get the opposition withdrawn, consented to the extension of their canal to Autherley; and there was accordingly introduced into the bill a clause (84 of the Act), which enacted that in case the respondents should not complete the intended navigation, so that it might, within six months next after it was finished to Birmingham, be made to communicate with the canal then being made between the Trent and Severn, at or near Autherley (the appellants' canal) so as to make and effect a free, easy, and perfect communication between Birmingham and the said canal, it should be lawful for the appellants to complete such navigation!"

Then it appears that there was ultimately an agreement

entered into between the companies, and it appears from the headnote that "The company recently proposed to construct machinery which should pump back some of the water coming from the W. level, and so would affect the supply to the S. & W. Canal, but would not prevent the existence and free use of the communication at A. The S. & W. Company filed a bill to prevent the construction of this machinery, alleging that it was contrary to the intention of the legislature as shown in the various Acts, and to the deed of arrangement; and also contrary to the right which must now be taken as vested in the S. & W. Company by user and prescription".

VISCOUNT SIMON: What is the year of this case?

MR. FILLMORE: 1866, my Lord. One reason why I am reading this is that Mr. Justice Estey remarks that there is no evidence that this would be a bad thing for the railway company, and I submit that it is not a matter of evidence; it is something that is prima facie wrong.

I would then refer to a passage in the judgment of the Lord Chancellor at page 267. He says: "The evidence, that this reduction of the depth of water in the locks will impede the communication between the two canals, does not appear to me to be of a very satisfactory description. (His Lordship went through it, and commented on it). I am not at all satisfied that, if the appellants receive out of the respondents' canal a depth of two feet of water above their summit level, any such injurious effect will be produced; and the appellants have no right, under the Act of 8 George III, to more than a continual supply of water sufficient to keep open the communication between the two canals.

"But the appellants contended that, although this may originally have been all they were entitled to under the Act of Parliament, yet that they have since acquired a right to the quantity of water discharged from the respondents' locks into their canal by long user under the Prescription Act.

"The second section of that Act applies to a claim to the use of water, which may be lawfully made at the common law, by custom, prescription, or grant. Custom and prescription are here out of the question, and if the respondents could not have granted the use of the water to the appellants, the Act is wholly inapplicable; but the respondents have not the water in their canal with an absolute power of dealing with it at their pleasure. When the canal was made, under the provisions of the Act 8, George III, the public had a right to use it upon payments of tolls, and the respondents were bound to keep and maintain the canal in an efficient state for the passage of the traffic along it." That is something like the obligation here. It uses the word "efficient". "They could not bind themselves that, for all time to come, a certain quantity of water should be discharged from their canal into that of the appellants, because it was impossible for them to know whether all the water beyond what was necessary to keep open the communication between the two canals would not be wanted for the purpose of their own canal. By a grant of the continual use of the quantity of water flowing from their canal into the canal of the appellants, the respondents would have fettered themselves in the exercise of the powers vested in them by the Act for extending, preserving, and improving their canal, for which the application of all the water beyond what was necessary for keeping up the communication between the two canals might have been essential". It was not found that it was.

"To impose such a servitude upon the water in their canal as that contended for by the appellants would have been ultra vires of the respondents, and consequently length of user could never confer an indefeasible claim upon the appellants under the Prescription Act, as no grant of the use of the water could have been lawfully made by the respondents".

It seems to me that that case has some application to the facts and circumstances here, because what the company has agreed to do may in the future and to some extent interfere with the efficient operation of the railway.

VISCOUNT SIMON: Was there an agreement in that case that they would provide a certain quantity of water to be discharged?

MR. FILLMORE: No. It appears from the headnote that the 258th section of one of the incorporating Acts prohibited the Birmingham company from "doing anything to obstruct the navigation of the S. & W. canal, or, 'in anywise to shorten or vary all or any of the B. Company's canals, so as thereby to impede the navigation of the S. & W. canal', without the consent of the S. & W. Company." That does not seem to cover it.

VISCOUNT SIMON: They were proposing to instal some machinery which would have had the effect of taking away some of the water, were they not?

MR. FILLMORE: Yes, my Lord. It was not proved that it would, but they were going to do something which might eventually or possibly. If they were compelled to deliver the water to the other company, if there was an agreement to that effect, then that might possibly interfere with the obligation of the Birmingham company to efficiently operate their own canal.

LORD ASQUITH: This is a case where one can imagine that, if they discharged that amount of water into the other canal, their own might completely have dried up.

MR. FILLMORE: Yes.

LORD ASQUITH: It is rather different from tying their hands to keep the principal workshops in a particular place and to do that for a very powerful consideration.

MR. FILLMORE: It might have given rise to a more serious circumstance, it is true; but it is a matter of principle and a matter of degree. If it is wrong in principle to do anything which may possibly fetter the statutory powers of the corporation, then it is ultra vires.

LORD ASQUITH: It must depend on the size and power of the fetter and also the reason why it is submitted to.

MR. FILLMORE: Yes.

LORD ASQUITH: It is a very difficult conception, is it not: a statutory corporation abjuring its functions completely and agreeing to exercise them in a particular fashion indefinitely for an indefinite advantage of comparable magnitude?

MR. FILLMORE: I cannot see any difference in principle. When the contract was made it was either within the powers of the railway company or it was not.

LORD OAKSEY: Does not your argument involve that, if they made it

for one month, it would be adjuring their power to move? If you say that it is a question of principle, your argument seems to me to involve that: that for however short a time they abjured the right to move their principal workshops, you would say that they were abjuring one of their powers.

MR. FILLMORE: If it were only for one month, the directors could see that far ahead.

LORD OAKSEY: Why, if it is a question of principle; or, as my noble and learned friend Lord Simon put it to you, take it for five years.

LORD TUCKER: I think that your principle does depend upon the use of the word "forever".

MR. FILLMORE: Yes.

LORD TUCKER: Your argument would be that they could never make any agreement of any kind forever. It is the word "forever" that offends, in your argument, really, is it not?

MR. FILLMORE: That is the only argument I have got. When it is put to me: Could they make an agreement for a certain time?, the answer is that when you use the word "forever" you get beyond the ability of the present directors to forecast.

VISCOUNT SIMON: Your argument is that no one can foresee into the future, if the future is forever?

MR. FILLMORE: Yes, my Lord, where it is indefinite.

LORD OAKSEY: How can one foresee into five years? Circumstances may alter in such a way within five years that it might be in the interest of the company to remove its principal shops from the place.

MR. FILLMORE: That might be a fetter on their statutory powers, because the Act gives them a right to move the line of railway. They can move the railway at any time they like. The shops have to be on the railway.

LORD COHEN: It must be a question of degree whether a particular action is an abandonment of the power. It may, as my Lord says, in one case be difficult to draw the line; but there is no doubt whatever that it is beyond the line if the contract is forever. That is your argument, is it not?

MR. FILLMORE: That is my submission. As stated in the case in 1926 Appeal Cases, in the passage to which your Lordship called my attention yesterday, it is a question of whether it is an ordinary business transaction or whether it is something objectionable. That is to be found at the bottom of page 375: "In other words, the Board of Trade is here the constituted authority, by whose discretionary intervention the supply of electricity may be secured in the interest of the locality. This is a very different scheme from a constitution of undertakers, which under the same statute establishes their existence, confers their powers, and defines their purposes.

"It appears to me that no line can be drawn between the agreement now in question and any ordinary trading contract, if the appellants are right in testing the validity of the contract by its ultimate and theoretic possibility of bringing upon them a crippling loss". It is a question of whether it is an ordinary business contract or is one of such a nature that it falls within the prohibited class.

I would then like to refer again briefly to the Whitby case. I want to refer to the incorporating Act. The case is Corporation of Whitby v. Grand Trunk Railway Company, reported 1 Ontario Law Reports, page 480. It is suggested by the judges in the Supreme Court that the statutory powers of the Canadian Pacific Railway are wider than they were in the case of the Port Whitby and Port Perry Railway Company. The report says that the Port Whitby and Port Perry Railway Company was incorporated by Chapter 42 of the Statutes of Canada of 1868. First, the incorporating Act provides that the several clauses of the Railway Act, and so forth, with respect to powers shall apply. That is similar to the Canadian Pacific Railway Act. Then Section 3 provided: "The company hereby incorporated, their servants and agents, shall have full power and authority under this Act to lay out, construct and finish an iron railway from such points within the limits of the Town of Whitby" and so on "as to the directors may appear expedient, and the said company shall have power and authority to construct the different sections of the railway in such order as they may think fit" and so on. There was no obligation here to construct in accordance with a contract or to efficiently operate. There was a wide open power to construct and finish an iron railway.

Then the Consolidated Railway Act, to which the company was subject, is Chapter 66 of the Consolidated Statutes of Canada of 1859. Section 8 of that Act provides: "Every company established under any special Act shall be a body corporate under the name declared in the special Act, and shall be invested with all the powers, privileges and immunities necessary to carry into effect the intentions and objects of this Act and of the special Act therefor, and which are incident to such corporation, as are expressed or included in 'The Interpretation Act'".

Then Section 9 provides: "The company shall have power and authority" and so on. That section is much like Section 7 in the Act of 1879. No doubt the Act of 1879 was a consolidation of this Act. Then under the heading "Ninthly", it says: "To construct, erect and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of and according to the meaning and intent of this Act, and of the special Act."

There is everything there, except the word "useful". You can only give the Canadian Pacific Railway power to enter into that perpetual covenant by taking the word "useful" out of clause 4. It therefore seems to me that the attempt to distinguish the Whitby case from the present case must fail. They could do everything; there was no restriction on the Whitby Company.

LORD TUCKER: In the Whitby case was there any clause anything like clause 4 in the Charter in the present case, expressly providing for wider powers?

MR. FILLMORE: There was Section 8 of the Consolidated Railway Act, which I have just read: "shall be invested with all the powers, privileges and immunities".

LORD TUCKER: Which Railway Act is that?

MR. FILLMORE: That is the Act of 1859. The Charter of the Port Whitby Railway Company says that it will be subject to the Consolidated Railway Act of 1859. The Act of 1859 says: "Every company established under any special Act . . . shall be invested with all the powers, privileges and immunities necessary to carry into effect the intentions and objects of this Act."; that is,

to construct a railway and operate a railway. The ninth power is "to construct, erect and make all other matters and things necessary and convenient for the making, extending and using of the railway". It is certainly convenient for "using" a railway to get a tax exemption; but the court said that it was not "convenient" or "necessary" or within their powers to agree to maintain the workshops forever in Whitby. I fail to see how the judges in the courts below distinguish the Whitby case from the present case.

LORD COHEN: They were not bound by it, were they?

MR. FILLMORE: No, my Lord; I do not think that the Supreme Court is.

LORD COHEN: There is a ground on which the Whitby case might be right, even though the ratio decidendi was wrong, namely, that the obligation was entered into by a company which had ceased to exist or, at any rate, been wound up. It had been merged in the Grand Trunk and such an obligation would not, I think, pass to the Grand Trunk.

MR. FILLMORE: That point apparently was not argued and was not made in the Whitby case. Ordinarily, where one company takes over another -----

MR. CARSON: The point was evidently raised. It was discussed on page 486 of the Report.

LORD COHEN: "There are other difficulties in the way of a recovery upon the agreement sought to be enforced which it becomes unnecessary to discuss, the most formidable being the difficulty of holding that this agreement, if valid, is a claim or liability enforceable against the Midland Railway Company, and consequently against the defendants". The decision, I think, may be right, even though the ratio decidendi was not. What is said about it in this case is stated very shortly by Mr. Justice Kerwin at page 418. He says: "Decisions like Corporation of Whitby v. Grand Trunk Railway Company, relied upon by the City, depend upon the terms of the enactments conferring the particular powers there in question."

MR. FILLMORE: Yes; in other words, he agrees with the judgment in court below and all the judges who were against us say that the word "useful" gives them. I submit that certainly they have taken the wrong view of that, because it is useful to get tax exemption, but whether it is useful to agree to maintain workshops in a certain locality forever nobody knows. Nobody can forecast whether that is useful or will prove to be useful or detrimental.

VISCOUNT SIMON: The other judge in the Supreme Court who deals with this Whitby case is Mr. Justice Estey. It is at the top of page 396. On the previous page he has already said that, in his view, the company had the power to exercise the power as "incidental". Then he says: "In either view, the company, in executing the contract, did not exceed its powers as provided in its charter. This distinguishes this case from that of the Corporation of Whitby v. Grand Trunk Railway Company."

MR. FILLMORE: That is a statement that he makes, but that is begging the question. He says that "the company, in executing the contract, did not exceed its powers"; but that is the question; and where did it get the power? No one has suggested that it got the power from the fact that the word "useful" was in clause 4. That is the sole support for that argument.

VISCOUNT SIMON: His view of it is on the previous page, at line 20. He says: "the company must be treated as if it had been incorporated by statute" and "it would seem that the power to execute the contracts here in question would be necessarily incidental to those powers expressed in the Charter".

MR. FILLMORE: Then he says at line 43 on that same page: "It is not suggested that at the time the contract with the City was made, or any time thereafter, it has not proved useful to the company".

LORD COHEN: If it had not proved useful to the company, you would not be here now.

MR. FILLMORE: No. It has proved very useful to the company, but whether it will be useful to them five years from now or fifty years from now we do not know. In fifty years from now you might find that the company was the defendant in an action, as happened in the Whitby case.

Then I have already referred to the case of Corporation of York v. Henry Leatham & Sons, Limited, which is reported in 1924, 1, Chancery Division, page 557. In that case "The plaintiffs were by statute entrusted with the control and management of part of the navigations of the Rivers Ouse and Foss, in Yorkshire, with power to charge such tolls, within limits, as the Corporation deemed necessary to carry on the two navigations in which the public had an interest. In 1888 the Corporation entered into two agreements with the firm of Henry Leatham & Sons. By the Ouse agreement the Corporation covenanted to allow the firm, their successors and assigns, the right to carry cargoes on the Ouse in consideration of the annual payment of £600 in place of the authorised dues and charges, with a proviso that there should each year be refunded to the firm, their successors and assigns, the difference between the £600 and the amount ordinarily charged on the traffic actually carried"; and the Foss agreement was to the same effect.

Mr. Justice Russell first comments on some of the evidence that was given as to the tolls charged and amounts collected. He then says at page 568: "This evidence must be considered with this qualification - that it by no means follows that the traffic of the defendants which was carried on the two rivers during the operation of the agreements would have been forthcoming to the same extent or at all if the agreements had not been entered into. But in my opinion the evidence is immaterial. The question of ultra vires is not to be decided by the pecuniary result of the bargain which was struck. If the bargain was at its date within the powers of the Corporation the fact that it turned out a bad bargain from their point of view would not convert it into an ultra vires transaction. Conversely if it was at its date beyond the powers of the Corporation the fact that it proved a profitable one for the Corporation would not render it intra vires."

As I have already indicated, the plaintiffs are invested with statutory powers of charging such tolls, within limits, as they may deem necessary for the purposes of carrying on these two undertakings in which the public are interested. The effect of these two agreements is that they bind themselves for a period, the duration of which depends upon the volition of the defendants, not to exercise those powers as against them. No matter what emergency may arise during the currency of the agreements the Corporation have deprived themselves of the power to charge the defendants such increased tolls as might

enable them to cope with the emergency. They have for so long a time as the defendants desire to that extent wiped out or fettered their statutory power. If that be, as I think it is, the effect of these agreements, they are, in my opinion, agreements which are ultra vires the Corporation! That is the principle laid down by the learned judge.

LORD ASQUITH: You agreed with me, I think, that this decision had been criticised?

MR. FILLMORE: Yes.

LORD ASQUITH: Can you remind me what the criticism was or whether it affected the passage which you have just read out?

MR. FILLMORE: The principle was not criticised. It was criticised on the facts, because I think it was Lord Sumner who suggested --

LORD ASQUITH: In the Birkdale case?

MR. FILLMORE: In the Birkdale case, in 1926 Appeal Cases.

MR. CARSON: It is dealt with by Lord Birkenhead at page 366 and by Lord Sumner at page 374.

MR. FILLMORE: Lord Birkenhead said at page 366: "In none of the authorities cited in the Court of Appeal, or, indeed, before Mr. Justice Astbury, was the principle I have mentioned questioned. The problem was throughout, on the facts proved, to bring the case within the principle." That is the problem: whether on the facts the case comes within the principle. "The York case was somewhat severely criticised in the Court of Appeal. The facts of it are peculiar, and, having regard to this peculiarity and to the acute criticism of Lord Justice Sargant (which I adopt), I regard that case as distinguishable!"

Then at page 368, Lord Sumner says: "Are they, then, void at common law as being ultra vires the appellants, a trading company, incorporated to exercise statutory powers vested in them in the public interest under the authority of the legislature? This is a doctrine, which it may be unwise to circumscribe within the limits of an inelastic definition. We have, however, a long series of decisions, extending over nearly a century, and at any rate illustrating the cases to which the rule has been understood to extend. With the exception of York Corporation v. Henry Leatham & Sons no case has been cited, in which a contract by a trading company to compound with a customer without limit of time for the price to be paid for services rendered to him, has been declared to be ultra vires, and we were told that the diligence of counsel had failed to find any other case. Certainly I have been able to go no further".

LORD COHEN: He deals with it again at page 374.

MR. FILLMORE: He says: "In York Corporation v. Henry Leatham & Sons" and he reviews the fact and at the end he states: "No distinction appears, from the judgment of Mr. Justice Russell, to have been drawn in argument between these two undertakings, but it is possible that the agreement in dispute, by which the undertakers compounded the rates with a particular customer, might be regarded as a direct breach of the mandatory charging clause of the Ouse Act of 1732, and consequently ultra vires. The same view could not arise on the Foss Act. The ratio decidendi of the judgment, however, proceeds entirely on the analogy of the Ayr Harbour case". That was a case to the effect that a company

cannot agree to use any of its lands for other than the statutory purposes.

Then on page 375 he says: "If, again, the agreement is to be ultra vires at all, it must be ultra vires all through. In cases like the Ayr Harbour case the land acquired under statutory powers was fettered in the undertakers' hands from the time the agreement was made. In the present case the company's activities have not yet been and may never be impaired by the agreement at all. So far it may have been and probably has been safe and beneficial. How, then, can it have been ultra vires hitherto?"

It seems to me that that is an obiter dictum which is probably not sound in principle, because you cannot judge whether an agreement was ultra vires or intra vires by the result, by looking back and seeing whether the company has made money or lost money as a result of the agreement.

VISCOUNT SIMON: The reference in Lord Birkenhead's judgment to the acute criticism of Lord Justice Sargant of the York judgment is to be found in 1925 Chancery. Lord Justice Sargant's judgment begins at page 821. At page 824 he insists that a risk which is run by a concern carried on for the purpose of profit is one thing, and he says: "In my judgment, it would be an extraordinary extension of this doctrine of ultra vires or repugnancy to say that in such a case as this a commercial undertaking was deprived of its ordinary discretion as to fixing the price at which the services rendered or the commodities supplied should be rendered or supplied". We had better just look at it, I think.

MR. FILLMORE: Yes, my Lord.

VISCOUNT SIMON: At the bottom of page 821 the learned Lord Justice referred to the judgment of Mr. Justice Russell in the York case and said: "But there is here no question at all of dealing with or restricting the user of any particular property. We have only to deal with an agreement regulating the price to be charged for certain services to be rendered or commodities to be supplied. I cannot see any analogy between those cases and the present case, unless you extract from the statutory constitution of the defendant company some obligation on them to apply specifically towards the upkeep of their undertaking the receipts that they are to get from the supply of electrical energy or some definite portion of those receipts".

MR. FILLMORE: He insists that it is really a commercial matter. Is it an ordinary business transaction which the management of the company would have a right to enter into, or does it cross the line and become something unusual and something not authorised? In our case there is an element of the user of land, because they covenant that they will maintain the workshops in a particular locality, which means that they will not use their land in any other place for this purpose.

LORD ASQUITH: The purpose for which they are going to use their land is not contrary to the objects of the Act or statute of incorporation?

MR. FILLMORE: That is correct.

LORD ASQUITH: That is the distinction between this case and the Ayr case. In the Ayr case they undertook to use their land in a manner which violated the purposes for which they were empowered.

MR. FILLMORE: My submission is that there is this analogy: that here the Canadian Pacific Railway covenants that they will use their land in the City of Winnipeg for certain purposes and they will not use their land in any other part of the province for those purposes. There is a certain amount of analogy in that.

LORD OAKSEY: Surely one has to look at the matter reasonably. It applies to their principal workshops. They could put up workshops anywhere else on their line. Is it not rather akin to the cases where companies have agreed to a towing path being used for other purposes than their own, which were not inconsistent with their own use?

MR. FILLMORE: I would submit that "principal workshops" means that they must be established in good faith. With a large company like the Canadian Pacific Railway Company, where their shops are erected at a large centre, from which branch lines radiate, they could not whittle away or minimise the covenant by any measure of evasion. We have to assume that the principal workshops are works of some magnitude, which the company in good faith would not whittle down.

I would like to call your Lordships' attention to what was said by the Master of the Rolls, Sir Ernest Pollock, in 1925, 1, Chancery Division, in the Court of Appeal, in Southport Corporation v. Birkdale District Electric Supply Company. At page 812 he says: "If those bodies are charged with duties and are given powers for the purpose of carrying out those duties they must fulfil their duties and cannot fetter themselves in the exercise of, or discharge themselves from, those powers with which they have been so entrusted. I agree also with what was said by Mr. Justice Russell in the York case that, when you examine the bargain or the contract which is in issue, you must look at the date at which it was made." He quotes the passage from the judgment of Mr. Justice Russell, which I have already read.

Then on page 813 Sir Ernest Pollock says: "After very carefully considering the terms of the clause I cannot find that the clause is one which imposes a fetter. It seems to me one characterised by business prudence and one into which the defendant company might well, in the exercise of their discretion, have come to the conclusion that they might enter".

That is the test: Is the agreement one which it is apparent from the circumstances, as we know them, that the directors might enter into, or does it appear on the face of it that it is something that might eventually and possibly embarrass the company and be incompatible with the right and obligation of the company to efficiently manage the railway?

There is one other case that I would like to cite on the point, which is also referred to by Mr. Justice Estey, namely, re Heywood's Conveyance, reported in 1938, 2, All England Law Reports, page 230. The headnote says: "In 1876, a railway company acquired by compulsory purchase a plot of land for the purpose of their undertaking. The company entered into a covenant with the vendor, his heirs and assigns that 'no engine works or sheds locomotive works or sheds fitting-sheds or any buildings for the purpose of manufacture or business other than goods or passenger stations or signal-boxes or sidings in connection with the railway or stations shall be erected on any lands belonging to or to be acquired (by the company) from J.P.H. his heirs or assigns without the consent of the said J.P.H. his heirs and assigns'. The company desired to sell the

plot of land to persons who wished to erect a public-house thereon. In 1920, and in 1924, the Liverpool Corporation acquired the adjacent land formerly owned by J.P.H., and claimed to be able to enforce the covenant and prevent the erection of the public-house: Held, (1) the covenant, even if originally valid, was not a covenant which ran with the land so as to enure for the benefit of the purchasers, because there was no sufficient description of the land to be benefited. (2) there was no enforceable covenant in any event, because the covenant originally entered into was void under the rule in Ayr Harbour Trustees v. Oswald".

In the course of his judgment, at page 232 Mr. Justice Simonds says: "It is said, in the second place, that there is no enforceable covenant in any event, because the covenant originally entered into was void and of no effect, under the doctrine of the well-known case of Ayr Harbour Trustees v. Oswald. In my view, both those contentions are well-founded.

"The Cheshire Lines Committee is a corporation which, under an Act of 1874, was empowered by Section 4 to enter on, take and use certain lands, 'described in the deposited plans and books of reference as they require for purposes of works authorised by this Act or other purposes of the undertaking belonging to or under the management of the committee'. Under Section 6 of the same Act, subject to the provisions of the Act, the committee were authorised to make and maintain certain works which are there more specifically described.

"The land the subject of the present application was land which was included in the lands described in the deposited plans and books of reference. Accordingly, it was land in regard to which the plaintiffs were by the legislature given certain statutory powers. Those powers they could not sell, to use the words of Lord Sumner in the later case of Birkdale District Electric Supply Company, Limited v. Southport Corporation, because it was part of their statutory birthright, of which they could not rid themselves, to enter upon and use these works for all the purposes which the legislature has prescribed, and the Act contained no provision specifically protecting the owners of the lands in question in any way. Although the Act contained no such provision, however, the parties, by a bargain entered into by the conveyance of February 3, 1876, to which I have referred, purported to bind themselves in this way". I have already read that from the headnote. Then a little later he reads another part from the deed, about "no engine works for sheds, locomotive works" and so on "shall be erected", and that I have read in the headnote. He then says: "If one can imagine those words of restriction inserted into the Act, it would clearly amount to a substantial restriction of the statutory purposes for which the legislature was authorising the acquisition of these lands". I presume that the company had other lands or could have bought other lands. "That is something which clearly cannot be done, in view of the case to which I have referred, Ayr Harbour Trustees v. Oswald, a case too often cited for it to be necessary for me to refer to it. I need refer only to the words of Lord Blackburn, at page 634: 'I think that where the legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently

for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void'.

"The contract which I have read is just such a contract. It is a contract not to use the land for certain purposes, which the legislature has authorised. Accordingly, it is a contract which is void, whence it follows that it is a covenant which is not enforceable by the corporation against the Cheshire Lines Committee."

It seems to me that that has some application here, because the railway company have covenanted that they will forever use lands in the City of Winnipeg for certain purposes, which involves a covenant that they will not use any lands that they own or may acquire outside the City of Winnipeg for such purposes. By necessary implication it means that they will always keep Winnipeg either on the main or branch line of the railway.

My Lords, let me put it in this way: in 1881 could the railway company have made a bargain with a City in every province in Canada to the same effect; or, to go a step further, could they have agreed with certain towns in Manitoba that they would always keep those towns on a branch line; in other words, could they make an agreement which would involve them agreeing that they would always maintain a branch line at certain points or could they make an agreement that they would not build a branch line near those towns?

That is stated in the case in the Supreme Court of Canada, Montreal Park and Island Railway Company v. The Chateauguay and Northern Railway Company, which is reported in 35 Supreme Court Reports, page 48.

VISCOUNT SIMON: There is at page 396, in the course of the judgment of Mr. Justice Estey, a quotation which I expect that you want:

"The courts ought not to enforce and will not enforce an agreement by which a chartered company undertakes to bind itself not to use or carry out its chartered powers."

MR. FILLMORE: Yes.

The point is made at page 57 of the Supreme Court Report, where Mr. Justice Davies says: "I am of the opinion that the courts ought not to enforce and will not enforce an agreement by which a chartered company undertakes to bind itself not to use or carry out its chartered powers. I do not think such an agreement ought to be enforced because it is against public policy. If enforceable it practically amounts to an amendment and limitation of the chartered powers granted to the company by Parliament. Who can tell whether Parliament would have granted the limited powers only had they been asked or would have agreed to pass an amending Act limiting these powers or the areas within which they were exercisable as the agreement contemplated? Of course if it is lawful for a company possessing special statutory powers to bind themselves for a consideration not to exercise them in part they can do so in whole. The courts have no right to speculate whether Parliament would or would not have granted these chartered powers to the defendant company over the limited area. Parliament alone can enact the limitation, and neither courts of justice nor companies can substitute themselves for Parliament. If the principle is once conceded that chartered companies which have obtained powers from Parliament, presumably for the public good, can by contract with a rival company, or with others, limit themselves and their successors not to use those powers in whole or in part, the most serious consequences might result and the chief object of Parliament in chartering companies authorised to construct railways in certain sections of country or to promote legitimate rivalry and competition in such construction, might be defeated." He then refers to the case of Ayr Harbour Trustees v. Oswald and other cases.

I submit that that reasoning is applicable here: that parliament did not give the railway company power to enter into such a covenant, and the question immediately arises, if that covenant was valid, what is the limit; how far could they have gone in crystallising the line of the railway in 1881; could they forever have bound the company to keep its principal workshops in Manitoba in a certain place and in other provinces in a certain place; could they have gone further and said: We will agree with towns that we will always keep a branch line of the railway through their towns; we will not build a branch line through a town ten miles away? I submit that on the face of it the covenant is bad in principle and that it amounts to a negation, to that extent, of the statutory powers conferred on the railway.

I want to comment briefly on some remarks made by Mr. Justice Adamson in the Court of Appeal for Manitoba, at page 232, line 34. He says: "In the first place, it cannot be assumed that there will be such changes that the railroad cannot be efficiently and effectively operated within its main line and shops in their present locations".

It seems to me that the onus is the other way around; that when a company covenants to maintain something forever, the onus would be, not only to show that it had the statutory powers, but to show clearly that it could not possibly, no matter what happened, be incompatible with the statutory powers of the company.

Mr. Justice Adamson then says: "The second answer is that the company agreed to do something which under its charter it was required to do, not something 'incompatible with the due exercise' of its powers."

I think that that is a misconception, certainly. It

was required to erect workshops, but it was not required to covenant that it would forever maintain the same in any particular place.

"The important thing is that the company did what it was required to do".

LORD COHEN: That is the same point.

MR. FILLMORE: That is the same observation again.

Then I come to what was said by Mr. Justice Estey at page 396 and 397. He says: "The company's powers do not require the construction of its said principal workshops in any particular place in the Province of Manitoba." That is quite right. "They might, therefore, have been placed by the company at any point that it might have selected." We do not quarrel with that. "What is significant is that its placing of them in the city has never been regarded as inconsistent or incompatible with its duty to forever maintain and operate the railway efficiently. In other words, the complaint is not that the company has failed or contracted not to exercise its power, but only that it has contracted not to exercise that power elsewhere in the Province of Manitoba than the City of Winnipeg. That city may always remain the proper place for the maintenance of these principal workshops. Therefore, the language of the contract does not disclose any inconsistency or incompatibility with the company's duty." You get the same point again.

Are we going to assume that things will be the same yesterday, today and forever; or are we going to assume that there will be changes in the future as there have been in the past?

VISCOUNT SIMON: If one is at liberty to speculate about the future, one might assume what sounds quite absurd. One might imagine that in some future age if a railway engine wants to be repaired you will always take it by air to some central point which you have selected and you will then repair it and then return it by air and drop it on to the railway. All sorts of things can be supposed, if one considers the future in a speculative way, can they not?

MR. FILLMORE: That is a point raised by Mr. Justice Estey. He says: "We must assume that nothing will happen to change the situation." He says: This has been a good bargain up to date and we must assume that it will continue to be beneficial to the railway company; that nothing will happen which will indicate that the directors used bad judgment.

LORD ASQUITH: He says that we cannot assume the contrary, does he not?

LORD TUCKER: He is using that line of reasoning, as I understand it, to indicate that, in his view, this covenant is not one which is on its face incompatible with the powers of the company. That is rather a different point. That is rather, is it not, that it is not on its face incompatible? It may possibly turn out to be a bad bargain; but you would agree that it is not on its face incompatible?

MR. FILLMORE: Yes, my Lord.

LORD ASQUITH: Your objection to it is a different one, is it not, namely, that any bargain "forever" must necessarily be one which

extends beyond the purview of any reasonable calculation of any ordinary man?

MR. FILLMORE: Yes; in other words to put it in another way, the directors who were in power in 1881 were not infallible prophets and they could not forecast and decide with certainty what was best for the railway company for all time to come, because, if they could do that in one class of case, they could do it in another and thereby stultify the powers of future Boards of Directors.

VISCOUNT SIMON: I do not understand that. The thing is really the same as if the directors had said: It may be in the future that we shall judge the right thing to do to be to move our principal workshops somewhere else; but, even if that did turn out to be the situation in the future, we promise you that we will keep our workshops in the City of Winnipeg.

MR. FILLMORE: Yes, my Lord.

There is only one other case along this line to which I would refer. That is the case of Baroness Wenlock v. River Dee Company, reported in 10 Appeal Cases, page 354. The headnote says: "The respondents were constituted a company by an Act of George the Second, for the purpose of recovering and preserving the navigation of the River Dee. This Act was amended by subsequent Acts, but none of them expressly authorised or forbade the company to borrow, till the Act 14 and 15 Victoria, Chapter LXXXVII, which, by section 24, empowered the company to borrow at interest for the purposes of their Acts upon bond or mortgage of the lands recovered and inclosed by them, or partly upon bond and partly upon such mortgage, a sum not exceeding £25,000, and also a further sum, not exceeding £25,000, upon mortgage of their tolls, rates and duties: Held, affirming the decision of the Court of Appeal, that whether the earlier Acts gave an implied power to borrow or not, the company was prohibited by the 14 and 15 Victoria, Chapter LXXXVII, from borrowing except in accordance with the provisions of that Act."

I only want to call attention to two observations in the judgment. The first is in the judgment of Lord Blackburn, at page 360. He says: "It is not necessary to decide anything as to the effect of Ashbury Company v. Riche. The course the argument took makes me think it proper to say - though it is quite true, as Mr. Rigby said, that it was not necessary for the decision in Ashbury Company v. Riche to do more than decide what the law was with regard to a company formed under the Companies Act of 1862 - that I think the law there laid down applies to all companies created by any statute for a particular purpose."

I want then an observation of Lord Watson, at page 362. He says: "But I cannot assent to the doctrine which was contended for by Mr. Rigby. Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions."

I submit that this was in effect a special Act which incorporated the Canadian Pacific Railway Company, and that it was incorporated for a particular purpose, namely, that it might

carry out the contract which was confirmed by statute.

There is only one other point on which I wish to make any submission, and that is in reply to the suggestion that there might be estoppel or ratification. I submit that the law is clear that, if an agreement is ultra vires, it is a nullity; it cannot be made into a good agreement; it cannot be made intra vires by the conduct of the parties.

VISCOUNT SIMON: I think that we were told by Mr. Carson in an intervention that the respondents were not proposing to rely on this argument.

MR. CARSON: That is so, my Lord, and did not rely on it in the Supreme Court.

MR. FILLMORE: Then I need not cite any authority for that proposition.

Then I submit in conclusion that paragraph 4 does not expressly or by necessary implication empower the railway company to enter into the agreement which it purported to enter into and alleges that it entered into with the City of Winnipeg in 1881.

VISCOUNT SIMON: We are to hear you on the other point, are we, Mr. Bond?

MR. BOND: Yes, my Lord. I have very little to say on this question of the business tax. As your Lordships know, it was very exhaustively argued before you by my friends Mr. Leslie and Lord Hailsham, representing Saskatchewan and Manitoba, in the previous case. I have nothing to add in the way of arguments. I will merely, with your Lordships' approval, adopt their argument to my case and rely upon it.

I would, however, like to direct your Lordships' attention to the differences in the legislation between the Saskatchewan Act, the City Act, and the City of Winnipeg's Charter.

The sections of the Winnipeg Charter dealing with the business tax are to be found at pages 85 to 91 of the Appendix. Some of them I would like to read; others I do not think it will be necessary to read.

LORD TUCKER: This is a Manitoba Statute, is it not, consolidating and revising the Winnipeg Charter?

MR. BOND: Yes. Section 290 of the statute defines "business" as including "a trade, occupation, calling, manufactory, art or profession."

Section 291 is the important section dealing with business tax. It provides: "(1) Excepting as otherwise hereinafter provided every person carrying on any business in the city whether he resides therein or not shall be assessed for a sum equal to the annual rental value of the premises which he occupies in carrying on, or uses for the purpose of, such business, or uses in any way excepting solely for residential purposes. Such assessment shall be known as 'business assessment' and the tax levied on this assessment shall be known as 'business tax'".

That is similar to section 441 and section 443 of the City Act of Saskatchewan, defining the yardstick. Our yardstick

is different from theirs, as your Lordships will recall. Theirs was based on area, whereas ours is based on the rental value of the premises used for the business carried on.

Then section 292 provides: "(1) Annual rental value for the purposes of this Act, shall be deemed to include the cost of providing heat and other services necessary for comfortable use or occupancy, whether the same be provided by the occupant or owner."

I cannot find any comparable section to that in the City Act. I read it merely to draw attention to the fact that this would be foreign to a property Act, if the business tax was to be a property tax.

Then in subsection 2 it is provided: "In assessing annual rental value, the assessment commissioner shall take all factors into account so that as far as possible premises similar in size, suitability, advantage of location, and the like, shall be equally assessed. The intent and purpose of this section is that all persons subject to business tax shall be assessed at a fair rental value of the premises occupied or used, based in general upon rents being actually paid for similar premises."

Section 293, subsection 1, deals with a special mode of assessing filling stations. It says: "The business assessment in respect of gasoline filling stations may be against either the occupant thereof or the person the sale of whose products is the principal business carried on by the occupant."

I suggest to your Lordships that that indicates that it was a tax for the carrying on of the business and not an occupancy business tax or a property tax.

Then section 295 provides by subsection 1: "No business assessment or business tax shall be made or levied in respect of any of the businesses herein enumerated in any year during which or any part of which such business is licensed by the city" and so on. Those are the exemptions to the general business tax.

Section 295, subsection 2, is inserted in the Appendix, but it has been repealed. It reads: "No business assessment or business tax shall be made or levied in respect of a railway company, or a ticket agent, ticket seller, telegraph agent, or railway agent, employed by a railway company exclusively for the business of such company, if such company is liable to pay taxes under 'The Railway Taxation Act' or if the property of such company is exempt under any by-law of the city."

That was repealed in 1948, and the repealing statute is to be found at page 96. It is a series of amendments to the Winnipeg Charter. It is 12 George VI (1948), Chapter 92. The section relating to that subsection is to be found at page 98. It is section 6 of the repealing statute: "Subsection (2) of section 295 of the Act is repealed."; but section 9 is a saving clause in so far as the Canadian Pacific Railway is concerned. Section 9 reads: "Nothing in this Act" -- that is, the Act repealing subsection 2 -- "shall (a) injure, affect, prejudice, or cause the forfeiture or impairment of, the benefit, right, exemption, or privilege, if any, of the Canadian Pacific Railway Company under (i) by-laws numbered respectively 148 and 195 or any other by-law of the City of Winnipeg; or (ii) a contract or contracts, if any, entered into between the City of Winnipeg and the Canadian Pacific Railway Company; or (b) be or be considered to be, a repeal of any of the provisions of chapter 64 of the Statutes of Manitoba, 46 and 47 Victoria." 46 and 47 Victoria, as your Lordships

will recall, was a statute which validated by-law 148; so that, in so far as every other railway in Winnipeg is concerned, section 295, subsection 2, is repealed, but not so far as the Canadian Pacific Railway is concerned. I do not think that I need read any further in that section.

Then on page 87, we have section 296, which provides: "No person shall be exempt from assessment for business tax in respect of any premises on the ground that he is the owner of the premises and liable to taxation as such."

Something has been made of the phrase "in respect of any premises". I suggest that it is merely a convenient way of expressing it. If that were left out, the section would read awkwardly. It is merely a convenient way of expressing the assessment.

Then we come to the business tax rates. Section 297, subsection 1, provides: "For the purpose of levying the business tax hereinbefore referred to, the assessment commissioner shall classify in accordance with the classifications hereinafter set forth, the business of each person carrying on business in any premises in the city, according to the principal business carried on by him therein, and every such person shall in each year pay to the city a business tax based on the assessed annual rental value of the premises occupied or used by him for the purposes of such business and at such rate per centum of said value as is applicable to the class in which such business falls, as shown on the business assessment roll, the rates within each class varying according to the assessment where hereinafter indicated. The said classes and the respective rates applicable thereto shall be as follows", and then there are a number of classifications, finally coming down to classification (L), "Proprietor or conductor of express freight or passenger transportation service not otherwise exempt (by rail, motor vehicle, aeroplane or other conveyance, not including taxicabs)."

In 1948 that clause (L) was amended by striking out the words "not otherwise exempt"; so that those words are not now in the City Act.

The next section, section 299, merely deals with the adjusting of business tax when the premises are occupied for part of the year.

Section 299A is the converse of that. Section 299A is similar to section 483 of the Saskatchewan City Act.

Section 300, subsection 2, says: "Provided that where owing to the nature of the occupancy or other cause, it is, in the opinion of the assessment commissioner, impossible to determine the annual rental value of any premises occupied for business purposes, or where the annual rental value does not, in the opinion of such officer, exceed one hundred dollars, it shall not be necessary to assess or levy any business tax in respect of such premises."; that is, where the assessment commissioner cannot apply the yardstick, he cannot assess for business tax.

Then section 306, subsection 1, provides that, where the assessment is increased in any year, he must notify the party assessed so that they may have the right to appeal.

Section 312 deals with the right to appeal to the board of revision.

Section 345 differentiates between the business tax roll and the land tax roll, the real property tax. It says: "The business tax roll shall in all respects be a separate roll from the general tax roll".

Then we come to the collection. Section 348 provides: "When each of the said tax rolls is completed it shall be given to and remain in the hands of the tax collector for collection", which indicates that these are two separate kinds of taxes.

Section 351, subsection 1, is not important and I will not read it; but I would like to note that it corresponds to section 511 of the Saskatchewan City Act.

Section 359, subsection 1, provides: "The taxes accrued on any land shall be a special lien on such land, having preference over any claim, lien, privilege or encumbrance of any party except the Crown, and shall not require registration to preserve it." That corresponds to section 512 of the City Act.

Section 360, subsection 1, provides: "The city shall have a first lien or charge upon all the personal property of every person liable to the city for business tax, and the city may levy such tax with costs by distress and sale of the goods and chattels or the interest therein of the person who ought to pay the same wherever the same may be found within the city." That refers to business tax only, and is also for the purpose of assisting the tax collector collecting the taxes.

Section 364 provides: "Tax, whether business or general" — they do not distinguish — "together with penalties for default in payment as provided for by this Act, may be recovered with costs in any court of competent jurisdiction in the province as a debt due to the city from any person by whom the same are payable, or in whose name the same are assessed, in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person, purporting to be certified by the collector as a true copy, shall be sufficient evidence of debt."

Section 365, which apparently gave the trial judge some difficulty and to which I will refer later when I read the judgments of the Court of Appeal, provides: "Any taxes may be recovered and may be levied on any real or personal property, excepting therefrom that mentioned in subsections (a), (b), (d) and (h) of section 29 of 'The Executions Act', which are not relevant here.

That, I submit, should be read along with sections 359 and 360, of course; but I will deal with that later on in the judgments.

Section 369 provides: "In a case a person neglects to pay his general taxes for thirty days or his business tax forthwith, after the mailing to such person or his agent of the notice required by this Act, the city shall have the right to levy the same with costs by distress and sale of the goods and chattels or the interest therein of the person who ought to pay the same; subject, however, to the exemption mentioned in section 365".

Then subsection (3) of that section is, I consider, a very important provision and I call special attention to it.

It is: "The business tax shall not be a charge upon the land or building occupied, but such tax is levied in lieu of a tax upon personal property."

VISCOUNT SIMON: You call it a very important provision; but does it make any difference as to the nature of the tax that it is declared not to be charged upon the land or property? It is a security for collecting it, is it not?

MR. BOND: My submission is that it shows that it is not a tax on property. It is not a property tax, because there is no charge against property.

VISCOUNT SIMON: It is levied in lieu of a tax upon personal property?

MR. BOND: Yes. In 1892, when the business tax was first brought into Winnipeg, the personal property tax which had been in effect was abolished. That has been the case, I think, in every case where the business tax has been brought in; personal tax has been abolished. The business tax was then imposed and I submit that the reason for subsection 3 of section 369 was to make it as clear as possible that it was not a tax upon property. That is the only reason that I can see for it. That section does not appear in the Saskatchewan Act.

Those, my Lords, are the pertinent sections of the City's Charter dealing with business tax.

VISCOUNT SIMON: Just to make your scheme quite plain to me, there is a tax which you call conveniently a business tax. How is that tax measured?

MR. BOND: The yardstick used is the assessed rental value of the property. The assessor assesses the rental value of the property.

VISCOUNT SIMON: That is section 292, subsection 2, is it?

MR. BOND: No, my Lord; section 297, subsection 1, at page 87 of the Appendix.

LORD TUCKER: It is also section 291, subsection 1.

MR. BOND: Section 291, subsection 1, sets it out and section 297 also sets it out. Section 291 says: "Except as otherwise hereinafter provided every person carrying on any business in the city whether he resides therein or not shall be assessed for a sum equal to the annual rental value of the premises which he occupies in carrying on, or uses for the purpose of such business, or uses in any way excepting solely for residential purposes." That is the city's yardstick. Your lordships will recall that in the Saskatchewan case the yardstick was the area of the property which was used in carrying on the businesses. That is the one place where we differ from the Saskatchewan case, but my submission is that the yardstick makes no difference; it is merely a manner of computing the tax. We might have adopted the same as Saskatchewan did; but apparently when this tax was imposed the city fathers thought that a better method was to adopt the rental value basis.

VISCOUNT SIMON: Apply it for me to the Canadian Pacific Railway Company. Supposing that in Winnipeg the Canadian Pacific Railway has an office, is it assessed on the annual rental value of the office?

MR. BOND: Yes.

VISCOUNT SIMON: That is what you call the yardstick?

MR. BOND: That is the yardstick. Then there is an arbitrary percentage applied to that. The percentages vary in different kinds of business. The percentage for the railway company would be twelve and a half percent, as shown by the second schedule of section 297, on page 87. It would be twelve and a half percent of the annual rental value of their office. In the Saskatchewan case they took the area and placed a rate against it -- not to exceed eight dollars per square foot, I think.

LORD ASQUITH: In the Saskatchewan case one of the questions that was submitted to the court was in three parts. (a) was in respect of the area or floor space; (b) the rental value and (c) was something else.

MR. BOND: Yes. There were three yardsticks referred to.

VISCOUNT SIMON: This falls within (b)?

MR. BOND: Yes.

LORD ASQUITH: In Saskatchewan only the first was involved.

MR. BOND: Yes. Saskatchewan was (a), area; and this falls within (b), rental value.

Perhaps I might now pass on to the judgments.

LORD TUCKER: In order to get a picture of the case as compared with the other, we ought to contrast the language of the exempting by-law with clause 16 in the Saskatchewan case. We have the by-law in this case at page 293. The words are different from clause 16 in the Saskatchewan case. This by-law is confined to property owned by the railway?

MR. BOND: Yes. The provision is: "Upon the fulfilment by the said company of the conditions and stipulations herein-mentioned, by the said Canadian Pacific Railway Company all property" -- it is confined to property -- "now owned, or that hereafter may be owned by them within the limits of the City of Winnipeg for Railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every kind."

In the Saskatchewan case the clause read: "The Canadian Pacific Railway, and all stations and station grounds, workshops buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be forever free from taxation by the Dominion or by any province hereafter to be established, or by any Municipal Corporation therein".

It finally boils down in both cases to this: That it was the property that was to be exempt and in the Saskatchewan case in addition there was the capital stock of the company.

LORD COHEN: I suppose that the addition of the word "owned", which appears in the by-law and did not appear in the Saskatchewan case might make a difference if the Canadian Pacific Railway took some property under licence and not under either lease or ownership; but there is no suggestion in this case that there is anything in question but property owned by the Canadian Pacific Railway?

MR. BOND: That is so.

LORD ASQUITH: I rather gather that you rely on certain differences between the Saskatchewan Act and Manitoba Act as favouring your argument. Which is the best distinction for your purpose?

MR. BOND: The only real difference between the two Acts is this charging section.

LORD ASQUITH: Section 369, subsection 3, is the only difference?

MR. BOND: That is the only difference of any importance.

LORD ASQUITH: Otherwise it is merely a question of the yardstick?

MR. BOND: Merely a question of the yardstick and it comes down to whether it is a property tax or whether it is a personal tax.

Your Lordships will find the judgment of Mr. Justice Richards in the Court of Appeal of Manitoba at page 198, line 33. He says: "The plaintiff claims it is not liable to the business tax imposed on persons carrying on business in the city because of the exemption provision of by-law No. 148, supra."

"The learned Chief Justice of the King's Bench sets forth all the relevant facts and discusses the leading cases in regard to the business tax in paragraphs 228 to 315 of his reasons for judgment. Therefore it will not be necessary for me to set forth all the relevant sections of the Winnipeg Charter, but it is, I think, advisable to refer to the following sections which provided for assessing and fixing the amount of the tax." Then he refers to section 291 and 292, which I have read, section 360, section 364, section 365 and section 369, and at page 200 at line 9 he continues: "The trial judge expressed the opinion that section 365" -- that is the section which provides: "Any tax may be recovered and may be levied on any real or personal property" -- "refers to the business tax. The city contends it does not. See paragraphs 231 and 254 of his reasons for judgment. I do not think the correctness of either view makes any difference to the decision on this phase of the case."

"The city claims the business tax is a tax in personam and not a tax in rem and there is, under the sections I have quoted, and other sections of the Charter relating to business tax, no tax or assessment of property of the company."

"The company claims that under the scheme of this taxation there is an assessment of its property and, following the assessment, a tax on its property."

"The trial judge agrees with the company's contention and sets out his finding in the following words: '(255). In my opinion the Charter subjects the property of the tax-payer, real and personal, to a levy for business tax. This is, then, a "municipal levy" on property. But the exemption agreement provides that the property of the plaintiff is to be forever free from all municipal taxes."

"(256). The business tax imposed by the present Winnipeg Charter is, therefore, in this respect a tax on property, although it also partakes of the nature of a tax in personam in that it may be recovered as a debt: sections 343 and 364 (paragraph 231 supra). It is however one tax and I take the view that the fact that it can be recovered in an action does not make it any the less a levy on property."

"(257). It seems to me that besides being a municipal levy it is also a municipal tax on property within the meaning of the term as used in the exemption agreement, but I prefer to base my judgment on the ground that it is a municipal levy on property from which the plaintiff is forever exempt."

"The basis of his opinion, is his view of the use of the word 'levied' in section 365 of the City Charter, supra. Evidently he ascribes to it the meaning 'taxed' which he considers would be a breach of the agreement to 'exempt from taxes, rates and levies'. Applying the eiusdem generis rule, the word 'levies' clearly means taxes. The Oxford Dictionary gives a definition of the noun 'levy' as 'an assessment, duty tax etc.' I think, however, the word 'levied' used as it is in the tax collection sections, should be given the meaning ascribed to the verb 'levy' in the Oxford Dictionary, namely: 'To collect a debt; to raise a sum by legal execution.' The tax which has been fixed and imposed in personam may be levied.

"It will be noted that section 292(2) provides the manner in which the Assessment Commissioner shall arrive at the annual rental value, and section 297 (1) fixes the tax at a rate per centum on such value.

"I am unable to find any definition of the words 'Annual rental value.' The Oxford Dictionary gives the following meaning of the word 'value': 'The material or monetary worth of a thing. The amount at which it may be estimated in terms of some medium of exchange.'

"There is not to be an assessment of property of any kind. In the case of an occupant of his own premises there is not even a rent. The annual rental value which is to be assessed is neither real nor personal property. It is merely an amount of money, not actually in existence but estimated by the Assessment Commissioner on the basis of rents being actually paid for similar premises and not on the basis of the value of any property.

"Then as to the business tax being a tax on real or personal property. Section 369(3), which I have quoted, says it is not to be a charge upon the land or building occupied. Certainly it is not a tax on any particular real or personal property.

"In my opinion Sections 360(1), 364, 365 and 369(1), which influenced the judgment of the trial judge, are not for the purposes of imposing a tax and do not impose a tax, but are merely for the purpose of collecting the tax by distress or sale of personal property, and, possibly, by levying it under section 365 on real property. Such provisions do not make the tax itself a levy upon property. There must be a further active move by the tax collector before there is a levy. It is true that payment may be realised out of property but all debts of every kind whatsoever are payable out of property of some kind and that is the only means of paying them.

"I cite as a test the following hypothetical example which illustrates the principle and scheme of the tax and shows that the result of the tax is the creation of a debt owing by the occupant carrying on business in the premises, but is not a tax on any property.

"Let us suppose an extra-provincial corporation rents a furnished office in Winnipeg for the sole purpose of giving information as to its business, all correspondence being handled by the head office of the corporation in another province,

or by the Winnipeg office on stationery belonging to the landlord, for which payment is made after use, and assuming that the corporation has no property whatsoever in Winnipeg. In such case the tax could only be in personam and not in rem, because there was no property of the tax-payer in Winnipeg. I think, that being the result of the test, the contention of the city is correct.

"The relevant cases are fully and adequately discussed by the learned trial judge and, if I may say so, his expressions of opinion as to their purport are correct. The plaintiff company, however, still contends the Halifax v. Fairbanks case, decides that a business tax is a direct tax on real property and, therefore, conclusive against the appellant. I cannot add anything to what has been said by the trial judge in this case, but I, too, point out that the statute in the Halifax v. Fairbanks case is different from the City Charter and the real question in that case was whether the tax was direct or indirect. There is no provision in the Winnipeg Charter that imposes the business tax directly or indirectly on the owner of any real or personal property, qua owner, although he may be required to pay it as occupant and user."

VISCOUNT SIMON: Will you turn back to page 198, where you began reading? You began reading a judgment of the Court of Appeal. The case was dealt with by Chief Justice McPherson, but you did not refer us to that.

MR. BOND: I am sorry. I have references to his judgment in my notes and was going to read it later on.

VISCOUNT SIMON: At page 198, line 37, Mr. Justice Richards says: "The learned Chief Justice of the King's Bench sets forth all the relevant facts and discusses the leading cases in regard to the business tax in paragraphs 228 to 315 of his reasons for judgment."

MR. BOND: Yes. Page 67 is the judgment of the Chief Justice of the King's Bench.

VISCOUNT SIMON: Then we get into paragraphs?

MR. BOND: Yes. Paragraph 228 is on page 137, and he goes on to paragraph 315, which is on page 161.

VISCOUNT SIMON: You have been reading to us the judgment of Mr. Justice Richards, which is on this point in your favour, but one of his colleagues, who gave judgment before him, was the Chief Justice.

MR. BOND: I had intended to read three judgments that were in our favour and then to take the two judgments which were against us.

VISCOUNT SIMON: Very well.

MR. BOND: I have dealt with the judgment of Mr. Justice Richards.

The next judge whose decision was in our favour was Mr. Justice Adamson. At page 234, line 9, he says: "Does the city business tax constitute an 'assessment' of the property of the company of any nature or kind or impose a tax or levy on the property of the company? On this point I agree with my brother Richards."

"It has frequently been held that a business tax is a personal tax and not a tax on property: Reference re Taxation

of Canadian Pacific Railway" -- that was the Saskatchewan Reference in the Court of Appeal for Saskatchewan -- "and cases there cited. The fact that it is called a business tax and that business is property, does not determine the matter. The nature of the tax is the determining factor. Whether or not a business tax is a tax on or assessment of property depends on the statute in each case.

"Section 291(1) of the Winnipeg Charter, Statutes of Manitoba, 1940, chapter 81, as amended, says: '... every person carrying on any business in the city ... shall be assessed for a sum equal to the annual rental value of the premises which he occupies ...' The business tax imposed by this enactment is an assessment of the person. It is not an assessment of property, nor is it a tax upon property. 'The annual rental value' is not property. It is an abstract term used as a measure or standard for the personal tax imposed.

"The company is not exempt from assessment or taxation. All the company's property is not exempt; only that property owned by the company for a certain specific purpose, or in connection with that purpose, is exempt. In United Towns Electric Company, Ltd., v. Attorney General for Newfoundland the company was exempt.

"There is a fundamental difference between exempting an individual or a company from taxation or assessment and exempting only the property, or part of the property, of such individual or company. Had it been intended to exempt the company, as was done in the Newfoundland case, it would have been so stated in the agreement. This exemption clause appears to have been most carefully worded to express precisely what the parties intended. It bears all the marks of negotiation and compromise.

"The only sense in which this can be said to be an assessment or tax on property is that it must be paid with property. To hold that this makes it a tax on property would be to enlarge the scope of the agreement. It would do away with the distinction between exempting the individual or company. An illustration of that distinction occurs in this case. By clause 16 of the contract quoted in the charter, the Canadian Pacific Railway is exempt from taxation by the Government of Canada. By the Railway Taxation Act, Statutes of Manitoba, 1900, Chapter 57, Section 18, the company was exempt from taxation by all municipal corporations within the province. Under the contract we are considering, only part of the property of the company is exempt. It cannot be supposed that those who agreed upon this clause did not know and understand the wide difference between exempting the company from taxation and exempting some particular property owned by the company.

"It may be that if the city had been alert and well advised, it might have collected the business tax from 1894 to 1899. The company has not been injured or prejudiced by this inadvertence on the part of the city." In 1900, your Lordships will recall, the Railway Taxation Act was passed. "The argument on the company's behalf is that because for those years it received greater advantages under the agreement than it was entitled to, it should continue for all time to benefit to a greater extent than was intended by the agreement. The statement of Lord Halsbury in North Eastern Railway v. Hastings, which is quoted above, gives the answer to this contention: 'No amount of acting by the parties can alter or qualify words which are plain and unambiguous.'"

That is Mr. Justice Adamson on the business tax.

VISCOUNT SIMON: Is it important that we should look at the case, to which he refers, of United Towns Electric Company, Ltd., v. Attorney General for Newfoundland?

MR. BOND: I do not think so, my Lord.

VISCOUNT SIMON: The learned judge says: "Had it been intended to exempt the company, as was done in the Newfoundland case, it would have been so stated in the agreement." I do not know what it is.

MR. CARSON: I do not think that that case helps one way or the other, my Lord.

VISCOUNT SIMON: If you agree that we need not look at it, we will not. What is the reference to the third judge?

LORD COHEN: It is one sentence at page 228, is it not?

MR. BOND: It is page 228.

LORD COHEN: Mr. Justice Dysart had found in favour of the city on the ultra vires point of the case, so that it was not necessary for him to go into the business tax.

MR. BOND: All that he says, at line 6, is: "that the business tax is not exempt because, although the amount of the tax annually assessed is to be computed upon the rental value of the property in which the business is conducted, the tax is not on the property but on the person involved." That is all that he has to say.

VISCOUNT SIMON: Those are the three who were in your favour?

MR. BOND: Yes.

VISCOUNT SIMON: Then we will look at the others after the adjournment.

MR. BOND: If your Lordship pleases.

(Adjourned for a short time).

VISCOUNT SIMON: When we adjourned you were about to refer us to the judgments which were against you.

MR. BOND: Yes, my Lord.

VISCOUNT SIMON: Which is the first one?

MR. BOND: The Chief Justice in the Court of Appeal. His judgment is to be found at page 185. At line 25, he says: "The next question to be considered is liability of the railway to pay the business tax on all their property situate within the present limits of the City. I am not now considering the question of liability for taxation of the Royal Alexandra Hotel as distinct from other properties. That question will have to be dealt with separately".

Then he reviews the exempting clause and says: "The City of Winnipeg was incorporated on November 8, 1873, by 37 Victoria, Chapter 7, and under Section 112 thereof there was set forth the property which was liable for taxation, namely, 'all land and personal property in the City of Winnipeg shall be liable to taxation, subject to the following exemption'."

VISCOUNT SIMON: Is it necessary to read it all through?

MR. BOND: I do not think so, my Lord.

VISCOUNT SIMON: At page 187, line 22, he says: "In considering the true intent of the contract".

MR. BOND: I was about to come to that. I do not think that the other is material. He says: "In considering the true intent of the contract entered into between the parties, consideration must be given to the conditions that existed when the contract was entered into. At that time the only taxation levied was on land and personal property. No other method of collecting taxes was in existence, and under clause 4, Section 8, above mentioned, it would appear that all property was to be free and exempt from all municipal taxes, rates, levies and assessments of every nature and kind.

"When the business tax was introduced as a new method of taxation it was definitely provided by statute, and carefully continued through the subsequent statutes, that the same was levied in lieu of a tax upon personal property.

"I am of opinion that the inclusion of such a term was not merely by accident but for a definite purpose, namely; to show that it was a tax substituted for the previous existing tax. It was entirely unnecessary to include such an explanation for any other purpose as the power of taxation of personal property could have been dropped out of the statute and the power to institute" -----

VISCOUNT SIMON: I do not think that we need discuss the meaning of "in lieu of". We know what that means.

MR. BOND: On page 188 he says: "The effect of such a term has been considered in the Shaftsbury v. Marlborough case. In that case the Earl of Shaftsbury left to his grandson annuities of £1,000 and £2,000, each subject to certain conditions, and his Executors were to pay the legacy dues on said annuities. In a codicil he revoked the annuities in his will and 'in lieu thereof' directed that his Executors pay his grandson £3,000 yearly".

VISCOUNT SIMON: Can we go to line 30: "when the City exempted all property (which included land and personal property) from all taxation, they cannot, at a later date, under a tax under another name substituted therefor, make the company liable for such substituted tax".

MR. BOND: Yes.

VISCOUNT SIMON: Then he summarises the argument.

MR. BOND: "Counsel for both parties submitted very strong arguments in support of their contention as to whether a business tax was a tax on property or not. In Hydro-Electric Power Commission v. City of Hamilton; Toronto Suburban Railway Company v. City of Toronto, it was held that business tax was not a tax on property but a personal tax. On the other hand: in Nova Scotia Power v. Bank of Nova Scotia; Pigeon v. City of Montreal and in Dominion Express Company v. City of Brandon, the opinions expressed by members of the court were that it was a tax on property. In all of these cases the questions before the various courts were entirely different from those in this action and dealt with the various statutes and the effect of same in reference to taxation of Crown lands or property occupied by the Crown, or cases of double taxation in contravention of the statutes under consideration. In no case was it for the purpose of settling the point of whether it was a property or personal tax, and the comments in reference to that phase of the problem were obiter dicta.

"In Reference re Taxation of Canadian Pacific Railway Company, now subject to appeal, certain questions were submitted to the Saskatchewan Court of Appeal as to the powers of a municipality to tax the company in that province. Various local Acts were under consideration and the effect of clause 16 set forth in Chapter 1 of the Statutes of Canada, 44 Victoria, 1881, and the court held that in Saskatchewan the company was liable for both property and business tax.

"In the first analysis, all taxation is personal as it has to be paid by the person taxable, although there are different ways of ascertaining what the amount of the tax shall be; and conversely, all property owned by the person responsible for payment of the tax is available for the purpose of realising the amount thereof and becomes subject thereto.

"I do not think that in the present case it makes any difference whether it is a personal or property tax. The rights of the parties hereto depend upon the agreement entered into by them, as contained in the by-law".

He then goes on to discuss Hedley Shaw Milling Company v. City of Medicine Hat and the former case of Canadian Pacific Railway Company v. City of Winnipeg.

VISCOUNT SIMON: Does he not come to his conclusion on the next page, at line 25?

MR. BOND: Yes, my Lord. He says: "The ordinary municipal tax on property is levied against the assessed capital value of the property." That is the ordinary municipal tax. "The business tax is levied by an assessment of the annual rental value of the property. In both cases the property is to be taken into consideration. Because the basis of valuation used for the purpose is different, it does not eliminate the fact that the assessment is made in relation to the property and the City is not entitled to make an assessment of any kind".

That is where we differ from the learned Chief Justice. We say that it is only a yardstick. I think that is the end of where he deals with the business tax.

LORD COHEN: At line 39 on page 191 he sums it up.

MR. BOND: Yes; that is his conclusion. "I am, therefore, of the opinion that the company is not liable for the so-called business tax for the following three reasons: (1) It was a tax substituted for the personal tax from which it was exempt at the time the by-law was passed; (2) That the by-law prohibited the City from making the assessment necessary before such a tax could be ascertained; (3) That on a true and correct interpretation of the meaning of clause 4, sub-section (8) at the time the by-law was passed and the contract entered into between the company and the City, which was the reason for the passing of the by-law and the exemption being granted, the company was to be exempt from any and all taxes levied by the municipality".

VISCOUNT SIMON: Of those three reasons, (2) is the critical one for you, is it not: "That the by-law prohibited the City from making the assessment necessary before such a tax could be ascertained"?

MR. BOND: Yes.

LORD COHEN: That is the one based on the extract from the judgment of Mr. Justice Sedgewick, at page 190, line 8?

MR. BOND: Yes.

LORD TUCKER: (3) is really summing the thing up?

MR. BOND: In so far as No. (1) is concerned, our submission is that it is an entirely new and different tax.

LORD COHEN: I should have thought that it was a bad reason. You have to look at the nature of the tax itself; not what it was substituted for.

MR. BOND: Yes.

VISCOUNT SIMON: I do not think that the first reason need worry you. The difficulties are in (2) and (3); and, if it is correct that the company was to be exempt from burdens put upon it in respect of property owned by it, the question is whether or not this tax is not a tax on property.

MR. BOND: Yes; that is the whole question: whether or not it is a property tax.

VISCOUNT SIMON: Yes. What is the next judgment?

MR. BOND: Mr. Justice Coyne, at page 202, line 34 says: "I also concur in the judgment of the Chief Justice of this court, with the exception of the two sentences at the end of his judgment where he refers to the Reference respecting the British Columbia Labour Statute as affecting employees of the Empress Hotel" - we are not concerned with that - "where, on the basis of a supposition of interpretation of that case, he finds the Royal Alexandra Hotel liable to taxation." That is nothing to do with it. He simply concurs with the Chief Justice.

Those are all of the judgments in the Court of Appeal, my Lords.

In the Supreme Court this question was not argued, because the Saskatchewan Reference had been recently decided and, while we did not argue it, we reserved our rights to present an argument on it, should it go beyond the Supreme Court. However, some of the judges did refer to it.

VISCOUNT SIMON: Did you say that in the Supreme Court this point was not argued?

MR. BOND: It was not argued at length. It was argued in connection with the Royal Alexandra Hotel, but it was not argued generally.

VISCOUNT SIMON: It would have been open to you in the Supreme Court to have distinguished, if it were possible to do so, the Saskatchewan case from this case, would it not?

MR. BOND: We took the position that the Saskatchewan Reference was similar to ours and we still take that position. I am adopting their argument in this case.

Turning to the judgments in the Supreme Court, at page 414, line 20, Mr. Justice Kellock says: "It is also contended on behalf of the appellant that the exemption extends to so-called business taxes. As this point is concluded in this court by our decision in Canadian Pacific Railway Company v. Attorney-General for Saskatchewan, effect must be given to this contention."

At page 418, lines 23 to 25, Mr. Justice Kerwin says something similar: "The third question, whether business taxes are included in the exemption, is settled by the decision of this court in Canadian Pacific Railway Company v. Attorney-General for Saskatchewan."

Then Mr. Justice Estey, at page 402, line 44, says: "Then with respect to the validity of the business tax prior to 1893 the City of Winnipeg was authorised to impose taxation upon real and personal property"; and he discusses the legislation. At page 403, line 18, he says: "Apart from this statutory recognition of the exemptions created by by-laws 148 and 195 with respect to the business tax, the language of this exemption which we are here considering - 'all property now owned, or that hereafter may be owned . . . shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind', - is even more broad and comprehensive than that in clause 16 considered in Canadian Pacific Railway Company v. The Attorney-General for Saskatchewan, where this court held that the business tax was included within the exemption there provided for. The principle of that decision resolves this issue in favour of the company".

On that point, before the adjournment, Lord Asquith asked me whether there were any differences in the legislation. There is this difference: that under the City's legislation it is property owned by the company. The word "owned" does not appear in the Act on the Saskatchewan Reference.

LORD ASQUITH: Is the word "used" there or "occupied"?

MR. BOND: I think that it is "used".

LORD TUCKER: The word is "used", but it has to be occupied as well. It is an occupation tax.

MR. BOND: That is what they held.

LORD TUCKER: Occupancy came into it in the Saskatchewan case.

LORD COHEN: But in both cases, the word "owned" in one and "used" in the other, was used in defining the property which was exempted, and the exemption in both cases was to continue so long as it was used for railway purposes, I think.

MR. BOND: Yes, my Lord.

VISCOUNT SIMON: It is not disputed, is it, that in Winnipeg the lands, the annual value of which it is sought to use as the yardstick, are owned by the Canadian Pacific Railway?

MR. BOND: I think that they are all owned by the company.

MR. CARSON: I do not know of any suggestion to the contrary my Lord.

MR. BOND: In the Saskatchewan case, in the Supreme Court, Mr. Justice Kellock, at pages 218 and 219, distinguished the case of Hydro-Electric Power Commission of Ontario v. City of Hamilton, and in the judgment of the Chief Justice in the Court of Appeal of Manitoba in this case it was said that in none of the cases which he mentioned (and this was one of them) was it stated that the tax was a personal tax.

I would like to refer your Lordships to Hydro-Electric Power Commission of Ontario v. City of Hamilton, which is reported in 47 Ontario Law Report, 155, where the question was under consideration regarding assessment for business tax and was, I submit, similar to the present case. In that case Chief Justice Meredith stated at pages 160 and 161 quite definitely: "The word 'property' means, I think, real property, because personal property is not liable to taxation." That is our case, too. That is exactly what our Act says: that personal property tax was abolished.

LORD ASQUITH: I am not quite clear what a personal tax means, if it is a term of art. Does it mean taxation which is not levied on property or taxation which is not levied on realty, or does it mean a tax which is not enforceable by a charge?

MR. BOND: I think that it is the latter.

LORD ASQUITH: The subject matter of the tax can be anything?

MR. BOND: Yes. That is why they inserted in the City Charter, when they imposed the business tax, that it should not be a charge. I think that that was the reason for it: to differentiate between a tax on real property and a tax on personal property.

LORD COHEN: I think that in the Saskatchewan case some judge said (and I am not sure that all of those who were against you did not say) that such a provision had nothing to do with determining the nature of the tax; it merely related to the method of collection of the tax, and it might be a real or personal tax.

MR. BOND: Yes, my Lord; that is true. My submission is that this Hamilton case is directly in point. The only difference is that the yardstick that they used was the actual value of the land and they applied an arbitrary rate to the value of the land instead of to the rental value of the land. That was the only difference as I see the case.

MR. CARSON: That was Question (2c) in the Saskatchewan case?

MR. BOND: That was Question (2c) in the Saskatchewan Reference.

At page 161 Chief Justice Meredith goes on to say: "The business assessment is imposed by Section 10 and is a personal tax, and not a tax on real or personal property. The assessment on land is used only for the purpose of determining the amount of business assessment, which is a percentage on the assessed value of the land occupied or used for the purpose of the business." That is our case, except that the yardstick is different. He confines the business tax, as I have said, to a personal tax and by no process of reasoning can it be said to be a tax on property.

LORD TUCKER: What was the exempting provision in that case?

MR. CARSON: Property vested in or controlled by any public Commission is not liable to taxation.

MR. BOND: It was the Ontario Assessment Act, Revised Statutes of Ontario, 1914, Chapter 105, section 5, paragraph (7): "Property vested in or controlled by any public Commission is not liable to taxation, unless occupied by a tenant or lessee". That apparently was the language of the Act.

This case of Hydro-Electric Commission of Ontario v. City of Hamilton was followed in the Saskatchewan courts in the cases to which my learned friend Mr. Leslie referred your Lordships: Moose Maw v. British-America Oil Company (1937, 2, Western Weekly Reports, page 309) and Northern Saskatchewan Flying School v. Buckland Municipality (1943, Western Weekly Reports, page 609). We rely on those cases, and your Lordships will recall that in his reasons for judgment in the Saskatchewan Reference (1951 Supreme Court Reports, page 190) Mr. Justice Estey, at page 231, dissented from the other judges. I am not going into that, because it was fully dealt with in the previous case.

My final submission is that the exempting clause of by-law No. 148 was most carefully worded, as Mr. Justice Adamson has stated, to express precisely what the parties intended; and further, to ensure that there would be no doubt that the exemption given in 1881 should not be misconstrued and taxation, other than on property, be introduced, this Section 19 was inserted in the Act of 1893 - that comes forward as Section 369, sub-section (3) of the present Act - declaring it not to be a charge made upon land or buildings, which was the incidence of property taxation. I think that that is the only reason why that section would have to be put in there: to show that it did not carry along the incidence of property tax; it was not a tax on property.

In conclusion, I would like to say that the business tax in the City of Winnipeg is not a tax respecting the use and occupation of land, in my submission, and it is not a tax on property. It is a tax which, I believe, is unique in Canada. I do not think that you have any counterpart to it over here and, so far as I can find out, they do not use it to any extent in the United States. It is a tax unique in Canada and was, I believe, first imposed by the Province of Ontario in 1890. Manitoba apparently got it from there in 1893. It was imposed to replace the personal property tax, which was difficult of collection and was not satisfactory; and I think that in every jurisdiction where the business tax has been brought into force the personal property tax has been abolished. It does not necessarily carry the same incidence of taxation as the personal property tax, inasmuch as it is not a tax on property. It is an

arbitrary sum which the province permits the City to charge on persons carrying on business in the City, so that they may through this tax contribute something in return for the services that they receive; that is, police protection, fire protection and services of that nature. Otherwise, no contribution could be obtained from many of these persons, since they carry on business in rented premises and live in rented premises, and they would be free from all taxation and would receive the same services as the other citizens who paid the tax.

I submit further, my Lords, that the fact that the tax is computed by estimating the annual rental value of the premises occupied and multiplying it by an arbitrary percentage does not necessarily ^{alter} its character; that it is not an occupancy tax.

VISCOUNT SIMON: In this case it is not occupancy; it is ownership, is it not?

MR. BOND: It has been held that it is an occupancy tax.

LORD TUCKER: In the present case the tax is an occupancy tax?

MR. BOND: It is based on occupancy. That is the yardstick.

LORD TUCKER: The exemption that the Canadian Pacific Railway will get is because they own the property and therefore claim to be exempted under the terms of the by-law?

MR. BOND: Yes. Our submission is that the factor of occupancy is merely the yardstick - the same as in the Saskatchewan case.

VISCOUNT SIMON: What you have said about the business tax in other jurisdictions is interesting. You say that it was first imposed in Ontario.

MR. BOND: In 1890, my Lord. At that time it was a tax on all merchants. That is the way that they described it.

VISCOUNT SIMON: In Ontario, when the business tax was imposed, how was it measured?

MR. BOND: It was on the value of the land, I think; the same as it is now in Ontario, a percentage on the value of the land.

MR. CARSON: As in Question (2c) in Saskatchewan?

MR. BOND: Yes.

VISCOUNT SIMON: I think that you are right in saying that we have nothing which is parallel to it in this country, and you say that you are not aware that it exists in the United States?

MR. BOND: No. They still seem to stick to the personal property tax in the United States.

LORD TUCKER: It bears a very close resemblance to our rating principles, especially the clause to which you referred us: "In assessing annual rental value, the assessment commissioner shall take all factors into account so that as far as possible premises similar in size, suitability, advantage of location, and the like, shall be equally assessed. The intent and purpose of this section is that all persons subject to business tax shall be assessed at a fair rental value of the premises occupied or used, based in general upon rents being actually paid for similar premises." It is very like our rating principle of

of equality of rating of comparable premises; but, of course, our rating applies to residential properties as well as business.

MR. BOND: Yes.

VISCOUNT SIMON: Is there any provision that, if one person who is assessed to pay the business tax considers that the rental value of another person's premises has been fixed too low, he can apply to have it put up?

MR. BOND: Any person can appeal to what we call our Board of Revision.

LORD COHEN: In respect to somebody else's assessment or only about his own?

MR. BOND: About other people's.

MR. CARSON: We have that in Ontario.

MR. BOND: Whether they have any interest or not.

VISCOUNT SIMON: In our own rating law you can object that somebody else is not sufficiently assessed.

MR. BOND: Yes. Any person can appeal.

I have not attempted to advance any argument, because I had the privilege of listening to the argument in the Saskatchewan case and I agree with it and I am adopting that as my argument on this point. I do not think that there is anything further that I can add.

My friend Mr. Wilberforce has drawn to my attention Section 300, at page 88 of the appendix. I do not know whether I read that or not.

LORD COHEN: I marked it. I do not know whether you read it, but, at any rate, I did.

MR. BOND: If your Lordship pleases.

VISCOUNT SIMON: Mr. Carson, the Board has on a number of issues reached in its own mind a conclusion; but I notice that in the first reason which you append to your Case you say: "Because the respondent was a corporation with power to give the bond and covenant!" That reason may arise because the respondent is in the position of a common law corporation or it may arise from the argument that it is a statutory corporation with the necessary power. If you, representing the Canadian Pacific Railway, want us in our decision to decide which of these two things it is, we ought to hear you. If you are content to deal with the matter without discussing the question as to whether it has common law powers or adequate statutory powers, the position might be otherwise.

MR. CARSON: The reason is intended to cover both grounds and I would be content to have the view of your Lordships on the first ground; that is, that it has power by virtue of the terms of its Letters Patent.

VISCOUNT SIMON: In paragraph 32 of your Case, you say of the company: "It has the status, it is submitted, of a common law corporation and as such has all the powers of a natural person."

MR. CARSON: Yes.

VISCOUNT SIMON: One possible view is that we do not say that, but it none the less has the necessary power when you consider the statute and what is equivalent to the statute.

MR. CARSON: As your Lordships will recall, the majority of the judges of the Supreme Court found in our favour on the question of powers, on the basis of the terms of the Letters Patent. If your Lordships desired to hear me, I would naturally support that view in the Supreme Court.

LORD COHEN: In other words, they did not hold that you were a common law corporation? They did not find it necessary to determine it?

MR. CARSON: They did not find it necessary to decide, and I would think it proper for me to support the majority view in the Supreme Court.

VISCOUNT SIMON: We are only anxious that we should not frame our judgment in a way which ties your hands in possible future cases.

MR. CARSON: Yes, my Lord. For the purposes of this case, I would be quite content with a judgment which held that we had this power by virtue of the terms of the Letters Patent.

LORD COHEN: In other words, Mr. Justice Locke was right?

MR. CARSON: Yes, and Mr. Justice Kerwin, who wrote the judgment of the Chief Justice, Mr. Justice Taschereau and Mr. Justice Sautaux.

VISCOUNT SIMON: That would leave you, in litigation in the future, free to contend, if you felt that you could, that you were a common law corporation.

MR. CARSON: Yes.

VISCOUNT SIMON: Then I do not think that their Lordships will require to hear you. I think that that is the view to which they are likely to come. If, on reflection, their Lordships were to find that their present^{view} did not commend itself, we should have to let you know.

MR. CARSON: If your Lordship pleases.

VISCOUNT SIMON: Is there anything that you wanted to say about Mr. Bond's arguments?

MR. CARSON: May I glance at my Reasons to see if there is anything that I should say about anything else. I think not, because my Reason (2) is only relevant if the question of powers is decided against me. The same would apply to Reason (3) and to Reason (4).

VISCOUNT SIMON: You are ^{not} taking the point in Reason (5), are you? You are not suggesting that there is res judicata?

MR. CARSON: I would only take it in this view: that in the Supreme Court in that particular decision of 1900 they held that the tax exemption was binding. I do not think that I need to develop that, as long as I remind your Lordships of what that decision was.

VISCOUNT SIMON: As regards your Reason (9), I suppose that you say that, if the Privy Council took the view in the Saskatchewan case that the exemption was good, a fortiori it is good in this case?

MR. CARSON: Yes, my Lord.

VISCOUNT SIMON: Then I do not think that their Lordships need to trouble you, Mr. Carson.

MR. CARSON: If your Lordship pleases.

VISCOUNT SIMON: Their Lordships will take time to consider what advice they will humbly tender to Her Majesty in this case.