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22 of 1953

IN THE PRIVY COUNCIL

Council Chamber, Whitehall, S.W.1

Wednesday, 13th May, 1953.

Present:

VISCOUNT SIMON
LORD OAKSEY,
LORD TUCKER,
LORD ASQUITH OF BISHOPSTONE,
LORD COHEN OF WALMER

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

THE CITY OF WINNIPEG

Appellant

and

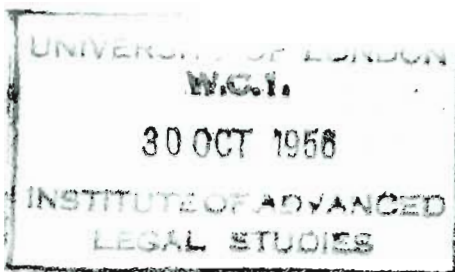
THE CANADIAN PACIFIC RAILWAY COMPANY

Respondent

FIRST DAY

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

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(Transcript of the Short-hand Notes of Marten, Meredith & Co.,
11 New Court, Chancery 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. H.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.

F I R S T D A Y

MR FILLMORE: My Lords, I appear with my learned friends Mr Bond and Mr Wilberforce for the Appellant, and my learned friends Mr Carson, Mr Gahan and Mr Findlay appear for the Respondent. This is an appeal by special leave from a judgment of the Supreme Court of Canada. All the Judges in the Supreme Court of Canada agreed in the result, although some of them gave different reasons.

In the terms of the Order granting leave to appeal the appeal is limited to the following questions, firstly, whether the Deed of Covenant dated 10th October, 1881, was ultra vires the Respondent, with the result that the exemption from taxation purporting to be conferred on the Respondent by By-law 148 never became effective, and, secondly, whether, if any perpetual exemption from such taxation is conferred by the said by-law, such exemption does or does not extend to the business tax. If it is agreeable to the Board, I will deal with the first question and my learned friend, Mr Bond, will deal with the second question. I have no doubt that my presentation of the matter has been shortened and assisted by the previous case, because your Lordships have considered the Act incorporating the Canadian Pacific Railway, the Agreement which was ratified by the Act and perhaps to some extent the Charter.

I should like, before reading the judgments, to put before your Lordships some of the circumstances existing in 1881 with reference to the subject under discussion, and briefly to call your Lordships' attention to certain sections and clauses in the Incorporating Act, the Agreement and the Charter issued pursuant thereto.

VISCOUNT SIMON: What was the order in which the cases were heard before the Supreme Court? The case we have just heard was also an appeal from the Supreme Court. I do not remember what the date of the judgment was. Judgment in this case was given on 22nd October, 1951.

MR FILLMORE: Yes.

VISCOUNT SIMON: Was the case we have just heard heard before that?

MR CARSON: Yes, my Lord. The Saskatchewan case had been decided before judgment was delivered in this case.

MR FILLMORE: Yes; and for that reason there was no extended discussion or long written judgments in the Supreme Court of Canada on the question of the so-called business tax exemption.

Before going into any of the circumstances and the documents, it would perhaps be of assistance to your Lordships if I were to call your Lordships' attention to By-law 148, which is the exempting by-law relied upon by the Respondent, and the crucial document at issue in this litigation. It is to be found at page 289 of the Record. Your Lordships will remember that the Railway Company was incorporated by an Act dated 16th February, 1881. This by-law is dated the 5th day of September, 1881. It is entitled "A By-law to aid and assist the Canadian Pacific Railway Company in consideration of certain undertakings on the part of the said Company."

Then the preamble says: "Whereas it is desirable that a line of railway southwesterly from the City of Winnipeg, towards the westerly limit of the Province of Manitoba, through the Pembina Mountain District should be built for the purpose

of developing and advancing the traffic and trade between the City of Winnipeg and the Southern and South Western portions of the Province.

"And, Whereas it is also desirable to secure the location of the Workshops and Stockyards of the said Company for the Province of Manitoba in the City of Winnipeg as a central point on the Main line of the Canadian Pacific Railway, and the several branches thereof, and the said Company have agreed to construct a railway South, and Southwesterly as aforesaid at the time and in manner as in this By-law hereinafter mentioned, and have agreed to establish and continue their principal Workshops and Stockyards for the province of Manitoba in the City of Winnipeg aforesaid.

"And whereas it is expedient for the City of Winnipeg to lend their aid to the said Company in consideration of the premises, upon the terms hereinafter mentioned, by granting them by way of bonus, debentures of the City of Winnipeg to the amount of two hundred thousand dollars payable in twenty years from the day this by-law takes effect, with interest at six per centum per annum payable half yearly, and by exempting the property now owned or hereafter to be owned by the said Railway Company for Railway purposes within the City of Winnipeg from taxation forever, and by conveying to the said Company lands sufficient and suitable for a passenger Station within the said City of Winnipeg.

"And Whereas, the amount of the whole rateable property of the City of Winnipeg, according to the last revised assessment roll is \$4,008,290.00.

"And Whereas, the total amount required to be raised annually for paying the said debentures and interest is Seventeen Thousand dollars.

"And Whereas, it will require an annual special rate of Four and four tenths Mills in the dollar, over and above all other rates and assessments for paying the interest, and providing an equal yearly sinking fund for redeeming and paying off the principal of the debt thereby to be created.

"Now Therefore the Mayor and Council, of the City of Winnipeg enacts as follows".

I do not think that I need read sections 1, 2 and 3. Those are all particulars relating to the debenture issue.

Section 4 provides: "The conditions hereinbefore referred to are as follows: (1) The said Canadian Pacific Railway Company, shall on or before the first day of November, one thousand eight hundred and Eighty-two, commencing within the City of Winnipeg, construct and complete and fully equip one hundred miles of the railway running South Westerly towards the Westerly Limit of the Province, upon a course starting within the said City of Winnipeg, crossing the Assiniboine River", and so forth; I do not need to read those legal descriptions; I can continue at the top of page 292: "or within a distance of six miles upon either side of a line which may be drawn through the said townships to the extent of the said One hundred miles in the direction above described." Nothing turns on that. The railway was constructed.

Then subsection (2) says: "The Canadian Pacific Railway

Company, shall on or before the first day of November, one thousand eight hundred and eighty two, build, construct and complete, within the City of Winnipeg", on the described lots, the legal description of which I do not think matters, "(which are to be conveyed to the said Company on or immediately after the ratification of this by-law, as aforesaid, by the Mayor and Council of the City of Winnipeg, for that purpose) a substantial and commodious general passenger railway depot, with all the modern improvements for the accommodation and convenience of the public at large and the business of the said Company."

Then subsection (3) does come into point. "The said Canadian Pacific Railway Company, shall immediately after the ratification of this By-law as aforesaid, make, execute, and deliver to the Mayor and Council of the City of Winnipeg a Bond and Covenant under their Corporate Seal, that the said Company shall with all convenient and reasonable dispatch establish and build within the limits of the City of Winnipeg, their principal workshops for the Mainline of the Canadian Pacific Railway within the Province of Manitoba, and the branches thereof radiating from Winnipeg, within the limits of the said Province, and for ever continue the same within the said City of Winnipeg."

LORD COHEN: Was that done?

MR FILLMORE: Yes. A bond in the required form, I think dated 16th October, 1881, was executed and delivered to the City of Winnipeg.

LORD COHEN: And the workshops were erected?

MR FILLMORE: The workshops were built; that is admitted.

VISCOUNT SIMON: It is amusing to think of the difference in different cases. The City of Oxford exerted itself to prevent the Great Western Railway having its works in the City of Oxford, and they succeeded in getting the works erected at Swindon instead; but in this case the City of Winnipeg was demanding and clamouring that the railway should come to the City of Winnipeg.

MR FILLMORE: There is one peculiarity which may come out later. Your Lordships probably observed that the recital says: "Whereas it is desirable that a line of railway southwesterly" and so forth, and at the top of page 290 it says: "And Whereas it is also desirable to secure the location of the Workshops and Stockyards of the said Company for the Province of Manitoba in the City of Winnipeg as a central point on the Main line", there is no covenant to locate the main line in Winnipeg.

Subsection (4) provides: "And by such bond and covenant the said Company shall bind themselves as soon as they conveniently can to procure and erect within the City of Winnipeg, large and commodious stock or Cattle Yards, suitable and appropriate for the central business of their Main line of railway and the several branches thereof." That is not included in the covenant specified in the preceding paragraph, although the second recital states "and have agreed to establish and continue their principal Workshops and Stockyards for the Province of Manitoba in the City of Winnipeg aforesaid." The stockyards might be still be more objectionable than the railway yards, in view of the present live stock market. As a

matter of fact, I might mention in passing that in 1903 the workshops were moved to an outlying portion of the city, the boundaries of which had in the meantime been extended. The stockyards, or at least the main cattle yards, are now in the town of Transcona, some distance outside Winnipeg. When these new yards were established (they are called Public Markets, Ltd.) the Act creating that company expressly provided that nothing done pursuant to the Act would prejudice the rights of the Canadian Pacific Railway Company under this old by-law. They have always been very astute in not doing that.

Returning to the By-law, section 5 provides: "If the said Company shall make default in any of the conditions herein mentioned to be by them performed the said Trustee shall thereupon, and in any such case deliver all the said Bonds with the Coupons attached, not paid, and all the monies in his hands, by virtue of the trust hereby created, to the Mayor and Council of the City of Winnipeg.

"(6) The Mayor and Council of the City of Winnipeg, are hereby authorized and empowered upon the said Company making, executing and delivering, to the Mayor and Council of the City of Winnipeg, the bond and covenant in the third Subsection of the fourth Section of these presents, mentioned, to make, seal and deliver to the said Company a deed of the lands, upon which the passenger Station in the Second Sub-section of the Fourth Section of these presents mentioned, is to be erected."

The bonds were delivered. By a subsequent by-law, No. 195, which follows, which I need not read now, the time for building a railway was extended for a year or so; but that is not material. In 1883 the power of the city to enact this by-law was confirmed by a statute, to which I will refer later, in which it is declared that the by-law is valid and binding on the City of Winnipeg.

LORD ASQUITH: What sort of statute -- a provincial statute?

MR FILLMORE: Yes; it was an Act of the provincial legislature, to which I shall refer, and it is in the Factum.

I do not think that section 7 is material here. It is an arbitration clause.

Section 8 provides: "Upon the fulfilment by the said Company of the conditions and stipulations herein-mentioned, by the said Canadian Pacific Railway Company all 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 nature and kind." That is the exemption provision. One might surmise, although, of course, one could not prove it, that whoever suggested such a bargain might have read clause 16 of the Agreement.

LORD TUCKER: Will you help me with the numbering of these sections? I am not quite clear how this by-law works. On page 290, after the recitals, there are the words: "Now Therefore the Mayor and Council, of the City of Winnipeg enacts as follows". Then there are sections (1) to (4). When you get to section (4) that says: "The conditions herein before referred to, are as follows".

MR FILLMORE: I am afraid that I misled your Lordships. Section (4) is the last one.

LORD TUCKER: Are the others all conditions?

MR FILLMORE: I think so.

LORD TUCKER: No, they are not, because when you get to (6), that is part of the enactment, is it not? It is not a condition?

LORD COHEN: I think (5) is part of the enactment: "If the said Company shall make default in any of the conditions herein mentioned?"

MR FILLMORE: Yes. I think that (1) to (4) must be the conditions.

LORD COHEN: I think that (5) should have a bracket round it. If we put brackets round the rest, that will make it clear.

MR FILLMORE: Yes.

VISCOUNT SIMON: When on page 291 you come across the phrase "the conditions hereinbefore referred to", that, I think, takes you back to line 21 on page 291, in the sentence which says: "until the said Canadian Pacific Railway Company shall have performed the conditions and each and every of them hereinafter specified". Is that right?

MR FILLMORE: Yes. (4) is a separate paragraph and (1), (2), (3) and (4) are sub-paragraphs.

LORD ASQUITH: Then (5), (6), (7), (8), and (9) are all bracketed? The numeral with which they open ought to be bracketed?

MR FILLMORE: Yes.

Now might I give your Lordships a little more of the background. It has already been called to your Lordships' attention in the previous case that the Act respecting the Canadian Pacific Railway Company, which is Chapter 1 of 44 Victoria, Statutes of Canada, 1881, recites that it was one of the terms of the admission of British Columbia into the Union that the Dominion Government would, I think within ten years, complete, having commenced within a certain time, a railway to the Pacific Coast. As Mr Justice Rand stated in the Supreme Court, as your Lordships will see from page 387 of the Record, "Here was an undertaking conceived primarily for a high national purpose; it was designed as a bond to complete the scheme and organization of a Dominion extending from ocean to ocean by furnishing the essential means for the settlement and the utilization of the resources of its western half; and the company was made the beneficiary of substantial assistance from the public in money, lands and privileges." Those have already been called to your Lordships' attention. I was only emphasising, in making the point, that the construction and completion of the railway was a matter of great public importance in Canada at the time, and I was going to add to what was said by Mr Justice Rand on the subject some observations of my own, that it was not only a matter of agreement with the province of British Columbia, it was not only to bind eastern and western Canada, but it was also to save western Canada from trading to a certain extent with the United States. When you consider the geography of Canada, starting about 140 miles east of Winnipeg and stretching for 600 or 700 miles easterly, you have that rocky and wooded country north of the Great Lakes. It is sometimes referred to as a bridge between

eastern and western Canada, and it was desired to link eastern and western Canada together by a railway passing through that part of the country. It even had political significance, because at the time there was agitation in the United States, and there was a fear in Canada that western Canada might fall into the hands or become under the influence of the United States. Even then the words "imperialistic designs" were used.

Furthermore, this would establish a trade link not only across Canada but also from Great Britain across Canada to the East; and, as a matter of fact, by section 26 of the Charter the company was given power to engage in navigation.

LORD ASQUITH: You have told us of the two points involved in the appeal, but exactly how do the points arise? The Canadian Pacific Railway sued the City of Winnipeg?

MR FILLMORE: Yes. I was coming to that later, but I may mention it now. Your Lordships heard some discussion this morning about the agreement between the province of Saskatchewan and the Government of Canada whereby Saskatchewan gave up certain rights of taxation, the Railway Taxation Acts were suspended, and thus the province was left free to tax railways. The same situation existed in Manitoba. I will refer your Lordships to the Acts later. In 1948 the City of Winnipeg attempted to tax the Canadian Pacific Railway Company both for real estate taxes and for business taxes. It purported to repeal By-law 148, and it levied the tax. Then the Railway Company issued a statement of claim and asked for an injunction. The Railway Company said that By-law 148 was evidence of an agreement, that there was an agreement entered into in 1881, the terms of the agreement were set out in By-law 148, the Company was exempt from taxation, that exemption applied both to tax on real property and so-called business tax, and they asked for an injunction to restrain the City of Winnipeg from levying or attempting to collect either of those taxes. The learned trial judge granted the injunction; he found in favour of the Railway Company on all points.

LORD TUCKER: Was there any issue raised as to whether the City of Winnipeg, whatever it had undertaken to do, could not be sued for breaking its contract, that is to say, it could not bind its successors for ever not to impose taxation in the future? Was that ever an issue?

MR FILLMORE: The by-law was declared valid and binding on the City of Winnipeg by the provincial Act. Therefore the city had power to enter into such a bargain and, having made such a bargain and having had the power and authority to do so, it could not turn round the other way. It might purport to repeal the by-law, but it could not, by unilateral action, rescind the agreement. That was the position taken by the Railway Company. They said: "You have made a bargain. Here is your bargain. There is this perpetual covenant that goes on for ever, and we are entitled to an injunction to restrain the city from attempting to tax or collect any tax from the Railway Company".

The defences raised by the city were these: Firstly, they said that the Railway Company had no power, that is to say that it was ultra vires the Railway Company to give such a perpetual covenant in exchange for the agreed consideration. That is the first point. There is nothing in the Act of Incorporation, there is nothing in the agreement, there is

nothing in the Charter and there is nothing in the Consolidated Railway Act of 1879, to which the Charter is subject, which gives the Railway Company the power to enter into a covenant of a nature which lasts for all time. Therefore there was no bargain. The parties were never ad idem. The Railway Company had no power to enter into the agreement, and it is, therefore, bad, it is not binding on the Railway Company and, therefore, it is not binding on the City of Winnipeg. That is the point that I am endeavouring to put before the Board.

VISCOUNT SIMON: Might I ask you about the pleadings which are printed in the Record. You have described in general terms what the action was. I see that the Amended Statement of Claim appears on page 1 and sets out what you have sketched. Then I see that on page 4 paragraph 11A is in heavy type. Why is that in heavy type?

MR FILLMORE: I think merely to show that that is the part inserted by the amendment.

MR CARSON: After the action was commenced the City of Winnipeg attempted to impose the business tax, and the Statement of Claim was amended to bring in the issue of the business tax.

VISCOUNT SIMON: You get the business tax mentioned on page 5, line 18, in heavy type in the same way.

MR CARSON: Yes, my Lord.

VISCOUNT SIMON: I do not know what the black type at line 39 on page 5 indicates.

MR FILLMORE: That is in the Prayer for Relief. The plaintiff asks for an order that the Railway Company and the properties should be struck off the assessment roll. That relates to procedure.

VISCOUNT SIMON: Then, when one turns to the Statement of Defence, do the paragraphs on page 7 ~~which~~ plead the point which you are just mentioning? Paragraph 7 says: "In answer to paragraph 5 of the plaintiff's Statement of Claim defendant says that there was no agreement between the plaintiff and defendant as alleged. If there was such an agreement, which is denied, the defendant says that the plaintiff did not make, execute or deliver to the defendant a bond and covenant"; and paragraph 8: "If the plaintiff did deliver to the defendant what purported to be such a bond and covenant on the part of the plaintiff the defendant says that the plaintiff had no right, power or authority under the charter or otherwise to make or execute or deliver such a bond and covenant." That is the point which you have just mentioned?

MR FILLMORE: Yes.

VISCOUNT SIMON: Is that the point on which you are going to argue?

MR FILLMORE: Yes. We have the Agreement, and my submission is that, if there was any such purported agreement, the Railway Company had no authority to enter into it. That, shortly, is the point which the City has raised.

My Lords, I was going to give your Lordships a little more of the history of the matter. The Charter of the Railway Company has been amended several times by special Acts. For example, in 1890 the railway was given power to make

working arrangements with railways outside Canada. In 1903, Statutes of Canada, Chapter 57, power was given to hold shares in land and building companies, and to own and operate hotels, to engage in mining and smelting and to transmit electricity, construct irrigation projects, and so forth. That is to be found on page 68 of the Appendix of Legislation. In 1919 (this is not in the Appendix), by Statutes of Canada, Chapter 80, it was given power to construct and operate aircraft.

I might also call your Lordships' attention to an amendment to the Canadian Pacific Railway Act, which is Chapter 53 of 1882. That is not in the Appendix of Legislation.

LORD ASQUITH: To which Act is that an amendment?

MR FILLMORE: It is provided that the Canadian Pacific Railway may, subject to the approval of the Governor in Council, lay out and locate their main line of railway from Selkirk to the junction with the Western Section at Kamloops by way of some pass other than the Yellowhead Pass, provided that the pass be not less than one hundred miles from the boundary between Canada and the United States of America.

LORD COHEN: I am not quite following to what this is directed. Do these provisions such as the one you have last mentioned have any direct bearing on the question which we have to decide, or are you citing them merely for the purpose of showing that the Canadian Pacific Railway, though in form a charter company, is in substance a statutory company?

MR FILLMORE: Yes, my Lord. Those are all relevant to that point.

LORD COHEN: But has the question of the railway going through this pass any direct bearing on what we have to decide?

MR FILLMORE: It has the direct bearing on the argument which I shall advance later, that this is, in effect, a company incorporated by a special Act for a special purpose.

LORD COHEN: That is what I thought was the point, but I wanted to be sure that I had appreciated the relevance of what the argument was.

MR FILLMORE: Yes. I am not at the moment so much advancing an argument as taking your Lordships back to circumstances as they existed in 1881 and 1882.

LORD COHEN: Is this a correct summary of the argument: These Acts show that the company was a creation of statute?

MR FILLMORE: Yes, my Lord. I am going to put forward that argument later. The Court may not be interested -----

LORD COHEN: It is; but I could not find the Statutes here, and therefore I wanted to be sure whether the details of them mattered.

LORD ASQUITH: It is the 1882 Act. By what legislature was that Act passed?

MR FILLMORE: By the Canadian Legislature. It is 45 Victoria, Chapter 53. It is provided that the Company, subject to the approval of the Governor in Council, may lay out and locate their main line of railway from Selkirk, which is about 20 miles north of Winnipeg, to the junction with the Western Section at Kamloops by way of some pass other than the Yellowhead Pass -- I will explain that -- provided that the pass be not less than one hundred miles from the boundary between

Canada and the United States of America. That seems to have been a precaution that the Government considered that it should take.

The original plan for the Canadian Pacific Railway was for the railway to cross the Red River at a point about twenty miles north of Winnipeg called East Selkirk. I regret that the maps which show this are not in the Appendix of Legislation, because I should like to put them before your Lordships.

VISCOUNT SIMON: Winnipeg was originally known as the Red River Settlement, was it not?

MR FILLMORE: Yes. When it was first settled by the Selkirk settlers brought out by Lord Selkirk round about 1800 it was known as Fort Garry. There was the Upper Fort and the Lower Fort, the Lower Fort being at the junction of the Assiniboine River and the Red River, and the Upper Fort about twenty miles away, at St. Andrew's Rapids. That was built about the time of the trouble with the North West Company.

Your Lordships will see that the Yellowhead Pass was approximately in the west of where the City of Edmonton is now located; but the Canadian Pacific Railway Company located what they thought was a better pass known as the Kicking Horse Pass at a more southerly point in British Columbia through which the railway was eventually constructed.

VISCOUNT SIMON: One sees the black line which is the track of the railway as it passes west through Edmonton. Then it enters the mountainous region. There is a straight line, but, of course, it zig-zags round, and ultimately gets fairly straight running beside the river. What pass is that?

MR FILLMORE: That is the Yellowhead Pass through which the railway was to be located in the first instance. Nothing turns on that. I just want to point out that it was subsequently changed, and I should like to call the attention of your Lordships to an Order in Council dated 11th October, 1879, which is found on page 106 of the Appendix. That says: "On a Memorandum dated 10th October, 1879, from the Hon. the Acting Minister of Railways and Canals submitting that the Engineer in Chief of the Canada Pacific Railway Reports that the City Council of Winnipeg has granted a temporary Right of Way from Point Douglas to a common point on the Western side of the City plot near McPhillips Street, and that it becomes necessary to confirm and adopt the location from that point as far as it has been selected as shown between the two points marked A and B on the trace plan accompanying the Engineer in Chief's report herewith submitted. The Minister recommends that the location of the Line of the Railway from the point A near McPhillips Street, on the Western side of the City plot of Winnipeg, to the point B on the Fourth Base Line, near the Penitentiary". Your Lordships will see the map there. Nothing much turns on it except that you can see from the map, which was one that was used in the Supreme Court of Canada, a line B from near the City of Winnipeg going north-westerly.

VISCOUNT SIMON: That is called Fort Garry?

MR FILLMORE: It goes from Fort Garry to what is known as the Stonewall Penitentiary. Apparently Winnipeg was on the railway before By-law 148 was passed. It has been suggested that by passing By-law 148 Winnipeg was put on the railway, but it seems that by the 11th October, 1879, Winnipeg was already on the line of railway.

Then we have other Orders in Council confirming that. On page 112 of the Appendix of Legislation there is something that might be of interest. This is history and not argument, and perhaps not altogether relevant. There is an Order in Council P.C. 210 of 9th February, 1880. That says: "On a memorandum dated 7th February, 1880, from the Honourable the Minister of Railways and Canals submitting with regard to the question of bridging Red River at the City of Winnipeg that he has obtained from Messrs S. Fleming, Engineer-in-Chief of the Canada Pacific Railway, C. Schrieber, Chief Engineer of the Government Railways in operation and I. Page, Chief Engineer of Canals, a joint report expressing their views and opinions, on the proposed enterprise — That those engineers are of opinion that the attempts to build a bridge over Red River in the vicinity of Winnipeg is an undertaking attended with great risks, and, that if it be determined to build one, the following precautions should be adopted to minimise those risks". I do not need to read any more, but it is a matter of history that in 1826 and 1852 there were disastrous floods in the Red River Valley, when the inhabitants took to the hills, and after this case was decided in the Court of Appeal for Manitoba we did have a flood in May, 1950, which came close to being a major disaster.

The Orders in Council show that the line was located from Winnipeg westwards. Then, when we come to page 118 of the Appendix of Legislation, there is an Order in Council dated 6th August, 1881: "On a memorandum dated 2nd August, 1881, from the Honourable the Minister of Railways and Canals representing that the line of the Canadian Pacific Railway between Winnipeg and Portage la Prairie as constructed by the Government extends from the City of Winnipeg in a northerly direction to near Stonewall, thence westwards to Ossawa thence Southward to Portage la Prairie a distance of about 70 miles." What I wanted to point out here was that, after the incorporation of the Respondent Company and as early as 2nd June, they applied for a more direct route west. They did not want to go up to Stonewall and then to Portage la Prairie. They asked for permission to build a more direct line west of Winnipeg, and the subsequent Orders in Council on pages 119 and 120 show that that was done. For example, in the Order in Council of 19th November, 1881, on page 119 of the Appendix of Legislation, we find the following: "That by a letter dated the 27th instant the Company applied for approval of the line westwards from Winnipeg shown on the plan submitted on the 2nd of June, the course of such line extending to a point of junction with the line authorized by the Orders-in-Council above cited, about twelve (12) miles east of Portage la Prairie, the Company in such letter offering to continue to operate the present line to Stonewall as a branch of the Railway."

I think that the next paragraph is worth reading: "That under date the 27th instant the Chief Engineer has reported that as the City of Winnipeg is likely to be a great centre of trade, and it being also designed to establish the general workshops of the railway at that point and assuming that the City is intended to be on the main line of the railway, it would be greatly to the advantage of the traffic both through and local to have the location as direct as possible."

Therefore before By-law 148 was passed on 6th September, 1881, the Canadian Pacific Railway Company had decided to proceed westerly from Winnipeg.

VISCOUNT SIMON: I am afraid that I have not at the present quite followed. What is the purpose for which we are invited to consider these changes in route and location?

MR FILLMORE: I wanted to point out that this matter of the

construction of the railway was a matter of great public importance, that the Government kept a certain amount of supervision over it and that it was a semi-public corporation, and that it was a company incorporated by a special Act for a special purpose, leading up to the argument that it had no powers beyond those expressly granted to it in the Act of incorporation or in the Consolidated Railway Act, 1879. I will not weary your Lordships any more with what might be only the background of the case, because it probably has no particular interest from the legal point of view.

VISCOUNT SIMON: It is of great interest. I only wanted to follow it. Is this in support of the argument that the Canadian Pacific Railway Company had no power to enter into the covenant?

MR FILLMORE: Yes.

VISCOUNT SIMON: They are the provisions in the document which are impeached as being beyond the power of the railway?

MR FILLMORE: The covenant in section 8 of By-law 148, that it would construct and for ever maintain its principal workshops for Manitoba within the limits of the City of Winnipeg. That is the point.

VISCOUNT SIMON: It is subsection (3) on page 292?

MR FILLMORE: It is subsection (3) of Section 4 on page 292 of the Record, that the Railway Company "shall immediately after the ratification of this By-law as aforesaid, make, execute and deliver to the Mayor and Council of the City of Winnipeg a Bond and Covenant under their Corporate Seal, that the said Company shall with all convenient and reasonable dispatch establish and build within the limits of the City of Winnipeg, their principal workshops for the Mainline of the Canadian Pacific Railway within the Province of Manitoba, and the branches thereof radiating from Winnipeg, within the limits of the said Province, and for ever continue the same within the said City of Winnipeg." Then subsection (8) is: "Upon the fulfilment by the said Company of the conditions and stipulations herein mentioned . . . all property . . . shall be for ever free and exempt" from taxation.

I intend to address myself to the point that the Company had no power under the Act of Incorporation, the agreement that was thereby ratified or its Charter to enter into such a covenant, and, unless express power can be found in those constituting documents, it cannot be inferred that it is not incidental to the exercise of the powers which are granted.

LORD ASQUITH: Section 8 is not a covenant by the railway; it is a covenant by the City of Winnipeg.

MR FILLMORE: Yes.

LORD ASQUITH: It is the other one, is it not; Section 4(3)?

MR FILLMORE: It is subsection (8), "Upon the fulfilment by the said Company of the conditions and stipulations herein mentioned".

LORD ASQUITH: Those are the ones in (4)3 — "and for ever continue the same"?

MR FILLMORE: Yes, my Lord.

VISCOUNT SIMON: The actual bond and covenant is on pages 294 and 295?

MR FILLMORE: Yes.

VISCOUNT SIMON: Your contention is that the covenant on page 295 had no effect?

MR FILLMORE: Yes — that it was a negation of their statutory powers for ever to continue to operate the railway.

VISCOUNT SIMON: Then is the argument that, if they made a promise by which they could not be bound, in the same way the Corporation of the City of Winnipeg are not bound by their half of the bargain?

MR FILLMORE: That is the submission, that there was a lack of mutuality in these continuing covenants.

VISCOUNT SIMON: I understand what it is. The bargain appears to be under seal?

MR FILLMORE: The bond and covenant is under the seal of the Railway Corporation.

VISCOUNT SIMON: I meant subsection (8) on page 293. The promise of the Winnipeg Corporation is under seal?

MR FILLMORE: It is a by-law. It is in the ordinary form of a by-law, but it probably has more strength than the seal, because Parliament passed an Act saying that the City had the power to pass the by-laws. It is binding.

LORD TUCKER: It is the City of Winnipeg which stipulates by this document that it shall receive a covenant in a particular form, and then it did receive the covenant in the form in which it stipulated, and now it says that it is worthless?

MR FILLMORE: That is my submission, that the Railway Company did not have the power to give such a covenant.

(Adjourned till to-morrow morning at 10 o'clock.)