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22 of 1953

IN THE PRIVY COUNCIL

Council Chamber, Whitehall, S.W.1.

Thursday, 14th 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

S E C O N D D A Y

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

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UNIVERSITY OF LONDON
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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.

S E C O N D D A Y

MR. FILLMORE: By way of trying to put the relevant facts before
your Lordships, I thought that I would start by referring
briefly to the Act of incorporation, which is in the Appendix
at page 11. That is the Act of 1881, whereby the railway
company was incorporated. Attention has already been directed
to the recital, so that I will refer only to the operative
part. Clause 1 provides: "The said contract, a copy of which
with schedule annexed, is appended hereto, is hereby approved

and ratified, and the government is hereby authorized to perform and carry out the conditions thereof, according to their purport."

Clause 2 is the one which has been the subject of discussion in the judgments: "For the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Governor may grant to them in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended, and such charter, being published in the Canada Gazette, with any Order or Orders in Council relating to it, shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract."

Then I would turn to the contract and agreement, which is at page 13, and in passing call attention to paragraph 5, whereby it is provided: "The company shall pay to the government the cost, according to the contract, of the portion of railway, 100 miles in length, extending from the city of Winnipeg westward." That was referred to in the Orders in Council mentioned yesterday, which indicated that Winnipeg was "on the line" of the railway.

Then clause 7 provides that upon completion the railway shall belong to the company and at line 42 it says: "and upon completion of the remainder of the portion of railway to be constructed by the government, that portion shall also be conveyed to the company; and the Canadian Pacific Railway shall become and be thereafter the absolute property of the company. And the company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway."; imposing an obligation to the public.

Clause 8 is somewhat to the same effect. It provides that the company "shall equip the same in conformity with the standard herein contracted for" -----

VISCOUNT SIMON: The standard was the standard of the Union Pacific Railway of the United States?

MR. FILLMORE: Yes -- "and shall thereafter maintain and efficiently operate the same."

Then clause 13 provides: "The Company shall have the right, subject to the approval of the Governor in Council, to lay out and locate the line of the railway hereby contracted for as they may see fit, preserving the following terminal points, namely: from Callander station to the point of junction with the Lake Superior section; and from Selkirk" -- that is 20 miles north of Winnipeg, where they first proposed to cross the Red River -- "to the junction with the Western Section at Kamloops by way of the Yellow Head Pass."

VISCOUNT SIMON: I wish that you would help us about the geography. I got the C.P.R. in London to give me three copies of a map of the C.P.R. I want to understand where these places are. It is familiar to you, but not so familiar to us. Perhaps I might offer you one of the maps. (Handing same). The C.P.R. is in red here. I see Winnipeg in the middle of the map. I infer that the Red River runs from south to north.

MR. FILLMORE: Yes.

VISCOUNT SIMON: That is what floods occasionally and it runs through Winnipeg?

MR. FILLMORE: Yes.

VISCOUNT SIMON: I see East Selkirk some 20 miles to the north of Winnipeg. What I want to identify is this provision that this company shall have the right to lay out and locate the line of railway as it may think fit, "preserving the following terminal points, namely: from Callander station to the point of junction with the Lake Superior section." Where is Callander?

MR. CARSON: Near North Bay, my Lord.

MR. FILLMORE: It is a small point now. I do not think that it would be shown on the map.

VISCOUNT SIMON: Is it called Callander now?

MR. CARSON: It is a few miles north of South Bay. It is not on the Canadian Pacific line today.

VISCOUNT SIMON: That is one point -- "with the Lake Superior section." The sections were defined earlier in a passage which there is no need to read.

MR. FILLMORE: Yes.

VISCOUNT SIMON: The Lake Superior section is mentioned at page 13.

MR. FILLMORE: It would end at Selkirk.

VISCOUNT SIMON: The Eastern section is to "comprise that part of the Canadian Pacific Railway to be constructed, extending from the Western terminus of the Canada Central Railway, near the East end of Lake Nipissing, known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in course of construction extending from Lake Superior to Selkirk on the East side of Red River." Everything to the east of Selkirk is the Eastern section, is it?

MR. FILLMORE: Would it not be the Central or Lake Superior section?

VISCOUNT SIMON: Then it goes on: "That the portion of said railway, now partially in course of construction, extending from Selkirk to Kamloops" -- where is Kamloops?

MR. FILLMORE: That is in the centre of British Columbia in the mountains.

VISCOUNT SIMON: It is just to the west of Sicamous. Is not that right?

MR. FILLMORE: Yes.

VISCOUNT SIMON: That is called the Central section?

MR. FILLMORE: Yes. That is from Selkirk to Kamloops.

VISCOUNT SIMON: The Western section is the portion of the railway from Kamloops to Port Moody. That would carry you to the Pacific.

MR. FILLMORE: Yes.

VISCOUNT SIMON: Then clause 13 provides that the company shall have the right to lay out and locate the line as they may see fit, preserving the following terminal points: from Selkirk to the junction with the Western section at Kamloops by way of the Yellow Head Pass. It did not in the end go through the Yellow Head Pass; it went through the Kicking Horse Pass.

MR. FILLMORE: Yes. Your Lordship will remember that in the Orders in Council to which I referred yesterday the Canadian Pacific Railway Company on the 2nd June, 1881, applied for leave to build the railway through a more southerly pass, more commonly known as the Kicking Horse Pass, which they claimed would be a better line. Permission to make that change was formally granted by the Statute of 1882, to which I referred yesterday.

MR. CARSON: In the record in the Saskatchewan case there is a map at page 250 which shows Callander and shows the sections in different colours.

VISCOUNT SIMON: What is there marked as "Location as revised" in the red dotted line is the line that goes through the Kicking Horse Pass?

MR. CARSON: Yes.

LORD COHEN: The yellow is what it would have been?

MR. CARSON: Yes.

MR. FILLMORE: The only observation that I wish to make about clause 13 is, first, that they have the right to lay out and locate the line of railway and, secondly, preserve the following terminal points. Actually Selkirk was not the terminal point. Winnipeg did not become the terminal point either, because the road was to be through Winnipeg.

VISCOUNT SIMON: If the Canadian Pacific Railway main line runs through Winnipeg, as it does, it also runs through East Selkirk, does it not?

MR. FILLMORE: Yes; and it runs down the east side of the Red River to what is known as St. Boniface, across the Red River from Winnipeg.

VISCOUNT SIMON: It has not by-passed East Selkirk; it has gone through East Selkirk?

MR. FILLMORE: Yes.

LORD COHEN: It has by-passed Selkirk, though?

MR. FILLMORE: I think that the Canadian Pacific Railway has since built what is called a Moulson cut-off, so that the bulk of the traffic goes east by the more direct line; but it is still on the railway.

Then clause 15 provides: "For twenty years from the date hereof, no line of railway shall be authorised by the Dominion Parliament to be constructed south of the Canadian Pacific Railway! That does not come into it, except to show that there was a company with a monopoly.

Then clauses 21 and 22 have been the subject of some discussion. Clause 21 provides: "The Company to be incorporated

with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be binding in the event of an Act of incorporation being granted to the company in the form hereto appended as Schedule A."

VISCOUNT SIMON: That was done, was it not?

MR. FILLMORE: No, my Lord. For some unexplained reason an order in Council was passed and a charter was issued to the railway company in exactly the same terms and under the Great Seal and that gives rise to the argument that it has all the powers of a common law corporation; but it has not been satisfactorily explained as to how that happened to come about. That is commented on in some of the judgments which I will read shortly.

LORD COHEN: I suppose that the validity of a Charter under the Great Seal cannot be impeached, can it? Are you impeaching it?

MR. FILLMORE: No, my Lord.

LORD COHEN: Are you challenging the validity of the Charter?

MR. FILLMORE: No, my Lord. All that I have to address myself to is the argument that it is in effect and it should be construed as if it were a special Act of Parliament.

LORD TUCKER: One has to consider clause 21 of the contract in the schedule together with section 2 of the Act itself, which seems to be inconsistent.

MR. FILLMORE: Yes.

Then I think that clause 22 is important. It says: "The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the company, shall apply to the Canadian Pacific Railway." You have the Charter, therefore, and it is made subject to the railway Act.

VISCOUNT SIMON: Is there something significant in the Railway Act?

MR. FILLMORE: The argument is advanced that by the Charter, as your Lordships will see from section 4, which I will read next, they were given all the powers necessary to complete the contract.

VISCOUNT SIMON: Necessary or useful.

MR. FILLMORE: Necessary or useful. I intend to advance the argument that that enabled them to carry out their obligations to the government; but for ordinary business transactions for the running of the railway after its completion, to find out what the powers of the railway are, we turn to the Railway Act, in which they are defined and specified — the ordinary powers of business management.

VISCOUNT SIMON: It stands like this so far, then. There was the agreement entered into on the 21st October, 1880. Assuming for the moment that the agreement meant what it said, the railway company contracted to do certain things. Then we have the statute which creates the Canadian Pacific Railway, which is in the Appendix at page 11, and in clause 1 the contract is approved and ratified. That would seem to include ratifying the undertaking of the company in the agreement.

MR. FILLMORE: Yes.

VISCOUNT SIMON: There is a provision in clause 2, as my learned friend Lord Tucker has said, that the company shall be created under the corporate name of the Canadian Pacific Railway Company and they have to have a Charter conferring on them "franchises, privileges and powers embodied in the schedule" and then it would grant to them the powers necessary to carry out the contract.

MR. FILLMORE: Yes.

VISCOUNT SIMON: Assuming that there had been a Charter of incorporation, and exercise of the prerogative, there is no doubt that the charter contemplated is one which would authorise the railway company to do what it promised to do without acting ultra vires.

MR. FILLMORE: Yes, my Lord. Paragraph 4 of the charter, which is at page 23, is the one relied upon by the respondent. They say that that gives them power to enter into the bond and covenant which they did purport to give.

LORD TUCKER: What is Schedule A.? That is the Act of incorporation?

MR. FILLMORE: It is the actual Charter.

MR. CARSON: It is the contemplated Act of incorporation.

LORD COHEN: Clause 21 of the contract refers to "an Act of incorporation being granted to the company in a form hereto appended in schedule A."

LORD TUCKER: It is the thing which was contemplated by clause 21 of the contract, but it was not provided for eventually.

MR. FILLMORE: Actually there was issued to the railway company a charter under the Great Seal of Canada, which is dated 16th February, 1881, and is to be found at page 262 of the record.

VISCOUNT SIMON: Supposing that the course which was indicated by this schedule had been strictly followed, you would not dispute that the company so incorporated would have all the powers useful to enable them to carry out all the conditions of the agreement?

MR. FILLMORE: I have to admit that.

VISCOUNT SIMON: Therefore, the contract when made, that it would go through Winnipeg and keep Winnipeg as its centre, have stockyards there and a railway there and serve Winnipeg and help to build up the town, no doubt would have been perfectly right?

MR. FILLMORE: I am still on my main contention, that "useful" meant useful in completing the contract. No doubt they had to have stockyards; they had to have workshops, and they had to put them somewhere; but I submit that, consistently with the efficient operation of the railway, the directors could do what was useful at the time or from time to time, but I submit "useful" means useful in completing the railway, perhaps in locating it, building the necessary works, but it did not go so far as to say: You can covenant and agree that you will

forever maintain your line through Winnipeg or that you will forever maintain within the city limits, the principal workshops for the main line in Manitoba.

VISCOUNT SIMON: If you look at the contract, the contract had conferred upon the company a great advantage, in that it was not going to be taxed.

MR. FILLMORE: Yes.

VISCOUNT SIMON: Why is not the power in the company and useful to it if it is a power which enables it to avail itself of the advantage agreed upon?

MR. FILLMORE: My whole submission is that it may have been useful at the time and no doubt it appeared to the directors of the company at the time advantageous to get a tax exemption, and Winnipeg might have been the logical and desirable point to which to build the line and maintain their workshops; but the point is, I submit, that "useful" means consistent with the efficient operation of the railway company. There was co-existing ^{an} obligations to forever efficiently operate the railway. Therefore, the point is: Could the then directors covenant and agree that forever these workshops would be maintained in the City of Winnipeg? I submit that there is nothing that goes quite that far; that the Act did not contemplate that they could forever tie the hands of future directors, because one point is that, if they could crystallise things forever in that manner, where would you draw the line? How far can they go in putting the company in a strait-jacket from which they could never escape? It is a matter of principle and I submit that it is ex facie beyond the enumerated powers to go that far; to give this perpetual covenant.

VISCOUNT SIMON: It might be the price of perpetual exemption from taxation?

MR. FILLMORE: It might; but, I would call attention to what has happened in one Ontario case, to which I will refer. Supposing, for example, that it was decided that they would amalgamate with or be taken over by the Canadian National Railway, which is the other main line through Winnipeg, or perhaps the Canadian Pacific Railway might take over the other, it might be a matter of good management that they should use the principal workshops of the Canadian National Railway, which are just outside the City of Winnipeg. Can we visualise what would happen fifty years from now or five hundred years from now? There may be mechanical improvements in locomotion. We do not know what mechanical improvements there might be. We do not know what floods might occur. After all -- it may be absurd to talk about it -- the government provided at the time that the pass to the west should not be less than one hundred miles from the boundary. It is possible that there might be war or threat of war, which would make it necessary to move the railway further north from the boundary and not within seventy miles.

My submission is that you cannot, having in mind what has happened in the last fifty years, not only in international affairs, but science, say now that it was useful at the time to forever crystallise the line of railway and the principal workshops within the limits of the City of Winnipeg.

LORD OAKSEY: Who else but the directors could decide at the time what was useful?

MR. FILLMORE: No one, my Lord. I think that they had the right to decide what was necessary and useful to complete the contract, and no doubt they had to have workshops at every divisional point. That they had to build workshops cannot be disputed; they needed them efficiently to operate the railway: but, in order to build the railway and in order efficiently to operate the railway, they did not need to agree for a present advantage. For a present advantage they purported to sell the right not to exercise the powers of efficient management in the future.

LORD COHEN: Are not the directors constituted the judge of what is the best method of carrying out their obligations?. The ordinary principles of company law apply to this company, do they not?

MR. FILLMORE: Yes; I agree with that. They could do whatever is incidental to efficient operation.

LORD COHEN: Therefore you have to say that it could not possibly be in the interests of the company?

LORD ASQUITH: Do you say that it could not be useful to the country to incur an obligation, unlimited in time, in consideration of an exemption which is also unlimited in time?. Is there any particular taint attached to perpetuity either in the obligation or in the advantage as such?

MR. FILLMORE: It might look to the directors at the time that they were making a good bargain and up to date it looks like a good bargain, because we would not be worried with it if it was not a good bargain for the railway company -- that is self-evident -- but I submit that this is not the kind of covenant that you find directors of commercial corporations entering into.

LORD TUCKER: What I find it difficult to understand is this. I can see that once the company has been created and the directors purport to exercise their powers in making a particular contract, the question may arise as to whether what they are doing is or is not ultra vires; but this is part and parcel of the creation of the company itself. The company was created for the purpose of carrying out this contract, which was embodied in the Act, was it not?

MR. FILLMORE: Yes, my Lord.

LORD TUCKER: It is the legislature which is creating the company with these powers and obligations?

MR. FILLMORE: Yes; but the whole point is that I submit that a company of this character, which might be called a semi-public corporation, with obligations to the government efficiently to operate forever, could not barter away any of their powers by a perpetual agreement.

LORD COHEN: You are saying, if I have followed you aright, that wide though clause 4 of the charter is, there is a limit on those powers and it must be useful to the company (and you say that it cannot be useful to the company) to bind itself irrevocably in the future to maintain its workshops in a particular place. As I have gathered it, that is your argument. Is that right?

MR. FILLMORE: Yes. I would phrase that a little differently. I would say that prima facie it is not useful to a company to

bargain away part of its statutory powers. It is almost a question of onus. I submit that this is an unusual covenant, one that is rarely found and the authorities are to the effect that the company cannot fetter -----

LORD COHEN: It is certainly an unusual case, because it is certainly unusual, when you have a party who has done the thing and is willing to carry out the agreement, to find the other side saying: You cannot carry out that which you have bound yourself to do. It is certainly an unusual case.

VISCOUNT SIMON: I understand the contention to be -- see if I put it fairly from your point of view -- that this company had a discretion as to where it would go and what it would do and it could not tie its hands and say by any contract, for any consideration whatever: We agree that our hands shall be bound in this particular way and we give up our discretion?

MR. FILLMORE: That is the substance of my point.

LORD TUCKER: I follow that; but I do not follow how, when a contract of that kind is incorporated in an Act of Parliament, to which it is equivalent, any of those considerations apply. Assuming that the company could not have contracted in that way, if that particular contract is made valid by legislation and is part and parcel of the creation of the company itself -----

MR. FILLMORE: The railway company say that there was a contract and, if you look at the by-law passed by the City of Winnipeg, you will find the terms of the agreement.

LORD COHEN: It is not the contract which is embodied in the charter of incorporation which you are attacking, but the contract which is referred to in the by-law and which purports to have been made in pursuance of powers granted by clause 4 of the charter. Is not that right?

MR. FILLMORE: Yes.

LORD COHEN: Is it not also fair to say, as you told us yesterday, that that particular by-law was itself confirmed by an Act of Parliament?

MR. FILLMORE: I think that I should refer to that straight away and indicate to your Lordships the Act of the Provincial Parliament, which is found at page 47 of the Appendix.

VISCOUNT SIMON: It is an Act to legalise certain by-laws of the City of Winnipeg.

MR. FILLMORE: And the debentures issued thereunder. That was in 1883. I do not need to read all that recital. It says: "Whereas it is expedient to grant the prayer of said petition" and then it goes on to state that whereas the Mayor and Council of Winnipeg have passed a by-law to authorise the issue -----

VISCOUNT SIMON: The Mayor and Council were saying to the legislature: Do make it clear that the contract contained in our by-law is valid from beginning to end.

MR. FILLMORE: I submit that that is not the effect of it. On the next page, the recital says: "And whereas, it is deemed expedient to set at rest all doubts that may exist as to the validity of any or all the above in part recited by-laws and the debentures issued thereunder, and to legalise and confirm the same, and each of them respectively." Then you read that far

you would not realise that they were going to legalise the other part of the by-laws.

When you get down to the operative parts it reads: "That by-law numbered one hundred and ninety-nine passed by the mayor and council of the City of Winnipeg and intituled: 'A by-law to raise one million dollars by debentures for permanent improvements in the City of Winnipeg'; by-law 211 intituled" so and so, by-law No. 212 and so on, passing to line 22, "By-law No. 148 to authorise the issue of debentures granting by way of bonus to the Canadian Pacific Railway Comapny the sum of two hundred thousand dollare in consideration of certain undertakings on the part of the said company; and by-law 195 amending by-law No. 148 and extending 'he time for the completion of the undertakings expressed in by-law No. 148 by the Canadian Pacific Railway Company and all debentures and coupons for interest issued under each and every of the said by-laws, be and the same are hereby declared legal, binding and valid upon the said the Mayor and Council of the City of Winnipeg, and the said the Mayor and Council shall pay the said debentures and coupons and each and every thereof according to the tenor thereof, when they and each of them shall respectively become due and payable."

You would have to read those by-laws, Nos. 148 and 195 to find out that the tax exemption is being included here.

VISCOUNT SIMON: Is not the effect of the statute to say: Hereafter nobody shall allege that anything that you find in by-law No. 148 or by-law No. 195 is ultra vires?

MR. FILLMORE: I would submit that it is saying ultra vires of the city. There were doubts as to whether the city had the power. The city had no statutory power to give a tax exemption and therefore this Act says that the by-laws "be and the same are hereby declared legal, binding and valid, upon the said the Mayor and Council of the City of Winnipeg."

LORD TUCKER: One of the all important clauses in the by-law is clause 8, on page 293, That is made binding for all time on the City of Winnipeg. That is the clause by which the City of Winnipeg exempts this railway from taxation.

MR. FILLMORE: May I put it this way: this Act confirmed the power of the City of Winnipeg to pass by-law 148 and by-law 148 says in paragraph 8: Upon the fulfilment by the said company of the conditions and stipulations hereinbefore set out the tax exemption will become operative; but, if the railway company did not have the power to give a binding obligation, then they did not fulfil the conditions and stipulations.

LORD COHEN: The difficulty that I feel about that is this. I respectfully agree with you that the Act of Parliament cannot enlarge the powers of the Canadian Pacific Railway, because that company derives its powers from an Act of either the Imperial Parliament or the Parliament of Canada; but once this Act is passed surely the position is that the validity of by-law 148 cannot be challenged in the Manitoba courts, but the Manitoba courts are bound to recognise the validity of the Manitoba Statute.

MR. FILLMORE: I do not challenge the validity of by-law 148, in so far as it authorises the City of Winnipeg to pass the same.

LORD COHEN: One wants to look at the actual wording.

MR. FILLMORE: It says "be and the same are hereby declared legal binding and valid upon the said Mayor and Council of the City of Winnipeg".

LORD COHEN: The whole of the provisions of the by-law, therefore, are to be valid.

MR. FILLMORE: Yes, but let us read the bylaw, my Lord. Paragraph 8 says: "Upon the fulfilment by the company of the conditions and stipulations" -----

LORD COHEN: That condition had been fulfilled on the 10th October and the statute is passed on the 30th October.

MR. FILLMORE: It is true that we got a form; we got a document from the railway company in the required form; but, if it was ultra vires of the company to give the covenant, that form was a nullity; it did not amount to anything. If it was ultra vires, it was a nullity; it did not amount to anything and the company was not bound by it and they could move their principal workshops tomorrow, if they so desired. That is the point of that.

LORD TUCKER: One of the "conditions and stipulations herein-mentioned" which had to be fulfilled by the company was that contained in paragraph 3 on page 292: that they will immediately execute and hand to the Mayor a bond and covenant to that effect. You say that the bond and covenant which they did in fact deliver was waste paper?

MR. FILLMORE: Well, it was not a binding obligation.

LORD COHEN: I have it down in this way: none the less, clause 8 of that by-law is given under the condition and that condition has not been fulfilled, because the covenant of the 10th October of 1881, while correct in form, was a nullity. Is that right?

MR. FILLMORE: Yes, my Lord; that is it.

VISCOUNT SIMON: Lord Cohen has just mentioned a date in October. Is that a date that you get from the Bond and Covenant?

LORD COHEN: Yes. The date appears on page 295. The Covenant starts at page 294. The 10th October was the date of the Covenant. The 7th July, 1883, two years later was the date of the Statute of Manitoba.

MR. FILLMORE: At page 294 we have the Bond and Covenant, which is dated 10th October, 1881.

LORD COHEN: The statute to which you referred us was assented to on the 7th July, 1883.

MR. FILLMORE: Yes, my Lord.

In passing, there is a Privy Council case which makes some comments as to the effect of a similar form of by-law. It is Ontario Power Company of Niagara Falls v. Municipal Corporation of Stamford, reported in 1916 1 Appeal Cases, page 529. The headnote says: "By the Public Schools Act, 1892 (Ontario Section 4, 'No municipal by-law hereafter passed for exempting any portion of the rateable property of a municipality from taxation, in whole or in part, shall be held or construed to exempt such property from school rates of any kind whatsoever.' In 1904 the respondents passed a by-law fixing the assessment of the appellants' property at 100,000 dollars for the next twenty years. This by-law required statutory confirmation, since

it had not received the assent of two-thirds of the voters, as provided by the Consolidated Municipal Act, 1903, section 591a. By an Act of the Ontario Legislature the by-law was 'declared to be legal, valid and binding notwithstanding anything in any Act to the contrary': Held that the confirming Act gave statutory effect to the by-law subject to the construction imposed upon it by the Public Schools Act, 1892, and that the property could be assessed at over 100,000 dollars in respect of school rates."

At page 534 Lord Buckmaster says: "Now it is important to observe that the Act does not purport to confirm any agreement whatever between the parties; it purports only to legalise and make binding the by-law, which was not legal and could not be made binding without statute, for the reasons that have been already set out."

"The question on which this case depends is whether this statute confirms this by-law as a by-law subject to the interpretation to which such a by-law would be subject by virtue of the statute relating to public schools, or whether it confirmed it so as to enable its words to be read according to their general meaning and not in accordance with their statutory significance."

"In their Lordships' opinion, the former is the true view of the case."

I only cite that to show their Lordships' ~~of the~~ view that it does not purport to confirm any agreement ~~point~~, but only to legalise the by-law; in other words, to make it binding on the municipal corporation.

LORD COHEN: In the present case there is no special significance, which you suggest has to be applied to the by-law. You say that the ordinary law applies?

MR. FILLMORE: Yes. It is to be construed just as if the City had had power to pass a by-law as of the date of the by-law instead of having it conferred on it later.

I want now to continue on page 23 of the Appendix, which is more convenient probably than reading from the actual charter. The all important clause is clause 4, which says: "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."

Then I pass to clause 17, which is at page 27. That clause reads: "'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."

These are all the clauses which relate to the powers of the company; except that I will return later -----

LORD TUCKER: Those were repeated in identical words in the charter?

MR. FILLMORE: Yes. The charter, which is Exhibit 1, recites the Act of Parliament. It recites the agreement and then it says that in conformity to the express desire of Parliament these Letters Patent are issued.

LORD COHEN: That is page 272.

VISCOUNT SIMON: The actual document which brought into existence the Canadian Pacific Railway Company begins at page 262 of the record, does it not?

MR. FILLMORE: Yes, my Lord.

VISCOUNT SIMON: I see that one of the provisions is paragraph 21, at page 271: "The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be binding in the event of an Act of incorporation being granted to the Company in the form hereto appended as Schedule A."

LORD COHEN: That is not part of the charter that is merely part of the recited agreement. The charter starts as to the operative part at page 272.

MR. FILLMORE: Yes. They recite these documents and then the operative part says at page 272, line 41: "And whereas the said persons have prayed for a charter for the purpose aforesaid: (1) Now know ye, that, by and with the advice of our Privy Council for Canada, and under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in Us vested in this behalf, We Do, by these our Letters Patent, grant" and so on.

LORD COHEN: Of the clauses to which you have referred, the first one appears on page 274?

MR. FILLMORE: Yes; paragraph 4.

LORD COHEN: Then you passed from there to page 277, but I have forgotten which was the clause which you read to us.

MR. FILLMORE: It is clause 17, under the heading "Powers". It says "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."

My submission, in short is that paragraph 4, which says that they will have all the powers, franchises, rights, and privileges useful or necessary to complete the contract refers to the whole vast undertaking; that the government had to get these through within a limited time. It was a matter of great national importance and here they said to these men: Do everything useful and necessary to complete this great project within the time limited; you can take it that you can do anything that you like to get this through; but when it is complete, to see what the directors can do in the way of operating the business of the railway, we turn to the Consolidated Railway Act and to section 7.

LORD COHEN: Before you go to that, how do you reconcile the argument that you are now advancing with the last sentence of paragraph 4: "And the enactment of the special provisions hereafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby

conferred upon them"? Does not that mean that clause 4 overrides, if necessary, everything that follows?

MR. FILLMORE: I submit that, notwithstanding anything in the Railway Act, the directors can do anything in the world to complete this contract, to get this railway built and get it into operation, and that would necessarily include having workshops somewhere, certainly; but the point is that, in order to carry out the contract, it was not necessary to covenant that they would forever maintain any particular part of the works or any particular part of the line in a certain place forever.

LORD OAKSEY: Must not your argument amount to this: That they could not bind themselves to maintain their principal workshops at Winnipeg even for one year, because it might not become useful within one year?

MR. FILLMORE: I submit that that is probably the situation. I do not know where you would draw the line.

LORD OAKSEY: It is involved in your argument that from moment to moment the directors might alter their decision about what was useful and therefore they could not bind themselves not to exercise their discretion?

MR. FILLMORE: That might be the irreducible minimum; but I do not think that it comes down quite to that point. My argument is that, no matter what the consequences may be, the then directors could not for all time tie the hands of future Boards, who were in office from time to time, in respect of the efficient operation of the railway, which the company was bound to carry out. I submit that it amounted to a covenant not to exercise their statutory powers and obligations of efficient management, because it involved a covenant not to build their workshops anywhere else; it involved a covenant not to use other property of the company outside the City of Winnipeg for any such purpose. That is the situation as I see it.

My friend Mr. Carson has asked me also before discussing the judgment to refer to the admission of facts, which is to be found in the record at page 257. It says: "The parties to this action, for the purposes of this action only, hereby admit each and every one of the facts hereunder specified. Facts Admitted. (1) That Letters Patent under the Great Seal of Canada were issued by His Excellency the Governor General of Canada to Canadian Pacific Railway Company on February 16, 1881, and that a photostatic copy thereof will be admitted in evidence in lieu of the original Letters Patent.

"(2) That on August 24th, 1881, by-law 148 of the City of Winnipeg was submitted to and approved by the ratepayers of the City of Winnipeg as then constituted.

"(3). That on October 26th, 1882, by-law No. 195 of the City of Winnipeg was submitted to and approved by the ratepayers of the City of Winnipeg as then constituted.

"(4). That the plaintiff (a) constructed, completed and fully equipped before February 1st, 1883, one hundred miles of railway" and so forth; "(b) built, constructed and completed before November 1st, 1883, a substantial and commodious general passenger railway depot"; "(c) executed and delivered to the Mayor and Council of the City of Winnipeg a bond and covenant under its corporate seal which is produced by the city in its affidavit of documents No. 17, but the defendant does not admit the power of the plaintiff to give the said bond and covenant.

"The plaintiff established and built, as shown on a plan to be filed as an exhibit, in the City of Winnipeg its principal workshops for its main line in Manitoba and the branches thereof radiating from the City of Winnipeg and has continued to this date the said workshops in the locations in the City of Winnipeg shown on the said plan. In the year 1882 the plaintiff established and built its principal workshops for its main line within the Province of Manitoba and the branches thereof radiating from Winnipeg at the location shown and numbered 1 on the said plan, and in the year 1887 the plaintiff enlarged the said workshops to the location shown and numbered 2 on the said plan"; that is, they were moved out to an extended part of the city. "The said workshops were moved to the location shown and numbered 4 on the said plan in the year 1903 and have been continued in this location to the present date. An engine house has been maintained by the plaintiff at the location numbered 3 on the said plan from 1903 to the present date.

"(6) That in 1882 the plaintiff procured and erected in the City of Winnipeg large and commodious stock and cattle yards and the defendant admits that such stock and cattle yards were continued in the City of Winnipeg, at the locations shown and numbered 5, 6 and 7 on the said plan, until 1911; but the defendant puts the plaintiff to the proof that such stock or cattle yards were continued in the City of Winnipeg after 1911.

"(7) That the debentures referred to in paragraphs 1 and 3 of by-law No. 148 as amended and re-enacted by by-law No. 195 were, in due course, delivered by the defendant to the plaintiff.

"(8) That the lands upon which the said passenger station was to be built were conveyed by the defendant to the plaintiff by a deed dated April 18th, 1882."

Then in paragraph 13 -- apparently the others are not material to the issues here -- it said: "That from the year 1881 until the year 1948 the defendant has not demanded and the plaintiff has not paid real estate and business taxes on the plaintiff's properties in the City of Winnipeg used for railway purposes or in connection therewith, with the exception that in the year 1894 an action was brought by the City of Winnipeg against the Canadian Pacific Railway Company to recover taxes imposed by the authorities of the City of Winnipeg for school purposes for and upon the estimates of the Board of Public School Trustees of the School District of Winnipeg for the years 1890 to 1894, both inclusive, upon certain property of the Canadian Pacific Railway Company, and in the years pending the final determination of said action, taxes for school purposes were likewise imposed and claimed, but the plaintiff did not pay the said taxes."

Then there is agreement as to copies of all maps, plans and so forth.

There was an action in which the City of Winnipeg sued for school taxes and the railway company said that school taxes were municipal taxes. The Court of Appeal for Manitoba agreed with the City of Winnipeg, but the Supreme Court of Canada said: School Taxes are municipal taxes and therefore they come within the exemption. The case went that far.

I think that I can now turn to the judgments and read those parts that relate to Question No. 1. They are not very lengthy.

VISCOUNT SIMON: The first question is whether the Canadian Pacific

Railway Company was acting beyond its powers in entering into the deed of covenant, with the result that the exemption purported to be conferred never became effective?

MR. FILLMORE: Yes.

VISCOUNT SIMON: There are really two separate points in that. There is, first of all, the question whether the Canadian Pacific Railway Company was acting beyond its powers in tying its hands in undertaking to stay in Winnipeg?

MR. FILLMORE: Yes.

VISCOUNT SIMON: The second is the question: Supposing that that is so, is the result that the corporation is released from its promise?

MR. FILLMORE: Yes.

VISCOUNT SIMON: You contend that both are true?

MR. FILLMORE: Yes. There are really two questions there.

At page 183 of the record we have the reasons for the judgment of Chief Justice McPherson, who was the Chief Justice of Manitoba. I will try and shorten this a little by not reading facts which have already been put before the Board.

LORD COHEN: We have not to look at the judgment of the trial judge? It does not matter for this purpose?

MR. FILLMORE: He was against the city on all points and his judgment is very lengthy.

LORD COHEN: I am not asking you to read it. It is merely that I saw that there was a judgment.

MR. FILLMORE: It is a very lengthy judgment. At page 183, line 31, the Chief Justice says: "The main line to be constructed was originally planned to cross the Red River at Selkirk and proceed westerly. If this plan had been carried out it would have meant that the City of Winnipeg, as then and now located, would have been by-passed by the main line and at best could only be situate on a branch line running south from the main line to the Border. The citizens of Winnipeg realised this situation and entered into negotiations with the company to run their main line through the city, and the terms under which the change was made were embodied in an agreement between the company and the city and were set forth in by-law No. 148 passed by the corporation."

One object that I had in reading some of the earlier orders in Council was to show that the line was already located through Winnipeg before the 5th day of December, 1881, and if the citizens of Winnipeg thought that they were getting the railway by entering into the agreement, they may have merely been getting something which was already in store for them.

"Under the terms of the agreement the company undertook to build its main line through the city." I do not need to read that recital of facts.

"It is admitted that both parties to the agreement completed and fulfilled all the terms of the same." We did not admit that they constituted a binding obligation.

"I agree with my brother Adamson, for the reasons stated by him, that the company was incorporated by a special charter under the Great Seal and had all the powers incident to such a charter. I also agree with him that the contract entered into, as set forth in the by-laws above mentioned, was a good and valid contract and was within the powers of the contracting parties."

That is all that the Chief Justice says on the first question.

The reasons for judgment of the late Mr. Justice Richards are on page 193. Under the heading "The Validity of the Main Agreement" he says: "I agree with my brother Dysart that the company's powers are limited to those set forth in the Act authorising its charter and in the Acts amending same or giving the company additional powers. I think, however, that the agreement entered into, as evidenced by By-law 148, was not ultra vires of the company. One contention of the city is, that the covenant to 'establish and build within the limits of the City of Winnipeg, their principal workshops for the main line of the Canadian Pacific Railway within the Province of Manitoba . . . and forever continue the same within the said City of Winnipeg' was so onerous and restrictive that it might conflict with the duty of the company, to 'forever efficiently maintain, work and run the Canadian Pacific Railway' as required by section 7 of the contract dated 21st October, 1880, between George Stephen and others with the Government of Canada to build and operate the railway.

"The City of Winnipeg is in a fairly central position on the main line within Manitoba and the tying of the main workshops to that position for the Province of Manitoba was of little importance compared to an exemption from taxation and a bonus of 200,000 dollars." -- apparently indicating that the city got the worst of the bargain, which is admitted.

"The city relies on the judgment of the Ontario Court of Appeal in Whitby Corporation v. Grand Trunk Railway Company. That case is discussed in McMurphy & Denison's Railway Law of Canada, 3rd Edition, pages 249 and 250. At page 250 there is the following statement: 'As already mentioned, it has sometimes been held in the United States that contracts for the location of the line or some or one of its stations in a particular place have been declared ultra vires: Pierce, page 513; but no such decision, other than the Whitby case, has been found in England or Canada. The question must always largely turn on whether express or implied statutory power has been given to railways to receive benefits and give covenants imposing corresponding liabilities, and sufficient authority will now generally be found either in the Acts of incorporation or in the general statutes, if any, incorporated with them. The Whitby case is, however, authority for the proposition that the directors of a railway company have not, without express statutory authority, power to bind it by a contract imposing for all time a peculiarly onerous condition.'"

I will refer to that case later, but I might mention now that that was a case where the company agreed to maintain their principal workshops in a certain place. They amalgamated with another company and they found it more convenient or necessary to have one principal workshop for the amalgamated company. The railway company moved out of Whitby and the Court of Appeal for Ontario said that the directors had no power to give such a covenant.

VISCOUNT SIMON: Is that something like the situation that arose when railways were first promoted in this country? Mr. Wilberforce

may know that there is some authority about it. Land-owners found that the plans provided for a railway to run through their property and so they were minded to stipulate with the railway company that every train should stop at a station. I rather think that Swindon stipulated that the Great Western Railway should stop all its trains at Swindon for ten minutes. It was for the benefit of the refreshment department; the people got out and had a drink. It was quite a common stipulation in earlier days in the making of our railway system in England. It is a small country and land-owners sometimes liked and sometimes did not like a railway going through their property. That sort of arrangement was sometimes made and I think that, if the Privates Acts were looked at, you would find many such provisions embodied in the Private Acts. Is not that so?

MR. WILBERFORCE: I believe so, my Lord; yes.

VISCOUNT SIMON: I remember a case about the London and South Western Railway running through Hurstbourne, which is on the property of the Earl of Portsmouth. He stipulated and got the bargain into the Act that every train that unloaded goods at Hurstbourne Station should result in his receiving sixpence a ton. That was put in the Act of Parliament.

MR. FILLMORE: I think that that is the Great Eastern Railway v. Hastings in 10 Appeal Cases.

VISCOUNT SIMON: That is another one. Do not bother now. It is in my mind, but I do not say that it is anything to do with it. The argument was not advanced that the bargain was not enforceable because it was not according to the duty of the railway company to stop every train at a wayside station. It had to be got rid of by compensation. I am sure that there was a stipulation that every train that is going to the West of England had to stop at Swindon. Another stipulation was one that Mr. Grey occasionally used when Foreign Secretary. There was a provision that the Great Northern, running the line from Newcastle to London, must at request stop at a wayside station that was next to Mr. Grey's house. He would not use it and never did use it unless he had very important business and had to be up in London quickly; but there was such a stipulation.

MR. FILLMORE: The Canadian Transport Commissioners formerly the Railway Commissioners have such control over ^{the} matters and there are matters of agreement and they are, I think, under the authority of the railway commissioners. They can order a company to abandon a branch line. They have great powers of supervision.

Mr. Justice Richards goes on to say: "In my opinion the covenant was not a peculiarly onerous condition but, on the contrary, was a very advantageous arrangement for the railway company and was not ultra vires."

LORD ASQUITH: I rather gather that, if one left out the words "and was not ultra vires" you would agree with that. You would agree that this was a very advantageous arrangement for the railway company? You have said that the City of Winnipeg got the worst of the bargain.

MR. FILLMORE: It has apparently up to date proved a very advantageous arrangement for the railway company.

VISCOUNT SIMON: What is the meaning of the covenant to stay in Winnipeg?

MR. FILLMORE: He is discussing the covenant to maintain the workshops.

Perhaps I might make this observation at this stage, my Lords. The authorities show that you do not judge ultra vires by the fact that an agreement may be a good bargain. A company cannot make intra vires what is ultra vires by making a very profitable bargain.

LORD OAKSEY: You may have to, may you not, if you have to construe the word "useful"?

MR. FILLMORE: That is the word that the judges have selected as being the all-important point.

At page 202, line 30, one comes to the reasons of Mr. Justice Coyne. He states that he concurs with the judgments of the trial judge and Chief Justice of the court.

At page 203, he says: "The exemption provision must be interpreted so as to effectuate the intention of the parties, and as words mean little alone without knowledge of the circumstances in which they were used, it is plain that where, as here, the words have been used many long years before and no contemporary witnesses survive, history and the conduct of the parties is the best interpreter. The city admits that after the extension of area sixty-eight years ago, it never endeavoured to assess or tax the company" -- that is on another point about the extended boundary.

I do not think that he says anything more on the first point, except that on page 205, line 27, he says: "The majority of the Court holds that the doctrine of res judicata does not apply. I do not think it is necessary to deal with the doctrine in this case. The 'school tax' case is however a binding precedent."

We now come to the judgment of Mr. Justice Dysart, at page 206. It is a little longer than the other judgments.

LORD TUCKER: Mr. Justice Coyne did deal with this matter, I think, at page 203, line 30, did he not?

VISCOUNT SIMON: He agrees really with the Chief Justice of the Court.

LORD TUCKER: Yes, except that he thinks that this hotel point does not matter.

MR. FILLMORE: Yes.

VISCOUNT SIMON: At page 206, we have the reasons for ~~the~~ judgment of the learned judge whose view you embrace.

MR. FILLMORE: Yes.

VISCOUNT SIMON: Then we had better read carefully what he says.

MR. FILLMORE: Most of the points that I intend to make in argument are covered here and it will naturally shorten my argument to read this judgment.

VISCOUNT SIMON: Let us see how he puts it.

"This is an appeal from a judgment of Chief Justice Williams, restraining the defendant from assessing and levying taxes on the plaintiff's railway property in the City of Winnipeg.

"The company claims perpetual exemption from taxation in the city, based upon an agreement made in 1881. The city contends that the alleged agreement did not constitute a contract because the company lacked the power to make such an agreement. To this the company rejoins that it had the necessary power; that the agreement is valid; and that in any event the city is barred from challenging its validity. Other issues of an alternative nature are also raised, touching the meaning of the tax exempting clauses.

"The agreement, as a document, is not in evidence; but its terms are fully set forth in By-law No. 148 passed by the city on September 5th, 1881, and are repeated, with some amendments, in By-law No. 195 passed by the city on October 30th, 1882. Paragraph 4(8) of the agreement reads as follows: 'Upon the fulfilment by the said company of the conditions and stipulations' and so forth. As I have read that before I need not read it again.

"The 'conditions and stipulations' mentioned in paragraph 4(8) were three, namely: that before a specified date, the company would (1) construct and equip a line of railway commencing in the city and extending one hundred miles south-west thereof; (2) construct 'within the limits of the city' a commodious passenger depot; and (3) give to the city its bond and covenant that it would, with all reasonable despatch, (a) 'build within the limits of the City of Winnipeg their principal workshops for the main line' of the railway and the branches thereof radiating from Winnipeg, and 'forever continue the same within the said city'; and (b) construct 'within the city' as soon as convenient, large and commodious stock or cattle yards. (Again the underlining is mine).

"As part of the agreement, as a bonus and in addition to tax exemption, the city was (1) to convey to the company land for the depot, and (2) issue its debentures for 200,000 dollars payable to the company in twenty years, with interest - the debentures to be held by a trustee until the company fulfilled the three conditions.

"On March 30th, 1883, the city passed By-law No. 219, which, after reciting that the company had 'completed and performed all the conditions mentioned in the said By-law 195 and in all other respects complied with same,' authorised and instructed the trustee to deliver the 200,000 dollar debentures to the company. The trustee then delivered the debentures and the city conveyed the land for the depot.

"The recitals in By-law 219, according to the City's contention, are not admissions that a valid covenant had been given by the company, but are only an introduction to the instructions for the trustee.

"The city had obtained the approval of its ratepayers before passing By-laws Nos. 148 and 195; but in order to set at rest all doubts as to its competence to pass the by-laws, it procured the Legislature of Manitoba to validate them by an Act. Statutes of Manitoba, 1883, chapter 64, section 6 of which reads:", and I have already read that.

VISCOUNT SIMON: As a matter of information, how does the city obtain

the approval of the ratepayers? Do they have a vote?

MR. FILLMORE: Yes, my Lord. They submit the by-law to the ratepayers. They advertise and announce that people will vote for or against on a certain day.

VISCOUNT SIMON: It is only validated if the vote approves it?

MR. FILLMORE: I assume so; if the ratepayers approve it. I think that the by-law said that it would only become valid upon becoming approved by the ratepayers and it was approved; but as a matter of fact there was in the City Charter at the time nothing authorising the city to grant such an exemption or to submit such a question to the ratepayers. That is the reason why the statute was passed in 1883: because those doubts existed.

Mr. Justice Dysart goes on to say: "Again, in 1886, Statutes of Manitoba, chapter 52, section 741 was enacted declaring, inter alia, that: 'all existing by-laws heretofore passed by the . . . City of Winnipeg . . . shall in all courts of law or in any other place or at any other time . . . be held to be valid and binding, and the same are hereby ratified and confirmed . . .'. That was when the Charter was revised to preserve in effect all by-laws that had been passed by the city.

"These validating Acts did not - so counsel for the city argue - validate the agreement itself, but confined their operation to the by-laws alone. The grounds for this distinction are to be found in the authorities they cite: Ontario Power Company v. Municipal Corporation of Stamford, at page 534, and Winnipeg City v. Winnipeg Electric Company, at page 354. The company's power to enter into the agreement and covenant was apparently assumed by both the contracting parties to be adequate; at least, the company never had them ratified or confirmed by the Dominion authorities.

"The validity of the agreement was not further questioned by the City until 1948. For much of that long delay there were compelling reasons, as will be shown later in connection with alleged estoppel. True the meaning and scope of the tax exemption clauses were more than once challenged; but the agreement, as a contract, was never questioned for validity. In 1948, however, the city assessed the property of the company for all municipal taxes, and the company reacted by promptly bringing this action for an injunction to restrain the assessment, and for a declaration that the exemption from taxation in the city is effective forever.

"This action raises several important questions which, in their order of importance, though not of logic, may be put thus: (I) Did the Company as incorporated derive its powers from the Crown or from Parliament? (II) Was the company empowered to covenant to continue its workshops in the city 'forever'? (III) Is the city barred from challenging the validity of the covenant?" The follow the other questions, with which we are not concerned.

"As to the first question, the incorporation must be traced from its beginnings." I do not know whether I need to read again sections of the contract which have already been read. He refers to section 21 and then to section 4.

VISCOUNT SIMON: He comes to the conclusion, I gather, that the Canadian Pacific Railway owes its corporate existence to a statute and therefore has no powers except such as the statute

gives it?

MR. FILLMORE: Yes.

VISCOUNT SIMON: And it is not what is called a common law corporation, created by an exercise of the prerogative?

MR. FILLMORE: He says that it should be construed as a special Act and that accordingly the railway company has no powers except such as may be found within the four corners of the Act.

LORD COHEN: He gives his reasons on page 210.

MR. FILLMORE: Yes. I do not think that I need to read page 209, because I have already read those sections. He says that it is a voluminous document and so on. At line 44 he says: "Of the several kinds of corporations known to the law, we are concerned with only two: (1) corporations created by charters granted by the Sovereign in the exercise of his prerogative powers, and known as common law corporations; and (2) corporations created by Acts of Parliament in the exercise of its legislative powers, and commonly known as statutory corporations. The chief difference between a 'common law company' and a 'statutory company' lies in the extent of the powers conferred upon the company.

'A corporation created by charter has at common law power to deal with its property and to incur liabilities in the same way as an ordinary individual. Even if the charter expressly prohibits a particular act the corporation can do the act, but if it does that which is prohibited or is not authorised by its charter, its charter may be recalled by the Crown by proceedings on a scire facias.' 8 Halsbury, 2nd Edition, section 125, and cases cited. See also Bonanza Creek Gold Mining Company v. The King.

'Where a corporation is created by a statute, its powers are limited and circumscribed by the statute creating it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.' There are authorities cited for that too.

"I have come to the conclusion, after a careful study, that the charter, although in the form of a Royal Charter, is in substance a statutory one; at least that the powers it confers are those stated in the statute alone.

"My reasons for that view are: (1) That the Charter was granted at the request of the Parliament of Canada, for the one and only purpose of enabling the company to carry out the contract which, 'with the expressed desire of Parliament', had been entered into between the company and the Government; which contract, with Schedule A. thereto appended, had been 'approved and ratified' by an Act of Parliament. The whole enterprise was of so great a national importance that Parliament felt it necessary to control all the details of the project, including the terms of both the contract and the charter. The signing of the Letters Patent by the governor was therefore of the nature of an executive Act, rather than of a prerogative one: 6 Halsbury, 2nd Edition, section 547."

VISCOUNT SIMON: Can you tell me where the words come from "with the expressed desire of Parliament"?

MR. FILLMORE: Yes. That is at the beginning of the operative part of the charter, at page 272, line 18: "and whereas in conformity with the expressed desire of Parliament, a contract has been entered into for the construction of the said portion of the main line" and so on.

VISCOUNT SIMON: It is a curious phrase. Had the Dominion Parliament expressed its desire? It had passed various Acts of Parliament saying: Create a company; but how does Parliament express its desire.

MR. FILLMORE: That is quoted and recited in the statute.

LORD COHEN: That is at page 11 of the Appendix.

MR. FILLMORE: It is in the recital of the Act of 1911 at page 11. In the fourth recital it says: "And whereas, in conformity with the expressed desire of Parliament, a contract has been entered into for the construction" and so forth.

VISCOUNT SIMON: That is referring back to the second recital, is it not: "And whereas the Parliament of Canada has repeatedly declared a preference for the construction and operation."?

MR. FILLMORE: Yes.

VISCOUNT SIMON: Very well.

MR. FILLMORE: Mr. Justice Dysart then says: "(2) That, although Letters Patent were not expressly called for by the Act, they were the usual, if not the only, means by which the Governor-General could grant the 'charter,' and so were impliedly requested by Parliament. In 6 Halsbury, 2nd Edition, it is stated in section 549: 'The principal documents by means of which the Crown carries into effect or makes known its intentions with regard to such matters as are left to its control, either by the common or statute law, are . . . letters patent under the Great Seal . . .'."

LORD COHEN: Would there have been anything, having regard to the powers of the Parliament of Canada at the time, in the Parliament of Canada itself passing an Act incorporating the company instead of leaving it to be done as a chartered company by Charter?

MR. FILLMORE: I think that the Parliament of Canada had ample power.

LORD COHEN: It was within its powers under section 91?

MR. FILLMORE: Yes.

MR. CARSON: There can be no doubt about that.

LORD COHEN: I do not want you to deal with this, but when the first reason given by Mr. Justice Dysart was that if Parliament chooses expressly to request the Governor-General to issue a charter instead of itself passing an Act, it might be that they have done it deliberately in order that the company so formed should have the powers of a chartered corporation. However, that is a matter to deal with when we have finished the judgments.

MR. FILLMORE: If your Lordship pleases.

"(3) That the Great Seal of itself adds nothing to the force or effect of the Letters Patent. Nothing in the Act or contract expressly suggested that the Great Seal should be affixed to the Charter, and so no significance was thereby attached to the Seal. Moreover, the Monarch is a corporation sole and, as such, does not need a seal: 8 Halsbury, 2nd Edition, sections 15 and 29; 1 Blackstone's Commentaries, 15th Edition, pages 469 and 475. The Sovereign's representative in Canada is in similar position - his signature by 'sign manual' would have been sufficient of itself to authenticate the 'charter'. His signature in that form alone is all that is required on letters patent by which he officially appoints Lieutenant-Governors: per Lord Haldane in the *Bonanza Creek* Case, at page 581. The same learned jurist says, at page 580 of that case: 'Provincial Great Seals were assigned' to Lieutenant-Governors 'as evidences of their authority.' That language applies with equal force to the Governors-General to whom the Dominion Great Seal is assigned for no other purpose than as evidence of their authority as Governors-General to sign state documents.

"(4). That in granting this charter, the Governor-General did not profess to exercise any prerogative right of the Crown. He assigns three grounds for incorporating the company: (1) the advice of our Privy Council of Canada; (2) the authority of the 'hereinbefore' in part recited Act'; and (3) 'any other power and authority whatsoever in Us vested in this behalf.'

"The first two of these grounds speak of themselves - they exclude any notion of exercising the prerogative. The third ground is claimed by the company to be an invocation of prerogative power. But it is limited by the words 'in this behalf,' which mean that the additional authority invoked for the incorporating of the company is confined to that one thing. The whole of this third ground may however mean no more than a reference such 'power and authority' as vested in the Governor *qua* Governor to act upon the advice of his Privy Council, and to perform all things constitutionally required of him. But if this third ground is an attempt to invoke the prerogative in any larger sense, the attempt is contrary to the whole scheme which Parliament had devised in connection with this company, and so cannot be effective.

"(5). That the prerogative rights of the Governor, prior to the Act of 1881, did not include the right to grant a Charter to this or any railway Company. In earlier days the Sovereign had extensive prerogative powers, but that prerogative has in modern times been greatly curtailed by statute: Clement's Canadian Constitution, 3rd Edition, page 118. The Sovereign's prerogative is extended to the Dominion by delegation to the Governor-General as the personal representative of the Monarch, and its extent is such as is indicated in his Commission of Appointment, supplemented by any instructions which accompany it, and as it is enlarged or curtailed by the statutory law of Canada: *Bonanza Creek* case, at page 587. We have not before us the Commission of Appointment nor any accompanying instructions. The onus of presenting these is upon the company, as the asserter of the prerogative, but has not been discharged. We have before us, however, the statute law of Canada of 1881, and can ascertain the limitations placed upon the prerogative by that law. Section 3 of the Canada Joint Stock Companies Act, 1877, being Statutes of Canada, 1877, chapter 43, reads: 'The Governor in Council may, by letters patent under the Great Seal, grant a charter to any number of persons . . . constituting such persons . . . a body corporate and politic, for any of the purposes or objects to which the legislative authority of the

Parliament of Canada extends, except the construction and working of railways . . ." That is also stressed by Mr. Justice Kellock.

"That section, in the plainest terms, deprives the Governor of any theretofore existing prerogative right to grant Letters Patent under the Great Seal for the incorporation of railway companies. 'The prerogative is the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown'. This language of Dicey's is adopted by Lord Dunedin in Attorney-General v. DeKeyser's Royal Hotel, Ltd., at page 526." I think no doubt that my Lord Simon will agree with the judgments handed down in that case.

VISCOUNT SIMON: I think that they were in accordance with the arguments submitted to the House of Lords.

MR. FILLMORE: I think that it probably would not be proper for me to read the arguments submitted on behalf of DeKeyser's Royal Hotel Limited. "Section 2 of the 1881 Act in effect amends section 3 of the Companies Act of 1877 by lifting the prohibition against incorporation of railway companies by Letters Patent - but lifting it on definite terms for this one instance of the Canadian Pacific Railway.

"(6). That even if the prerogative power to incorporate a railway company be assumed to have been revived by section 2 of the 1881 Act, the revival was only in the restricted or curtailed extent expressed in that Act. In De Keyser's case supra, at page 526, Lord Dunedin states: 'Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions the Crown assents to that, and by that Act, to the prerogative being curtailed.' And at pages 539 to 540 of the same case, Lord Atkinson says: 'When such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance'; and 'after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.'

"(7) That even if the prerogative power were revived in toto, that power could not enable the Governor to grant the powers granted by this Charter. Many of the powers of the company were beyond the prerogative rights of the Crown to confer by any charter. Examination of the Charter and Contract will reveal many powers and privileges which Parliament alone had the right to confer. For instance, the company was, by the contract, entitled to get large grants of public domain, to import its materials free of tariff duties and to have other large public aids. These could only come from Parliament - they were beyond any prerogative power to confer. True, they were to come by virtue of the contract, which the charter was intended to enable the company to carry out; but the contract was 'only to be binding' if the charter was 'in the form' prescribed in the Schedule A.: (section 21). That means that no powers were contemplated or permitted for the company larger or other than those prescribed by Parliament. Consequently, the company'

powers, rights and privileges are those, and only those, stated in the Act of 1881 and its schedules, and are therefore derived essentially from the statute and not from the prerogative.

"In Elve v. Boyton, an insurance company was incorporated 'by a prerogative charter' under a general Act of Parliament empowering the Crown to incorporate such companies, with special privileges and limitations; and the question arose whether that company was incorporated by prerogative or by statutory authority. Lord Justice Lindley held that the incorporation was by Act of Parliament. At page 507, after recounting some of the privileges allowed the company by the Act, he speaks of the Act in these terms: 'It empowers the Crown to grant charters of a particular kind - to grant charters which the Crown could not grant apart from the provisions of this Act of Parliament.' And at page 508: '... it would have been impossible, without the Act of Parliament, to create such a corporation by that charter or any other charter. The real truth is, that, if you look at it very closely, the corporation owed its birth and creation to the joint effect of the charter and of the Act of Parliament, and you can no more neglect the Act of Parliament than you can neglect the charter.' That language seems very apposite in this case.

"(8). That the qualifying words of section 2 of the authorising Act are not to be misconstrued; they must be given their full natural meaning and effect. As Lord Haldane said in the Bonanza case, page 577: 'The words employed to which such a corporation owes its legal existence must have their natural meaning, whatever that may be'. And at page 578, he adds: 'The question is simply one of interpretation of the words used.' Section 2 states: 'Such charter . . . shall have force and effect as if it were an Act of the Parliament of Canada.'

"In the Institute of Patent Agents v. Lockwood, an Act of Parliament provided that general rules might be made which shall be of the same effect as if they were contained in this Act, and shall be judicially noticed. Dealing with that language, Herschell L.C. says, at page 360: 'I own I feel very great difficulty in giving to this provision . . . any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act.' And Lord Watson, at page 365, referring to the same words, states: 'Such rules are to be as effectual as if they were part of the statute itself.'

"The Minister of Health v. The King, at page 502, and Belanger v. The King are to the same effect.

"This provision of section 2 requires that the charter be treated as a statutory one. The additional provision of the said section - that the charter 'shall be held to be an Act of incorporation within the meaning of the contract' means that the charter must be held - that is, by all Courts - to be an Act of Parliament incorporating the Company. These last quoted words add strength and positiveness to the first-quoted words, and make this charter for all purposes a statutory charter.

"A similar clause in the Companies Act of 1864, was interpreted by Lord Haldane in the Bonanza case 'as an enabling one and not intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the Letters Patent granted in accordance with its provisions.' But the Act of 1864 differs from the Act of 1881, in that it contains no such restrictions or conditions as dominate the Act

of 1881. His Lordship's interpretation cannot apply to the instant case.

"(9). That both the company and Parliament have always treated this charter as a statutory one. From time to time since the very date of its incorporation, the company has applied for alterations, amendments and additions to its corporate powers; and in every instance has secured them by an Act of Parliament. In all, more than two hundred Acts have been passed. If, as the company now contends, the charter was a prerogative one with the powers of a common law corporation, it would have possessed all those powers by virtue of its Charter, and the Acts would have been unnecessary.

"The meaning which both the company and parliament have, from the beginning, publicly attached to this charter, is strong evidence that the charter is a statutory one: Maxwell on Interpretation of Statutes, 9th Edition, page 308 et seq.

"That view of the company and Parliament is shared by the Justices of the Supreme Court, as indicated in the recent case of the Canadian Pacific Railway v. Attorney-General of British Columbia, where the issue concerned the company's powers in reference to the Empress Hotel, which it owns and operates at Victoria, British Columbia. At page 374 Mr. Justice Kerwin says: 'The company, incorporated under the Statutes of Canada owns,' etc., and at page 376: 'The company may under its special Acts engage in many activities'; and at page 377: '... the company has been endowed by its creator, the Dominion, with power.' Mr. Justice Estey (Mr. Justice Taschereau concurring) says, at page 386: 'The Canadian Pacific Railway Company was incorporated by Special Act of the Parliament of Canada in 1881 and by Letters Patent under the Great Seal of Canada in the form set out in the schedule to that Act.' Mr. Justice Rand at page 391 says: 'The Canadian Pacific Railway Company was incorporated by Dominion charter under the authority of and with the effect declared in chapter 1 of the Statutes of Canada, 1881.' Mr. Justice Kellock at page 399 says: 'In fact it was not until the Act of 1902 section 8, that the appellant (company) was authorised to operate hotels ... It is noteworthy that by the following section, section 9, the appellant (company) was also, in order to utilise its land grant ... authorised to engage in general mining ... And by section 11 it was authorised to exercise the powers of an irrigation company.'"

VISCOUNT SIMON: Mr. Justice Dysart takes the view that this company was created by statute and therefore has no powers except such as may be found from examining the statute and powers which are supplementary in carrying out the purposes of the statute?

MR. FILLMORE: Yes.

VISCOUNT SIMON: Supposing that that is so, then the statute in question is the Act of incorporation, which is on page 11, of the Appendix, and the statute creates the company and at the top of page 12 the company, those who are incorporated, have granted to them "the powers necessary to enable them to carry out the said contract" and to avail themselves of every advantage agreed upon?

MR. FILLMORE: Yes.

VISCOUNT SIMON: One advantage that was agreed upon was a permanent exemption from rates and, in order to buy that, the

company claimed to bind itself to stay in Winnipeg. Why is not that on any view by the statute, even supposing that the company's powers are derived by looking at the statute?

MR. FILLMORE: Clause 16, which was under discussion in the Saskatchewan case, has no bearing in this case, because in this case the exemption depends entirely upon a private treaty between the railway company and the city, which the railway company say is embodied in ^{the} 148. We are not concerned in this case with clause 16 of the contract. The by-law of the city says that upon fulfillment of the obligations the exemption will exist. I think that what your Lordship has directed my attention to is this: If the powers especially granted by statute permitted the company to enter into such a contract, we do not need to discuss the effect of the Great Seal. That is perfectly clear. If the words of paragraph 4, that the company can do everything necessary and useful to complete the contract are wide enough to enable the railway company to give this covenant, we do not need to discuss any other point in the case.

LORD COHEN: That was the ground on which Mr. Justice Richards decided the case?

MR. FILLMORE: Yes; and also Mr. Justice Adamson. In the Supreme Court, Mr. Justice Locke, Mr. Justice Rand, and Mr. Justice Kellock did not go that far; but the other judges in the Supreme Court did not discuss it at any length the effect of the Great Seal. They said: The word "useful" is good enough; we do not need to worry about anything else.

VISCOUNT SIMON: Mr. Justice Dysart does not discuss apparently in this judgment whether, supposing that the powers of the company are limited to what the statutes referred to, the powers do not on examination turn out to be wide enough to authorise the company to agree to stay in Winnipeg.

MR. FILLMORE: Yes, my Lord; that is the next point that he discusses. I will give a summary then.

VISCOUNT SIMON: You were on page 215, where Mr. Justice Dysart had been giving a list of nine reasons why he held that the Charter was a statutory one. It was because he had said that that I interrupted you to ask you that. Perhaps he goes on about that.

MR. FILLMORE: He says: "All these statements indicate that the Justices of the Supreme Court understood that the Company was incorporated by the Act of 1881, and that it derived its present powers from that Act and from subsequent Acts, and not from any other sources than those statutes.

"One further question on this point remains to be answered: if statutory powers were alone intended for the company, why did not the incorporation take the usual and direct form of a special Act instead of the unusual and indirect form of the Act and Charter? The only answer I can give is that both the company and Parliament intended and understood that the Letters Patent in the form prescribed would have the 'force and effect of an Act of the Parliament of Canada'. The reasons which actuated them are not disclosed by the record and it would be useless to speculate why they chose the one rather than the other of the courses open to them.

"(10) That the foregoing reasons for my opinion that the company's powers in 1881 were derived solely from the statute are not in conflict with the Bonanza Creek decision, which is strongly relied upon by the company in support of its contention that the company is a common law company. The Bonanza Creek Mining Co, Ltd. was incorporated in 1904 by Letters Patent under the Great Seal of Ontario issued by the Lieutenant-Governor of the Province under the general authority of the Ontario Companies Act of 1897, chapter 191. By section 9 of that Act, incorporation of such company was authorised in that manner for purposes within the legislative jurisdiction of the Province, including mining and exploring for minerals. The Privy Council held that as the company 'purports to derive its existence from the Act of the Sovereign (through his representative the Lieutenant-Governor) and not merely from the words of the regulating statute' it therefore possesses 'a status resembling that of a corporation at common law . . . a general capacity analogous to that of a natural person.' The Court treated the Ontario Companies Act as a 'regulating statute' governing the incorporation of companies by prerogative power but held that the prerogative power had, by the British North America Act, been continued in the King's representative from pre-Confederation days, and had not been abrogated or curtailed by that statute or any other statute. In delivering the judgment of the court, Lord Haldane, (Lord Chancellor) states at page 585: 'It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities.'

"Fundamental differences exist between the extent of the power of the Lieutenant-Governor to incorporate that mining company, and the extent of the power of the Governor-General to incorporate this railway company. For several years prior to the granting of the mining charter in 1904 the Lieutenant-Governor had full prerogative power to incorporate mining companies; whereas for several years prior to the granting of the railway charter, the Governor-General had no prerogative power to incorporate a railway company. In the one case the prerogative had been left entirely unrestricted by section 9 of the Ontario Companies Act of 1897; in the other, that power had been entirely abolished by section 3 of the Dominion Companies Act of 1877. Besides, the granting of the mining charter was attended by no provincial government concern or assistance or restrictions - the long-standing general Companies Act pointed the direction and paved the way for the incorporation of any petitioning persons by prerogative powers; whereas the granting of the railway charter was the special desire of the Dominion Government, which not only arranged all the details but passed a special Act to enable the Governor-General to grant it.

"Without section 2 of the Act of 1881, this company could not have been incorporated by Letters Patent. That section created or revived the necessary power in the Governor-General. In enacting the section, Parliament did exactly what Lord Haldane said the Ontario Legislature had not done, but which, inferentially, might well have done; that is, the Dominion 'thought fit to restrict the exercise . . . of the prerogative to incorporate by Letters Patent.' Not only that, but it embodied the restrictions in the very Act which authorised the exercise of the power to incorporate. Explicitly and repeatedly, section 2 lays down those restrictions. It prefaces the authorisation with these restrictive words: 'For the purpose

of incorporating the persons mentioned in the said contract . . . and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof.' It then authorises the Governor to grant 'a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended.' That authorisation is to grant a charter, not to any persons who might petition therefor (as the Ontario Companies Act permitted), nor for any general purposes (as the Ontario Act allowed), but only to specified persons and for specified purposes. These restrictive words of the section forbid the incorporation of any other persons, or for any other purposes, and must be given their natural meaning and full effect.

"In the Attorney-General v. De Keyser's Hotel at page 539, Lord Atkinson states: 'It is quite obvious that it would be useless and meaningless for the legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the legislature (in the absence of compelling words) an intention so absurd.'" See also Maxwell on Interpretation of Statutes, 9th Edition, page 140, et seq., where this view is amplified."

VISCOUNT SIMON: Is this quite right? It would be absurd "if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do." Ought it not to be "to do the thing that the statutes did not empower it to do".

MR. FILLMORE: No; I think that it is correct.

VISCOUNT SIMON: That was the point in the De Keyser's Hotel case. The Crown claimed to be able to requisition property during the war and to pay for it or not as it liked. The answer was: The statutes have been carried which prescribed that, if land is taken over for various purposes, it must be paid for under a particular provision and it would be absurd to say after that that the prerogative had a power to do things which the statute has thus limited. I cannot think that it is quite right.

MR. FILLMORE: I will read the passage from the report my Lord: "It is quite obvious that it would be useless and meaningless for the legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative to do the very thing the statutes empowered it to do."

VISCOUNT SIMON: It does not make sense, does it?. It ought to be "to do the very thing the statutes did not empower it to do."

MR. FILLMORE: I think that the idea is that, where the statute empowers the Governor-General to do something, whatever he does is pursuant to the statute. He does not then act on prerogative; he acts only on the instructions of Parliament.

LORD ASQUITH: Does he mean: and by virtue of the prerogative, to do without restriction the very thing which the statute says that he shall do subject to restriction?

MR. FILLMORE: That may be it. The principle is as simple as possible. The principle is that the prerogative of the Crown covers a certain field and within that field the Crown can exercise its prerogative and do what it likes; but, if the Crown is one of the parties, if by consent of both Houses of Parliament it is provided that inside that field a particular set of rules shall be observed, as, for instance, if you want to take land for war purposes you must give notice and you must have the land valued and pay what it is worth, it would be meaningless to say that the prerogative still enables the Crown to take it in disregard of that set of rules. The prerogative of the Crown shrinks by the action of the Act of Parliament which limits the field in which it may be applied. That was the argument.

MR. CARSON: That was the principle in that case; and it was also stated that the prerogative consists only of the residue of power not taken away from it.

VISCOUNT SIMON: I think, as Lord Asquith has said, that may be what Lord Atkinson meant.

MR. FILLMORE: I do not think I need read the rest of that page. That deals with Canadian cases, where they have distinguished the Bonanza Creek case.

Turning to page 218, Mr. Justice Dysart says: "For the foregoing reasons I think that the company's charter had 'force and effect' of the statute which authorised it and prescribed its terms, and that the company's powers are therefore 'limited and circumscribed' by that statute.

"The second important question is: had the company any power to covenant that it would continue its workshops within 'the limits of the city . . . forever'? If the company had been incorporated by prerogative charter, with powers analogous to those of a natural person, it admittedly would have power to enter into the covenant; but if, as I hold, it had been incorporated by statute, it would have the covenanting power only if that power was by statute conferred, expressly or impliedly. 8 Halsbury, 2nd Edition, section 125, supra.

"The power was not conferred expressly. Neither the charter, not the Act authorising the charter, nor the underlying contract, not, the Consolidated Railway Act, of 1877 as embodied by reference in the contract and charter, expressly conferred the power. The only powers expressly conferred are directed to the financing, locating and building of the railway; to the erecting of buildings, stations and other incidental works, and the doing of things necessary and convenient for the making, extending, using and operating of the railway; they allow the company to receive grants and donations that are 'voluntary' - that is, are obtainable without price or consideration."

VISCOUNT SIMON: When the learned judge says: "the doing of things necessary and convenient for the making, extending, and using of the railway" he is referring to powers useful to enable them to avail themselves of any advantage agreed upon?

MR. FILLMORE: I think that he is referring to the powers in the Consolidated Railway Act.

LORD TUCKER: Does he anywhere cite the language of clause 4 in Schedule A?

MR. FILLMORE: Not unless he is referring to it there. I do not think that it is quoted later on. He does not use the words "necessary and useful".

LORD COHEN: I think that you must be right, because when he talks of implied powers he again uses words, which are not to be found

anywhere in the special Act.

MR. FILLMORE: He is probably referring to section 7 of the Consolidated Railway Act of 1879, which is at page 9 of the Appendix. Section 6 provides: "Every company established under any special Act shall be a body corporate under the name declared in the special Act, and shall be vested with all powers, privileges and immunities necessary to carry into effect the intentions and objects of this Act and of the special Act therefor", and so on.

Then section 7 provides: "The company shall have power and authority, (1) to receive, hold and take all voluntary grants and donations of land or other property made to it, to aid in the construction, maintenance and accommodation of the railway; but the same shall be held and used for the purpose of such grants or donations only; (2) To purchase, hold and take of any corporation or person any land or other property necessary for the construction, maintenance, accommodation and use of the railway, and also to alienate, sell or dispose of the same" — some are left out here but it is not material — "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, and to purchase and acquire stationary or locomotive engines." "(10). To construct and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of this Act, and of the special Act."

There you have the ordinary operating powers of the railway. Section 7 of this Act is the one which says what the directors can do in the ordinary course of business.

Then I call attention to paragraph 19 of section 27: "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 all and every the clauses of this Act shall refer as fully to the part of such line of railway, so at any time changed or proposed to be changed, as to the original line; but no railway company shall have any right to extend its line of railway beyond the termini mentioned in the special Act."

VISCOUNT SIMON: The learned judge, having decided that you must attribute to this railway company any powers that are not expressly or by fair implication given to it, then looks at the railway Act on page 8 of the Appendix to see what powers are given to it. That is where he gets this phrase that they may do "things necessary and convenient".

MR. FILLMORE: Yes.

VISCOUNT SIMON: He does not look, so far as I can see, at the statute which incorporates the railway company, to see whether any powers authorised or empowered by that Act are also any part of the endowment of the railway company.

MR. FILLMORE: Although he does say that "neither the charter, nor the Act authorising the charter nor the underlying contract ———

VISCOUNT SIMON: That is why I ventured to interrupt, I am not sure that that is right.

MR. FILLMORE: He says that they do not expressly confer the power;

so that I presume that he must mean that even the word "useful" is not good enough to give them the power.

LORD COHEN: He did look at the charter, because he refers to the obligation thereafter to efficiently maintain, work and run the railway or, at any rate, he looked at the contract.

MR. FILLMORE: Yes. I do not know that I need to read that.

VISCOUNT SIMON: You ought to read at line 40 on page 218, ought you not?

MR. FILLMORE: Yes. He refers to the Ashbury Carriage case and Wenlock v. River Dee corporation, and says: "While the purposes for which the company was incorporated were many and varied, they include the all-important one that the company, upon receiving from the Dominion transfers of the completed portions of the railway, would 'thereafter and forever efficiently maintain work and run' the railway, including all its branches. To this undertaking the company bound itself by accepting those transfers. This obligation was imposed because of its high importance to Parliament for the due performance of the Dominion's own obligations to British Columbia. Therefore even if, but for this provision, the covenant could - contrary to my opinion - be regarded as necessary, or proper, or incidental to, or consequent upon, the powers and duty of the company to construct the railway, the covenant must nevertheless be viewed in the light of that Dominion requirement of perpetually efficient operation of the road. If the covenant is in conflict with, or even incompatible with, that permanent overriding duty, it is prohibited and ultra vires. This well-established principle is stated by Lord Birkenhead in Birkdale District Electric Supply Company v. Southport Corporation, where he says: '... if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties.'"

"The covenant must be appraised in the light of the circumstances existing at the time it was entered into." I do not think that I need read all that paragraph.

"What then were the circumstances surrounding this transaction when the covenant was entered into? They were chiefly - that for years prior thereto, the intention of the Government had been to carry the railway over the Red River at Selkirk, about 25 miles north of Winnipeg; that the line had been built from the east to the bank of the river at that point; that a branch line connected Winnipeg with Selkirk; that the choice of Selkirk rather than Winnipeg for the main line crossing had been made on the advice of responsible engineers, who had studied the relative suitabilities of the two possible sites; that among reasons for the choice of Selkirk was the fact that in earlier years Winnipeg had several times been inundated by spring freshets, and a repetition of these was considered possible, if not probable, and that such freshets would be a menace to the efficient operation of the railway. Those were the dominating circumstances existing when the covenant was made.

"In order to secure a reversal of the deliberate decision and to effect the change of crossing site, the ambitious city offered large and attractive inducements. Free land for a depot, 200,000 dollars of debentures and perpetual exemption from taxation, were large and onerous considerations from the struggling

young city of 8,000 inhabitants. But without these inducements the crossing site would not have been changed." I do not agree with that on the facts. I think that Winnipeg was already on the railway. "We may fairly assume that the bargain was struck only after considerable negotiations, in which the company laid down the terms upon which it would change the crossing site. The whole transaction is evidence of the company's conviction that Winnipeg was not a suitable place for its main western headquarters if efficiency in the operation of the railway was to be perpetually maintained. No financial advantage could change the physical facts.

"There were additional reasons why the company should not bind itself to continue the workshops in Winnipeg 'forever'. The then anticipated growth of the railway and of the city might make it desirable, in the interests of efficient operation, to move the site of the shops to some other more advantageous place outside - even if near - the city. Moreover, by the Consolidated Railway Act of 1879 (which was, in parts, incorporated by reference in the charter) the company was in some respects subject to the orders of the Railway Committee of Parliament, and future orders of that Committee or its successors might affect the location of the shops."

VISCOUNT SIMON: What is the reason why the learned judge says at the top of page 220: "The whole transaction is evidence of the company's conviction that Winnipeg was not a suitable place for its main western headquarters."

MR. FILLMORE: I do not know that I can justify that statement.

VISCOUNT SIMON: It has turned out to be a very suitable place.

MR. FILLMORE: The Government engineer thought that Winnipeg was not a suitable place.

VISCOUNT SIMON: Originally the railway by-passed Winnipeg.

MR. FILLMORE: They intended to cross the Red River at Selkirk, but they did build a branch line from Selkirk down to the Border on the east side of the river. Then in 1879 they decided to build a bridge across the Red River at Winnipeg. As a matter of fact the bridge was built by the City of Winnipeg. The Canadian Pacific Railway was given running rights over it and on the 2nd June, 1881, after the Canadian Pacific Railway was incorporated, the Orders-in-Council show that the Canadian Pacific Railway got permission to build a line west from Winnipeg; so that the line of railway was undoubtedly located through Winnipeg. Winnipeg was on the railway in 1881, and, I submit, before the 5th September, 1881. When the learned judge says: "The whole transaction is evidence of the company's conviction that Winnipeg was not a suitable place", I do not know that I can justify that.

LORD ASQUITH: All that it means is that there was a change of plans. Originally it was not intended to go through Winnipeg; later on, on second thoughts it was to go through Winnipeg, but why does it follow that second thoughts were a bad bargain and were known to be such?

VISCOUNT SIMON: That it was contrary to the company's conviction of what was best?

MR. FILLMORE: I think that it was the Government Engineer, who recommended against crossing at Winnipeg; but the company, I think, wanted to locate their shops at Winnipeg. They wanted to build west of Winnipeg. The material before the court shows

that the company had decided to build west from Winnipeg even before the Bill was passed.

LORD COHEN: As I follow you, you do not seek to support the passage in the judgment which my Lord Simon has criticized?

MR. FILLMORE: No, my Lord. I do not think that that is correct on the evidence — that the whole transaction is evidence of the company's conviction that Winnipeg was not a suitable place for its main Western headquarters.

LORD COHEN: The learned judge's view is that the company was really bribed into doing it?

MR. FILLMORE: I am not trying to support that as a correct statement of fact. It was the Government, who thought that it was hazardous to build a bridge across the Red River. I do not know what the company thought about it; but they had decided in the summer or so soon as they came into power in the spring or summer of 1881, that a bridge should go across the river at Winnipeg and that they should build west from Winnipeg and also that they should build the road through along the banks of the Assiniboine and go through another pass in the mountains.

The learned judge goes on: "Although events subsequent to 1881 are not relevant on this issue, the company points to sixty-seven years of experience as proof of the suitability of Winnipeg for the perpetual site of the shops. But the fact is that the experience proves the contrary and confirms the unsoundness of the choice of the original Winnipeg site for the permanent home of these shops. In 1903 the company found it advisable in the interest of efficient operation to abandon that original site and to build new shops outside the original area of the city. The fact that the new site happened to be in the new area added to the city after 1881 is immaterial. The main fact is that the shops could no longer be 'continued within the limits of the city' of 1881. If the city had seriously objected to the removal, the shops would have remained where they were at the expense of efficient operation of the railway. That fact alone condemns the covenant as a violation of the company's charter powers and duties. No assurance can be given that in the future the shops may not have to be moved again.

"The advantage derivable by the company from the agreement, while undoubtedly useful" — there we find the word "useful" — "as an aid in financing the building of the railway, was not useful to the perpetually efficient working and running of the road. The means for financing the building of the railway were all set forth in detail in the charter and do not include such aids as that of tax exemptions purchased at the price which the company paid under the agreement with Winnipeg. Financial advantage alone, if it could justify this agreement, would logically justify any agreement or action by the company — even one that was expressly prohibited. The test of validity is not the financial or other advantages, but the actual powers to make the agreement. In York Corporation v. Leatham, at page 569, Mr. Justice Russell states: '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.'

"The suggestion is also made that the validity or invalidity of the covenant is immaterial, because the city could sue the company for any breach of the covenant and so get proper redress in damages. This suggestion overlooks the fact that there can be no action for breach of a contract, unless there is first a valid contract to breach. In such an action as is suggested, the company could set up ultra vires as a defence and so remove the very foundation of the suit. In my opinion no action could successfully be maintained by the city for breach of this covenant: Canadian Bank of Commerce v. Cudworth Rural Telephone Co., Wegenast's Canadian Companies, pages 145 to 155.

"The law on this point is clear. Of the many decisions supporting the city's contention, the one most nearly in point and most strongly relied upon, is Whitby v. Grand Trunk Railway. In that case a local railway company (which was later absorbed in the Grand Trunk Railway) was incorporated by statute, with authority to accept bonuses and benefits from municipalities. A cash bonus was received from the Town of Whitby in consideration of the company's undertaking by covenant to keep for all time its head office in the town." I think that it was actually workshops.

VISCOUNT SIMON: Was the Grand Trunk Railway Company a company that was incorporated by statute?

MR. FILLMORE: Yes; it was incorporated by statute and it was subject to a Railway Act and one of the sections of the Railway Act gave some general powers.

MR. CARSON: It was the head office and machine shops.

MR. FILLMORE: The learned judge says "In the course of time, the company found that it was impracticable to maintain its head office at Whitby." Actually the agreement was to maintain the head office and "to erect and maintain during the operation of the railway in the said town the chief workshops of the company which may be required for the construction and repair of the company's rolling stock, plant and machinery."

LORD COHEN: I gather from the way that Mr. Justice Dysart states the facts that the company which entered into the contract was not the company against which it was sought to enforce it, but a new Grand Trunk company resulting from an amalgamation. He says "In that case a local railway company (which was later absorbed in the Grand Trunk Railway) was incorporated by statute". It was the local company which made the contract and that had ceased to exist. The decision may, therefore, have been reached on quite a different ground, namely, that such a contract only lasts for the life of the company.

MR. FILLMORE: That was not raised, my Lord. On the Incorporation of Whitby v. Grand Trunk Railway Company the contract was between the Port Whitby and Port Perry Railway Company and the municipality, and that company was taken over.

VISCOUNT SIMON: It was a statutory company, which entered into an agreement that its head office should be at this place, Whitby. It moved its head office somewhere else. Thereupon it was sued or some action was taken to enforce this promise upon it. The answer was: It is true that the promise was made, but it is not an enforceable promise, because it was not within the power of the statutory company to make such a promise. That is right, is it not?

MR. FILLMORE: Yes, my Lord. The judgment of the court was

delivered by Chief Justice Armour and, after reviewing the earlier decisions in England, he comes to this conclusion at page 485. "These provisions give no express power to the railway company to enter into such an agreement, and I do not think that the power to make such an agreement, so onerous upon the railway company and binding upon them for all time, can be held to be derived by reasonable implication from these provisions, or can be fairly regarded as incidental to, or consequential upon, the things authorised by them:".

LORD COHEN: As set out in that report, there is no provision in the wide form of clause 4 in the present contract?

MR. FILLMORE: There is one approaching it. It has almost the same words except the word "useful". I have the statute here and I will read it to your Lordships. Perhaps I may make this observation. The Chief Justice says: "I do not think that the power to make such an agreement, so onerous upon the railway company and binding upon them for all time,". When the contract was signed the directors of the railway company probably did not mean it to be onerous. It did not turn out to be onerous until something happened which made them want to move their head office and their shops from the city. It was not, therefore, apparently, obviously onerous at the time.

LORD COHEN: There was certainly nothing in the special Act corresponding to it?

MR. FILLMORE: No; but it was made subject to the Railway Act. Perhaps I may refer to section 8 of the Railway Act, No. 22 Victoria, Chapter 66.

LORD ASQUITH: Is that an Act of the Dominion?

MR. FILLMORE: Yes; the Legislative Council and Assembly of Canada. That was Canada before confederation.

MR. CARSON: The Province of Canada before confederation.

MR. FILLMORE: Yes. Section 8 reads: "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'".

VISCOUNT SIMON: What is the year of that statute?

MR. FILLMORE: 1859. There you have nearly every word, except the word "useful". Under "Powers", I think that the Consolidated Railways Act of 1879 must have followed this.

LORD OAKSEY: Do you have the words "to avail themselves of every advantage agreed upon"?

MR. FILLMORE: No, my Lord. "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", are the words in section 8.

Then in section 9, under the heading "Powers", it says: "The company shall have power and authority: Firstly, to receive, hold and take all voluntary grants and donations of land"; secondly, to purchase, hold and take land; thirdly, to occupy public lands; fourthly, to cross private lands; fifthly, to

cross streams; sixthly, to make, complete, alter and keep in repair the railway; seventhly, to erect and maintain all necessary and convenient buildings, stations and so on; eighthly, to make branch railways; ninthly, to construct, erect and make, all other matters and things necessary and convenient for the making, extending and using of the railway; tenthly, to take, transport, carry and convey persons and goods; eleventhly; to borrow from time to time sums of money. It did, therefore, have wide powers.

VISCOUNT SIMON: The Chief Justice says: Look at all these express powers; they give express powers to the company to enter into an agreement that their chief office shall be in a particular place forever. That is all?

MR. FILLMORE: Yes, my Lord. My submission is that there is nothing in section 4, the wide section relied upon, or in the Consolidated Railway Act which expressly or by necessary intendment gives the Canadian Pacific Railway Company power to enter into such a perpetual covenant.

LORD COHEN: Supposing that Whitby v. Grand Trunk Railway were rightly decided, it would not have been binding on the Supreme Court, would it?

MR. FILLMORE: No, my Lord.

VISCOUNT SIMON: I think that we can go to page 221, line 40, or can you pass to page 223, where he reaches his conclusions?

MR. FILLMORE: I should like to call your Lordships' attention to a case at page 222, line 23. The learned judge says: "In Montreal Park & Island Railway v. Chateauguay & Northern Railway Company, Mr. Justice Killam states: 'An agreement by a corporation exercising a franchise for the public convenience, that it will not exercise it where the convenience may be thereby promoted is invalid'". That was a case where the railway company agreed with another railway company that it would not build a line of railway in an area where it had a right to build.

"In York Corporation v. H. Leatham & Sons, Ltd., Mr. Justice Russell states: '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.'

"The doctrine of ultra vires has been held to apply strictly to railway companies incorporated by private Act in much the same manner as to municipal corporations: see Shrewsbury & Birmingham Railway Company.

"At page 58 of the Montreal Park case, it is said: '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.' And if such companies 'can by contract . . . limit themselves . . . not to use those powers in whole or in part . . . the chief object of Parliament . . . might be defeated.'"

VISCOUNT SIMON: He then reaches his conclusion, and these two

paragraphs which you will now read seem to me to be very important.

MR. FILLMORE: "The covenant to continue the shops for ever in the locality fixed by the covenant was incompatible with the company's duty to move them to some other locality if efficiency of operation so required. That incompatibility has existed from the beginning. A conflict between the covenant and the duty was foreseeable in 1881; it actually occurred in 1903, and may occur again. The 1903 conflict was solved by obeying the charter duty and disregarding the covenant. If the city had objected - as it had a right to do - the conflict might have brought the whole question to a head. Similar lassitude by the city is not to be expected in the future. The incompatibility is not a matter of opinion or speculation; it is now a proven fact of importance." I think that it is a matter that has to be apparent on the face of the covenant.

"On the facts and law, I am of opinion that by entering into the covenant to continue the shops in the city forever, the company virtually agreed, in certain eventualities, not to exercise the powers which were conferred upon it, and not to discharge the duties imposed upon it for the public good." I think that that is the best summary that he has made of his position. "The covenant was therefore ultra vires when made, and has always been void.

"In reaching this conclusion, I have confined myself to the covenant for the reason that it is in the covenant (that is, the bond and covenant) that the ultra vires undertaking is to be found. All other terms and conditions imposed on the company by the agreement with the city - the undertaking to build the one hundred miles branch line, the depot, the stock yards and the workshops - were well within its powers. But because the agreement is one integral and indivisible unit, the invalid covenant invalidates the whole contract."

VISCOUNT SIMON: How many judges sat in the Supreme Court?

MR. FILLMORE: The full court of nine judges, my Lord.

(Adjourned till Monday morning next at 11 o'clock)