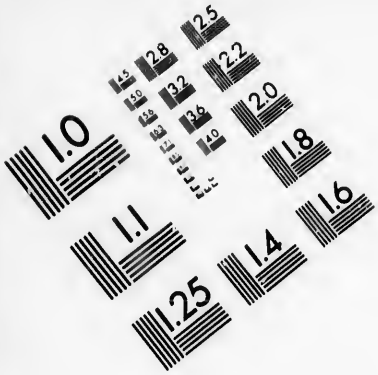

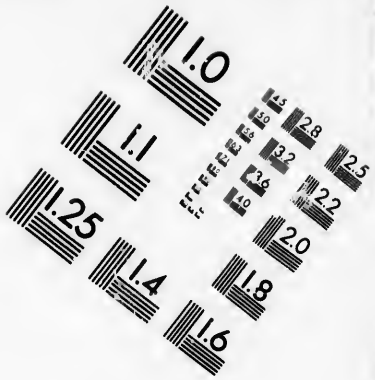

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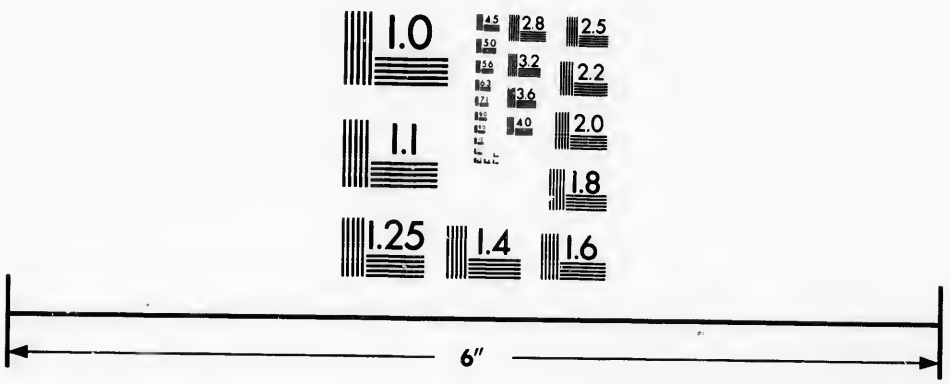

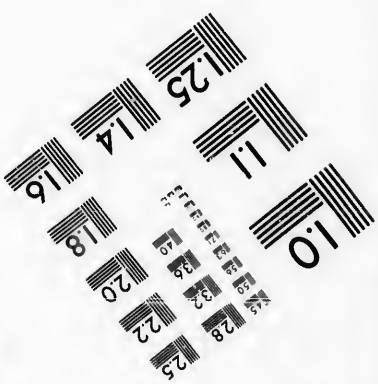

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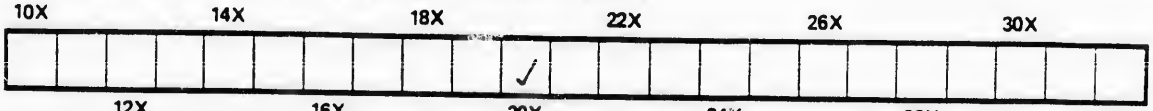

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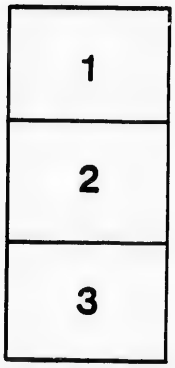

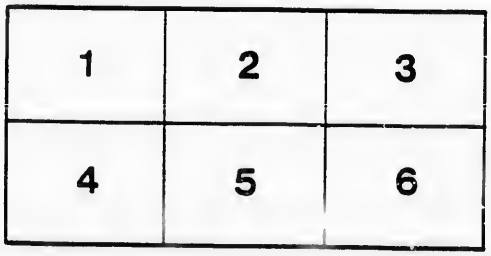

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REPORT

—OF—

AN ARGUMENT BEFORE THE SUPREME COURT

—SUBMITTED BY THE—

Railway Committee of the Privy Council

—ARISING ON AN—

APPLICATION OF THE HON. JOSEPH MARTIN

Railway Commissioner of Manitoba

REPORTED BY HOLLAND BROTHERS,

SENATE REPORTERS, OTTAWA.

OTTAWA:
PRINTED BY A. S. WOODBURN, ELGIN STREET.

1888.

IN THE

Supreme Court of Canada.

In the matter of a question submitted by the Railway Committee of the Privy Council for Canada, under Section 19 of "The Railway Act," (51 Vict Chap. 29, 1888,) arising on an application of the Honorable Joseph Martin, Railway Commissioner for Manitoba, dated the 10th day of September, A. D. 1888.

CASE.

Under Chapter 5 (five) of the Statutes of Manitoba (passed on the thirtieth day of April, 1888) the Railway Commissioner of that Province is constructing a Railway, known as the Portage Extension of the Red River Valley Railway, from Winnipeg to Portage la Prairie, both places being within the Province of Manitoba, and he has made application to the Railway Committee of the Privy Council of Canada, under Section 173 of the Railway Act of 1888 (Canada) for the approval of the place at which and the mode by which it is proposed that the said Portage Extension shall cross the Pembina Mountain Branch of the Canadian Pacific Railway), the said branch being part of the Canadian Pacific Railway at a point within the said Province.

The Railway Act of Manitoba under which the Railway is being constructed by the said Commissioner is hereto annexed, marked A. The application of the Railway Commissioner of Manitoba to the Railway Committee of the Privy Council is annexed, marked B.

IN THE

Supreme Court of Canada.

In the matter of a question submitted by the Railway Committee of the Privy Council for Canada, under Section 19 of "The Railway Act," (51 Vict Chap. 29, 1888,) arising on an application of the Honorable Joseph Martin, Railway Commissioner for Manitoba, dated the 10th day of September, A. D. 1888.

After hearing the parties interested, and at the instance of Counsel for the Canadian Pacific Railway Company, the following question is submitted by the Railway Committee for the opinion of the Supreme Court of Canada, under the provisions of Section 19 of the Railway Act of 1888.

Is the said Statute of Manitoba, in view of the provisions of Chapter 109 Revised Statutes of Canada, particularly Section 121 thereof, and in view of the Railway Act of 1888, particularly Sections 306 and 307, valid and effectual so as to confer authority on the Railway Commissioner in said Statute of Manitoba mentioned, to construct such a railway as the said Portage Extension of the Red River Valley Railway crossing the Canadian Pacific Railway, the Railway Committee first approving of the mode and place of crossing, and first giving their directions as to the matters mentioned in sections 174, 175 and 176 of the said Railway Act?

(Sgd.) J. H. POPE,
Chairman of the Railway Committee of the Privy Council.

OTTAWA, 2nd November, 1888.

The letter of A. P. Bradley, Esq., Secretary of the Department of Railways and Canals, to the Minister of Justice, transmitting the question to be submitted to the Supreme Court, named the Canadian Pacific Railway Company and the Government of Manitoba as the parties to the case.

HON. JOSEPH MARTIN, Attorney-General and Railway Commissioner of Manitoba, appeared personally.

Hon. O. Mowat, Attorney-General of the Province of Ontario,
Dalton McCarthy, Esq., Q.C.,
Hon. F. Langelier, and
J. J. Gormully, Esq.
Counsel for the Province of Manitoba.

Hon. Edward Blake, Q.C.,
C. Robinson, Esq., Q.C.,
G. M. Clark, Esq., General Solicitor of the Canadian Pacific Railway Company,
A. Monro Grier, Esq.
Counsel for the Canadian Pacific Railway Company.

OTTAWA, Wednesday, November 21st, 1888.

MR. BLAKE—I appear, with my learned friends, Mr. Robinson and Mr. Clark, for the Canadian Pacific Railway Company in this case. As I understand the position of affairs, the Railway Commissioner of Manitoba applied to the Railway Committee of the Privy Council to authorize a crossing on the Canadian Pacific Railway. On that the Canadian Pacific Railway Company intervened and raised a preliminary legal objection that the Railway Commissioner had no authority to construct a line crossing the Canadian Pacific Railway, in consequence of the illegality of the statute. That question is now submitted to you.

RITCHIE, C. J.—Would not that question come more logically from the party who claims the right to cross?

MR. BLAKE—I am quite willing that my learned friends should allege that there is no presumption in favor of the validity of the statute, if they choose. The whole question depends, as I understand it, upon the validity of the local statute. That is the question—is the local legislation valid or void? I understand the legal presumption to be *prima facie* in favor of the local statute.

STRONG, J.—You impugn the validity of the local statute?

MR. BLAKE—Yes, I understand that unless I can establish that the local statute is void, the question must be answered against me.

STRONG, J.—The presumption is in favor of the validity of the legislation. When the Liquor License Act was referred to this court, the party impugning its validity was heard first.

MR. BLAKE—The case that is before your lordships under the recent legislation, states the facts and the points which are to be disposed of briefly and, it seems to me, clearly. It informs the Court that under chapter five of the Statutes of Manitoba the Railway Commissioner of that Province is constructing a railway from Winnipeg to Portage la Prairie, places within the Province; that he has made application to the Railway Committee of the Privy Council for their approval of the place and mode of crossing the Pembina Mountain Branch of the Canadian Pacific Railway. Now, although the question is one, no doubt, of the very highest public importance, yet it seems to me that it is one simple in its character and that the propositions upon which the answer depends

are few and also clear. The position which we take is that the work or undertaking which is described in this question submitted to your Lordships, is a work or undertaking under the exclusive legislative authority of the Parliament of Canada; that by consequence the provincial legislation which assumed to authorize it, is *ultra vires* of the Legislature and void; that by consequence there is no authority in the Railway Commissioner to perform the work. It is obviously assumed by the case, and for the purposes of the question must be taken to be correctly assumed, that if, contrary to these propositions, the local Act referred to is a valid Act, then, notwithstanding other objections which might be raised, the 177th Section of the Railway Act does apply, the Railway Committe, have a jurisdiction to approve of the crossing and to regulate the mode of crossing, and the case is therefore rightfully before them. Now one may begin, perhaps usefully, by eliminating some questions which may have been supposed to be open upon this controversy but which, as I understand it, are not at all open, and are not therefore the subject of discussion.

In the first place it was thought by some, at an early period after the completion of the Canadian constitution, that upon a proper interpretation of that document, all railways were under the exclusive jurisdiction of the Parliament of Canada, and at no distant period one of the learned Judges whom I am addressing, in a cause in this Court, pointed out that that question had not yet received a judicial determination, and expressed doubts as to the solution which should be attained. That question is not open to us here. I do not conceive it to be open to us upon this present application. I think it would be straining the opportunity which has been given to submit a question for the judicial determination of this Court beyond its fair limits if we were to attempt to argue the exclusive jurisdiction of the Canadian Parliament under the British North America Act direct and apart from any action it has taken under that Act, to all railways, and, therefore, whether that question might be properly raised with reference to this particular railway, or may properly be raised in some other proceeding, I do not consider it is before your Lordships at this time for consideration.

Another question of great importance, and, perhaps, of more

doubtful solution than that to which I have now adverted is also to be eliminated from the subject in controversy, and that is anything which might arise under that provision of the sub-section of the Act which deals with railways extending to the boundary of the Province, or connecting one Province with another. Whether, in point of fact that question may arise with reference to this particular enterprise in some other form, is immaterial. It is enough to say that in the opinion of those who are acting for the Railway Company, this present case, within the limits of which we appear, does not authorize us to present that proposition to your lordships, for upon the language of the case the railway is from one point within the Province to another point within the Province, without giving your lordships any information as to its touching the boundary or as to its being possibly brought within that clause to which I refer. Therefore, once again, if there be any subject of controversy which could be raised upon that section of the Act, it is not a subject of controversy which can be raised in this provision and we thus get down—we narrow the questions for discussion to the question whether under action taken by virtue of sub-section "C," of section 10, of the 92nd section of the British North America Act—by virtue of action taken by legislative authority competent so to act, this work, which otherwise would have been, upon the assumptions which must prevail in this case, within the legislative, if not within the exclusive legislative authority of the Province, has been removed altogether from that authority and placed entirely under the legislative authority of the Dominion. I wish first of all to examine briefly the relevant portions of sections 91 and 92 in order that your lordships may apprehend precisely the position which we take as to the powers of Parliament. To read what seems to be the relevant portions of section 91, I will read them thus: the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say, and then after a certain number the enumeration 29—"Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

So I find that the exclusive legislative authority of the Parliament of Canada does expressly extend to those classes of subjects which are expressly excepted in the enumeration of subjects assigned to the Provincial Legislature. I then turn to that enumeration which is found in section 92, and I find that sub-section 10 of the enumeration of those subjects in respect of which the Legislature is given rights reads thus :

"Local Works and Undertakings other than such as are of the following classes :—

(a) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Provinces, or extending beyond the limits of the Province :

(b) Lines of steamships between the Province and any British or Foreign country :

(c) Such works as, although wholly situate within the Province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

I thus find an express exception in section 92 from the subjects within the Provincial legislative jurisdiction, of such works as, although wholly situate within the Province, are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada or of two or more of the Provinces. I then read the British North America Act as enacting expressly that works of that description are within the legislative authority of the Parliament of Canada, and I argue that all I have got to find is whether the Parliament of Canada has executed the legislative authority with which it is clothed by sub-section "C", namely, to declare this work to be for the general advantage of Canada, or for two or more of the Provinces. Finding that the British North America Act has stated that the works which are so declared are within the exclusive legislative competence of the Parliament which does so declare, I apprehend that all I have to do is to show your lordships that Parliament has so declared, and then the matter is drawn within the exclusive competency of the Parliament so declaring. Now it may be argued with great weight that it is an anomolous thing that of the two classes of legislatures between whom, by the British North America Act, the subjects of legislation were being divided, one of the two should have the power of arrogating to itself some of the subjects which

were by that Act, in default of such arrogation, assigned to the others. It might, perhaps, be argued that it would have been prudent to clothe some joint or some impartial authority with the power of deciding whether works should be withdrawn from one Legislature and assigned to the other Legislature, in preference to committing to one of the Legislatures the power of aggrandizing itself at the expense of the others, but all such arguments were suitable for debate when the Constitutional Act was being passed; what we who live under the Constitution have to do, and what courts who gave to expound the Constitution have to do, is to ascertain what the Constitution is, not what it ought to have been; and so I pass by those considerations.

Next, had the British North America Act provided that any work which was for the general advantage of Canada or for two or more of the Provinces, should be within the legislative jurisdiction of the Parliament of Canada, then the jurisdiction of that Parliament would, of course, have depended upon the fact, so to speak—if a deduction from numerous considerations of policy and expediency, perhaps, ought properly to be called a fact—it would have depended upon that conclusion at all events, if the Act had said, after specifying certain works, "and all works which are for the general advantage of Canada or for two or more of the Provinces." The question would have arisen, whatever way it was to be solved, who shall decide whether any particular work is for the general advantage of Canada or two or more of the Provinces?—because, unless it be so, there is no jurisdiction in the Parliament of Canada, and it is possible though I think very doubtful, that upon such a frame of the Constitution a question might have been raised for the judicial department of the Constitution to decide; but as I said a moment ago, the question in its nature is hardly properly to be called one of fact; it is one of opinion, it is one of policy, and it would have been a very extraordinary trial before a court to determine whether any particular work was for the general advantage of Canada or of two or more Provinces of Canada. Animated presumably by that consideration—by the consideration of the difficulties which might arise if any doubt existed as to whether the work was or was not for the general advantage,—what the Imper-

ial Parliament, in fact, did, was not to make the conclusion depend upon the circumstance that the work was for the general advantage, but to make it depend upon the declaration of the Parliament of Canada that it was for the advantage. By the declaration of the Parliament of Canada that a work is for the general advantage, the jurisdiction is obtained, so that courts or any other tribunals have naught to do with the question whether the work is or is not for the general advantage; if the Parliament of Canada choose to declare, in the method in which Parliament speaks, namely, by Act, that a work is for the general advantage, it is that declaration which gives the jurisdiction; it is not the fact, it is not the conclusion. The opinion therefore is entirely conclusive, and therefore the test which is to be applied in any case is not whether the work in question is one for the general advantage but whether the Parliament of Canada has declared it to be one for the general advantage. This sovereign power may have been, and it may be abused. In the very legislation which gives rise to this case, divers opinions were expressed as to the propriety or impropriety of such legislation. A minority in Parliament deemed the Act an abusive use of the power given to Parliament. Opinions may differ; they did differ. On the one hand it may be contended that it was the spirit of the Constitution that works which, for some reason given or probable, in the opinion of Parliament, at any rate, were for the general advantage, should be so declared; on the other hand it may be contended and was contended, and the contention is embodied in the Act, that Parliament had an absolute uncontrollable power of declaring any work it pleased within the general advantage, and that is the proposition which we assert to-day as the legal effect of the constitution, and the proposition which we assert to have been acted upon by the Act of 1883, and the subsequent Acts to which I am about to refer your lordships. In truth, as I have said, the question itself by whatever tribunal, whether political or judicial, it were to be solved, is one of opinion and of policy open to a thousand arguments and not at all susceptible of demonstration, except in a few obvious cases, in a scientific sense. I contend then that if Parliament choose to declare absolutely a projected railway on the little sand bank which faces Toronto Bay a work for the general advantage of Canada; if it choose to

declare a railway from here to Hog's Back, a place on the Rideau Canal, near the City, a work for the general advantage of Canada, its declaration is indisputable, and these works become, whatever we think privately of them, works for the general advantage of Canada within the meaning of the Constitution, by virtue of that declaration. In the interpretation of our constitution, there is, I think, a marked distinction as to the rules of interpretation from those which obtain with reference to the greatest example of a Federal Constitution which exists, that of the neighboring Republic. There, as your lordships know, the powers of Congress are strictly enumerated, while the States have the whole residuum, and there it has been laid down that the interpretation of State Constitutions is to be liberal, with presumptions in their favor, while the interpretation of the Constitution of the United States, of the Congress, is to be of the reverse order. It must be established, in the case of an Act of Congress, that the authority is within the power; it must be established, in the case of an Act of a State, that the authority is beyond its power; but that distinction, of course, is not applicable here, or if applicable, it is applicable in a reverse sense, because the residuum of power is here given to the central instead of to the State authorities. That consideration adds great weight to the analogies which may be drawn from the judgment of the judicial department of the United States upon the interpretation of the Constitution of the United States with regard to the exercise of the incidental powers, the powers which Congress exercises, not specifically enumerated, but in order to carry out and effectively to execute its enumerated powers, because notwithstanding that narrow scheme of interpretation, it will be found that in the most debateable land which exists with reference to the exercise of powers by Congress, the courts, the general current of authority is against the drawing into the domain of the judicial tribunals of such matters. Take for instance the great controversy with reference to internal improvements, not yet solved. Your lordships will find in one of the very latest writers who has referred to that subject and who summarizes the condition of the law upon it—I refer to Cooley's Principles of Constitutional Law, at page ninety-four, a statement of the condition of the controversy—

How far Congress, as an incident to powers expressly granted, has a right to appropriate money or public lands to what are called internal improvements within the States, has been the subject of earnest discussion, almost from the foundation of the government, and is even now not authoritively determined. It is for the most part conceded that such appropiations may be made for the improvement of the navigable waters which constitute highways of foreign and inter-state commerce, and the harbors which are important to such commerce, and to build break-waters, light-houses, and piers; but it is contended by some that Congress may also assist in the making or improvement of highways, railroads and canals, existing or authorized under state authority. To some extent such assistance has been given in money, but to a much greater extent in lands, and the question of right, like that of protective duties, has always been treated as exclusively political.

In Congress they might debate whether a particular internal improvement was within the power of Congress or no, but the judical department, if Congress decided that would do the work, declined to consider the question whether Congress was right or not. It was left with the political department of the Government. At page 148 and following pages of the same book are to be found statements of the principles on which the courts declare Statutes unconstitutional and void, as applied to the Constitutions of the United States and of the several States, and at page 149 is perhaps a somewhat valuable statement :—

"So the principle that local affairs shall be managed in local districts and that these shall choose their own local officers constitutes one of the chief exellencies of our system of Government but in applying it the difficulty is at once encountered of determining what are local concerns and what general; and it may perhaps be found in a given case that the concerns that are set apart as local, if neglected or imperfectly performed, subject the whole state to embarrassment, so that state intervention becomes necessary. And it is obvious that, whenever a recognized principle of Free Government requires legislation for its practical application and enforcement, the body that passes laws for the purpose must determine, in its discretion, what are the needs of legislation, and what its proper limits. The courts cannot take such principles as abstract rules of law and give them practical force."

So again, in the other book, Judge Cooley's work on Constitutional Limitations, in the fifth edition, at page 77, and at pages 86 and at 153, your lordships will find passages which seem

to me to be not immaterial as argumentative expositions of the principles which I have been endeavoring to present to your lordships. At page 77—

" Akin to this is the rule that ' where the power is granted in general terms the power is to be construed as co-extensive with the terms, unless some clear restriction upon it is deducible (expressely or by implication) from the context'. This rule has been so frequently applied as a restraint upon legislative encroachment upon the grant of power to the judiciary, that we shall content ourselves in this place with a reference to the cases collected upon this subject and given in another chapter. Another rule of construction is, that when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the Supreme Court of Maryland, that where the Constitution defines the qualifications of an officer, it is not in the power of the Legislature to change or super add to them, unless the power to do so is expressly or by necessary implication conferred by the Constitution itself. Other cases recognizing the same principle are referred to in the note. The considerations thus far suggested are such as have no regard to extrinsic circumstances, but are those by the aid of which we seek to arrive at the meaning of the Constitution from an examination of the words employed. It is possible, however, that after we shall have made use of all the lights which the instrument itself affords, there may still be doubts to clear up and ambiguities to explain, then and only then are we warranted in seeking elsewhere for aid. We are not to import difficulties into a Constitution, by a consideration of extrinsic fact when none appear upon its face. If however, a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford. Among these aids is a contemplation of the object to be accomplished or the mischief designed to be remedied or guarded against by the clause in which the ambiguity is met with."

Then, at page 86 :—

" We have elsewhere expressed the opinion that a statute cannot be declared void on the ground solely that it is repugnant to a supposed general intent or spirit which it is thought pervades, or lies concealed in the Constitution, but wholly unexpressed, or because, in the opinion of the Court, it violates fundamantal rights or principles, if it was passed in the exercise of a power which the Constitution confers. Still less will the injustice of a Constitutional provision authorize the courts to disregard it, or indirectly to annul it by construing it way. It is quite

possible that the people may, under the influence of temporary prejudice or a mistaken view of public policy, incorporate provisions in their character of Government, infringing upon the proper rights of individual citizens or upon principles which ought ever to be regarded as sacred and fundamental in Republican government; and it is also possible that obnoxious classes may be unjustly disfranchised. The remedy for such injustice must be found in the action of the people themselves through an amendment of their work when better counsels prevail. Such provisions, when free from doubt, must receive the same construction as any other."

Then at page 153 :—

"Besides the limitation of legislative authority to which we have referred, others exist which do not seem to call for special remark. Some of these are prescribed by Constitutions, but others spring from the very nature of free government. The latter must depend for their enforcement upon legislative wisdom, discretion and conscience. The Legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public moneys and should provide for disbursing them only for public purposes. Taxes should only be levied for those purposes which properly constitute the public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where under pretence of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character the courts can endorse only those limitations which the Constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives."

And also I would refer to page 210 of the same work. Now, I apprehend that under the power which is conferred upon the Parliament of Canada, even if the exercise of that power were accompanied upon the face of the statute book by a reason assigned which would indicate in the mind of the judicial tribunal a probable misconception of the range of the power, yet still the declaration would govern. I put an extreme case. I am putting a case which does not arise in the present instance, but I desire to state broadly what I conceive to be the power of Parliament, and I say that if your Lordships found that the declaration that the work was for the general advantage of Canada, was accompanied by the expression

of some one reason which your Lordships thought indicated that Parliament misconceived the grounds upon which, under a true interpretation of the Constitution, it ought so to declare, yet your Lordships would be obliged to treat the declaration as valid and final, and not construe the reason given as destroying the efficacy of the declaration. For example, if it were said, by way of recital, anterior to the declaration, that unity of administration and of executive and legislative control over all railways of whatever sort and description in all the Provinces of Canada was important, and that recital were followed by a declaration that all the railways were declared to be for the general advantage, I apprehend that the declaration would be potent, even although (and it is unnecessary to discuss it at this moment) the reason were thought by the court to be foreign to the grounds on which Parliament ought, in its view, to have made such a declaration. Efficacy is to be given to the declaration, even under those extreme circumstances, but of course, as I have said, that consideration does not here arise. Now the power that is given of declaring all works for the general advantage is, as to the character of the works, is as to the circumstances of the works or projects, of the very widest possible description. It applies not merely to projected enterprises, not merely to things in contemplation, not merely to matters as yet untouched by any legislative authority, free to be dealt with according to the view of either legislature, a local or a general legislature, according to its conception of the public good—not merely to those, but it applies to works even after their execution. A Provincial Legislature may itself build a railway, it may incorporate a company to build a railway which it does not itself build, it may subsidize that corporation—it may embarrass its finances, it may burden its future in order that the railway may be built, and built under its control, and yet, after all is done, the instant it is completed, or ten years after it is finished, after its execution at any time, while yet, perhaps, the Province may be laboring in the effort to meet the obligations into which it has entered in order to create this Provincial enterprise under its own control, yet three words of the Parliament of Canada, declaring that specific work to be for the general advantage, are potent to remove it wholly from the jurisdiction of the Province and to place

it within the control of the Dominion. The strength of the apparent objections to be exercised at such a time and under such circumstances of such a power, was, I presume the reason why this clause was so particularly framed. I suppose the draftsman thought that if it was simply said that the works might be declared, or the undertakings might be declared by the Parliament of Canada to be for the general advantage, it might be argued that that could never apply to a case where a work had been done under provincial authority, paid for by provincial money and arranged for in that way, and so as to make it as wide as possible, and to include all conceivable cases, you find "before or after their execution." It is, one might say, a strong thing to give power to declare, as to any particular suggested work, a work say from Winnipeg to Portage la Prairie, within the Province of Manitoba, a project for the general advantage of Canada and thus to wrest from the Province the power of advancing it. But it might be said in answer to that proposition that the declaration of the Parliament of Canada, honestly given, as it would be assumed to be given, would be a declaration which would of course result in the work being promoted, as far as that Parliament could promote it, because it is committed to the proposition that the work is one for the general advantage. But much more than that is done; when the work has been completed, when it is all there, notwithstanding that, it can be taken out of the legislative control of the Province and handed to the legislative control of the Dominion. Why? For unity of administration. It is not for the execution of the work that it is done, because the work is accomplished, the work is there and in operation, and the only conceivable purpose for which, after its execution, it should be so transferred is to provide for unity of administration over all works under the control of the Parliament of Canada. Then what are the consequences of such a declaration when made? The work, as I have said, to which the declaration applies, is taken out of section 92 and is brought into section 91. Thenceforward no Provincial Legislature is competent to deal with the matter any more than if that specific work had been named in the British North America Act itself, either expressly or by words which included it as a work within

the legislative jurisdiction of the Parliament of Canada. The powers, whatever they may have been, of the Province, are annihilated from the day of that declaration. What the condition o the work or project is at the time follows to be considered, and different results will ensue according to that condition, but this result is common to all, that from that day, as the matter stands that day, the Province can do or say no more, and all that is to be said or done must be said or done by the Parliament of the Dominion. If then nothing has been done by the Province, nothing can be done afterwards. If anything has been done, what remains to be done must be done by the Parliament of the Dominion. It may be suggested that under these provisions the Local Legislature might still authorize the execution of the work. I cannot conceive that that should be seriously suggested, because the arguments against it appear to be overwhelming. I will state them with the brevity which, under the circumstances, is proper. First of all there is no concurrent jurisdiction in this department under the British North America Act. It is quite clear that with whomsoever the jurisdiction is, it is exclusive at the time. The Province has jurisdiction up to a point, *ex hypothesi*—because the railway is one within the limits of the Province, and, on the assumptions on which I opened the case, omitting the general arguments to which I refer, the railway is within the exclusive legislative jurisdiction of the Province. The power of the Dominion Parliament to act arises only upon its performing, either at the same time or preliminarily, another act, namely, declaring that that particular work is within the legislative jurisdiction of the Parliament. In the case of the Grand Junction vs. Peterborough, which ran the gauntlet of all the courts, that proposition was stated, and I do not think it can be denied that unless the Parliament of Canada chooses to make the declaration which shall give it authority to act, its action is as null with reference to anything which only by virtue of that declaration shall come within its jurisdiction as would be the action of a Province, after that declaration had been made. Therefore up to the moment of the declaration the Province has exclusive jurisdiction; from the moment of the declaration the Dominion has exclusive authority, and I may say generally, with reference to our Constitution, that

the principle of concurrent jurisdiction is not the principle of the Constitution. It is true there are one or two enumerated cases in which concurrent powers are given, but the exceptions, as well as the general language which gives the power to the Dominion and to the Legislatures, all go to prove the general rule. Then, if it be true that the jurisdiction is exclusive with the body with whom for the time it rests, that is a conclusive argument against a Provincial Legislature, after a declaration, having this jurisdiction to charter or to authorize the execution of the work, for, *pro tanto*, that would be a concurrent jurisdiction. Certainly the Parliament of Canada, after having made the declaration, would have jurisdiction to authorize the construction of the work ; and under the legislation of the Local Legislature there would be another authorization, and so you would find, *pro tanto*, a concurrent jurisdiction, contrary to the spirit and the letter of the Act. Then it would be ridiculous, no less that the Local Legislature should have power to authorize a work or to create a corporation which it did not control, which it could not control, which *eo instanti* that it brought into existence, passed beyond its domain altogether—passed a law which it could neither repeal nor amend, created a power which it could not modify, increase or diminish. That is a proposition which, I think, would require the very strongest argument to show that it existed under any reasonable constitution. Then the argument *ab inconvenienti* is of the utmost force, because it is quite clear, on the hypothesis that there would be a power to charter or authorize the construction, that in the interval between two sessions of the Parliament of Canada work might be done in a way, obligations might be entered into after a fashion, which would be entirely opposed to the views that Parliament might entertain as to the method in which the work should be done and as to the obligations which should be entered into for it. It is true that at the next session of the Parliament of Canada it would have the power to repeal, or modify the Act, but in the meantime engagements conclusive and final in their character, commitments of the gravest description, might have been made. Then lastly, such a construction is opposed to the specific language of the enactments by which this declaration was made, as I shall endeavor to show when I

reach that language. Therefore my contention is that with reference to such matters as remained in the character of projects, in respect to which there has been no legislative action on the part of a Provincial legislature before the Dominion Parliament has made its declaration, *eo instanti* that the declaration has been made such projects, projects of that character and embraced in that definition, pass out of the domain of the Provincial legislature altogether and become and remain exclusively, so long as that declaration is on the Statute book, within the power of the Dominion Parliament. On the other hand, suppose, instead of a clear sheet, that action has been taken—suppose that instead of nothing having been done legislatively, something has been done legislatively : suppose that a Provincial Legislature has acted ; suppose it has incorporated a company, or granted authority to an individual, or itself taken steps to construct a work, what happens under those circumstances upon the making of the declaration ? Why, by the making of the declaration the work becomes from that moment a Dominion work. The authority which has been given, to the extent to which it was not inconsistent with the laws of Parliament, remains a valid authority, but it remains an authority which the Local Legislature cannot any more touch than if it had been originally enacted by the Parliament above them. It remains an authority which is to be diminished, repealed or amended by the Dominion Legislature, which Legislature has exclusive control of enterprises as well as of projected works. It is then as if that Act was to be originally a Dominion Act, and by the Dominion Parliament alone is repealable or amendable.

These are the views which I venture to submit to your lordships as the true general views to be taken with reference to this constitutional power of the Parliament of Canada and the effect of its acting under that power. Now there was, at a comparatively early period after confederation, the exercise of the powers which were confided to the two sets of legislatures, the Provincial and the Central Legislatures. The making of railways led to the practical consideration of what should be done in the event of a Dominion and a Provincial railway touching or crossing, and action was taken by both the legislative authorities. The Provinces provided, with reference to their roads, regulations under which a

Minister or a political authority could control or regulate in the public interest the mode of crossing, and the Parliament at Ottawa, recognizing the power of the local Legislature to incorporate railway companies within the Provinces, and to incorporate them for objects which might involve the crossing of Dominion railways, yet asserted, and the assertion has been justified by several decisions, its authority also to regulate and control the method of crossing, as far as the interests of which it was the guardian were concerned, and in 1877, by the Act 40, Vic., c. 45, the provisions as to crossings, which had been placed upon the Dominion Statute book by the Railway Act of 1868, were extended to the cases of Provincial railways crossing lines which were under the legislative jurisdiction of the Parliament of Canada.

TASCHEREAU, J.—Is this one of those printed in the case?

MR. BLAKE—No. By this Act of 1877, the occasion having arisen in the meantime, the provisions as to crossing were extended to the cases of provincial railways crossing Dominion lines, and thus the Parliament of Canada assumed a limited power, not interfering with the Provincial Railways; otherwise a limited power, a power as necessarily incidental to its power to charter Dominion railways, of controlling crossings which otherwise might cut up and destroy the Dominion railways. Now it is that legislative action which has been from time to time carried forward and which is to be found in Section 177 of the Railway Act of 1888 under which the present application to the Railway Committee is being made. I was just stating to your lordships, that historically the foundation of that legislation is in the Act of 1877 and it has been carried on ever since. From 1877 there has thus been a sort of double jurisdiction, the Provinces and the Dominion each claiming the right to have a say in the cases in which Provincial railways cross and are crossed by Dominion railways. It has been suggested, indeed, that the existence of this clause, 177, has application to the construction of the clauses 306 to 308, under which we contend that the local legislation in question is void. The suggestion derives any possible weight from the hypothesis that without such a construction as is argued, the clause 177 would have nothing to operate upon; but I at once remove that hypothesis by pointing out to your lordships that the clauses upon which we

rely as being a declaration of the Parliament of Canada making this particular enterprise a Dominion enterprise, do by no means have so extensive an operation as this argument would involve: for those clauses 306 to 308, whether in their original form or in the consolidation of 1886, or in the Act of 1888, give the character of a Dominion work by the declaration of general advantage, not to all railways which cross all Dominion railways, not to all railways which join all Dominion railways, but only to all railways which cross or join certain named Dominion lines, ten in number, the Grand Trunk Railway, the Canadian Pacific Railway, &c. Now there are many other Dominion railways incorporated, and many constructed, and several of these themselves do cross or join the named Dominion railways, but the Act of 1883 which is re-enacted at section 306, does not, any more than section 306, deal with those railways at all.

GWYNNE, J.—Section 306 in the present Statute?

MR. BLAKE.—Yes, my lord, and an example may be found close to our own doors, in all probability. Without admitting that it is the case, for the purposes of argument, I will assume that there is no such connection between the Manitoba Southwestern Colonization Railway and the Canadian Pacific Railway, by virtue of the lease of that line to the Canadian Pacific Railway, as would make it a part of the Canadian Pacific Railway in the sense in which that term is mentioned in the Act, but it is a Dominion railway, it was incorporated by the Dominion Parliament. Now one of the objects which the Manitoba Commissioner of Railways has in hand is to cross by his branch the Manitoba Southwestern Colonization Railway, as well as the Canadian Pacific Railway itself; but unless I could establish that the Manitoba Southwestern Colonization Railway was the Canadian Pacific Railway, I would be unable to argue that that object and purpose rendered the Act of the Manitoba Legislature void, because I admit that a Provincial Legislature has still the right to incorporate a railway which shall cross [illegible]ion line, provided the Dominion railway is not one of the t[illegible]ays specifically mentioned in the Dominion Act, and I give in this very case a proof that the Act of 1877, to which I refer, and which now exists in section 177, properly preserves its existence, has its proper vitality and usefulness, and

is entirely consistent with the argument addressed to your lordships with reference to the crossing of the Canadian Pacific Railway or any other of the ten named railways. Then, having stated so far the general principles which I conceive to be applicable to the case in hand, I desire to endeavor to apply them to the legislation which is before your lordships. Our argument is that the power of Parliament, conferred by the joint operation of sections 91 and 92 of the British North America Act, has been exercised in relation to such an enterprise as that in respect of which the Railway Commissioner makes his application to the Railway Committee—that it has been declared that that is a work for the general advantage of Canada, and that, by consequence, that work has passed, and passed long ago, out of the domain of Provincial, and into the domain of Dominion legislative authority; and I am called upon to show when and how these results occur. They occur in 1883 by the Act of that session, C. 24 being an Act to amend the Consolidated Railway Act of 1879. The 6th section of that Act reads thus :—

"Whereas it is, in and by the British North America Act, 1867, among other things in effect enacted that the exclusive legislative authority of the Parliament of Canada extends to such local works and undertakings as, although wholly situate within a Province, are, before or after their execution, declared by the Parliament of Canada, to be for the general advantage of Canada, or for the advantage of two or more Provinces; and whereas not only the main lines of the Intercolonial Railway, the Grand Trunk Railway, the North Shore Railway, the Northern Railway, the Hamilton North Western Railway, the Canada Southern Railway, the Great Western Railway, the Credit Valley Railway, the Ontario and Quebec Railway, and the Canadian Pacific Railway, but also all branch lines or railways connecting with or crossing them or any of them, are works and each of them is a work for the general advantage of Canada; and whereas for the better and more uniform government of all such works, and for the greater safety, convenience and advantage of the public it is desirable that Parliament should so declare; therefore it is hereby declared that the said lines of railway are works for the general advantage of Canada and each and every branch of railway now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada."

Now, your Lordships will observe that there is here a recital in the first place of the power of Parliament, and declared intention

to excrcise that power, a reason g en after that declaration, amongst other reasons, why in the o inion of Parliament it was desirable to exercise it, and afterwards an execution of it. The preamble declares not merely that the railways named, but also all branch lines or railways connecting with or crossing them, are works for the general advantage of Canada. Then it proceeds to declare, as a preamble still, that "for the better and more uniform government of such works,"—that is, works for the general advantage of Canada—"and for the greater safety, convenience and advantage of the public, it is desirable that Parliament sho :ld so declare," and then it proceeds to make the declaration. The second sub-section of that section uses language which, I apprehend, in large measure would have been construed judicially by your Lordships to have been the effect of the section itself, but which is still not at all unimportant with reference to the construction of the section :—

"Nothing in this section contained shall be construed in any way to affect, or render inoperative the provisions of any act of a Local Legislature heretofore passed, authorizing the construction and running of any such railway or branch line or any act amending the same, but hereafter the same shall be subject to the legislative authority of the Parliament of Canada."

Thus your Lordships see that the Legislature was apprehensive that in the absence of a specific provision to the contrary, the language of the first sub-section of the 6th section would have been so wide and potent as actually to annihilate existing charters of Local Legislatures, as to sweep them out of the Statute book and put them to one side altogether.

GWYNNE, J.—And voided their contracts?

MR. BLAKE.—I do not say it would have done it, but I say simply that there was that apprehension, and it was desired to avoid that. I do not say it was done at all, because very prudently and properly, the possibility of such a thing is averted by this, but the circumstance that we find this here is a very strong proof of the sweeping character of the definition of railways for the general advantage of Canada as construed by the Legislature at the time it made the declaration—"nothing in this section contained shall be construed in any way to affect or render in-

operative the provisions of any act of a Local Legislature heretofore passed."

All we have to ask your Lordships is to determine that after such a declaration has been made—not before it, but after such a declaration—the Legislature of the Province has no longer any authority to pass valid laws for the construction of a railway coming within the definition. You find the Legislature saying that nothing in this section shall be construed to render inoperative acts which were passed before it. We do not ask your Lordships to do so, but we ask you to say that this legislation has the effect of rendering inoperative such legislation passed subsequently to the declaration itself. Then the third sub-section is not immaterial either :—

"Railway companies by this Act brought within the Legislative authority of Parliament shall have one year from the passing hereof, within which to comply with the provisions of sub-section 5, section 15 of the Consolidated Railway Act, 1879."

So that the Legislature contemplated, rightly or wrongly—there have been observations made by one of the judges at any rate that it was under a misconception—that the railways which were brought by that Act within the sphere of the Dominion authority, were bound to comply with the provisions of section 15 of the Consolidated Railway Act. I think that clause has reference to the increased height over the highest cars used—between the top of the car and the bottom of the bridge or tunnel—for the protection of brakesmen and others; the Act says they shall have a year to comply with that, but except for that they would have had to comply with it at once—they would have been in all respects immediately brought within the law. I say that in 1883, Parliament decided to use its declaratory power, and it did so by a general definition of that characteristic of the work which, in its opinion, made it a work for the general advantage of Canada. A certain characteristic is given to us as the characteristic which, in the opinion of the Parliament of Canada, makes any work in which that characteristic is to be found a work for the general advantage. What is that characteristic? It is that the work shall be one which shall connect with or cross any one of the ten named great railways. That is the characteristic, and the question which we

have to consider, if it was one of fact, indisputably would be that —does the railway cross the Canadian Pacific Railway or one of the ten named railways? Of course it is settled by the case, because the question presented to your Lordships is—does the railway in question cross the Canadian Pacific Railway? If so it falls within the characteristic: if so it is a branch line or railway crossing or connecting with one of the ten named lines of railway, and being so, it has been declared so long ago as 1883, to be a work for the general advantage of Canada; being so declared, ever since that time it has been within the exclusive domain of the legislative authority of Canada. Nor was it confined to branches. That has been the subject of judicial authority and is perfectly clear; it is not branch lines of railways, it is branch lines or railways, because it embraces not merely those that touch, but those that cross. Of course it is a characteristic of a branch to touch and not to cross, and I shall have occasion to point out, when I refer to later sections, the language is used with such changes as render impossible any such narrow interpretation. Nor is it confined to executed works, because it says "all works now or hereafter," and also because of the exception which is contained in the 2nd sub-section, that exception which I have already read to your Lordships and which speaks of acts authorizing the construction not being inoperative. It was not necessary, therefore, that the work should be executed, but if authorized by the Provincial Legislature, the charter remained, while the work had to be prosecuted as a work under Dominion authority. The effect then is obvious that such work became at once the subject of exclusive legislative authority, and that is the design, that is the recital, these are the reasons. It may be said that this is rather a wholesale operation, that the plan which the Canadian Legislature used is not within the spirit of the British North America Act, that it is difficult to conceive of satisfactory reasons for such a wholesale assumption of what, but for that assumption, were and would have continued to be local works, that any grounds which can be suggested are inadequate grounds, in the opinion of counsel, that the results are unexpected and also unfortunate. It may be said that uniformity and centralization are dearly purchased at the expense of the loss of

local initiation and independence, and that very small and very trifling roads which could hardly have been within the conscious cognizance of the promoters of the Railway Act would be, under this law, and under this interpretation, and under this action of the law, swept into the Dominion net. On the other hand, it may be contended that the intimate physical relations of two railways which join, and still more which cross one another, and the probable intimate commercial relations of those two railways with reference to traffic, demand, for the general good, unity of control and give Federal importance to each. But all those contentions are to be put aside as wholly irrelevant. They are not for this tribunal, august through it be ; they are for that tribunal which is authorized to make the declaration and amend or repeal the declaration as it deems fit.

Having passed that law in the year 1883, in the year 1886 in the Revised Railway Act of that year, it is re-enacted in substance, and these are the sections which were in force at the period of the attempt of the Legislature of Manitoba to deal with this work.

TASCHEREAU, J.—The Revised Statutes?

MR. BLAKE–Yes, the Revised Statutes, at section 121. It is the last section of the whole Act. It just precedes the schedule. The Act which was in force at the time when this action of the Legislature took place, was the Act of 1886 : although I have asked your lordship's attention to the Act of 1888, still this is the more important Act of the two, and this is the law as it stood at the time when the Legislature of Manitoba acted. Now that Statute, as I say, in its last section, the 121st, consolidates and re-enacts the legislation of 1883. With perhaps laudable prudence, the preamble is revised out of existence, and your lordships find nothing more than the declaration, but the declaration, as I have read it at all events, in the first part of the sub-section is just the same as the declaration of the earlier Act.

" The Intercolonial Railway, &c., are hereby declared to be works for the general advantage of Canada, and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railways,or any of them, is a work for the general advantage of Canada :

" 2. Every such railway and branch lines shall hereafter be subject to

the legislative authority of the Parliament of Canada; but the provisions of any Act of the Legislature of any Province of Canada passed prior to the 25th day of May, 1883, relating to any such railway or branch line, and in force at that date, shall remain in force so far as they are consistent with any Act of the Parliament of Canada passed after that date."

So your lordships find, in the first place, that the words "every such railway and branch line shall hereafter be subject to the legislative authority of the Parliament of Canada; but the provisions of any act of the Legislature of any province of Canada passed prior to the 25th day of May, relating to any such railway or branch lines, and in force at that date, shall remain in force," —after, and not before it. Then you find the intent of the Legislature as to the time at which the line should be drawn between the exercise of Provincial and of Federal authority sharply marked again, because you find the date of the passage of the Act of 1883 now described as the date up to which provincial legislation should be valid, and after which of course provincial legislation should be void. The provisions in the Act of the Legislature, passed prior to the 25th of May, 1883, relative to any such railway or branch line, and in force at that date, shall remain in force. If a statute was passed before that day and was on that day in force, it is not touched by this law so far as to be made invalid: it remains in force, so far as is consistent with any act of the Parliament of Canada passed after that date. It therefore remains as a substratum upon which the Parliament of Canada may build, but as a substratum which the Parliament of Canada may also destroy. That definition of time carries with it the inevitable inference that the Legislature once again reiterated its intention that after that date provincial legislation shall not have the effect which it declares up to that date it has. It shall have no effect after that. It had a modified effect before; it remained in force so far as it was not inconsistent with any act that the Ottawa Parliament might passs; after that time it had no force whatever. This is the law as it stood at the date of the provincial legislation which is before your lordships. That Act was passed on the 30th April, 1888, and it authorizes the Railway Commissioner of Manitoba to construct named railways, or described railways, and also, I think, to construct any others—

but at any rate it is very wide in its provisions. Now it is quite unnecessary to enter into a discussion of the characteristic of the particular railway which forms the subject of the application, because that is wisely settled for your lordships by the Railway Committee itself, which did not propose, as I understand, to remit, if it could have remitted, to this court any disputed question of fact at all, but states the facts to your lordships and asks you to apply the law with reference to those facts. The facts, as stated, are that a railway known as the Portage Extension of the Red River Valley Railway, from Winnipeg to Portage la Prairie, both places within the Province of Manitoba, is being constructed, and that the Railway Commissioner of Manitoba has made application to the Railway Committee of the Privy Council for approval of the place and mode of crossing. Then the question which is asked your lordships is " whether the Statute of Manitoba, in view of the provisions of the Railway Act, is valid and effectual so as to confer authority on the Railway Commissioner to construct such a railway crossing the Canadian Pacific Railway, the Railway Committee first approving."

You are to assume, for the purposes of the case, that the approval has been given, and if given whether the authority would exist in the Railway Commissioner; so the simple question is whether the Railway Commissioner has authority to construct a railway such as this mentioned, crossing the Canadian Pacific Railway. Now do I not show that that characteristic which, as I have said, is the characteristic given by the Act of 1883, repeated in the Act of 1886, exists with reference to this railway? Is it not a railway crossing one of the main lines of the ten named lines of railway? It is unquestionably. If it be, is it not within the meaning of the declaration which says that any railway or branch line crossing any of these lines is a work for the general advantage of Canada? Was not that declaration made many years before this Act was passed? Was it not repeated by the legislature two years before this Act was passed? Did not the legislature point out in the plainest terms, having authority, that its intent was, disturbing as little as was necessary, consistently with Dominion policy and antecedent legislation, to draw the line there and from that time forth to take away from the Provinces

altogether the power of action with reference to the classes of railways which fell within the characteristic, and if so, can any other answer be given to the question which is before your lordships than this, that the Railway Commissioner has not authority, by virtue of that Statute, to construct such a railway as is described crossing the Canadian Pacific Railway, because any such railway is within the declaration of the Statute of 1883 and the declaration of 1886.

Now some 23 days after the passing of that Act, of Manitoba, was passed the last Statute with reference to which I shall have to trouble your lordships, namely the Dominion Act of 1888. Sections 306 to 308 are those which relate to this matter. Section 306 is a repetition, I think, *totidem verbis*, of the 121st section of the Act of 1886. I do not observe that there is any literal change in that. Section 307 is a repetition *totidem verbis* of the 2nd subsection of that section which provides that thereafter such railways and branch lines shall be subject to the legislative authority of the Parliament of Canada. But then there is section 308 which throws, to my mind, a striking light upon the intentions and object of Parliament and indicates with arrant clearness the construction and operation of the preceding sections. Section 308 is in these words :—

"The Governor General, may at any time and from time to time, by proclamation or proclamations, confirm any one or more of the Acts of the Legislature of any Province of Canada, passed before the passing of this Act, relating to any railway which, by any Act of the Parliament of Canada has been declared to be a work for the general advantage of Canada, and from and after the date of any such proclamation the Act or Acts thereby declared to be confirmed shall be confirmed, ratified and made as valid and effectual as if the same had been duly enacted by the Parliament of Canada. All acts, matters and things which have been or may hereafter be done under any Act which may be so confirmed by proclamation and which might lawfully have been done if such act or acts which shall be so confirmed by proclamation had been within the competence of the respective legislatures by which the same were adopted, shall be ratified and confirmed and made as good and valid as if such Act or Acts had at the several dates at which the same purport respectively to have come into force, been enacted by the Parliament of Canada."

Now your lordships see that up to this time no provisions of

this description had been introduced in connection with the possible difficulties and complications which might arise from these declaratory Acts of the Parliament of Canada. Up to this time the Parliament had thought the possible cases of difficulty adequately provided for by the provisions which affirmed the continued validity, subject to modificationof the Parliament of Canada, of pre-existing Railway Act, and which in effect voided altogether provincial railway acts passed after the date of declaration. But here, although several years had elapsed between 1883 and 1886, no further provision is made. The Legislature, then revising the Railway Act, had of course to alter the language so as to produce the same effect that was produced by the Act of 1883, and so instead of saying hereafter, they said after the 25th May, 1883, to produce the same effect. They just make the alteration to make the new law say what the old law had said. They do not then propose to assign to the Executive a means of validating or confirming legislation passed after the 25th May 1883, it remains void. There is nothing done—there is nothing by which it can be confirmed ; but here and now, dealing for the third time with the subject, dealing with it two years after it had been dealt with in the Revised Statutes, they in the first place re-enact and then they introduce this new provision, and this new provision is obviously referable to this very circumstance which appears more or less upon the Statute book.

TASCHEREAU, J.—The words " passed before the passing of this Act " are in the section.

MR. BLAKE—Certainly, my lord. I say then that these words and this class, unless we are to shut our eyes absolutely to what is plainly before us, are obviously referable to a new complication, to a new situation—to that situation, which, I will not say has culminated, but which has resulted so far in the proceedings now before your lordships. On the Statute book of the same session is to be found evidence that the action which had been up to that time taken with reference to a particular section of the contract of the Canadian Pacific Railway had been reconsidered by Parliament. Your lordships are aware that Parliament had restrained itself by contract with the Canadian

which should run in a certain direction or within a certain distance of the Provincial boundary, and dealing as far as they could with Pacific Railway Company from authorizing any railway enterprises reference to existing Provinces and with recognition of existing provincial rights, they had gone also as far as they could with reference to those territories which were outside the limits of any Province and as to which they had, or assumed they had, absolute and unlimited rights, because they incorporated a provision that as to any such territories a constitutional provision should be inserted in the Acts which gave them provincial rights, continuing the absolute prohibition for the remainder of the period of twenty years. It is notorious that disputes took place as to the effect of this contract, as to the actual and the implied obligations of the Government and of the Parliament of Canada towards the Canadian Pacific Railway Company under it with reference to the Province of Manitoba. It is notorious that for many years that Province had been asserting its right under the Constitution, not interfered with nor capable of being interfered with by any Act or contract of the Parliament of Canada, to charter Provincial railways which should run in the specified direction and enter the prohibited territory of fifteen miles. It is notorious that agitation and discontent had ensued upon the repeated disallowance of those Acts by the Executive of Canada, and that the executive action of the Government of Canada had been ratified and confirmed by the Parliament of Canada. All these disputes culminated last session in an arrangement which is upon the Statute book whereby the clause in question was erased from the contract with the Canadian Pacific Railway Company for certain considerations which the Government, with the assent of Parliament, agreed to give in the shape of a guarantee; and therefore all the obligations of the Parliament of Canada and of the Executive of Canada, whether actually expressed or implied, whether more or less extensive, were entirely blotted out and the Canadian Pacific Railway Company had no longer any special, or specific, or particular right to call for intervention or inaction on the part of the Parliament of Canada by virtue of its contract.

STRONG J.—Or the Executive of Canada?

MR. BLAKE—Yes, either executive or legislative. That is

all blotted out. The Company has no legal and no moral right to come forward and say it is to be considered in any other position than any other individual or corporation on the face of the land with reference to this matter any more. While, then, all difficulties and complications resulting from any expressed or implied contract were thus got rid of, it remained to be considered by prudent men whether the aspirations of the Province of Manitoba could effectively be gratified, consistently with the voluntary action of the Parliament of Canada as appearing upon its Statute book. For at any rate it might be that there were other obstacles to the creation by local authority of such a railway or such railways as the Province of Manitoba desired to create, and was just at that time authorizing. Such obstacles there were, and they are to be found in the Act of 1883, and in the Act of 1886 and they were obviously present to the mind of the Parliament of Canada, when in the thick of these negotiations and when these settlements had been arrived at, that Parliament was engaged in re-enacting those very obstructive provisions. There you find that while, with one hand, the Parliament of Canada was removing, at the instance of the people of Maintoba, the particular obstruction and difficulty by way of a contract or obligation which had up to that time been thought sufficient to thwart the natural and earnest desires of that Province to exercise its constitutional rights, you find that with the other hand Parliament was re-enacting a clause which, as I think I have demonstrated to your lordships, would unless some further action were taken, render such local legislation inoperative and void. Now, different methods obviously appear to avoid that difficulty. The Parliament of Canada might have said " we will reconsider the policy of 1883 and the policy of 1886, which has nothing to do with the Canadian Pacific Railway Company by contract, which deals with the Canadian Pacific Railway just as it deals with the Grand Trunk Railway, the Hamilton and Northwestern and these others, upon considerations of general good and advantage—we will re-consider that policy, we will repeal that Act or we will amend or modify the Act. We will declare it shall continue no longer—that it shall no longer apply to railways chartered by the Province of Manitoba crossing the Canadian Pacific Railway, in

order that we may carry out the desires of the people." Of course the court will see, there would have been obvious difficulties in the way of administering larger local rights to one Province than was given to others."

TASCHEREAU, J.—Why? What was the necessity of saying that the Grand Trunk Railway and the Canadian Pacific Railway should be for the general advantage of Canada?

MR. BLAKE—I do not think there was any necessity with reference to some of these railways—or perhaps with reference to any of them. I am not sufficiently cognizant with the subject to know whether all of them had theretofore been declared Dominion railways, but the intention obviously was to point out these particular railways with reference to which these consequences were to fall, that is all. Of course the Grand Trunk Railway was already a work for the general advantage of Canada, and so was the Canadian Pacific Railway, and perhaps all of them.

TASCHEREAU J.—Without any declaration?

MR. BLAKE.—Yes.

STRONG, J.—I see among them the Canada Southern, a railway which was incorporated by the Province of Ontario.

MR. BLAKE.—Yes my lord, it was declared a work for the general advantage of Canada by specific enactment. The object was to name certain railways with respect to which the crossing or joining them shall make the work, which does so cross or join, a work for the general advantage of Canada.

TASCHEREAU J.—It is one way of doing it: I do not see any objection to it.

MR. BLAKE.—Yes, it is one way of doing it. As I was saying, the Legislature does not always adopt the most direct way. Parliament, in making this arrangement, might have said "now we perceive that we have got to consider, irrespective altogether of the Canadian Pacific Railway's specific interest and rights, which we have got rid of, the effect of existing legislation on the Statute Book with which we can deal as we please and in respect of which no individual or company has the right to affirm that there is any contract." It was very like putting on the Statute Book their motives of policy.

TASCHEREAU, J.—I see the Intercolonial Railway is the first that is mentioned in the section.

MR. BLAKE.—Yes, it was just in order to define clearly what the branches or other lines of railway were that were brought in. They might have said that, but they did not choose to say so. They had the subject brought to their attention necessarily, because you have got clause 308 here and clause 308 is a remedy. My learned friends may say that it is a very imperfect remedy—that it is a remedy not adapted to the occasion.

RITCHIE, C. J.—It legalizes their acts.

STRONG, J.—It was only potential authority to their own, the Dominion Executive.

MR. BLAKE.—I am not disposed to quarrel with their contention that it is a disappointment of the expectations of Manitoba—that it is a very different thing from repealing the Acts of 1883 and 1886.

STRONG, J.—The doubtful constitutional validity of that clause? In a judgment I prepared some time ago I had occasion to note that point.

MR. BLAKE.—I use it only for the purpose for which it is potent. I use it as expounding sections 306 and 308. I say it expounds them because it points out clearly what the Parliament of Canada thought, with this whole question before it, was being done—what it determined was the legal situation and would be the legal result unless something more would be done, and the thing more which it decided to do. It indicates that Parliament was of the opinion that but for some action, the Act in question, which is now before your lordships, would have been in operative if it involved a crossing of the Canadian Pacific Railway and it indicates the proposition that Parliament was determined not, save to a very limited extent, to interfere with that general policy which it had enacted in 1883 and re-enacted in 1886, and which was re-enacted in the two preceding clauses. It does depart from that policy, but the extent to which it departs from it was the re-affirmation in the strongest way of that part of the policy which it did not choose to depart from. Now what does it say? Does it say notwithstanding these clauses a work which crosses the Cana-

dian Pacific Railway or any one of the named railways of the Province of Manitoba shall be good? No. Does it say it shall be bad? Yes. Why? Because it says in order to the validity of such an Act, the Dominion Executive must interfere. It says if an Act of the Legislature of a Province, relating to any railway, is passed at any time before the passing of this Act—the new period—the Governor-General may confirm it. Without such confirmation, therefore, it would be void.

STRONG, J.—That is, the Governor-General may confirm an Act which at its inception was a nullity?

MR. BLAKE.—Yes, my Lord, that is the point; whether that is constitutional or not, the Dominion Parliament intended that such Acts should be confirmed—"may confirm any one or more of the Acts of the Legislature of any Province of Canada passed before the passing of this Act, relating to any railway which by any Act of the Parliament of Canada has been declared to be a work for the general advantage of Canada, and from and after the date of any such proclamation, the Act or Acts thereby declared to be confirmed shall be confirmed, ratified and made as valid and effectual as if the same had been duly enacted by the Parliament of Canada."

GWYNNE, J.—Then they would have to be administered by the Parliament of Canada?

MR. BLAKE.—I think it is quite possible. I think that would involve a very great difficulty in the application of such an Order-in-Council from its general terms.

GWYNNE, J.—An Act may operate as a Dominion Act and leave a work under the administration of the Dominion.

MR. BLAKE.—I suppose so, and that is my contention. "All Acts, matters and things, which have been or may hereafter be done under any Act which may be so confirmed by proclamation and which might lawfully have been done, if such Act or Acts which shall be so confirmed by proclamation, had been within the competence of the respective Legislatures." There again, pointing out that they were beyond the competence.

STRONG, J.—I understand the meaning is that the Dominion Executive may, by proclamation, confirm a Provincial Statute so

as to give it actual vitality and give effect to it as if it had been *intra vires.*

GWYNNE, J.—Or rather make a Provincial Statute a Dominion Act by proclamation.

RITCHIE, C. J.—If I understand it, it does this, it appears to me—it undertakes to make an Act of the Provincial Legislature, which is entirely void without any legislative act at all, be valid law by virtue of a proclamation.

MR. BLAKE.—Yes, my Lord.

RITCHIE, C. J.—If that is not legislating, I do not know what it is.

MR. BLAKE.—It is legislating with a vengeance, I should say, but does not that prove clearly what the meaning of such a law was when such a sweeping root-and-branch operation as this was deemed necessary by the Legislature in order to meet an exigency?

STRONG, J.—The object of course, referring to the 308th section, was to show that the Legislature itself supposed that was the construction, which you are now contending for, of the 307th and preceding sections of the Revised Statutes.

MR. BLAKE.—Yes, my Lord.

GWYNNE, J.—And if the Act had been passed before May, 1883, that would have been sufficient?

MR. BLAKE.—Your Lordship sees that the power has not been exercised: there has been no such proclamation.

GWYNNE, J.—I want to look at the meaning of the Act.

MR. BLAKE.—I confess, myself, not to have entered into the speculative consideration of what the precise effect of the proclamation would be if issued. I thought it was enough now to say that there being no such proclamation issued, the Act has no validity drawn from section 308, but that section 308 demonstrates the intention, and therefore the recognized Parliamentary construction of sections 306 and 307, is that the Act is void save for such vitality, whatever it may be, as may be accorded to it by the use of section 308. My learned friends may say that this is not what Manitoba wants or expected, that what Manitoba wants is to

be restored to the full exercise of its Provincial rights as before the Act of 1883.

RITCHIE, C. J.—It wants to get rid of the declaration.

MR. BLAKE.—If it wants that, it wants it by such an operation as your Lordship has described—by an operation which shall get rid of that declaration, either with reference to that Province itself, on the assumption that some special policy is appropriate and necessary for that Province which is inappropriate for the other Provinces, or by a declaration which restores to all the Provinces the provincial right which that declaration has taken away from all the Provinces. They may say that is what they wanted, but the question is not what they wanted, but what they got, and what they got was simply the power to obtain validation of their Provincial Act by means of this proclamation. The question whether they ought to have more is not for the court. The question whether they ought to have more is not for the Parliament which passed the Acts of 1883, 1886 and 1888, which thought the section 308 was adequate to meet the case, and which will no doubt be called upon to consider whether that conclusion at which they arrived is correct, or whether any further measure of policy is desirable in the present contingency.

I say then that it is clear that the Parliament which passed that clause 308, twenty three days after the Manitoba Act in question had become the law of the land, with the controversy before it, with the settlement before it, having passed measures at a large charge to the public to remedy the difficulty so far as the interests of the Canadian Pacific Railway were concerned—that the Parliament which so did has declared in the clearest way by that, by what it did and by what it abstained from doing, both by the provisions which it did make and by the absence of other provisions, the extent to which it was determined to depart from the Act of 1883 in the interest of the Province of Manitoba, and that extent was, whether too much or too little, to permit the validation by the action of the Dominion Executive of the local Acts which they might pass.

These are the observations which it appears to me to be important to place before your Lordships at the opening of the case. I have not troubled your Lordships, in my part of the argument,

with references to certain Provincial authorities, of Provincial courts, which have construed more or less the Act of 1883. My learned friend who is with me has undertaken, in addition to the other branches of the argument upon which he will enlarge, to furnish your Lordships with comments upon those authorities. Upon the whole I venture to ask your lordships, with a great degree of confidence, to declare that the Parliament of Canada has, years ago, efficiently exercised its declaratory and sovereign power with reference to railway works by the declaration that a work crossing the Canadain Pacific Railway is a work for the general advantage, that by that declaration any such work has been removed from the Provincial and assumed to be within the Dominion cognizance, that this work before your lordships is specifically such a work, and therefore that no other conclusion can be reached than that the Provincial Legislature was utterly incompetent to authorize the construction of such a work. It follows that the answer to the question whether the Act was valid and effectual so as to confer authority on the Railway Commissioner of Manitoba to construct such a railway must be in the negative.

MR. ROBINSON--I rise to speak in support of the argument against the constitutionality of this Act but I have no idea that I can add any argument substantially new to those which have been advanced, by my learned friend, before the court, and I certainly do not imagine for a moment that I can state those arguments with greater force or with equal force, and I propose therefore to confine my remarks to a few observations. In the first place I think this is a case which, although of very great importance, is not one which, after the general considerations affecting it have been once stated to the court, can with advantage be very elaborately argued. It does not divide itself into branches or divisions of any kind and in reality the substance of the argument against this Statute depends on three or four short sections to be found in our Railway Act and in the British North America Act. There are no decisions which can be said to be at all decisions bearing directly, or in point, on this question and there are really no principles to be brought to your lordships' attention which are to be applied to the construction of the British North America Act, with which

your lordships are not already abundantly familar and which have not been stated over and over again in arguments of this description. There is another disadvantage and another reason why I think our argument should not be prolonged now. It is that we are not aware upon what grounds my learned friends on the other side propose to support the constitutionality of this Statute exactly. The arguments by which it may be opposed are, in our view, very plain and very obvious, and they have been stated by my learned friend. How, on the other hand, my learned friends propose to support the constitutionality of this Statute, which I suppose is the only question before your lordships, I have not yet heard. I agree with my learned friend in what he said in his opening remarks, that it is not open to us to discuss here directly, or make a substantial branch of our argument, the question whether the Provinces, under the constitution, were intended to have and have the power to incorporate railways. Your lordships are perfectly well aware that in a case in this court, the Grand Junction Railway *vs.* Peterborough, to be found in eight Supreme Court Reports, pages 118 and 119, his lordship, Justice Gwynne, has pointed out the very doubtful and obscure character of that section, and your lordships are also aware that it has been a question mooted and one upon which differences of opinion have existed as to whether the intention of Parliament was to confer upon the Provinces, power to construct railways; but I do not think that can have any direct bearing upon this argument more than this—that if it be said, as has been said before, not here but in another place, that this Act of 1883 was a usurpation on the plain powers of the Provinces, was practically, as was said in stronger language, an outrage on the Constitution, it is not a usurpation on any plain language of the Constitution—it is practically affecting a right which at the most was a doubtful right and which, if a right which cannot be questioned now, is not open to question because of the long continued course of legislation which has been adopted by the different Provinces and which has been practically affirmed and confirmed by the Dominion Parliament. No one can deny, whatever may be the intention and effect of the British North America Act, that the Provinces have acted on a broad construc-

tion, and the Dominion has so far confirmed that construction as to recognize various railways incorporated by the Provincial legislatures, and so practically to concur in that; and while we all know that no legislature can give to itself jurisdiction which the Constitution has not bestowed upon it, by asserting it and acting on it, we all know equally well that in doubtful matters and in doubtful questions arising under the Constitution, the construction which the different powers acting under the Constitution have to put upon it, is a matter which is always fair to bring before the court and one to which the court should give great weight. Therefore we cannot use in this case, nor do we desire to use, any other view than simply to show that the right which is said to be such a very plain one on the part of the different Provinces, is by no means so plain as anyone would be led to imagine by the constant course of practice. I do no think either that the question whether this particular road is the Canadian Pacific Railway or not is a question which is open for discussion here. As I understand the statement of the case which the Railway Committee of the Privy Council has submitted to this court, and on which they ask advice, it is practically assumed by the questions before your lordships to be the Canadian Pacific Railway. It would be a question of fact afterwards if any doubt existed about it—the Railway Committee having been advised by your lordships whether the Provinces had power to incorporate a railway to cross the Canadian Pacific Railway, whether this was such a railway or not—in other words, whether it did cross the Canadian Pacific Railway proper or not. But the Railway Committee have assumed that in this case. That seems to be very plain from their words. Now, if the constitutionality of this Act is to be asserted, it is difficult for us to conjecture on what grounds my learned friends will rest their arguments in favor of it. Certainly the words of the Statute are perfectly plain. Certainly it is equally plain that we are not here now in a position to question either the policy or the expediency of that Statute. There is, however, one principle which I may bring to your lordships attention and which I happen to have found in an American case perhaps more clearly and plainly asserted than I have seen it elsewhere, and that is the principle on which our Constitution is to be construed as

opposed to the construction of the Constitution of the United States. Your lordships are all of course, familiar with the very elementary difference between that Constitution and ours—that here the reserve powers are with the Dominion Parliament; that in the United States they are with the different States. The result of that arrangement of their Constitution has been touched upon in the case of Weister & Hade, which I find reported in 52 Pennsylvania State Reports, page 477. The learned judge giving the judgment in this case, cites from an earlier Pennsylvania case. Quoting from the judgment of Chief Justice Black, Commonwealth and 5 Harrison, he says :—

"It is to be remembered that the rule of interpretation for the Stat- Constitution differs totally from that which is applicable to the Constie tution of the United States. The latter must be as strict construction; the former a liberal one. Congress can pass no laws but those which the Constitution authorizes, either expressly or clear implication, while the Assembly has jurisdiction *of all subjects* on which its legislation is not prohibited. The powers not granted to the Union are witheld, but the state retains every attribute of sovereignity which is not taken away."

That principle, of course, applies—that is to say, the strict construction in this case is to be given to the Provincial powers, the liberal construction is to be given to the Dominion powers; because here, differing from the Constitution there, the reserve powers rest with the Dominion. In other words, the Dominion has all powers not expressly given to the provinces, differing in that essential particular from the American Constitution, so that if there should be any necessity to call for a liberal construction of the power here given to the Dominion Parliament, we find it in this principle, applying that principle to the construction of our own Constitution. We find in that same case, as strongly and I think as clearly put as it can be put, the principle upon which this Court has always acted, and the principle on which, I understand, all courts in this country and the United States have acted when they are asked to consider, not the strict legality or constitutionality in the sense of being permitted by the Constitution, but when they are asked to consider its justice, its expediency or its policy. I find in speaking of a question of that sort, it is said in the same case :—

"2nd,—If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice; and the determination of the Legislature is conclusive."

In another place it is said that

"It is not for the judiciary or executive department to inquire whether the Legislature has violated the genius of the Government, or the general principles of liberty and the rights of man, or whether acts are wise and expedient or not, but only whether it has transcended the limits prescribed for it by the Constitution. By these alone is the power of that body bounded; that is the touchstone by which all its acts are to be tested; there is no other. It would be a violation of first principles, as well as their oaths of office, for the courts to enact any other standard."

I venture to call the attention of this Court to those few sentences, not because there is anything in them that is new, but because they state, perhaps more clearly and tersely than is usual, what has often been said in this Court, not by way of argument, but by way of citation for the assistance and aid of the court. We have heard it often said that those who frame constitutions—I myself have heard it stated in this Court—that those who are concerned in making acts of Parliament are perhaps the best judges of what is meant by them; but I happened to find the other day, looking for a totally different subject, a remark by one of the Lord Justices which I bring to your lordship's attention, not because it has a direct bearing on this case, but because I have heard that view urged with regard to doubtful questions in the Statutes, and I have heard it said that those by whom Acts of Parliament are framed are probably the best able to judge. In 5 Chancery Appeals, page 737, I find this remark made by the learned Judge before whom the question of the contruction of a document which he himself had framed was brought:—

"I have taken some considerable time to consider this question. I have felt that I might be misled by knowing what I, as the draftsman in my early professional life of more than one of these deeds, knew to be the intention of the draftsman—at least my intention as draftsman; but, on the fullest consideration, I cannot bring myself in the result to entertain any doubt that that intention is sufficiently and clearly expressed and that it is in accordance with the truth and honesty of the case."

I merely refer to that for the reason that we have in the

debates of 1883 a very full discussion of the object and purposes, the advantages and disadvantages, the reasons for the passing and the objections to passing this Statute. We are not allowed to refer to them for the very same reason that the learned judge gives there.

TASCHEREAU, J.—Lord Campbell, speaking on that very point of Lord Nottingham, said that he was the least qualified to construe it, being the author of an Act and considering more what he privately intended than the meaning which he had expressed.

MR. ROBINSON—I made a note of that, because it is a later case.

OTTAWA, Thursday, Nov. 22nd, 1888.

MR. ROBINSON resumed his argument. He said:—I said yesterday that there were no cases that I could say were directly in point as decisions upon the question involved here, but there is this fact, there are a number of cases in our own courts where this question concerning the Statute, the validity of which is now to be disputed, as we understand, by my learned friends on the other side, has been fought in various courts and there has never been even a question of its constitutionality. If its sweeping effect is referred to by my learned friends as not being intended, we find a very distinct declaration by one of the learned judges in his decision, attributing to it that effect and saying that that was very clearly the intention of the Statute. I refer to the case of Clegg *vs.* the Grand Trunk Railway Company, 10 Ont., 708. The late Sir Matthew Cameron, giving judgment, said in repudiating the narrow construction which had been attempted to be put on this section 306 by confining its application to branch railways :—

"It is true this liberal construction will put under Dominion control the whole, or nearly the whole, of the railway system of this Province. But it appears that was the intention of the enactment to be gathered directly from the language used. If this be so, the Midland Railway is removed from the jurisdiction of the Ontario Legislature and from the operations of past or prospective legislation in relation thereto by the Legislature."

It is therefore clear that it was the intention, according to that learned judge, that the Statutes should have that sweeping

effect—that that was the intention derived from its language. There are other cases in our own courts where the effect of that section has been considered, but I do not think they have any direct bearing on this case for this reason—they are all cases (his lordship Justice Patterson may remember some of them) in which the railways had been constructed, or rather incorporated prior to 1883, and then the question was to what extent and in what way did this legislation of 1883 affect them. They of course have no direct bearing on a case where the question is what is the effect of legislation anterior to the Act of 1883, just as I have said in none of them do you find that legislation on the part of the Dominion Parliament was questioned. Those are recent cases in our courts —Darling and the Midland Railway Company, 11 Practice Reports, 32; Barbeau and the St. Catherines and Niagara Railway Company, 15 Ontario Reports 583, and in the same volume another report on the same case on a subsequent application, page 586; Bowen and the Canada Southern Railway Company, 14 Appeal Reports, 1. There is also the case of Monkhouse and the Grand Trunk Railway, 8 Appeal Reports Ontario, also to be found in 3 Cartwright, 809; the Credit Valley Railroad against the Great Western Railway 25 Grant, 507, and the case of Dow and Black, 1 Pugsley, with which your lordships are familiar, also to be found in 1 Cartwright, and in the law reports, appeal cases, 272. It is also to be remarked that the Dominion Legislature in one case at least has legislated directly upon the construction which we now put upon the Statute. I do not mean to say that I attribute very great weight to that. We all know that no legislature can give to itself jurisdiction by its own legislation : that is to say, where there is another authority from which its jurisdiction is derived, and where the courts have power to decide upon its jurisdiction, it cannot give itself jurisdiction by any Statute that it may pass. It is said in the case of Parsons *vs.* the Citizens' Insurance Company, in giving judgement, referring to an Act of the Dominion Parliament which was passed upon an assumption of the construction which their lordships there thought proper to put upon the Statute in question—

"The declarations of the Dominion Parliament are not of course conclusive on the construction of the British North America Act, but when the proper construction of the language is used in the Act to define the

distribution of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered."

I do not go further than that, because this legislation is recent. It cannot be said that there has been a long constant course of legislation, and any other legislation of the Provinces perhaps tending in a different direction, but it goes this far at all events, that the Dominion Parliament had in their view the intention of the Statute when they passed it and acted upon the construction which we say its words plainly intimate. In the Statute of last session, chap. 63, 51 Vic., it is said:—

"Whereas the construction and operation of a railway from a point in or near Montreal is desirable, and whereas the said railway, if constructed, will cross the Grand Trunk Railway and the Canadian Pacific Railway, and will therefore under the provisions of section 121 of the Railway Act, be a work for the general advantage of Canada; and whereas a petition has been presented praying for the incorporation of a Company for that purpose, and it is expedient to grant in part the prayer of the said petition: therefore Her Majesty, by and with advice and consent of the Senate and House of Commons, enacts as follows:"

Then the company is incorporated. Your lordships will see there is a direct act of the Dominion Parliament incorporating a company to build a railway which will cross those roads, and this is incorporating the company because they assume that under their legislation it appertains to them properly to incorporate it. There is a case also of the Queen vs. Mayor, which may be worth refering to, a case in Quebec, reported in 7 Quebec Law Reports, 183, and to be found in 2nd vol, of Cartwright, page 257, in which the question came up as to the power of the Dominion Parliament to incorporate a company, namely a telephone company, which on its face appeared to be a local company.

TASCHEREAU, J.—A criminal case?

MR. ROBINSON—Yes, a criminal case. That Act, on its face, was intended only to operate within the Province, and the courts said that Act is unconstitutional: it would have been quite right if they had prefaced it by saying that it was a work for the general advantage of Canada; they said *prima facie* the Dominion had no power to incorporate the company, because it was a company which was intended only to operate within the Province of Quebec; but if

they had prefaced it by a declaration that it was a work for the general advantage of Canada, they had the power. It does seem absurd that there should be that sort of concurrent legislation, but the Dominion Parliament has the power to incorporate a company to construct a work which it declares is one for the general advantage of the Dominion, while on the other side the Province may incorporate such a company, it is said, although the Dominion may have declared it to be a work for the general advantage. I do not myself apprehend any tangible distinction making a difference in legislative jurisdiction on which that can possibly rest. We have a new work, lately received—I believe it is in your Lordships' library, although it is not here at this moment—in which I have found two or three chapters—a book on the construction of Statutes by Mr. Endlich. It is an American work founded on Maxwell, with an introduction of several chapters on the construction of Statutes in the United States, which cannot arise here. For instance there is one chapter devoted to the difference in the rules of construction. At page 710, there is a chapter upon the distinction between the rules applicable to the construction of Constitutions and of Acts of Parliament, and at section 527, there is a discussion as to the effect upon the presumption or rules to be applied to the constitutionality of Statutes; upon the use of contemporary and legislative construction, and various authorities in the United States are cited there. If your Lordships refer to those two chapters you will find a good deal of useful discussion. Section 528 points out that it is only in cases of doubt where contemporaneous construction placed upon it by the Legislature is of effect, and they say that legislation is of greater effect if it takes place in the time of the framing of the Act. I do not know that I have more to add, except one or two remarks upon the general subject involved here. It seems to have been thought, so far as one could judge from the discussion which has taken place on this subject outside, that this is really a question raised by the Canadian Pacific Railway Company for this particular occasion, and with no more general purpose or object; but that is an entire mistake. This Railway Company and the Grand Trunk Railway Company also regard it as of the greatest possible importance to the Province that other

railways connecting with or crossing them should be under the same general law and general government in all respects as they are themselves. They think that it will be of the greatest possible injury and detriment to them ; that it will be impossible for them, in fact, to work our railway system, if a line of the importance of the Grand Trunk Railway, or the Canadian Pacific Railway, running through all the Provinces, the prosperity of which is bound up to a large extent with that of the Dominion, is to be subject to different and varying legislation of the different Provinces through which it runs. That is to say, they run through one Province where they are crossed by or connected with half a dozen railways which are all subject to the railway legislation of that Province, and created by that Province alone ; they then pass into the next Province and find a different code of railway law and different principles applicable. That is very well pointed out in an article the other day in the *Canada Law Times*, one of our leading legal publications—in the number for November, 1888, page 269—in which is pointed out the fact, that it is almost essential that there should be some one uniform rule prescribed by the same tribunal or the same authority for the management and government of railways which are physically connected with each other or working together in any way. For instance, they point out that the Provincial legislation of Ontario requires a railway train to stop three minutes in crossing another railway ; the Dominion legislation requires the train to stop one minute. Now, how is that to be governed ? That is merely an illustration of innumerable instances which may occur in the same way : that is to say, a Provincial road crosses a Dominion road, the Province says your trains must stop three minutes, the Dominion says your trains must stop one minute. And in other ways instances may arise in various points connected with the management of railways. Now, it is said that it is unreasonable to declare that these various roads are all roads for the general advantage of the Dominion, but what is the reason why one road running from one Province into another, or running from one end of the Dominion to the other is for the general advantage of Canada ? Is it not that it affords communication from one portion of the Dominion to another ? Take Montreal and Vancouver, which are the two terminal points of the Canadian

Pacific Railway : the Canadian Pacific Railway is for one purpose a road for the general advantage of the Dominion, because it conveys passengers from Vancouver to Montreal. Every road built by a Province or by any other authority, which brings passengers from any point in British Columbia, say fifty miles from Vancouver, to the Canadian Pacific Railway, has precisely the same effect—that is to say, it is a feeder of this road which is for the general advantage of Canada, and is it unreasonable in the Dominion Parliament to say that these are all equally roads for the general advantage of the country? If for one reason the Canadian Pacific Railway is for the general advantage of Canada, because it brings passengers from Vancouver to Montreal, a road connecting with it, which brings passengers from different points of the Province to the same distant points has also the same character—it has the same effect on the general trade of the Dominion, and is also for the general advantage of Canada. It is reasonable and right, therefore, that all these roads feeding the main lines, as they do, or possibly competing with the Dominion roads shall be all subject to the same centeral authority. As to whether it is more or less wise to have these roads under Federal or Provincial control, that is a matter of policy with which we have nothing to do. We shall always find differences of opinion in respect to the jurisdiction of the Dominion and of the Provinces. We find in every Province, a step lower, persons disposed to enlarge the jurisdiction of the municipal councils. They say the municipal councils are better judges in many local matters than the Provincial Legislature. It is a mere extension of the principle, and it is a more question of policy or expediency whether you think it advisable to extend that principle or to carry out the principle of centralization and Federal authority.

STRONG, J.—You contend that all railways, although situated wholly within the Province, are for the general advantage of Canada, and therefore taking jurisdiction upon the Dominion Parliament, and administration also, of all railways?

MR. ROBINSON.—I would say to that, just as I have cited the rule of construction from a book authority, if it can do so it is a question of policy.

STRONG, J.—And as to questions of policy there can be no judicial interference?

MR. ROBINSON.—Yes, that is all I can say. I will also say to your lordships this, because I have a reference to that here too, I find in one judgment of the Privy Council, in the Queen and Hodge, the learned judge who delivers the judgment of the Privy Council using these words.

STRONG, J.—I suppose it is just a question of degree. You say that all railways which cross certain Dominion lines shall be works for the advantage of Canada—that a road from point "A" to point "B" shall be for the general advantage—and yet not say so in general terms in the Railway Act?

MR. ROBINSON.—I would go m ch further than that, as my learned friend has gone further in discussing this question, because it is all such works as are declared. Now there is a distinct, absolute and uncontrolled authority to declare such works, as in their judgment, are for the general advantage of the Dominion: your lordships cannot possibly interfere with the validity of the Statute containing that declaration, except by constituting the court, the judges of what works are for the general advantage of the Dominion, instead of leaving it to the Legislature. They have declared it; there is no limit to their power to declare. It is not such works as they have reason to declare, not even such works as they in their judgment declare, but such works as they choose to declare.

TASCHEREAU, J.—It seems to me that a condition precedent is that there is a work.

MR. ROBINSON.—That is a different question altogether; I was coming to that. But passing that by for the present, that there is a work, if there is something for their declaration to apply to, their declaration is sufficient.

PATTERSON, J.—You argue that "such works" means such classes of works?

MR. ROBINSON.—Yes, I am coming to that in a moment. I am now answering Justice Strong as to the extent to which they can declare. I say the court cannot interfere with the extent of the declaration.

STRONG, J.—It is not easy to see how they could do it specifically and yet have the full benefit conferred before execution.

MR. BLAKE.—The occasion to exercise the power might never arise.

MR. ROBINSON.—At all events, in this case of the Queen *vs.* Hodge, the sentence to which I intended to refer your lordships is this—their lordships say there that they are impressed with the justice of the expression of the learned Chief Justice of our court in saying that it is unwise, in the decision and disposal of questions relating to the constitutionality of an act of Parliament, to go further than the actual question before them requires, or attempt to lay down any general rule. What I should say in answer to the question which Mr. Justice Strong asked me is that we are now to confine ourselves to the question whether what they have said here is justified or not.

STRONG, J.—At the same time the solution of the question which is actually before us here may be greatly aided by the answer to the other question. That rule of construction which they seem to have laid down is entirely at variance with that laid down by judges with perhaps wider experience in the interpreting of federal and state constitutions than any others—the judges of the Supreme Court of the United States. We must see what the consequences and effect of the construction are. You cannot take a constitution piecemeal; you must take it as a whole.

MR. ROBINSON.—One sees the advantage of being able to lay down a general rule in advance, and on the other hand the great danger sometimes of doing so. The rule is laid down by the authorities by which we are governed, and they have thought it undesirable, in such cases, to do more than decide the particular question before the court.

STRONG, J.—If they would not be able to lay down a general rule applicable to all railways, upon what construction of the words of sub-section 3 would such a restrictive interpretation be founded?

MR. ROBINSON.—I cannot imagine any possible one.

STRONG, J.—It is left to the discretion of Parliament.

MR. ROBINSON.—There is nothing inconsistent with the spirit and genius of our Constitution in this respect. Both of these Legislatures are our own Legislatures. The people are represented in both. Those who framed this Constitution and asked for it are representatives from the provinces. Is there anything unreasonable in their saying "let the provinces have jurisdiction over certain subjects, unless our general Parliament think it advisable to have jurisdiction." Those by whom the Constitution was asked for have considered that only *prima facie* jurisdiction should be left in the Province and they ask "if our Legislature thinks it in the general interest which we are all here representing and in which we are all concerned, to take a certain jurisdiction, let them do so."

RITCHIE, C. J.—They declare the Canadian Pacific Railway a work for the general advantage of the Dominion and they profess now, by the present legislation, to incorporate lines connecting with and crossing that road. In whom is the legislation vested with reference to that, as regards the running of a train on the Grand Trunk Railway? Can the local Government interfere with the running of a train every time the Canadain Pacific Railway chooses to run trains over that road, or have they a controlling power to prevent them from running? Then again, if they have not that power to control it, has not the Dominion made for them an arrangement by which, as I understand the application made by the Province of Manitoba, they will be allowed to cross it and would they not have a right to incorporate the company subject to that Dominion control over the Canadain Pacific Railway which is reserved to them by the Act?

MR. ROBINSON—We say no, clearly not by the express words of the Act, because if this declaration of ours is valid, the moment we make it all the roads come within the exclusive jurisdiction of the Dominion.

RITCHIE, C. J.—Yes, but the Dominion has said it will give power to certain lines, under certain circumstances, to cross.

MR. ROBINSON.—That would not be roads that they have already declared to be for the general advantage of Canada.

RITCHIE, C. J.—It is under the exclusive jurisdiction and they exercise their jurisdiction also by another Act which says that they may grant privileges and powers to cross roads which are for the general advantage of Canada.

MR. ROBINSON—No, you do not find those words applied to roads which are for the general advantage of Canada or declared to be. The moment you declare a work to be for the general advantage of Canada, that moment all jurisdiction over it by the Province ceases.

RITCHIE, C. J.—I assume that to be the case, but I ask whether the Dominion, having this power over the Canadian Pacific Railway, has not made provision by which it gives permission to cross that road.

MR. ROBINSON—No my lord, my learned friend has pointed out the distinction. That section does not apply to any of these roads which are declared to be for the general advantage of the Dominion.

TASCHEREAU, J.—Section 177.

MR. ROBINSON—Yes my lord, I have read that section; that is the crossing section. There may be a Provincial railway which may cross a Dominion railway, but it cannot be one of those roads which have been declared to be for the general advantage of the Dominion.

RITCHIE, C. J.—You say that this road, which they have now chartered, has been declared to be a work for the general advantage of Canada?

MR. ROBINSON—Yes, distinctly.

MR. MOWAT—You mean by section 306?

MR. ROBINSON—Yes, and therefore it cannot come under section 177.

TASCHEREAU, J.—That is by the Revised Statutes of 1886, because the Act of 1888 was not in force when the Legislature of Manitoba passed this Act.

MR. ROBINSON—There are clear cases to which section 177 would apply, but it is not a work of this kind, because this is a work which is placed under the exclusive jurisdiction of the Dominion.

STRONG, J.—But under section 178 the Governor-General may, by proclamation, take a work which did come under section 177 out of the operation of that section, and therefore may validate a provincial statute which up to that time was wholly void and invalid.

MR. ROBINSON.—That has not been taken advantage of, and there seems to be no use in discussing it. If they had applied for that proclamation, and had desired to avail themselves of it, it would not have been worth our while to discuss it.

TASCHEREAU, J.—It has not been done?

MR. ROBINSON.—No.

STRONG, J.—It has a most important bearing on the other question.

MR. ROBINSON.—I think it has a most important bearing, but my learned friend discussed it at length in that view and showed how it had a bearing on the question here. It is no use discussing it as if it were a section having direct application to the question. There is only one remark which I wish to make on the subject to which Mr. Justice Patterson called attention. My learned friend has pointed out why those words, "before or after their execution," may have been placed there, and I think he has pointed out with great force that in enabling them to take it after execution it is a much stronger term than taking before. But it may also have been put in for another reason: if those words, "before or after their execution," had been omitted, then it would have been "such works as, although wholly situate within the Province, are declared." That would mean such works as are in existence. They would have argued that they were such works as already existed, because otherwise they are not works. They must have thought, and with reason, it is very right and just, if we are going to give the Dominion Parliament power to take such works under their jurisdiction after their execution, that they should have the power before their construction, because the Province would have reason to complain if, after having subsidized and built roads out of their own funds, they were taken without warning out of their control. Therefore, the Imperial Parliament, at the suggestion of the delegates, I suppose, said: "you may declare

those roads before they are constructed and give fair warning to the Provinces not to undertake such works or spend their money on them, because you declare and assume control over such works." That, to my mind, has always been a very forcible and probable reason for the introduction of those words, and that, to my mind, has always been a very strong justification of this legislation. It is what I call fair and reasonable legislation. In other words, the Dominion Parliament declare "in our view all roads connecting with, feeding, or crossing those great lines, are for the general advantage of Canada: we now declare it in advance, and let it be understood that the provinces need not commit themselves to such works; let the provinces join in the incorporation of such works, and we declare beforehand that is the policy of the country, and we make the declaration under the powers given to us under the Constitution, in order that no province may be misled or induced to embark its money or invest in works which we shall at once assume the control of." Because, as my learned friend has pointed out, there can be no object in allowing a province to incorporate a work, which, at the very instant of its completion, passes out of its jurisdiction. It is much more in accordance with our ideas of what is reasonable and just to allow Parliament to say it beforehand. We say that all those works are to be regarded as Dominion works: we tell you that in advance and therefore you cannot be misled. We regard this as a question of the utmost importance, not merely in relation to this case but in relation to the rights of the company in the provinces through which the line passes.

MR. MOWAT.—In presenting what occurs to me in favor of the opposite view to that for which my learned friends have contended, I wish first to offer some few observations on the summary of my learned friend, Mr. Robinson, before I enter upon the general argument. He suggests as a reason why it is most reasonable that the Dominion Parliament should assume jurisdiction over roads not yet built, not yet projected, not yet in contemplation at all, that it would be unjust for the Dominion to assume control of roads already constructed, built perhaps with provincial money. That is the very thing which the Dominion Parliament certainly has done. In regard to that there is no

question at all. It is pefectly clear on the enactment of the Dominion Parliament that they have assumed, if they have the power to assume, all provincial roads actually built and which cross or connect with the roads named. That is a ground which manifestly cannot have weight here. My learned friend makes another suggestion: he tells us that this principle which he contends for, this construction of the various Acts which he wants your Lordships to adopt, is regarded as of great importance by the Canadian Pacific Railway Company, and probably by other railway companies also, for the sake of having all such lines when built under uniform rules. That is not a question here at all. The question of management does not arise at all until the road is built and is a work, and when it becomes so, then there is no question between us, the Dominion has no doubt assumed, if it has power to assume, all works of that character. It is not necessary at all for the purpose which my learned friends say they have in view, that Provinces should be deprived of the right of building roads. Their object is perfectly attained, as stated by my learned friends themselves, when they provided for the government of the roads after their construction. Then my learned friends say that it is extremely reasonable that it should have been left to the Dominion Parliament to determine whether a particular work is for the general advantage of the whole Dominion, but that is not the principle upon which the British North America Act was framed. It has been recognized that there are some things which the Dominion Parliament should be allowed to deal with and others which should be left to the jurisdiction of the Provinces. There are different issues: there are issues on which men vote in elections for the Dominion Parliament which do not affect the Provinces. The matters which come under the jurisdiction of each are wholly distinct in point of fact. Now the question presented for your lordships decision may be regarded as perhaps two fold—whether the Manitoba Act, in reference to the railway in question and authorizing the building of it, is valid, and secondly, whether it is so valid as to confer authority to cross the Canadian Pacific Railway upon receiving the approval of the Railway Committee. That the Province must be taken now to have a right of building railways within its boundaries is admitted except

so far as that right may be interfered with by Dominion legislation, but the effect of my learned friends contention is that the legislation of the Dominion Parliament which has taken place deprives the Provinces of that right—that the effect of that legislation without making provision for the building of those cross-roads and connecting roads, is to deprive the Province of the right of building any such road—that since the 25th May, 1883, the Provinces have no longer that right, having been deprived of it by Dominion legislation. I dispute that view on grounds which I am going on to state to your lordship, and I will mention in the meantime that what has been done is practically forbidding nearly all railways being built by the Provinces. What the legislation purports to do is, according to the construction which my learned friends put on the varions sections (a construction which I entirely dispute and hope to be able to show is not a right construction), to deprive the Provinces of all right to make roads which connect with or cross the lines named. In Ontario there is not an important road which could be built now which would not touch some of the roads which have been taken away from the jurisdiction of the Province and the same remark applies to the Province of Quebec, and in a large measure to Manitoba and British Columbia : as to the Maritime Provinces I am not so familiar with them. This view of the Dominion legislation is unusual. My learned friend, Mr. Blake said that we could not look at what occurred at the time of the passing of the Act.

MR. ROBINSON.—No.

MR. MOWAT.—If we can look at it, it was stated then that it was only intended to apply to works constructed. The suggestion was made that the words employed might mean even to forbid the granting of charters, and the gentleman in charge of it said " no, only works constructed," and nothing to the contrary was said. Whether we can look at that or not, at all events your lordships can know judicially that that construction was acted upon for five years after the legislation of 1883 which comes in question. It was acted upon by the Minister of Justice without any doubt at all. He has made various reports upon Acts passed by the several Provinces providing for the incorporation and building of railways that connected with and crossed the railways

named. Some he has allowed to go into operation and some he has disallowed upon other grounds altogether. There is not a single report on those railways in which he suggests a solitary doubt or difficulty on this point. It was so thoroughly understood that there is no suggestion of a question in regard to it in any of the reports, and I have looked at several of them. I am looking now at the Sessional Papers for 1888, No. 21, which contains all the reports upon these Constitutional questions and other questions bearing on the disallowance of Acts up to that time. There are several pages, but I am referring merely to page 171. There, for instance, he refers to the Act to give to the town of Nelson certain powers for the construction of a railway. What is the remark of the Deputy, which is adopted?

"I am to state that the Minister of Justice sees no objection to leaving these Acts to their operation, except there are objections touching the general railway policy of the Dominion."

It is a matter of policy altogether. It continues "and so far as he is able to judge, there is no objection from this point of view, to leaving chapters 66, 67 and 71 to their operation but with respect to this, as well as to the question as to how far the other charters may be in accordance with the policy of the Government respecting the granting of charters to railways in Manitoba and the North-West Territories, he would be glad to be favored with the view of the Minister of Railways and Canals."

MR. BLAKE.—What has he decided?

MR. MOWAT.—I do not say that his judgement is conclusive, but I say it is something which your lordships will take into account and give such consideration as its weight is entitled to. I was reading this morning part of the judgment of his lordship the Chief Justice here, in which he referred to certain Acts being disallowed and not disallowed as something which this court would take judicial notice of. I will call your lordships attention to a number of those Acts more minutely hereafter. I just make the general observation now that that was the view on which the Minister of Justice acted and on which also the Railway Committee acted and I will give your lordships examples of it. There is no room for any doubt whatever as to what the actual intention of this legislation was; but my learned friends contend

that whatever the intention was, the legal effect is what he claims for it, namely, that now in regard to all the railways embraced in section 306 and corresponding sections of the previous Acts the Provincial Legislatures have no power to pass any Acts whatever. I have two answers to make to that, one that if it is the legal effect of the Dominion legislation, then the Dominion legislation is *ultra vires*—it is not warranted by the British North America Act. It can only be upheld by a perversion of what is to be found there. I do not agree with my learned friend in his construction of this legislation as to its legal effect. I think when you examine those Statutes and take into account the material judicial decisions, you will conclude that the legislation has not the effect of depriving Provincial Legislatures of the power of building railways which the Dominion does not purpose to build and does not provide for. Now, on the first point, what are the words which your lordships have to consider in deciding the question—I mean what are the words of this sub-section 10 of section 92? It assigns exclusive jurisdiction to the Provincial Legislatures in regard to local works and undertakings other than such as are of the following classes. Now my first observation on that is that the purpose of the British North America Act plainly was to give the general jurisdiction on this subject to the Provincial Legislature, and it is only in excepted cases that the jurisdiction is given to the Dominion Parliament. Now the construction that my learned friends contend for is in effect that all local works are at the mercy of the Dominion Parliament, that the exception includes all local works. There is no exception suggested or that can be suggested if that construction of the clause is correct. Now that is contrary to all principles of construction. There is every presumption against a construction which makes an exception destroy the principle. I say that Parliament in passing the British North America Act intended that the general jurisdiction should always belong to the Provincial Legislatures in regard to local works, and that they merely intended to provide, and that they merely have provided for possible exceptions to that. So far for those general principles. What do we find the exceptions are? The first (a) "lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Pro-

vince with any other or others of the Provinces or extending beyond the limits of the Province," (b) "lines of steamships between the Province and any British or foreign country," (c) "such works as, although wholly situate within the Province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

Now it is to be remarked that there is no repetition of the works specified in sub-section "a" and it is at least doubtful—it is not necessary for my present argument that I should establish that, but it is doubtful—whether the British Parliament meant by the works there to include railways—whether that was one of the works. I do not think it was; I do not think they really contemplated railways, whether your lordships reach that conclusion or not. The cases in which railways, canals and telegraphs should be taken possession of by the Dominion were where they connected with other Provinces or extended beyond the limits of the Province. I have no doubt the intention was to refer to other works than those named. Your lordships will observe that the works referred to in the sub-division (c) are such works as are for the advantage, and which are to be declared for the advantage of Canada.

STRONG, J.—Your contention is, that the intention was to make "such other works," mentioned in sub-division (c) applicable to works not included in (a)?

MR. MOWAT.—Yes my lord, that is what I contend. I would call your lordships attention to this—what was to be for the general advantage of Canada was the work itself. If it is the work that is to be for the general advantage, it does not matter whether it is the Province or the Dominion that builds it, provided it is for the general advantage. Now every detail of the argument we have heard here, everything which appears on the Statute book, everything which can be suggested, is for the purpose of showing the importance of uniformity of management, the difficulties of running &c.—all things that arise after the works are built and not before. The purpose of this clause was evidently for the relief of the Provinces. There was evidently no intention to give the Dominion the power that is claimed for it. The object was to enable the

Dominion to do something within a province and not leave it to the province merely, if it could be said honestly that it was for the general advantage to do it. Now an effort is made to apply this to the complete destruction of the powers of the provinces to build such works. What has been done here is to declare all railways which cross or connect with those specified to be for the general advantage of Canada, and the inference drawn from that and from other things found in the Statute, is, as I have said, to deprive the Provincial Legislatures of all power to make railways which so cross Dominion lines. If it was intended by a sweeping clause of that kind to give such jurisdiction, that would cover a case such as we have here. The same principle would apply to a still more general clause such as his lordship, Justice Strong, asked some question about. You cannot suggest a question to which such a sweeping destruction of Provincial powers as we have here may not be extended, if it is a rightful thing—you cannot suggest a principle, and no principle has been suggested, by which that cannot be carried on so as to enable the Dominion Parliament to say that all local works are for the general advantage. The line must be drawn somewhere. I do not think my learned friends would be bold enough, in so many words, to say that an Act of that sort would be valid, but if an Act of that sort would not be valid —and I am sure that your lordships would have no hesitation in saying that such an Act would be contrary to the whole intention and spirit of the British North America Act—the line must be drawn somewhere and the question is where that line is, whether it would cover the power which my learned friends say has been exerted here or not. In fact, if it really was intended to give to the Dominion Parliament the complete jurisdiction over local works which is contended for, that practically amounts to a complete change of our Constitution. It is a transfer of the Provincial jurisdiction to the Dominion Parliament in one of the most important matters with which we have to deal. Every body knows how very large a part of legislative attention is given to local works, the encouraging and assisting of them, &c., and if the Dominion Parliament has power to transfer to itself all that jurisdiction, it is a complete revolution in the Constitution as settled in the British North America Act. Now I do not think that is the meaning of

it at all. I have no doubt that the real meaning of it is this—and how near your lordships can come to it judicially will be a matter for consideration—that individual works were referred to which the Dominion Parliament might be willing to undertake themselves to sanction and to execute : and this power of declaring a work to be for the general advantage of Canada I have no doubt was incident to the power of the Dominion to do the Provincial work. Now the words are not inconsisent with that view as to one class of the cases which is covered by (" c"), and I think I must admit for the present purpose that there is a second class which comes in before the words " before or after execution." I do not think it is quite clear, but at all events a considerable amount of argument might be used. That is all I can say just now in favor of the position that after the execution of provincial railways the Dominion Parliament may assume jurisdiction over them That is the thing they have done and the expression " after their execution " is sufficient for that purpose. Before our Dominion Government could have executed the work which was wholly within the Province, they must have declared it to be a public work for the advantage of Canada, and if it were to be after the execution, it must refer to some work not executed by the Dominion. Without controverting that view then, I say those are the only two classes of cases which the Act really meant to deal with. To say that the Dominion had the power of withdrawing this whole subject of local works, or almost the whole of it—practically the whole of it—from provincial jurisdiction is contrary to the whole tenor of the British North America Act. Its purpose evidently was to divide jurisdiction—to divide it in as definite a way as the promoters of the Act could at the moment make the division. The 91st section speaks of the subjects which are to be under the exclusive jurisdiction of the Dominion Parliament, and the 92nd section speaks of the subjects which are to be under the exclusive jurisdiction of the Legislatures. The understanding always has been—the rightful understanding I submit—that in all executive matters falling within the jurisdiction of the Provincial Legislature, the Lieut.-Governor has the whole executive power in the same manner that the Governor-General has the whole executive power in matters falling within the jurisdiction

of the Dominion Parliament. In that way the royal prerogatives were divided, were permanently divided so long as the British North America Act is in force. There is no doubt so far as Nova Scotia and New Brunswick are concerned, because by one section of the British North America Act it was expressly declared that the executive authority should continue as before. In Nova Scotia and New Brunswick we know that all acts of the Executive, both of the class which now belongs to the Provinces and the class which has gone to the Dominion, are carried on and managed in the Queen's name. There is no room for doubt that all the other Provinces should be on the same footing in that respect as Nova Scotia and New Brunswick. Accordingly in all the Provinces the Executive has acted in the name of the Queen as before Confederation. As before Confederation her name was used in all grants of land by the Province, in all commissions that they issued and in all public Acts of every kind. In fact, the business of the Provincial Governments could not be carried on for a day without the exercise of the Royal Prerogative. And with it all, the Dominion has no right of interfering. Since, then, we find such a complete division as we do find, subject only to a very few exceptions such as my learned friend spoke about, I submit we have sufficient authority for rejecting the enormous power which the company desires to establish that the Federal Parliament has. In various cases that have been decided—I am not quite sure whether in this court or in other courts—reference has been made to the resolutions upon which the British North America Act was founded. What degree of importance should be attached to them has not been stated, but at all events it is reasonable for judges to look at them, and if they do find that they throw any light on the subject they should avail themselves of that light. The resolutions make the present point quite clear. The proceedings preliminary to the American Constitution are frequently referred to in their courts, and even their debates are referred to. We have no debates, because at the Conference the sessions were held with closed doors and there has been no publication of what was said; but it is quite in accordance with what has been done in the United States and with decisions of various judges in this country that your lordships may look at the resolutions. What do we find

in them? They are to be found at the end of Cartwright's first volume, and I refer your lordships to the 29th Resolution. In designating the subject of jurisdiction in the Provinces those resolutions gave generally the subject of local works to the Provinces, not mentioning any exception. The Dominion jurisdiction in regard to such works was contained in one of the resolutions expressly setting forth what the Dominion jurisdiction should be, and this is the expression in regard to that subject—"and all such works as shall, although lying wholly within any province, be specially declared by the Acts authorizing them to be for the general advantage of Canada." (2 Cartwright page 692.) That was the idea of those who agreed to Confederation: that was the view that they unanimously took as to the extent of the Dominion jurisdiction, that if the Dominion should, in an Act authorizing the work, specially declare a work to be for the advantage of the Dominion, it should be such a work.

GWYNNE, J.—Then the Dominion must have had the power of incorporting that company. If in the Act they had the power to make the declaration, they must have had the power to construct the road?

MR. MOWAT—I am not objecting to that now. I assume that the Dominion had power to build roads and to authorize the building of them.

GWYNNE, J.—I do not see how it supports your argument in the view that it was in the Act they were passing that it was to be declared a work for the advantage of Canada.

MR. MOWAT—That is the essential point of it. If the Dominion is going to build it, the Province should have no objection. They might build as many useful local works as they pleased in Ontario and nobody would object to it. We may think it is a wasteful expenditure of money and as Canadians object to it, but as a Province we could raise no objection. Therefore if they saw any local work was of advantage to the Dominion they might authorize and execute it if they declared in the Act authorizing it that it was for the general advantage. The language of the draughtsman in putting, in what he thought legal form, those Resolutions, changed the position of that clause. My learned

friend may say something ingenious on that point; he could say it on anything.

RITCHIE, C. J.—Are we to construe the Act of Parliament with the resolutions? It shows that it was before the mind of the draughtsman or those who negotiated this draft, the understanding between the representatives of the different Provinces in England at the time of the passing of the Act, and it appears that when it came to be put in binding form they most materially altered it. The inference is that they altered it advisedly.

MR. MOWAT.—There is some force in that way of putting it, but when we find in those Resolutions what I have said, and then find that the whole change in the meaning arises merely from a change in the place, instead of leaving local works in section 92 without any exception and putting the exception in 91, the exception is put in 92 itself, and in words not very different from the words of the Resolution, but putting it there instead of the other place, it gives ground for—

RITCHIE, C. J.—The phraseology is entirely different.

MR. MOWAT.—It is different in one respect only. The Resolutions speak of the declaration being in the Act authorizing the work, and the expression in 10 (c) is "declared by the Parliament of Canada to be for the general advantage," but that would be naturally thought to be a reasonable way of expressing the same thing when the question arose in the mind of the draughtsman, who is not here, which nobody thought of until now. At all events, for the reasons that I have mentioned I am entitled to say that the Act for confederating the Provinces does not entitle the Dominion Parliament to deprive the Provinces by its sweeping clauses, of the right to build roads crossing or connecting with the lines that are named. My argument is put very clearly by Judge Wurtele, and I will read as part of my speech the way he does put it. He refers both to the British North America Act and also to the clauses of the Dominion Statute to which I am going to refer in a moment. I am about to quote from page 549 of the Parliamentary Procedure of Quebec.

GWYNNE, J.—Is that a text-book?

MR. MOWAT.—It is not exactly a text-book but it gives reports.

STRONG, J.—That is when Judge Wurtele was speaker of the Quebec Legislative Assembly?

MR. MOWAT.—Yes. He states the case this way: The matter before the House was the Jacques Cartier Union Railway Company Incorporation Act. He said:—

"The incorporation of the Company was granted, and the construction of the railway was authorized under the exclusive power conferred upon Provincial Legislatures to legislate respecting local works and undertakings, by sub-section 10 of Section 92 of the British North America Act.

"By an exception to this general power, such works as are declared by the Parliament of Canada, either before or after their execution, to be for the general advantage of Canada, are withdrawn from the legislative jurisdiction of Provincial Legislatures, and are placed under the legislative authority of Parliament.

"In 1883, the Parliament of Canada, by the Act, 46 Victoria, chapter 24, declared not only the main lines of the Grand Trunk Railway of Canada, or the Canadian Pacific Railway, and of other railways, but also all branch lines or railways now or hereafter connecting with or crossing them, to be works for the general advantage of Canada, and as such to be subject to its legislative authority.

"The contention raised by the objection is that, by the operation of this Act, the Jacques Cartier Union Railway, which runs between and connects the Grand Trunk Railway with the Canadian Pacific Railway, has ceased to be subject to the jurisdiction of the Legislature of this Province.

"As I have already stated, the constitutional rule with respect to works and undertakings wholly situate within any province is, that the power to create and regulate, or to extend or modify the same, vests exclusively in the Provincial Legislatures. The power conferred upon the Parliament of Canada with respect to such of that class of works and undertakings as it declares to be for the general advantage of Canada, is a limitation and restriction of the general rule. Now it is a general rule in the interpretation of enactments which cut down, abridge or restrain powers, that they shall receive a strict and limited construction. (Potter's Dwarris, p. 260.) Such being the case, it would seem to me that the exceptional legislative authority thus conferred upon the Parliament cannot be exercised in a general but only in a specific manner; that local works and undertakings can only be brought within the purview of that authority by name, and not by general terms or by implication."

I am not quite sure that I have brought out that point in what I have said so far, because it seems reasonably clear, on the judicial interpretation you can put on that clause, "10 c," that the Constitution did not contemplate such a sweeping effect as that which has been stated by my learned friends. It contemplated particular works. Mr. Wurtele continues :—

"In the present case, the Jacques-Cartier Union Railway is not named, and it could be made subject to the legislative authority of the Parliament, only by bringing it within the scope of the following general terms, 'and each and every branch line of railway now or hereafter connecting with or crossing the said lines of railway or any one of them.' Under the rule of interpretation which I have just alluded to, it would therefore seem that the declaratory enactment should not be construed to include the railway in question.

It moreover seems to me, when I place the words 'each and every branch line or railway now or hereafter connecting or crossing the said lines, or any one of them,' in juxtaposition with the words 'main lines' of such and such railways, that they should only be understood and construed to refer to branch lines or branch railways appertaining to the railways named in the declaratory enactment."

That refers to clause 106. He continues :—

By referring to the Consolidated Railway Act, I see that provision is made in the 16th sub-section of section 7, for the crossing, union or intersection by Railways incorporated under Acts of Provincial Legislatures with Railways under the legislative control of Canada, and I do not find that this provision has ever been repealed. At the present time it would not either cross, intersect or join one of the Railways which have been declared by the amendment of 1883, to the Consolidated Railway Act and by special Acts, to be for the general advantage of Canada. This provision of the Consolidated Railway Act is, to my mind, an additional reason for saying that the general terms used in the declaratory section should only apply to branch lines or railways now existing, or which may hereafter be constructed in connection with the main lines of railways named. Any other construction of the general terms used would constitute an arbitary encroachment by the Parliament upon the powers of Provincial Legislatures to authorize or to construct local railways.

My attention has been called to that case by my learned friend Mr. Langelier, who is here looking after the interests of the Province of Quebec. I have said that it was not the intention of the Parliament of Canada; I will proceed now to consider the actual construction which ought to be put on the Dominion legis-

lation assuming they have the power which is claimed for them. I claim that there is nothing which has yet been done by the Dominion Parliament which has assumed the power, if the Dominion Parliament has the power of forbidding.

RITCHIE, C. J.—I understand you to contend that if this legislation has the effect contended for by the counsel on the opposite side, it is *ultra vires*?

MR. MOWAT.—Yes my lord. The next branch of the subject is what the Dominion Parliament has actually done, assuming it has the power. I claim that it was not the intention of the Parliament of Canada to forbid the building of roads by the provinces or by provincial authority. I need not say, everybody will take it for granted I am sure, that railways are in the public interest. They serve to develop the country, to increase its wealth and its resources and to benefit the public in a thousand ways. As a matter of fact, with the exception of some few lines, most of the roads in Ontario and Quebec, and I dare say in the other Provinces likewise, have actually been built under provincial authority. No possible reason can be suggested why this should be prevented. It is impossible to imagine that they deliberately thought that the provinces should be prevented from building provincial railways. I think that this view is quite consistent with everything that has been enacted by the Dominion Parliament. I look at section 306 of the Act of 1888, 51 Victoria, and it corresponds precisely I may observe here, with the corresponding clause in the revised Act passed in 1886. Now what are the words of it? The Intercolonial Railway and various other railways which are named are hereby declared to be works for the general advantage of Canada. Nothing of course turns upon that. Then follows "every such railway and branch line shall hereafter be subject to the legislative authority of the Parliament of Canada." Now, there the Parliament has declared all branch lines of railway then connecting with or crossing the named lines of railway to be works for the general advantage of Canada. They also provide that branch lines of railway "hereafter connecting with or crossing the said lines of railway,"—what I say is, that all that the Legislature meant, all that the language conveys, all that the words even grammatically will bear, is that when the line becomes a work, then it is for the

general advantage of Canada. It is not when it is put on paper, not when it exists merely in the imagination that it is for the advantage of Canada; it is when it has become a work that it is to be for the advantage of the Dominion. That is all that the Legislature have said there, all that they meant to say there. There is no indication of a larger meaning, and a larger meaning would be most unreasonable for the reasons I have mentioned, unreasonable as against the spirit of the British North America Act, and unreasonable as unnecessarily preventing the Province from building the roads which the Province ought to construct. It is utterly inconceivable that there was the slightest intention on the part of the Dominion Parliament to prevent any province from building the road. So inconceivable is it that up to this moment we have not heard a single suggestion made as to what object could be gained by preventing the construction of a road. We are only told that after the road is built it shall be under the same government as Dominion roads. I say the courts will not put upon those words a larger construction than the words absolutely require, and the construction that my learned friends put upon them is immensely larger than they absolutely require. It is to be remembered of course that a statute is read as always speaking, and therefore when it says that any work connecting with or crossing one of the main lines is a work for the general advantage of Canada, you must apply that when the question arises, when the road is there on the ground and executed and it is crossed or connected with one of the main lines, then that work is for the general advantage of Canada and comes under this clause; but until that point is reached it does not apply at all. My learned friends and their client are not satisfied with giving the grammatical construction of the words there, but they want to extend it enormously so as to deprive the Province of all jurisdiction on those subjects. I submit there is no foundation whatever for that view, and so far from the provisions in the Statute favoring it, the other parts of the Statute forbid it. Take for a moment the language of the 307th section, which I have already quoted: there it is a branch line when it becomes a railway, not when it is an act of Parliament merely, but when the thing has been done, when we have got the railway. Then it is to be subject to the

legislative authority of the Parliament of Canada. Then follows a proviso, probably unnecessary. I am not sure but one of my learned friends admitted that it was unnecessary, or perhaps one of your lordships made a remark to that effect. The proviso is this:—

"But the provisions of any act of the Legislature of any province of Canada, passed prior to the 25th day of May, 1883, relating to any such railway or branch line, and in force at that date, shall remain in force so far as they are consistent with any act of the Parliament of Canada passed after that date."

I suppose that would have been the case without that provision. The acts referred to there were within the competency of the Provincial Legislatures at the time they were passed, and the future legislation passing into the hands of the Dominion does not affect the past legislation at all. That would still be in force, and this provision is introduced by some specially cautious draughtsman.

TASCHEREAU, J.—The interpretation clause of that Statute says what the word "railway" means.

MR. MOWAT.—"The expression 'railway' means any railway which the company has authority to construct or operate &c."

MR. BLAKE.—It includes more than the building of the work.

MR. MOWAT.—That is defining what a company shall do; this has no reference to the powers of a company. I ask your lordships attention for a moment to clause 173 of the Act of 1888, which has been already referred to. It provides that no company shall cross without the approval of the Railway Committee. Then a company is also defined in the interpretation Act as being "a railway company, and includes any person having authority to construct or operate a railway." Here the Railway Commissioner of Manitoba has the right to construct a railway. The 173rd clause, as I have said, provides that no company shall cross, intersect, join or unite its railway with any other railway without application to the Railway Committee for the approval of the place and mode of crossing, intersection, junction or union proposed." That is worked out in the 175th and 176th sections, so that that is all that is needed for Dominion purposes.

TASCHEREAU, J.—That applies to Provincial Railways of course?

MR. MOWAT.—By the 177th section it especially applies to the intersection of railways under provincial charters. Now that is all that is required until the completion of the road, when the question of running comes up, and it is for the general advantage. Nothing could be further from the minds of any legislature than to prevent men from building provincial roads. As far as the public interests are concerned, you cannot imagine any such intention to exist if the Dominion does not choose to construct the works themselves, but the crossing matter is of course something material, and that is provided for. The 177th section is in these words :—

"Every Railway Company incorporated by any Act of the Legislature of any Province which crosses, intersects, joins or unites with any railway within the legislative authority of the Parliament of Canada, or which is crossed, or intersected by, or joined or united with any such railway shall, in respect of such crossing, intersection, junction and union, and all matters perliminary or incident thereto, be deemed to be, and be, within the legislative authority of the Parliament of Canada and subject in respect thereof to the provisions of this Act."

Now my learned friend says that that must be read as excepting section 306. The argument against that is still stronger when one refers to the Revised Act passed two years ago and to which I will call your lordships special attention. In the meantime I ask your lordships to observe that those clauses are general. There is no exception suggested. My learned friends want to make an enormous exception, which leaves little remaining, but the clauses themselves contain no exception, and the ordinary principle is that where general words are used you must find some special ground for allowing exceptions. Now my learned friend says that section 306 is an exception, but he gives no reasons for it on that point. I deny that it is an exception. It confirms the view that we really intended that this 177th section should only apply to any of the railways to be built and which are supposed to come under section 306. We may well assume that the legislature would have put in a few words, such as "every railway incorporated and not coming within the exception 306"—just those few words: I think we are bound to assume that if 306 were

intended to be an exception, we would find the words there. If you look at the Statutes of 1886, the Revised Statutes, what is section 306 in the Act of last session is section 121 in the Statute of 1886, and as I have already said it is in the same words. Section 116 corresponds with section 177 and there is no exception there. What are the words of section 116? It refers to a former section which I will read :—

"The provisions of sub-section 13 and 14 of section 6 in part 1, of this Act shall also apply to every company incorporated under any Act of any provincial legislature in any case in which it is proposed that such railway shall cross intersect, join or unite with a railway under the legislative control of Canada."

There we have the most general words, and it is within five sections of the section which declared certain works to be for the advantage of Canada. We know that in late sittings of the House legislators sometimes get tired and pass over sections to which their attention should be specially directed, but however tired they might have been when this Act was before Parliament they would hardly have overlooked this section which is within five of the last one in the Act. Now the court, I submit, should say that section 116 ought to be taken as a general expression, and that section 121 is no exception, because it is not stated to be an exception, which it would naturally be if that were the intention. These Acts are carefully prepared by a government well advised and we may take it for granted that if it was intended to except section 306 we would have found it excepted in the Act of 1888, and in section 116 of the Act of 1886. Now what are sections 13 and 14 to which reference is made in section 116? They will be found at page 1461 of the Revised Statutes. They are the sections which give authority to companies to cross, intersect, join and unite, and provide that no railway company shall avail itself of those powers without the sanction of the Railway Committee. So we find that is substantially the same provision that is incorporated in the other Act. It is especially declared that these provisions shall apply to companies incorporated by provincial legislatures. Upon my construction that there is no intention to interfere with the building of railways by the provincial legislatures my contention is clear ; but if it was to go further, if you construe

sections 306 and 121 so as to prevent the building of railways by the Provinces in future, they would come in there as a matter of course. Then again I think one of my learned friends said that these clauses were in the law in their present general terms before 1883 and that they had been merely continued, but I say the very fact of their being continued is an argument in my favor. It is quite clear that before 1883 the corresponding clauses in the old legislation would apply to all railways, not merely to those created under provincial legislation which should cross Dominion lines. Now that was the meaning before 1883, and when we find the very same words adopted in the legislation of 1883, 1886 and 1888, it would be contrary to all reason to say they are to be given the limited application which Parliament chose to give them. *Prima facie* it means in the subsequent Acts what it meant in the prior Acts unless the legislature made an exception which it did not make. The clause was taken from the Act of 1879.

MR. BLAKE—I think it first came into the Statute book in 1877 and then into the Consolidated Statutes of 1879—the crossing clause.

MR. MOWAT—What I was referring to was the express provision as to the characteristic applying to the Act of the Legislature. As early as 1877, at all events, that was the policy of Parliament.

STRONG, J.—What you say is, before this provision which is now contained in section 306 of the Revised Statutes was, for the first time, introduced in 1883, this crossing clause existed and had received a certain construction, and therefore being carried on to the present time the Legislature intended that that construction should remain undisturbed?

MR. MOWAT—Yes my lord. I have referred to the fact to show that this was the construction which all the Provinces were putting upon those clauses which we have been speaking of; and then in 1888, we find the very same thing repeated. Now it is held, I believe, as a settled principle that if the courts have been found to put a particular construction on an Act of Parliament and the Parliament afterwards repeats that enactment, it is presumed to adopt the decisions upon it as correct law, unless the contrary is expressly provided, and to prevent the operation of that rule when

it is desired to prevent it, clauses are introduced for that express view. Here we find that the construction which I am contending for was the recognized construction acted upon and acquiesced in by the Dominion Parliament.

RITCHIE, C. J.—Have you not in Ontario an Act which says it shall not have that effect?

MR. MOWAT—The Ontario Revised Act—yes my lord. Where there is no enactment that applies, the rule is as I have mentioned. It seems to me that it is quite as strong here as if we had a decision of the courts. Everybody took that view, and we find in 1888 this same language employed instead of the Legislature correcting it to prevent such a construction if they did not intend it.

RITCHIE, C. J.—Are there any judicial decisions?

MR. MOWAT—No, I have not found any.

STRONG, J.—When we find the Legislature continuing an old enactment, but introducing a new clause, I think we must suppose that they intended that the new clause should control.

MR. MOWAT—If my learned friend's construction of the 306th section is right we would be driven to say that the 177th clause excluded it.

STRONG, J.—Then you must come to what the construction of the 306th section is?

MR. MOWAT—I ask your lordships attention for a moment to the recital in the Act of 1883.

GWYNNE, J.—The recital of a particular section, or the preamble of the Act?

MR. MOWAT—The recital of the section.

MR. BLAKE—Originally the Act was introduced as a separate Act. There was a Bill going through at the same time and this was brought into it.

MR. MOWAT—The recital to which I wish to call attention will be found in chapter 24 of the Statutes of 1883. It is as follows:—

"Whereas, it is, in and by 'The British North America Act, 1867,' among other things in effect enacted: that the exclusive legisla-

tive authority of the Parliament of Canada extends to such local works and undertakings as, although wholly situate within a province, are before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more provinces; and whereas, not only the main lines of the Intercolonial Railway, the Grand Trunk Railway, the North Shore Railway, the Northern Railway, the Hamilton and North-Western Railway, the Canada Southern Railway, the Great Western Railway, the Credit Valley Railway, the Ontario and Quebec Railway and the Canadian Pacific Railway, but also all branch lines or railways connecting with or crossing them or any of them, are works, and each of them is a work for the general advantage of Canada; and whereas, for the better and more uniform government of all such works, and for the greater safety, convenience and advantage of the public, it is desirable that Parliament should so declare."

The preamble, my learned friend suggests, was not regarded as existing.

MR. BLAKE.—I said it was dropped, that is all.

MR. MOWAT.—I understood my learned friend to say that we could not look at the preamble for the purpose of assisting us to arrive at the meaning of the enacting clause.

MR. BLAKE.—Not at all.

MR. MOWAT.—Very good, we can look at it to throw some light on the enacting clause. I do not think my learned friend would say that this clause had a different meaning in 1886 and 1888 from what it had in 1883.

MR. BLAKE.—All I can say is the light has been extinguished.

MR. MOWAT.—It has not been extinguished because you can look at even repealed statutes to throw light on existing legislation. Whatever this clause meant in 1883 it meant in the Act of 1886 and the Act of 1888. My learned friends can draw no distinction. I refer to the preamble in order to know what the meaning of the clause was. What was the preamble after the portion that I have read?—"whereas for the better and more uniform government of all such works, and for the greater safety, convenience and advantage of the public, it is desirable that Parliament should so declare."

Now it is not suggested there that anything more is contem-

plated or intended by the Legislature than to provide for the more uniform government of the work and for the greater convenience and safety of the public. Those are provisions which applied obviously to the government of the road after its construction, and when we find words following to say that they did not clearly mean a railway built—which I think they do—which say that they may mean either a work done or a work contemplated, and then when we find in the preamble that the purpose of the enactment merely refers to the running, I think it demonstrates the intention of the legislature, that they meant only to deal with the running; in other words that they meant only to deal with the works after they had been completed, after the railway had been built. There was an argument on the 306th section and the corresponding clauses which I intended to mention, but which escaped me at the moment. The concluding words on which we have been talking so long, I must read once more:—

"Each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada."

Now does that mean branch line or other railway, or does it mean branch line or branch railway?

STRONG, J.—Does it apply to an independent railway?

MR. MOWAT.—That is the point I was going to suggest to your lordship. I say it does not. My learned friend thinks it is sufficient for him, in taking away the jurisdiction from one legislature and giving it to another, to find words which may mean it. I say he must find words which specifically declare it. Those words, "branch line or railway," may mean a branch line or a branch railway, and the beginning of section 307 confirms that view:

"Every such railway and branch line shall hereafter be subject, etc."

"Railway" there naturally means the railways named, the Intercolonial Railway and others which are first named and declared to be works for the general advantage of Canada. It would be necessary to declare them, but they have declared them. Then we come to section 307, "every such railway and branch line,"—I say the presumption is very strong that the meaning is

any of the railways named, and the branch line of course is obvious enough.

STRONG, J.—That would make the word "branch" redundant altogether.

MR. BLAKE.—It says "or crossing."

MR. MOWAT.—It might be two branches.

STRONG, J.—It says "each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway."

MR. MOWAT.—In the 6th line of section 307 the same words occur again, "railway or branch line." Then I think there is a further argument that this is the intention to be found in an Act also passed in 1888 putting an end to the provisions contained in the agreement with the Canadian Pacific Railway Company by which the Dominion Parliament was not to sanction any legislation interfering with the monopoly of the Company—I forget the exact words. The new agreement is set forth in a schedule to cap. 32 of 51 Vic.

STRONG, J.—That is special legislation.

MR. MOWAT.—Yes, it recites the old agreement, but does not contain the exact provision that the old agreement contains. That will be found in cap. 1, 44 Vic; it is the original Act concerning the Canadian Pacific Railway Company.

STRONG, J.—It is in the schedule of the old Act.

MR. MOWAT.—Yes my Lord. The following is the 15th clause relating to the restriction as to competing lines:—

"For 20 years from the date hereof, no line of railway shall be authorized by the Dominion Parliament to be constructed south of the Canadian Pacific Railway, from any point at or near the Canadian Pacific Railway, except such lines as shall run south-west or to the westward of the south-west; nor to within 15 miles of latitude 49. And in the establishment of any new province in the North West Territory, provision shall be made for continuing such prohibition after such establishment until the expiration of the said period."

By that provision no line of railway was to be authorized by the Dominion to be constructed as there mentioned. Now it appears from the reports of the Minister of Justice, some of which

I have referred to, and to one or two others of which I will refer, what we all know otherwise, that the Dominion Government vetoed all Manitoba legislation which would interfere with the terms of that clause in case it applied to the Manitoba legislature. In terms the Dominion Parliament only agreed that they would not authorize a line of railway, but the spirit of that was regarded by the Government as covering the duty apparently of vetoing acts—that is not done by the Parliament but by the Government. It was the policy of the Government to recognize the right of the Canadian Pacific Railway Company to have all these local Acts disallowed from time to time. It is quite plain that it was to get rid of this monopoly that the Act to which I am referring now, cap. 32 of 51 Vic., was passed and that the provision in the Act 44 Vic. cap. 1 was rescinded. In consideration of that the Canadian Pacific Railway Company get $15,000,000 guaranteed by the Dominion. Now if my learned friends construction of the Dominion legislation is correct, that is good for nothing. The object was to allow Manitoba to build roads: the Dominion was not going to build them; the Dominion was against building them. Fifteen millions of dollars was guaranteed in order to get rid of the supposed monopoly and permit Manitoba to build those roads. In my construction of the legislation that is quite sufficient; nothing more is needed, it is got rid of now.

STRONG, J.—It is quite consistent with the getting rid of the monopoly that the Dominion should, in the interest of its own public policy, insist upon this road being under the clause, if they can do it at all—that they should insist upon this railway being regarded as a Dominion work.

MR. BLAKE.—They are no longer bound to prevent it being built.

STRONG J.—I do not see that that in any way binds the policy of the Dominion under this section.

MR. MOWAT—It is one of a number of things which I thought tended in that direction and which I thought I should mention to your lordships.

STRONG, J.–It is a question of policy altogether. The Legislature of course is the sovereign judge in that case. The Dominion

may think it proper for some purpose, for military purposes, for instance, which under the British North America Act is entirely within the Dominion, to declare that all lines crossing these main lines of railway should be under their control. I do not think they have in any way deprived themselves of the right of insisting upon that policy by anything they may have done to abolish the monoply of the Canadian Pacific Railway Company.

MR. BLAKE,—They have only freed their hands to legislate in that direction if they please.

MR. MOWAT —I will now proceed to show, from the policy which Parliament has itself pursued, that their view is that the provincial legislatures continue, notwithstanding the sections I have mentioned, to construct local railways. I find this remarkable state of things, that several of these provincial roads, incorporated since May, 1883, and whose incorporation is therefore void according to the contention of the other side, have been actually recognized by the Dominion Parliament in a distinct way, granting them large bonuses in aid of the works. If that is not a recognition of the validity of those railway charters, I cannot imagine anything that would be a recognition. In order to find out the meaning of one Act of Parliament, we are of course at liberty to refer to all Acts of Parliament. The intention, manifested in any way, the courts will take into account. I do not think your lordships will be able to suggest any more striking way of proving the intention than by going to the Statute book. The first Statute that I observe is one passed in 1886 by the Ontario Legislature, cap. 69, authorizing the Irondale, Bancroft & Ottawa Railway to join any railway passing Orillia, which would of course authorize connection with the Northern or the Midland. To that railway a subsidy of $3,200., per mile was granted.

STRONG, J.—Since the clause of 1883?

MR. MOWAT,—Yes my lord, since the 1883 clause. Then cap. 77, incorporated the Richmond Hill Junction Railway Company to run from Richmond Hill village and connect with the Northern Railway near the Richmond Hill Station. It was subsidized the following year by the Dominion Parliament to the extent of $3,200 per mile. Then we come to Quebec: there is

the Jacques Cartier Union Railway Company, which is authorized expressely to connect with the North Shore Railway. It was in that case that the opinion of Mr. Speaker Wurtele was given, to which I have referred, and the Bill accordingly was passed. It is cap. 71, of the Statutes of 1884. Now that line was subsidized in 1887 by the Dominion Parliament to the extent of $20,000, and by another Act of Parliament $200,000.

STRONG, J.—Would that apply to anything more than these particular companies?

MR MOWAT.—They did not do anything to confirm those Acts at the time they subsidized the companies.

STRONG, J.—They grant a subsidy which would be a recognition of the incorporation. Where the Crown makes a grant to a corporate body it has the effect of recognizing the body as one duly and legally incorporated. Would it have any effect beyond these particular bodies to which the grant was made? Granting that they were invalid corporations before that time and that these subsidies made them valid, would it affect other bodies to which no such grant was made?

MR. MOWAT.—The language of section 306 is more or less doubtful, and if you attempt to say from that that the provincial legislatures have no power to incorporate such railways, and if we find that the Dominion Parliament pass an Act expressly subsidizing one of those railways, I think it is a pretty strong argument that the Dominion Parliament considered that a valid company.

TASCHEREAU, J.—It is not the Dominion Government that contends before us that this line should not cross. It is the Canadian Pacific Railway Company that appears before us and contends that all this is wrong. If this has any bearing the Canadian Pacific Railway Company cannot be affected by it.

STRONG J.—What you contend is that the Dominion Parliament has in this way put a legislative construction on these clauses, 121 and 306.

MR. MOWAT.—That is exactly what I wish to make out.

TASCHEREAU, J.—The Dominion Government is just asking the opinion of the Court; it does not contend anything.

MR. MOWAT.—I do not know whether the Dominion Government takes the same view that I do of this question, but the legislative construction would bind everybody in the Dominion. Take another Quebec Act, cap. 78, of the Statutes of 1886, incorporating the Cap Rouge and St. Lawrence Railway Company to connect with the North Shore Railway. It was subsidized by the Dominion with a sum of $38,400. Then again the same year, chapter 81, the Drummond County Railway Company was incorporated to connect with the Grand Trunk Railway, and it was subsidized by the Dominion afterwards to the extent of $3,200 per mile for 30 miles. Then chapter 68 of the Statutes of 1887 incorporated the Montreal and Lake Maskinonge Railway Company which is authorized expressly to connect with the Canadian Pacific Railway. It was subsidized apparently with $22,000. I now come to New Brunswick. In the year 1887, chapter 23 was passed by the legislature of that Province incorporating the Central Railway Company, with power to connect with the Intercolonial Railway, and a subsidy was granted by the Dominion in 1888, of $83,612.54, a most remarkable case of accuracy. Then in Nova Scotia, in the Statute book of 1886, I find chapter 155, incorporating a railway to run from a point on the Intercolonial Railway to Lansdowne; that was subsidized afterwards by the Dominion Parliament by a grant of $80,000. Then there is a whole host of railway companies incorporated during all those years in all the Provinces; I have a list of them here. I do not know that I need trouble your lordships with any of them, but none of them were disallowed.

GWYNNE, J.—Crossing these named railways?

MR. MOWAT.—Yes my 'ord. I will hand in a list of them. Your lordships will observe therefore that all these were allowed to go into operation after the Minister of Justice had reported to Council, with the exception of some lines in Manitoba, and those were disallowed not on any ground that they were *ultra vires*, but assuming that they were *intra vires* of the Manitoba Legislature there were reasons of policy why they should be disallowed. I should like to mention the case of the Brockville, Irondale and Sault Ste. Marie Railway Company as one of those incorporated since 1883 and subsidized by the Dominion Parliament. This

road runs from Brockville by way of Westport to the Sault. Of this road 45 miles have been built, from Brockville to Westport. It connects with the Grand Trunk Railway at or near Lyn, and there is some work now going on there to connect at another point near Brockville. That is one case in which application was made to the Railway Committee for leave to cross the Grand Trunk Railway.

MR. BLAKE.—What bearing has this upon the case?

MR. MOWAT.—The Railway Committee is a kind of court and there must be some means of finding what the court has done.

MR. BLAKE.—I do not know anything that has been done in that case and I do not think the court does either. We have not the facts of the case before us.

MR. MOWAT.—How can your lordships give an opinion unless you know what the Railway Committee have done?

RITCHIE, C. J.—If the Railway Committee know all about it, what is the use of asking for our opinion?

STRONG, J.—If their former decisions do not bind them, you can hardly expect that we shall follow their decisions.

GWYNNE, J.—Is your position this, that what they have done before is right, or do you contend that it is wrong?

MR. MOWAT.—If it is wrong I suppose they do not want to go on doing wrong: they want this Court to say what the law is. The Railway Committee is a Court with power to examine witnesses, and with very large powers, and there is no right of appeal from their decisions. I mention this for the purpose of stating that that is one of the roads that has received a subsidy of $3,200 a mile for 45 miles. There is another line which I think I did not mention. The Gananoque and Rideau Railway Company, which connects with the Grand Trunk Road at the Gananoque station.

TASCHEREAU, J.—The way that the question is submitted here, the Canadian Pacific Railway Company must have contended that the Railway Committee had not the power to permit the crossing, but because the Act was unconstitutional.

GWYNNE, J.—So that the fact of such things having been done before has no bearing on the subject before us.

MR. MOWAT.—I submit that when a question comes up as to whether the power of the Provincial Legislature has been taken away by the Dominion Parliament in a matter which that Parliament has a right to take it away, it should very clearly appear : it should not be found in provisions that are equivocal, about which there can be any doubt. It is as grave a matter as could possibly be done, and the way of doing it should be so clear that he who runs may read. The Courts will hold that unless language is used about which there can be no doubt at all, the power cannot be taken away. This section 306 does not mention anything about the legislatures of the Provinces, as other clauses do, and not having mentioned them, and the words being equivocal, they ought to be considered as not covering any case beyond what necessarily comes within them.

STRONG, J.—Should not we read "every such railway and branch line shall hereafter be subject to the legislative authority of the Parliament of Canada," as giving the exclusive jurisdiction to Parliament.

MR. MOWAT.—I have been urging that section 306 does not refer to merely contemplated roads.

STRONG, J.—But to all roads to which it does refer : everything which is embraced by section 306 is by section 307 taken under the exclusive power of the Dominion.

MR. MOWAT.—Yes my Lord, but if in section 306 it was intended to take away from the Provincial Legislatures the power of building roads, I have pointed out that it is not expressly stated in the clause, and it is not necessary to cover a case like this. Further I appeal to the rule that Her Majesty is never bound unless the implication is a necessary one. What is it contended that the Dominion Parliament has done? Her Majesty could build roads either on the advice of the Dominion Parliament or on the advice of the Local Legislature. It is said that Her Majesty has been deprived of the power of building roads on the advice of the local legislatures. On well considered principles I submit that the clauses should be considered not to cover cases of that kind. I think that the observations I have made include all that is material that I intended to advance

to your Lordships. I submit that while the actual intention is beyond any doubt here, the language that has been used is such as not to give larger powers than were intended, and is not such as shows an intention on the part of the Dominion Parliament to take away from Provincial Legislatures the right of building new roads crossing or connecting with those named, subject to being sanctioned by the Railway Committee at the proper time.

MR. MCCARTHY.—I appear in this case for the Attorney General of the Province of Manitoba. The case must, to a very great extent, be determined upon the construction, as it appears to me, which your lordships will place on these clauses of the British North America Act, because if we once ascertain the proper meaning to be attached to the clauses under consideration it will be easier, in all probability, to determine and define the proper meaning to be given to the particular section of the Railway Act of 1883, which has subsequently been re-enacted. I do not propose to dispute at all many of the observations which have been made on the other side of the case in the argument addressed to your lordships yesterday. As to the power of Parliament and as to the duty of the Court, I do not think that it would be open to me to argue, nor do I think it could be successfully contended that if Parliament has in this case enacted or declared—because it is a declaration and the exercise of a power—that any particular work which hitherto, and *prima facie* under the British North America Act was a provincial work, was henceforth to be a work for the general advantage of Canada, I do not think the Court can inquire into the reasons or ground on which that legislation was based. I quite go with my learned friend, Mr. Blake, in his argument that even if the reasons were given in the recital, and those reasons appeared to be wholly unsatisfactory to the court before whom the question came, if they appeared illogical, nay absurd, nevertheless if Parliament has come to that conclusion and has made that declaration, the courts, I apprehend, must give effect to it whatever the reasons may have been; but if there is a difficulty in construction, if there are doubts and differences of opinion which may be reasonably entertained, in other words if the Act itself is not perfectly clear and certain, then the considerations which have been advanced by my learned friend who

has preceded me, and those which I will afterwards offer to your lordships, may have a very great effect upon the proper construction to be placed on the enactments. I think my learned friend, Mr. Blake, referred yesterday to some extracts from Jude Cooley's celebrated work—because it has come to be recognized as a celebrated work—on Constitutional Limitations. I will add to this, if I am not repeating the quotations given to your lordships, the interpretation which should properly be given. At page 87 of the last edition of this work in the library, just stating the principle which my learnd friend, Mr. Blake, quoted, this language is to be found: "Still less will the injustice of a constitutional provision authorize the courts to disregard it, or indirectly to annul it by construing it away." Further on he remarks:—

"Such provisions when free from doubt must receive the same construction as any other. We do not say, however, that if a clause should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences, it might not be the duty of the Court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aims of these instruments."

At page 205. language to the same effect will also be found. He quotes from Mr. Senator Verplanck as follows:—

"It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority. There are indeed many dicta and some great authorities holding that Acts contrary to the first principle of right are void. The principle is unquestionably sound as the governing rule of the Legislature in relation to its own acts or even those of a preceding legislature. It also affords a safe rule of construction for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its Statutes."

These are the rules which I invoke for a consideration of the matter which is now before the Court, and let me first draw attention, if indeed it may be at the expense of some little repetition, in a case of this great importance, to the object of this power. It is perfectly plain that the intention of this Act is to confer upon the local legislatures, in ordinary and as a general

thing, control over local works and undertakings generally, and it is only in excepted cases that that power and that authority, generally to be looked upon in the first place as being in the local legislatures, is taken from them. I think there is great force in the argument which my learned friend, Mr. Mowat, presented to your lordships, that if the wide and sweeping powers which are claimed to be the proper meaning of the enactment in question, are held by your lordships to be its true meaning, the effect would be to give to the exception a construction so far reaching as to do away with the enacting clause. If it is lawful for the Parliament of Canada to pass the enactment having the meaning contended for on the other side, so as by one short sentence to sweep under its control practically all the railways then existing, and practically all the railways which for all time could or might be constructed, to take away from the authority in which it was, *prima facie* reposed, this power, then it would be equally within the competence of Parliament to declare that all local works and undertakings, using the language of section 10 that may be thought of shall be for the benefit of Canada. Now if that is possible the result, your lordships will see, would be to enable the exception to destroy what in other instruments would be called the grant of power. It would create such a repugnance between the exception and the grant that it would be impossible that both could stand, and according to well known rules of construction the effect would be that the exception would have to give way. Though perhaps unnecessary, I will refer on that point to the case of Furneval and Grimes, 5 Manning and Granger, 576; and to Livingston on the construction or interpretation of deeds, page 427. The first case is where church-wardens desiring to protect themselves endeavored so to covenant and limit their covenant that there should be no liability on them or their successors personally. The Court held that that was an impossible result, and the decision was that the persons were responsible personally notwithstanding the plain intent of the instrument. But there is also in this legislation—I am speaking now of the British North America Act—another view which it presents. Dealing with this sub-section "c" and not repeating Mr. Mowats view as to the limited effect that ought to be given to that sub-section, I say that

it is plain and clear that the key to the meaning of this sub-section is the word "works." "Such works" I leave out their situation, "as are"—or let me put it "such a work as is before its execution declared by the Parliament of Canada to be for the general advantage of Canada."—"such a work as, after its execution, is declared by the Parliament of Canada to be for the general advantage of Canada." "Such a work"—what does that mean? If the work is constructed, if it is in existence, there can be no doubt at all about the meaning to be attached to it. If in a liberal, a reasonably liberal sense, it is a work, I think the work is designed, conceived, thought of, agitated for. It is a work which Parliament in advance may say would be for the general advantage of Canada, but it is upon the object, the work, whether constructed, completed, or designed, upon which this legislation is to operate and not by a general enactment of laws that all works hereafter thought of, or which may be conceived of in the distant future are works for the general advantage of Canada. Why, gramatically it is absurd. Take this very work, and others that might be suggested as even more improbable as being within the contemplation of the Parliament of Canada—how can you conceive that a work which had never been dreamed of, which had never entered the mind of man to be constructed, not only shall be a work for the general advantage of Canada, but was at the time that legislation was passed a work for the general advantage of Canada? I have seen it laid down that Parliament is powerful enough to do everything, but make a man a woman or a woman a man, but if your lordships are to declare that a work which has never been thought of is a work for the general advantage of Canada, I think it is extending in an equal degree the power of Parliament. The Intercolonial Railway joins the Canadian Pacific Railway which crosses the continent: through the whole of this country north and south of this line of railway, roads may be built and works done which were never dreamed of and these are declared by this enactment to be works for the general advantage of Canada. It is plainly contemplated by this enactment that Parliament will exercise a judgment, or have the opportunity of exercising a judgment, with regard to any particular work which is withdrawn from the authority of a local body.

Your lordships will see that it is not the enactment of a law, it is not making a law which is to be read as we are told—as a statute always speaking, but it is the declaration of a power by virtue of which the authority that is vested in the local legislatures to-day is in a moment to be transferred to another legislative body, and that for all time, because I think I can satisfy your lordships that once that power is declared there is no revocation.

GWYNNE, J.—You contend that the enacment has no application to a future work?

MR. MCCARTHY,—It has no application to any but an actual work. This is a power which, your lordships will see, once exercised can never be recalled or revoked. It is not the making of a law or the enactment of a rule for the guidence of people, but it is a power which was given in this constituting instrument,as such instruments are sometimes called on the other side of the line,that on a given event happening, namely the declaration by the Parliament of Canada, that a certain work shall under its jurisdiction. That declaration being made the work becomes for all time under the jurisdiction of the Dominion, and Parliament can no more denude itself of that right than it can of the jurisdiction over trade, commerce or any other subject enumerated in section 91 : it practically comes under section 91 of the British North America Act, and once passing under the jurisdiction of the Parliament of Canada it can never afterwards cease to be under that jurisdiction and can never be revoked.

TASCHEREAU, J.—You contend that it must be read as enumerated under section 91?

MR. MCCARTHY,—Yes my lord, and beyond the purview of the local Legislature : the power is to declare that is for the advantage of Canada. If so, under section 29 it comes under the exclusive authority of the Parliament of Canada. If under the exclusive authority of Canada, what jurisdiction has the Parliament of Canada to transfer it to another body? I am not aware of any such power. These considerations must weigh with the court when I come afterwards to ask your lordships to interpret the effect of this enactment. My learned friend, Mr. Blake, used an argument yesterday which I think goes a long way indeed to strengthen this contention. He said that the Parliament of Canada, exercising

its power *bona fide*, must be assumed to undertake the promotion of that work. Apply that : the promotion of what work ? This work may or may not have been thought of. For my argument I may assume that it was never thought of in 1883, 1886 or 1888. The Parliament of Canada undertook to promote works which had never been thought of. I think Mr. Blake's contention is correct : Parliament says not only is that a work which it ought to promote, but it is so important that the power of the Dominion should be given to its construction and completion, but if you look at the map of the country and see the large blank that would be left in the power of the local legislatures to construct and build works, the effect of this would in the future be very detrimental to the public interests and on that ground cannot possibly be conceived to have been in the contemplation of those who framed the British North America Act. Therefore I say that the power of Parliament is to deal with works projected, designed, at all events conceived—in other words an object. What I mean, is, that the object which is intended in the construction of the work must be dealt with in the legislature. Now of course we all know, within our own experience, plenty of works which have been agitated for years ; one in my part of the country we have heard of a great deal for years, the Georgian Bay Canal. That was a projected work. It would have been quite possible, I take it, for the Parliament of Canada to have said that the Georgian Bay Canal is a work for the general advantage of Canada and to bring it within the jurisdiction of Parliament.

TASCHEREAU, J.—Creating it and making it a work for the general advantage.

MR. MCCARTHY.—I am not sure that it might go that length, but in advance of its creation it could declare it a work for the general advantage of Canada. What is the proper mean- of the word " works " ? What is a work ?

TASCHEREAU, J.—It contemplates execution.

MR. MCCARTHY.—It contemplates the execution of some particular work. It does not contemplate that the Parliament of Canada is to be authorized to make a law to do away with the authority of the local legislatures to do local works, but it contemplates that a certain work, under certain circumstances, shall be for

the general advantage of Canada. I deal first with the general principle. Although general words might be sufficient in some cases and it would not be absolutely necessary to specify the particular work, yet it is essential to designate particular works by particular names, if they are to be accomplished in another way. Then, very much in the same light that I have taken so far, is the negative of the proposition, and that brings me to the construction of this clause. Whatever that means I say that it cannot come under the head of works, if the words are to have the wide interpretation claimed for them on the other side. It cannot mean every branch line or railway hereafter connecting with or crossing the said lines of railway. If I am right so far, that follows. Now is this enactment to be read as one always speaking? We know perfectly well that that is the construction of ordinary Acts of Parliament, but I have endeavored already to point out to your lordships, and I will repeat very shortly, that that is the exercise of a power, and like the exercise of other powers it is to be performed in a certain way, it has to be executed in a certain way. When executed it is not a law like ordinary enactments, such as the criminal law or the Act regulating bills or promissory notes, but a declaration which has produced by antecedent enactment, the British North America Act, a certain result; but the law is not always to be read as speaking at that particular time. Take the narrow view, and it is the view which my learned friend Mr. Mowat has presented on that particular aspect of the case, and the argument is in our favor, because it contemplates as plainly as possible that it is the branch railway, or the railway, whichever it may be—I am coming bye and bye to see whether these terms are wide enough to include what is contended for on the other side—it is the branch railway which is declared to be a work for the general advantage of Canada, not the work conceived in the man's brain, not a sod turned on the ground, but the accomplished work which has *de facto* reached the point to connect it with one of the named railways. It is "every branch line or railway" not the works. I do not mean to say in one sense that you might not read the clause in that way. If the contention required it, and the subject matter made it necessary to give it that reading, it is possible that your lordships would say "branch line or railway" here means the

designed railway or the designed branch line, but I say in this case the context requires no such stretching of the language. When we speak of a railway or branch line, we are speaking of an existing thing which, for the reasons I have already adverted to, are not at all affected by this enactment, but which if the enactment is to be read as speaking from day to day and hour to hour would refer to the accomplished work and not the designed work.

GWYNNE, J.—Is the crossing made part of the Act?

MR. MCCARTHY.—No my lord.

GWYNNE, J.—There is no objection to the Act as authorizing the construction of a railway between two points; it is only the crossing of the Canadian Pacific Railway that is objected to.

MR. MCCARTHY.—Yes my lord, and not only that but this railway could geographically be built without crossing the Canadian Pacific Railway at all.

GWYNNE, J.—Then there is no objection to your doing that, it is only by crossing one of these named railways that you make it a Dominion work.

MR. MCCARTHY.—You are asked "is the said Statute of Manitoba, in view of the provisions of chapter 109 of the Revised Statutes of Canada, particularly section 121 thereof, and in view of the Railway Act of 1888, particularly sections 306 and 307, valid and effectual so as to confer authority on the Railway Commissioner, in said Statute of Manitoba mentioned, to construct such a railway as the said Portage Extension of the Red River Valley Railway crossing the Canadian Pacific Railway."

GWYNNE, J.—You must make it cross; it is only by attempting to cross that you make it a Dominion work.

MR. MCCARTHY.—Well, our legislation is not *ultra vires.* The Legislature of Manitoba has properly exercised its powers by incorporating a company to build this road between these two points.

GWYNNE, J.—If you can run between the two points without crossing the Canadian Pacific Railway.

MR. MCCARTHY.—Yes, and then what follows? You come to this, that our Act is good until we reach the point of crossing and then it becomes *ultra vires.*

GWYNNE, J.—Not if you do not cross.

MR. MCCARTHY.—The Act is either *intra vires* or *ultra vires*.

GWYNNE, J.—It is good to enable you to make the road without crossing.

MR. MCCARTHY.—I submit it is good on the face of it until we cross, beyond all question, and why should it then become bad? It may be that the moment it crosses it becomes subject to Dominion jurisdiction.

GWYNNE, J.—You convert it by that from a work under provincial jurisdiction to a work under Dominion jurisdiction.

MR. MCCARTHY.—Possibly that very moment we become subject to Dominion legislation.

GWYNNE, J.—Can you make it a Dominion work by your acts alone?

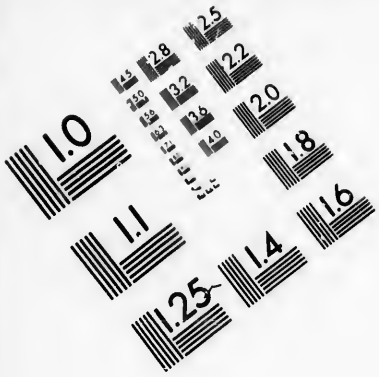
MR. MCCARTHY.—If we have power to charter a road which road may or may not cross. The first section of the Act says:—

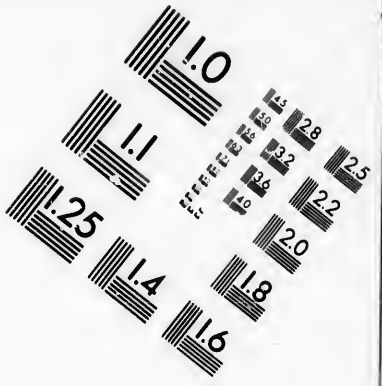
"The Railway Commissioner shall have the power to construct and operate a railway from a point within the City of Winnipeg to a point within or near the town of West Lynne, within the Province of Manitoba, and such railway shall be styled and known as the Red River Valley Railway."

That railway has been constructed without crossing any of the main lines. Then the latter part of the section is as follows:—

"And also to construct and operate a railway from a point within the City of Winnipeg to a point within the Town of Portage la Prairie, and also to construct and operate such other railways, within the Province of Manitoba, as may be determined upon by the Lieutenant-Governor-in Council."

Supposing this was an act of incoporation by which a company was incorporated with those powers. The corporation is good, it proceeds to exercise its powers and then it comes to the Railway Committee of the Privy Council and asks to be permitted to cross this line. What is the company to be told? That section 177 of the Railway Act provides for that case? Are they to be told "because you come here and ask to be allowed to cross you have destroyed your own charter? It was good up to the time you made the application to the Committee of the Privy





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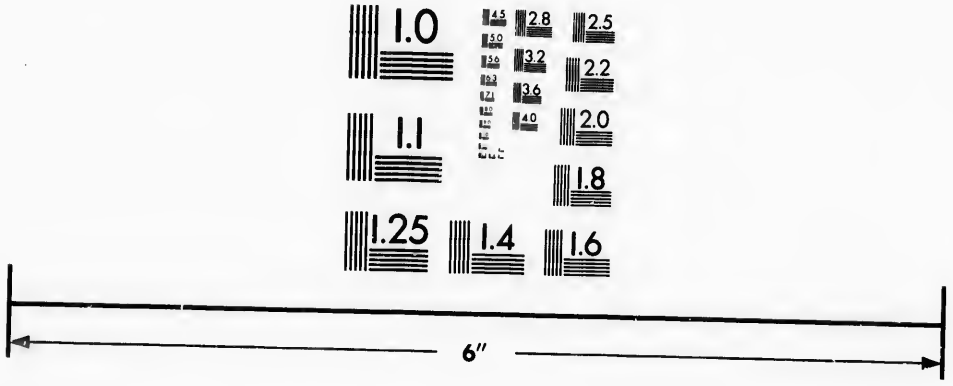

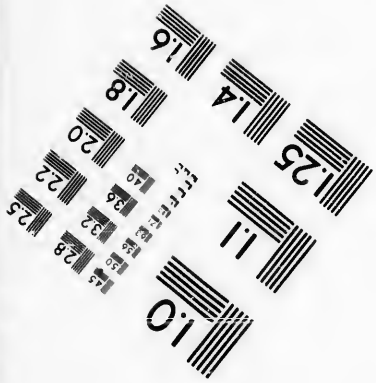

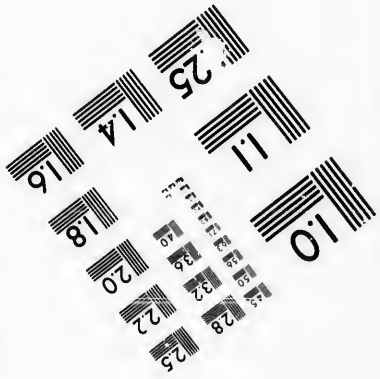

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Council, but that instant your charter has become null and void." Is that the construction that is to be placed upon it? It is a *reductio ad absurdum.* If that is the contention, that henceforward, just as with other railways, just as with those railways which were in existence in 1883, that those railways should be subject to Dominion legislation—

RITCHIE, C. J.—Can you construct a railway from the City of Winnipeg to a point at or near Portage la Prairie without crossing the Canadian Pacific Railway?

MR. MCCARTHY.—Yes my lord, that is a fact, and your lordships cannot shut your eyes to the fact that it is therefore a valid enactment.

GWYNNE, J.—A valid enactment to enable you to cross?

TASCHEREAU, J.—The question before us is not whether the Act of incorporation is good or not. It is quite a different question.

MR. MCCARTHY.—I start with the fact that the Act is valid on its face: its validity must be admitted until we apply to the Railway Committee for permission to cross. Then if it is valid for that purpose—

STRONG, J.—You contend it is valid so as to confer authority to cross?

RITCHIE, C. J.—Is it valid for that purpose without the consent of the Railway Committee of the Privy Council?

MR. MCCARTHY.—Certainly not.

MR. BLAKE.—Your lordships are asked to assume that they have a right to ask permission to cross.

MR. MCCARTHY.—The case is submitted to your lordships with this view, that the Railway Committee will, if they have the power, give permission to cross. They say the only objection is that your Act of Parliament is invalid. When did it become invalid? It was not invalid when it was passed. Then the Act becomes invalid because we go in a certain direction. The reasonable construction in that view would be that if the effect of this Act is—and it carries out the view for which Mr. Mowat has contended—that what the section of the Act of 1883, was dealing with was the existing railway, not the projected work. But

" existing railway and works " of course may be well used in either one sense or the other. Now these general considerations which appear to me to be of very potent weight in the determination of a matter of this kind, I have followed my learned friend, Mr. Mowat, in submitting to your lordships. There is just one case which I think may well be cited. It has been referred to by Mr. Robinson. I cite it for a different purpose. In Regina *vs.* Moore, a Quebec case, reported in Cartwright, vol. 2, p. 257, your lordships will find it laid down, that local works and undertakings are to have the widest possible signification, so that your lordships will see, if that is correct, and the reasoning appears to commend itself to one, as a correct signification, what I would say to that is that the generality of those words if applied in the way suggested by a sweeping clause as all local works and undertakings would necessarily destroy to a large extent the powers of the Local Legislatures.

TASCHEREAU, J.—That was reserved for a criminal case?

MR. MCCARTHY.—Yes my lord. Another case to which I would refer, is the European and North American Railway *vs.* Thomas, 1 Pugsley 42, and 2 Cartwright, 439. It upholds the validity of this charter. Your lordships will remember that case. It appears to me to go all the length of upholding the validity of this charter, upon the point I have just been speaking to. There the contention was that the object of the road was to connect with a line in the State of Maine, and it was urged that as that was the object, and that it could be established outside of the charter itself, then it would come within the forbidding clause, or exception of this clause 10. but the Court held there " that we cannot look beyond the charter itself to see what the objects, or motives, or intentions may have been. They may have carried their line to the international boundary, and for all we know the other railway may have been constructed to the same invisible line, and there may have been a connecting road, but this charter is within the power of the local legislature, because the authority confines it to the limits of the Province."

RITCHIE, C. J.—There is another case.

MR. MCCARTHY.—That is the case of Dow *vs.* Black, reported in 1 Pugsley, 300. That was on a different ground.

RITCHIE, C. J.—The point there was that the line was connecting with a foreign country.

MR. MCCARTHY.—The Court below put it that way. The Act that was considered *ultra vires* there was legislation to assist an existing road which had been chartered before confederation, and did connect with a foreign line; and I think the Court there determined that that being the object, to assist this line it was practicaily the same as if it was an incorporation of that line, but the Privy Council held otherwise. It is reported in 6 Privy Council, page 72. This case is, to my mind, a very strong authority, if, indeed authority is wanting—but I cannot see that there is—to uphold the validity of the legislation of the Province of Manitoba, and I know not how it is to be impugned afterwards.

RITCHIE, C. J.—Could they possibly authorize the crossing of the Canadian Pacific Railway?

MR. MCCARTHY.—Of course, I perfectly apprehend that, I perfectly realize that we have to satisfy your lordships, first that the Act itself could not be declared by this Court to be *ultra vires*. They build on that until they come to the crossing. It must be because in pursuance of the power therein conferred, they have applied to the Railway Committee of the Privy Council for liberty to cross, that they lose their entity.

STRONG J.—Is not the real question submitted to us here whether there is any power, conferred by this statute of the Province of Manitoba, on the company incorporated, to cross the Canadian Pacific Railway with the authority of the Railway Committee alone, and without any legislative authority of the Dominion?

MR. MCCARTHY.—That is another way of putting it, perhaps.

STRONG, J.—Is it not just that?

MR. MCCARTHY.—It may be.

STRONG, J—That is consistent with the argument. We may answer this question in the negative without in any way impugning the constitutionality or validity of the Statute.

MR. MCCARTHY.—Yes, that is, if it is possible for your lordships to do it.

MR. BLAKE.—And as they could build the road without crossing the Canadian Pacific Railway.

TASCHEREAU, J.—Has the Privy Council the power to authorize the crossing?

MR. BLAKE.—They ask your lordships to assume that they will exercise the power if you answer that they have.

STRONG, J.—Whether adding their authority to the Statute, without any legislative authority from the Dominion, there is power to permit the crossing.

MR. MCCARTHY.—I think what your lordships have before you is this: first, the Act of the Manitoba Legislature, second the application to the Railway Committee. We have these two facts. Now, upon these facts, can the Railway Committee proceed? One goes in advance of the other, illustrating the fact that the Statute applies merely to railways constructed, to works in that sense completed, and not to the conception of a work which is a different matter. The words are quite open, perhaps, to either one view or the other. It is impossible as it appears to me, to conceive of a charter which is good and becomes destroyed because the parties are pursuing the powers authorized by it. That is a kind of *felo de se* which one cannot understand.

Now, coming to a somewhat more minute criticism of the enactment itself, I do not know to what extent your lordships are at liberty to look back to the Statute of 1883 for an interpretation of the subsequent enactments in the Revised Statutes and the Statute of 1888, but I think it is impossible to read the original enactment without seeing the juxtaposition, to quote from Judge Wurtele's statement, in which main lines are put to branch lines. It recites that not only "the main lines of the Intercolonial Railway," &c., (mentioning them) but also "all branch lines of railways connecting with or crossing," &c. Now, there is some object in using the words "main lines" there. Certain railways have been selected as the great trunk lines of the country, and Parliament recites not only the main lines but also all branch lines of railways connecting with or crossing them. What I say is that the subsequent words are to be read in connection with the first

as referring merely to the branch lines—that these main lines and these branch lines are the lines declared to be for the general advantage of Canada. I admit that the language is not as apt, or distinct or precise in that regard as, perhaps, it should have been but there is nothing in the words that are used—unless the court is prepared to declare as a matter of law that a branch cannot cross a main line—to prevent the meaning being applied to the enacting part of the clause which I contend for. Now is there anything, in law or in reason, to say that a branch line of railway cannot cross? First it is to be a branch line; a branch line, secondly, which connects with, or, thirdly, which crosses. Ordinarily, I admit the acceptation of a branch is a line which connects with a trunk, but that is not, evidently, deemed sufficient by Parliament to define its meaning, because it says a "branch" which "connects with." These words can only refer to a branch, as has been properly stated on the other side.

MR. BLAKE.—No, branch lines, or railways connecting with or crossing.

MR. MCCARTHY.—That may be, but I should not think that the natural interpretation, I should think a branch, if it does connect—

MR. BLAKE.—If it is a branch it must connect, and therefore it does not apply to a branch.

MR. MCCARTHY.—Let us read the section :—

"Whereas it is, in and by the British North America Act, 1867, among other things in effect enacted, that the exclusive legislative authority of the Parliament of Canada, extends to such local works as, although wholly situate within a Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage, &c,..... all branch lines of railway connecting with or crossing the said lines of railway, or any one of them, is a work for the general advantage of Canada."

RITCHIE, C. J.—"Every branch line or railway now or hereafter connecting with or crossing the said lines, &c," and then section 307 says: "every such branch, &c."

MR. MCCARTHY.—The named railways are declared to be works for the general advantage of Canada, and "each and every branch line, etc., crossing"—the branch line must connect with.

Of course I admit, what my learned friend says, that the branch line would not be a branch if it did not connect, but Parliament has not chosen to rely upon that signification of a branch line; it goes on to say that a branch line is one which connects—"each and every branch line, etc., which connects, etc." "Would not it say "and" instead of "or"—every branch line and railway and every railway now or hereafter connecting with, etc. That would be the proper way to draw that clause. Then the 2nd section—the sub-section as it was then—of section 307 as it is now does not seem to me to help either my opponents in this view, or the view I am contending for, for it says "every such branch railway or line," because every such railway, therefore, was dealt with as an independent railway, and every branch line as a separate and distinct matter, "shall hereafter be subject to the legislative authority of Canada." But I think it is a mere repetition of what has already preceded it, and unnecessarily preceded it, in the principal clause in which it is enacted, that all those railways "are hereby declared to be works for the general advantage of Canada." Then it goes on unnecessarily to say that every one of those lines of road had been already declared to be for the general advantage of Canada, or were being declared for the general advantage of Canada. "Every such railway and branch line shall hereafter be subject to the authority of the Parliament of Canada." Now, there is a completeness in that; there is a reasonableness in that construction. There is an obvious sense, if the main line is to be under the control of Parliament, that the branch lines shall be under the control of Parliament, and the branch lines in a large and liberal sense. For instance, I know of one case where there was a branch line connected with the Grand Trunk Railway—the Midland—which was not brought under the jurisdiction of this Parliament until this enactment took place. I think that perhaps the Toronto & Nipissing may be said to have been a road which, in one sense, connected—I do not think it did literally—with the Grand Trunk Railway, but it was one of its branches.

PATTERSON, J.—It ran along the Grand Trunk Railway before it became a part of the system.

GWYNNE, J.—It was always a branch of the Grand Trunk Railway.

MR. BLAKE—The Midland systen is an aggregation of several roads.

MR. MCCARTHY—Your lordships will find the history of it in Clegg's case. Moorhouse, 8 Ontario Appeals.

GWYNNE J.—Does it not appear in the case of Barbeau *vs.* the Grand Junction ?

MR. MCCARTHY—The Toronto & Nipissing was in a different position. It was originally a narrow gauge line, a provincial road, and my recollection is that by license—not as a part of the Grand Trunk Railway, not as connecting with the Grand Trunk Railway, but by license—it ran from the Scarboro Junction into Toronto, a distance of 8 or 10 miles, to a station of its own. It was part of the Grand Trunk Railway system, physically connected with the Grand Trunk Railway system, and yet it was a branch. It became afterwards the ordinary gauge, and became a branch of the Grand Trunk Railway, which would naturally come within these words. Now, the question is whether your lordships would put the extravagant meaning which my learned friends on the other side have contended for, or attach a reasonable meaning to it. If that is open, there is no doubt as to what view your lordships should take under the well known rule regulating questions of that kind, and I am unable to conceive why it is that prominence is given to the words not only "main lines," but "branch lines," if it was intended to include every railway which crosses any of the named roads. My learned friend, Mr. Blake, urged that there is a commercial meaning to that, but these roads cross one another sometimes without having any joint station.

MR. BLAKE—The general law provides for and requires facilities at every crossing.

MR. MCCARTHY—If so, it is a general rule of law which is more honored in the breach than in the observance of it. I do not think they have joint, or junction stations at any of the crossings. They stop and cross as required by law, but they have no more to do with one another than if they were a hundred miles apart.

STRONG, J.—The Kingston & Pembroke crosses the Ontario & Quebec at Sharbot Lake, and there is a station at which they stop there.

MR. MCCARTHY—They do, but take the Ontario & Quebec where it crosses the Northern Railway. They stop there, according to the statute, but not for passengers. There is another crossing near Toronto—what was once the Nipissing passes under the Ontario & Quebec. There is no stopping there of course, of any kind, and no connection between them of any sort or description.

MR. BLAKE.—The section to which I refer is the 240th, which provides that.

"Every Company shall, according to its power, afford all reasonable facilities to any other railway company for the receiving and forwarding and delivery of traffic, &c.,

MR. MCCARTHY.—If that is the meaning of it, certainly it is not the adopted or recognized rule.

MR. BLAKE.—It is very full and plain.

MR. MCCARTHY.—There is but one more point with which I desire to trouble your lordships, because I am endeavoring, as much as possible, not to waste your lordships time by repeating arguments which have been so well advanced by my learned friend who preceded me. Is this branch of the Canadian Pacific Railway one of the main lines dealt with in this section?

GWYNNE, J.—That is, the Pembina Mountain Branch?

MR. MCCARTHY.—Yes, as a matter of fact, the Pembina Mountain Branch was not an existing line at the time of the passing of the Act of 1883. As I understand the general scope of the statute, it is the crossing of the main line of the road which works the extraordinary result contended for on the other side, but this is the crossing of a branch of the Canadian Pacific Railway, and if your lordships will look at the map, you will see that it is so. Now, I should have thought that was a very difficult argument to answer, when we come to look at the words of the Statute. Certain roads are named, and "each and every branch line or railway." Of course I am placing an interpretation on the word "railway" there which the other side have contended for.

This being " a railway now or hereafter crossing the said lines of railway, or any of them," surely applies to the main line, and not to its branches—it is the crossing the main line that constitutes it a work for the general advantage of Canada. The section itself draws a distinction between the lines and the branches and it is the crossing of the line itself—and all that we have heard on the other side would strengthen that view— that works the change in the legislative jurisdiction. Is there any answer to that view? The only thing that has occured to me—of course as to this I do not know what my learned friends on the other side may have to say—is that the charter of the Canadian Pacific Railway speaks of the railway and all its branches as being the Canadian Pacific Railway.

GWYNNE, J.—It is in the case here that the branch is part of the railway.

MR. MCCARTHY.—It is part of the line in one sense and not part in another. I think it is plain that a distinction must be drawn. The 15th section of the companys act of incorporation provides that.

" The company may lay out, construct, equip, maintain and work a continuous line of railway.....and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina in the said Province, and also other branches to be located by the company from time to time as provided by the said contract, etc."

STRONG, J.—Is your proposition that the Statute does not apply to the crossing of a branch of the railway?

MR. MCCARTHY.—Yes my lord.

STRONG, J.—And that this is a branch?

MR. MCCARTHY.—Yes, my lord, and that the Statute does not apply to the branch, but only to the main line.

STRONG, J.—You contend that it does not apply to a branch in any case? Take the Grand Trunk Railway for instance, you say that the Statute does not apply to a branch of that line?

MR. MCCARTHY.—Yes, my lord. The question would really not be open to argument, it appears to me, but for the clause to which I am about to refer.

STRONG. J.—You contend that the Pembina Mountain

Branch, mentioned in the case, is not within the class mentioned in the Act?

MR. MCCARTHY.—Yes, my lord—

"And together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the said main line of railway, that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called the Canadian Pacific Railway.

I take it that it is merely an interpretation clause for the charter. The road throughout this charter is referred to here in short terms, just as in a deed we say the company, or the Canadian Pacific Railway, or the railway hereinafter named called the company. That is the object and purport of that clause, but in the clause itself there is the very plainest distinction drawn between the main line and the branches, and in the legislation that we have; and every argument that has been offered, every argument that can be adduced in support of the wide construction contended for, can only be applicable to the main line—not to colonization branches stretched here and stretched there, wherever the Canadian Pacific Railway Company choose to stretch them, but to the main line of traffic and the main line alone. So I submit to your lordships, with confidence, that there is nothing in this section which prevents the Court from finding out which is the branch and which is the main line, and that if that be so, then the conclusion would follow that the effect here is not what is contended for in the attempt we are making now to cross this Pembina Mountain Branch. It was well observed in the passage of the bill through the House—and these words have become of very great significance—that the definitions, if they may be applied, were very vague and unsatisfactory. If your lordships are of that opinion—if you are in any doubt—if any of the arguments which have been urged to your lordships are of any force whatever, there can be but one result, that if this matter is open to doubt or question it must be resolved in favor of the Province. If the Provinces are deprived of the legislative power, it must be by clear and definite language, open to no misconception and no manner of doubt. That is the ordinary rule with regard to the exercise of power. Courts do not construe the words to destroy the exercise

of a power ; if they can see a clear intent for its exercise it will be upheld, but in a matter of this kind the exercise of the power must be clear and unambiguous. The very fact that we are assembled here to-day, that we have occupied your lordships time with this contention, if our opposition is not wholly unreasonable, is, I submit, the very best possible answer that can be made to the objection of the Canadian Pacific Railway Company to this crossing. It may not have been necessary to schedule all these roads in existence at that time? I believe the history of it was this; and I believe the effect of the legislation was to at once change into Dominion lines--if the wide views contended for by the other side prevail—roads then already in existence in the Dominion of Canada, and at the outside eight roads, which were not brought under authority of the Parliament of Canada. Of those eight, by contemporaneous legislation, three were at once to pass under Dominion legislation for other reasons, so that the effect of the legislation then, in that view, might be sufficient designation. In other words, it might be held, though I do not at all say it has the effect, that those general words "all roads crossing"—because those roads could be known and ascertained, and could have been put in the schedule and listed—might therefore become works for the general advantage of Canada ; but it could not possibly apply, by general words, to the future. That is the distinction which occurred to me in dealing with this matter. It was not essential, in other words, to name each road and call it by its designated corporate name, so long as the language used was sufficient to indicate its being an existing road

MR. BLAKE.—It was there on the ground.

MR. MCCARTHY.—It was there on the ground. But dealing with the future and for all time, it was quite a different thing to declare that things which were not actually dreamed of, and which had never entered into the mind of man to conceive, not only shall be by and by, but the language of the statute is ' are works "—that each and every one of those unprojected, unthought of, undreamed of works, is a work *eo instanti*, for the general advantage of Canada.

RITCHIE. C. J.—Have you, Mr. Langelier, anything to say on behalf of the Province of Quebec?

MR. LANGELIER.—No, your lordship, I have nothing to add to what my learned friends have said.

MR. BLAKE.—I shall begin by referring to the penultimate argument of my learned friend, because it lies almost at the root of the matter, and has to do with the language of the case itself, which your lordships are called upon, under the statute, to answer, I refer to that argument in which my learned friend presented the view that this was a proposed crossing of a branch of the Canadian Pacific Railway as distinct from the Canadian Pacific Railway itself, and therefore did not fall within what he would call the mischief of the Acts of 1883, 1886, and 1888. Now to that I have a two-fold answer; the first is that the case concludes the question, for the purposes of the case, against my learned friend. It is a question which, if one is at liberty to refer to what passed before the Railway Committee, was suggested should be raised but it is not raised, and for obvious reasons, because it was the opinion of the Committee that this was the Canadian Pacific Railway, and because very clearly this whole proceeding would be abortive if it were to go off upon the suggestion that the duty which is imposed upon your lordships sould be evaded by dealing with this as a branch instead of the Railway. What is said? The statement of the fact that application is made for approval of the place at which and the mode by which it is proposed that the Portage Extension shall cross the Pembina Mountain Branch of the Canadian Pacific Railway, the said railway being part of the Canadian Pacific Railway, at a point within the Province. Your lordships were not asked—respectfully I say your lordships are not at liberty to deal with the question whether the Pembina Mountain Branch is other than a part of the Canadian Pacific Railway itself, because where the Pembina Mountain Branch is named at all in the case, a definition of what it is is given, and your are told that it is part of the Canadian Pacific Railway, so that the question is not open even there. But when we come to the question itself, as distinguished from the statement of the case, your lordships are asked is the Act valid and effectual to confer authority to construct such a railway as the Portage Extension of the Red River Valley Railway, crossing the Canadian Pacific Railway, so it is made perfectly clear there

that it is the question of crossing the Canadian Pacific Railway that your lordships are called upon to deal with, and it would be most unfortunate, in view of all that has taken place, here and elsewhere on this subject, if those proceedings were to become practically abortive because your lordships should hold that it was your duty to enquire into the question whether the Pembina Mountain Branch was part of the Canadian Pacific Railway, to decide that it was not part of the Canadian Pacific Railway—to decide that this projected railway did not cross the Canadian Pacific Railway, and therefore that your lordships would not answer the question, because that would be the practical result.

The question is, is there authority from the Legislature to give power to construct a railway crossing the Canadian Pacific Railway. The second answer is that if your lordships propose to enter into that enquiry, the Act to which my learned friend refers concludes the question. The fifteenth section of the contract which was confirmed by and made part of the Act of Parliament, provides that the Company may

"Lay out, construct acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one half inches, &c., and the said main line of railway and the said branch lines of railway, shall be commenced and completed as provided by the said contract: and together with such other branch lines as shall be hereafter constructed by the said Company and any extension of the said main line of railway that shall thereafter be constructed or acquired by the company shall consitute the line of railway hereinafter called the Canadian Pacific Railway."

So that whether it be logical or not—whether it be accurate or not, Parliament chose, confirming this contract, to declare that with refrence to this particular enterprise the line specified in the contract, and which the Company was bound to build, certain branches which were specified, also some which were built, some of which were projected, and such other branches as the company might choose to build from time to time, and the extension of the railway which was contemplated, and which has since been effected to Montreal and at a later date to Quebec—that all those should be the Canadian Pacific Railway, so that I think if I have not the case I have the argument on the statute. I say that we are not embarrassed by any consideration of that description; we have to

deal with the simple plain question put before your lordships. The facts are stated in a manner which does not call upon your lordships to express any opinion as to whether the Pembina Mountain Branch is part of the Canadian Pacific Railway or not: it is stated for your lordships. That is assumed and it is upon that hypothesis that the case is to be decided. Having touched then upon that question, I come to those portions of the argument of my learned friends which deal with the British North America Act. My learned friend Mr. Mowat argued that the various reports which had been made by the Minister of Justice on Provincial railways in respect to which the power of disallowance was not recommended and was not exercised, although they were obnoxious to the proposition that the Acts were *ultra vires*, if our conclusion be correct, were matters to be considered by your lordships. I do not understand that even apart from the special circumstances of this case your lordships would pay any particular attention to the circumstance that the Minister of Justice on an *ex-parte* proceeding, without anybody complaining, without his attention having been called to those facts, is to be considered as a judicial authority whose conclusion when he is advising the Executive—sometimes it is whispered upon political considerations as well as upon those strictly legal considerations which alone should animate him in the discharge of that duty—is to be considered by your lordships. But when your lordships know that the Minister of Justice confesses his inadequacy satisfactorily to solve this question, and when he actually settles this case and submits it to your lordships that you may decide it, to quote his own preceding action or inaction as some reason, however slight, as some straw however trifling, which should guide the judgment of the court, seems to me to be nothing less than ridiculous. One has to ascertain what the meaning of the British North America Act is. I quite agree that that is at the root of this matter. My learned friend suggested that it was doubtful whether sub-section "c" included railways at all. I think that there is really no doubt about it. In looking at sub-section "c" and considering what the meaning of "works" is, you have to, as a governing consideration, allude to the main language contained in section 10 itself.—"Local works and undertakings other than

such as are of the following classes", that is to say that in each province the Legislature may exclusively make laws in relation to local works and undertakings other than such as are in the following classes. Then when you come down to "a" "b" and "c" you find it is local works and undertakings of the class "a"—"Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province."

That particular class of local works or undertakings is therefore handed over to the Dominion. Then "b" another class of local works and undertakings—

"Lines of steamships between the Province and any British or foreign country."

That particular class of local works or undertakings is handed over to the Dominion And then "c", a still other class of local works and undertakings—

"Such works as, although wholly situate within the Province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

Now we have some kinds of lines of railways excluded expressly by "a."—the kind of railways and of works and undertakings which had to do with the connection of one Province with another, or which extended beyond the limits of the Province. You find that the Legislature conceives that local works and undertakings which do not fall within "a" and "c" may yet be for the general advantage. They conceive that those which do fall within "a" and "b" are for the general advantage, but there may be some which do not fall within "a" or "b" which may be for the general advantage. But my learned friend says they must not be railways, steamships or telegraphs: neither must they be other undertakings because there is nothing mentioned: then there is nothing left—"a" provides for railways, steamships and other undertakings which connect; "b" provides for steamships; "c" provides for such works as although wholly within the Province, and therefore not coming within "a" or "b", are declared by the Parliament of Canada to be for the general advantage.

What reason, if we are to enter at all into the domain of reason in construing the statute, could there be for saying that that most important class of works, and that class of works which was most likely, although wholly within the limits of one Province, to be for the general advantage, was not to be included in "c"? Your lordships will see in an instant that if there was a line of railway built, for example, through a large portion of Ontario and another line of railway built through a portion of the Province of Quebec extending to its boundary, the link which should connect those two lines of railway, though built wholly in the Province of Ontario, might yet be most emphatically within the spirit even of section "a" for the general advantage of Canada, and yet my learned friend says "Oh, railways are excluded." I do not think it is possible to maintain that contention, and therefore I ask your lordships to conclude in the language of sub-section "c" that railways are included in "works."

STRONG, J.—Do not the words "such works" refer to the enumerated works in sub-section "a"?

MR. BLAKE.—Yes, I should have said so. Works of the same general description but not answering the description wholly, because they are entirely within the Province.

GWYNNE, J.—The contrast is between works entirely within the Province and works partly within the Province.

MR. BLAKE.—There are general words in "a"—it says "other works and undertakings." "A" is all-comprehensive if only they extend beyond the Province. The next suggestion by my learned friend is that there is here an exception; there is an exception out of the general grant to the local legislatures for the construction of local works and that the view which we present to the court of the possibilities in respect to this exception is so large that it would involve the total demolition and elimination of that power. I am not prepared to assent to that view. I do not say that it would be competent to a court to decide even upon such a question, but there would be strong ground for argument that a court might decide upon such a question and might hold an act which should say every local work and undertaking of every

description within all the Provinces is a work for the general advantage of Canada, was an act which was void upon this ground and upon this ground only, that it was impossible to reconcile with the express language of the Act the proposition that all works were works for the general advantage of Canada. The Act might be argued fairly to indicate that some works must remain which are local. And therefore an attempt on the part of the Legislature to arrogate everything from a side line to a jail or court house was inoperative and void. But as I said I think it would be a matter of grave doubt whether that question would be within the cognizance of the Court. But there is no such question; there has been no such attempt. There has been an attempt to define certain classes of a particular kind of local works, railways, as being works for the general advantage of Canada; and therefore your lordships are not face to face with any such enormous proposition as my learned friend suggested as involving a *reductio ad absurdum*.

Then my learned friend went on to suggest that the clause at any rate had to do with the work in the sense of being an actual and existent work of some kind. That argument is destroyed by the language "before or after execution." It is utterly impossible to say that one spadeful of earth need to have been dug upon any work, because it is before the execution that the power may be exercised; but it is also destroyed by the whole purview of the clause. In what sense is the word "works" in this connection used? Certainly in the same sense in which it is used in sub-section "a." Shall your lordships assign a narrower limit as to the period at which works in sub-section "c" may be declared to be for the general advantage than is assigned under sub-section "a" as to the works which are in effect declared by it to be for the general advantage, because they are on that theory expressly and at once placed within the special and exclusive jurisdiction of the legislature? I say no; and yet it is plain and beyond dispute that no project for the construction of a railway, a canal, a telegraph, or any other work or undertaking connecting the Province with any other or others of the Provinces—no project, no matter how much in embryo, could at any time be within the jurisdiction of the local legislature at all.

The whole subject even although, as my learned friend has said, it may never have been dreamed of, is taken away before they can begin to dream of it. The description is there, and the characteristic is there. Is the work connecting one Province with another, or extending beyond the limits of a Province? Your lordships could not say that means the work after it is commenced; that means the work after it is chartered; that means the work after it is projected; that means the work after it is agitated for; that means the work at any rate after it has been conceived, or has entered into the imagination of man. Not at all. No such limits are assigned, but from the beginning it is eliminated from local jurisdiction although never thought of. It may not have been conceived for twenty years afterwards, but nevertheless, it never was within the local power. That is the construction which you give to "works" and undertakings in sub-section "a."

STRONG, J.—If the consummation is void, the first conception of it is void also?

MR. BLAKE.—Certainly, and on the very obvious principle of public convenience as well as legal reason.

STRONG, J.—Such works as are for the general advantage of Canada.

MR. BLAKE.—When is the commencement?

GWYNNE, J.—You contend that section "c" enables the Dominion Parliament to declare what works shall be for the general advantage, in as general terms as the British North America Act does.

MR. BLAKE.—Certainly. In any state of existence or non-existence. If the Dominion Parliament is able to find a definition which will describe the work so that it will be found what it is, then it can make the declaration. I am answering my learned friends argument on the word "works" to which they wish to assign some tangible signification, something dreamed of or imagined. I say you find nothing of that kind in "a."

STRONG, J.—Sub-section "a" says that if a Provincial Legislature should assume to legislate concerning railways connecting one Province with another, it would be void.

MR. BLAKE.—Yes.

STRONG, J.—So you say if a provincial legislature should assume to legislate concerning a work which has been declared by the Parliament of Canada to be for the general advantage of Canada, that work is null and void?

MR. BLAKE.—Yes, my lord. There is no necessity for a work assuming a tangible shape even as a project; it is impossible it should be so in the language of sub-section "a."

STRONG, J.—So soon as you can get such a specific description of it as will enable you to identify it; you say this can be identified?

MR. BLAKE.—Certainly. I will take this example and ask your lordships to deal with this case upon the same principle as if you had found the legislature saying a road from Winnipeg to Portage La Prairie crossing the Canadian Pacific Railway is a work for the general advantage of Canada, and no more. Finding that upon the statute book; finding no authority from the Parliament of Canada to anybody for the construction of the work; finding nobody attempting to do it, but finding upon the statute book a declaration that a road from Winnipeg to Portage La Prairie, is a work for the general advantage of Canada, I ask upon what grounds it can be said that that is not a complete assumption by the Dominion Parliament, a complete removal from the local legislature of all control with reference to the initiation at some future distant period of that enterprise? That is what has been done in this case. As your lordship says, I think we have as good a definition of that work in this general language as applied to this case, as if we could read the words in the statute book, and I say therefore, that the whole argument of my learned friend with reference to something being necessary to be done, I do not know what, came down to something as vague as imagination and dreams of projects, but some thing is essential. I trust that this case will not be answered on that narrow interpretation. I will show that the contention of my learned friend, Mr. McCarthy, is answered in this particular case. My learned friend adverted to the Quebec resolutions, and pointed out to your lordships that the resolution which was submitted to the Imperial Parliament as the basis of the Act of Confederation, said "all such works as shall be specially declared by the Acts authorizing their

execution," &c. I do not think I can add anything to the observations which fell from the Bench on that subject. If there had been anything wanting to prove that it was intended to give a wider power than the resolutions prescribed, it would be the fact that the draughtsman and the legislature had before them this narrower power, and that they enlarged that power. How did they enlarge it? They were not engaged in withdrawing with one hand, when they were extending with the other; they were engaged in the work of extension. Under the resolution it was necessary that the work should be declared by the Act authorizing its execution to be for the general advantage, but what the Imperial Parliament chose to say was, that it should be before or after the execution, to give a new and additional power to the Parliament of Canada to take control of works after execution, which under the Quebec resolutions they had no power over. But my learned friend may say, "I quite admit that while with the one hand the Imperial Parliament were giving that additional power, were allowing the Parliament of Canada to take control of works after the execution, with the other hand they were withdrawing, and saying, "You shall not take control until some certain time. I do not know what, I do not know where it is; some no mans land, this period at which the Parliament of Canada is to be allowed to take control." If the 11th resolution is to indicate the meaning of that part of the Act or to throw any light on that part of the Act which it touches at all, it shows at any rate that the construction which my learned friends have put upon it is too narrow, in part of their argument, because it shows that a work completely unexecuted, not begun, even unauthorized, might, provided at the time at which the declaration was made it was authorized, be brought within the legislative jurisdiction of Canada. My learned friend suggested that the alteration that occurs is only a change in place. I do not know that that was a particularly happy way of destroying the effect of the alteration, whatever it is. Your lordships will recollect Palmerston's celebrated definition of dirt, that it was matter in a wrong place, and an alteration in an Act of Parliament may very frequently make a most important change, and make those things as baneful or obnoxious as matter in the wrong place does when it is

dirt. My learned friend comes next to a decision of Mr. Speaker Wurtele, which he read from a work on the Parliamentary Procedure of the Province of Quebec, and adopting that as a portion of his argument, he asked your lordships to come to the conclusion that the power could be exercised, in effect, only specificially and not generically. I do not think that that argument, even though it possesses the added weight of Speaker Wurtele's authority, can be sustained after being submitted to the test of examination. Let us see for example what would follow : it would be necessary, according to that view, that each work which the Parliament was declaring for the general advantage of Canada, must be named or described individually instead of generally. Now, that is not the scheme of the British North America Act. That is not the scheme of the 10th section itself. The 10th section in sub-section "a" when it proceeds to define, and by defining to exclude from the Provincial Legislature, works, excludes them by classes. Sub section "b" excludes them by classes, but my learned friend says if the Dominion Parliament is going to exercise its power of excluding, it must not follow precedent ; it must not exclude by classes. It must exclude them nominatively. It is a purely arbitrary restriction which my learned friend proposes to impose upon the Parliament. Then my learned friend Mr. McCarthy in dealing with the same branch of the subject, the construction of the British North America Act, asked your lordship, as indeed did the Attorney General, to give great weight to the proposition that the intention was, as a rule, to give control to the local legislatures, and that it was only in excepted cases that the control was removed and that the exception must receive a narrow construction. I do not think that that view is sound. In the first place under section 91 your lordships find that to the Dominion is given—before even you find the excepted cases dealt with — by enumeration those cases which are excepted out of the local authority. In the second place the language of the exception itself controverts and nullifies the argument because the language of the section is, in this section which we are now dealing with, "c", of the very widest possible character. The definition is the will, the legislative will of the Parliament of Canada, and where you find the Parliament of

Canada clothed with the very amplest power, in the very widest words that the wit of man can conceive, to ask the Court to give a narrow interpretation, a narrow definition to the exception, seems to me to be arguing for nothing less than a contradiction in terms. Then my learned friend reiterated the position of the Attorney General, that if the work were designed, if it were conceived, if it were thought of, if it were agitated for, it would be enough; and he referred to the case of the Georgian Bay Canal, which as he said, and as we all know, who live in the neighborhood of the locality which is proposed to be interfered with by that interesting work, has been under agitation since I think before the Union of Upper and Lower Canada, and yet it is not a bit nearer execution than it was on the first day—in fact, it is further off. It is generally conceded that the agitation is dropped, and that the work will never be entered upon at all. I mention that because my learned friends illustration seems to point very clearly to the great inadequacy of his definition: agitation for a work does not necessarily advance it, and to suggest that the agitation for the Georgian Bay Canal makes it a work which the Dominion Parliament would declare one for the general advantage, while another work which is not agitated for could not be declared, is a very absurd conclusion. My learned friend went on to argue that we must be cautious as to the construction which is to be placed on this power, because once executed it cannot be revoked. I am not at all sure that that is a consideration into which we are called upon to enter at this time. I think that it would be a very unfortunate thing if your lordships were to be called upon without the most solemn argument, and except in a necessary case, to attempt to reach the conclusion which my learned friends have suggested as to the consequence of a declaratory act of the Parliament of Canada, in the execution of this legislative power. For my own part I do not concur in his view. I do not understand that the legislative act which the Parliament of Canada is authorized to perform in this regard is any more or any less subject to the ordinary incidents of its other legislative acts than those other legislative acts. I cannot understand that if the Parliament of Canada should pass an Act to-day declaring a work to be for the general ad-

vantage of Canada, a statement of its policy of that day and of that time, and with its then light, that there is anything in the British North America Act which removes from the Parliament the power of altering its policy with new light and new conditions, declaring that was an erroneous interpretation, or if right at the time, has ceased to be right.

STRONG, J.—Is there any act of Parliament which Parliament cannot repeal?

MR. BLAKE—Maxwell, at page 510, says that where an act has expired or has been repealed it is as if it had never existed, except as to matters and transactions past and closed. Once you find that the Parliament of Canada, by an act which is not made irrepealable or irreversible, has declared its power—

RITCHIE, C. J.—And they cannot bind their successors.

STRONG, J.—It is an aphorism to be found in Coke that one Parliament cannot bind another.

MR. BLAKE.—It would be a restriction upon its own action to adopt the construction of my learned friend. He said that Parliament could not denude itself of the right to legislate by repeal.

RITCHIE, C. J.—The next Parliament might.

MR. BLAKE.—Yes my lord; and so we might go see-saw backwards and forwards upon a policy of this description, just according to the humor of the people or the needs of the country. The result of a work being within the exclusive legislative jurisdiction of the Dominion is accomplished by virtue of and exists just so long as the act which accomplishes it is operative, and the moment that ceases the result ceases with it. My learned friend suggested that the meaning of "work" contemplated execution, and that it did not contemplate the withdrawal of local power without general action. But I have shown your lordships already that by sub-section "a" of section 10, local power is withdrawn without general action. Exclusive legislative power is given to the Parliament of Canada as to those general works, but they are not bound to say or do anything. They are the sole judges of whether anything shall be done and what shall be done. That is what happens to them under sub-section "a," and that is what happens when they

declare all works for the general advantage under sub-section "c." Why incorporate or interpolate a limitation which does not exist with reference to sub-sections "a" and "b" upon the exercise of the power to declare, given in sub-section "c?" There is no obligation on the part of the Dominion to authorize, even still less to undertake, the burden of the works which are brought within its exclusive jurisdiction expressly by the Statute? Nor is there any implied as to the works they are authorized to take within their exclusive jurisdiction under sub-section "c."

PATTERSON, J.—It is not very easy to grasp that idea, how a work which has never been undertaken can be said to be for the general advantage.

MR. BLAKE.—I am sorry to say that a great many works which are not yet undertaken and may not be undertaken for a very long time, would, in the jugment of a great many people, be works for the general advantage of Canada, and I think as long as the world lasts there will be works, which are hoped but dimly for, which will be considered by many works for the general advantage, and the conception, as I understand it is this, that if the work is of a character so important that in the judgment of the highest legislative body it is for the general advantage, that body is entitled so to declare, and thereupon it becomes its exclusive right and its bounden duty to consider when, whether and how that work shall be accomplished. It is under no obligation to proceed with that work at an earlier period or in a different manner than it believes to be for the general advantage.

GWYNNE, J.—But the object of the declaration is simply to take it out of the power of the local and put it in themselves.

MR. BLAKE.—Yes, but a matter may be for the public advantage, and yet Parliament may decline to undertake it to-morrow. It may be very important in the meantime that the work should not be interfered with, that the capacity to deal with a work which is for the public advantage by the legislature that is authorised to declare it [illegible] public advantage, should not be impaired or thwarted by [illegible]pitate injudicious action by a provincial legislature. The real progress of a work may be impeded by, for instance, its authorization or creation in too precipitate a manner, by the creation of a work with too great capital, by

provisions unsatisfactory for its execution—all that may hinder instead of helping, and although the legislature which has declared it to be for the general advantage may not decide immediately to take it up, there is very good reason why, as soon as it has come to the conclusion that such a work would be for the general advantage it should at once so declare and prevent interference by others and assume publicly the responsibility itself. Then my learned friend says that the Act contemplates plainly the work itself; not the work conceived in a man's brain but the accomplished work which has reached the point of crossing. We come here to what the meaning of "work" is under the Dominion language itself as distinguished from the British North America Act, and therefore I pass on to the observations which my learned friends have both made upon the question of what is that exercise of the power which, as I submit to your lordships, was within the competence of Parliament. I have closed the observations which I had to make as to what the Parliament could do. I go on to consider what in effect Parliament has done. I ask your lordships to conclude that it was competent for the Parliament of Canada by appropriate words, to declare a work, not authorised theretofore by an Act of the provincial legislature, not authorised at that time by itself, but defined in some way or other which renders it sufficiently certain it is a work, for the general advantage of Canada, and by such declaration at once to remove that work from the legislative competence of the Province and to bring it within the exclusive legislative competence of the Parliament of Canada. Now the question is whether the Parliament of Canada has done that by the Acts which it has passed in this case as applicable to this road. My learned friend Mr. Mowat suggested that there was no intention to prevent any province from building a road, nor could there be any object in preventing the province from building a road. He pointed out that the language of the clause was such as would lead to the conclusion that it was the work when accomplished and not the project. Now, as to the object, I have already pointed out to your lordships possible objects: the object of retaining the uncontrolled power of deciding when and how and by whom and under what circumstances, and after what route and on what conditions the work which is to be declared for the

general advantage of Canada . all be carried out, is an important object. That object is attained by the construction which we ask your lordships to give the section. Suppose that the design of the Parliament of Canada was—and a most important and valuable design it would be for the public good—to take particular care that the railways which are constructed from this time out, coming within this definition, were constructed upon such principles, by such corporations and upon such principles as to the creation of the capital account as to prevent the outrageous system of creating watered stock and nominal securities, the interest and dividends of which have ultimately to be borne by the general public—suppose they said for the future we will insist on creating these works, on saying that the public will have to pay no more than a fair return upon the capital which is actually required to construct them, and that will be the principle of our railway legislation; and yet it can be conceived that if the local legislature were empowered to incorporate companies with a large amount of capital stock unpaid, and with a power to issue bonds the nominal value of which was more than the actual cost of constructing the road, and so create capital to the amount of two or three times the value of the work, that the policy of the Dominion Parliament would be thwarted by the creation of such corporations. The work would go on, stock would be emitted, and bonds would be placed in the hands of the public and the suffering public, the general public who use the railway would for all time be practically charged with a burden twice or thrice as large as was originally necessary to secure the acommodation.

RITCHIE, C. J.—Suppose they should come to the conclusion that it was necessary to know the place of crossing.

MR. BLAKE.—Yes, and the method of construction also. They might decide that iron and stone bridges were necessary for the general advantage; so that one can well conceive that if the work can be of the class which they could declare to be for the general advantage, there is not merely a conceivable object, but a very palpable object by saying," now we have no conflict, no local legislation; this is a work which we take the responsibility of, and there will be no local legislation about it."

My learned friend suggests that this means only branch railways, and that it is the railway, not the project. I do not think that that argument can prevail. I have already alluded in my opening remarks to the reasoning which it seems to me conclusively established the contrary. If you read the language of the statute you find that it deals with branch lines of railways connecting with or crossing. You may say that a branch line of railway is already sufficiently defined by the words " branch line of railway," and there is nothing more necessarily to be said. But certainly the words " branch lines of railway," are inappropriately defined by using the word " crossing," and therefore the language does not naturally fit, is not naturally proper to the limited construction which my learned friends would suggest. They have more than once led to consideration and discussions in Parliament on the subject. I am surprised that they should have argued this to your lordships, because if those subjects are at all to be adverted to as explanatory of the meaning of this Act, it will be found that not merely by discussion but also by way of amendment of the law there was a proposition made to limit the application of it to branch railways, and that proposition was rejected, so that if we are to enter into that field of disscusion —into which I have not entered—those who do enter into it ought all events to take care that they deal with what is more important than talk, the actual action of Parliament. At the very last stage of this measure in the House of Commons a proposal was made to produce that very result which my learned friend says it has as it stands, by the elimination of the words which he says now mean nothing at all. My learned friend Mr. McCarthy insisted that as to this particular railway it was subject to special consideration on the circumstances with reference to its local situation to which he adverted. He informed your lordships that it could be built as a mere question of geography, without crossing. I suppose if one looks at the map it is so. I have not looked at the map. Of course we all know that that does not mean, in the ordinary parlance of railway construction, a possibility, for although you may find that the road might be made between two places, without crossing, it may be there would be such difficulties in the way of the construction of the road as to render

it impracticable without the expenditure of an unlimited amount of money. But my learned friends entire argument on that seem to me to be fallacious. He holds as a fact that the railway from Winnipeg to Portage la Prairie could be built without crossing the Canadian Pacific Railway. It is not contended that it is anything but the fact of its crossing that creates the difficulty and therefore this legislation is valid. My learned friend shows that this legislation is valid so long as its object was for a purpose which is within the authority of the legislature. The Manitoba Legislature could legitimately authorize the construction of a railway from Winnipeg to Portage la Prairie by a route which did not cross the Canadian Pacific Railway. If you interpret the Act as so authorizing the construction, then if it is acted upon under that authority, there is no reason to interfere ; but if the Manitoba Legislature is to be presumed to have intended to authorize the construction of a road from Winnipeg to Portage la Prairie crossing the Canadian Pacific Railway which is being done, then a case arises ; and if you are not to assume that they intended that to be done which is being done, then *a fortiori* the Act is valid. Either they authorized the road to be built across the Canadian Pacific Railway or they did not. If they did authorize it, then the Act is valid ; if they did not authorize it. then the Railway Commissioner has no power to build it, because that legislature did not give him the power. He is on the horns of a dilemma where I leave him.

As to this particular railway, I now approach the part of my argument in which I deal with Mr. McCarthy's and Mr. Mowat's argument, as to the power under the British North America Act being limited to existing works, or works which were projected or imagined. Why, my lords, the very case they put is before the Court. The Act of 1888, which is the law of the land was passed a few days after the Act under which this railway is authorized to be constructed, was passed. It was no longer an imagination ; it was no longer a dream it was no longer a project merely in the minds of men, but in 1888, in revising the Railway Act the alterations were made which were appropriate to the conditions of things at that time. The law began to speak afresh from that date, and at that date, when it

began to speak afresh spoke with a new voice, as I shall repeat to your lordships presently, with reference to this matter. At that very date, in May 1888, when that Act was passed, the legislation which is now in question, this project for building the road from Winnipeg to Portage la Prairie—this railway was authorized by the Manitoba Legislature and so we are dealing, as far as this case is concerned, with the very matter in hand—we are dealing not with a dream, a project in imagination, but with a work which was attempted to be authorized. What happened? The Legislature, as I pointed out to your lordships, in consolidating and re-enacting the Railway Act from time to time in 1886 and 1888, made appropriate modifications and alterations to suit the circumstances as applicable to the Act of 1883. When they re-enacted it in 1886, they declared that Acts of the Provincial Legislatures, up to the 25th May, 1883, should remain valid. In 1883, they declared that Acts theretofore passed shall remain valid; in 1886 they declared that Acts passed up to 1883 should remain valid. In 1888 when they had to deal with this very case, when their legislation was to include the operation of Provincial law upon the Acts up to that date, they still declared that only Provincial Acts up to 1883 shall remain valid. They kept up the declaration which was made in 1883, 1886 and 1888, and they kept it up in 1888 by section 308, a section which my learned friends through a very strange omission, have not given your lordships the benefit of any comment. By section 308 the Parliament of Canada expressly provided some machinery for dealing with cases of that kind. For the first time they made particular provision for dealing with works which were authorized by Provincial legislation, touching works which would otherwise be entirely beyond the competence of the Provincial Legislature, and they said what? Not that these Acts should be valid. Not that they would except them from the sweeping nullification which was created by the Act of 1883, and renewed by the Act of 1886; but they would confer upon the executive of the Dominion the power to do so. Now that applies expressly to this very legislation. I take this Act in question, and I show to your lordships it was enacted after the 25th May, 1883; I show that it touches a railway which by the Act of the 25th May, 1883, was beyond the

Provincial competence. I show that by the 308th section of the Act of 1888, dealing with this very matter, Parliament was enacting the clause giving a method of dealing with this matter which it otherwise lacked. I ask, is not that the plainest declaration that that Act is void unless it be proclaimed? Does it not show to your lordships a legislative interpretation of sections 306 and 307, indicating in the plainest way that unless those steps are taken which shall give the Act vitality the Act is void? So that not merely do I exclude all that portion of my learned friend's argument which deals with a case of project, but I show that for this very railway itself special provision is made showing that the Act is entirely new and showing that by certain means it can be made law.

OTTAWA, Friday November 23rd. 1888.

MR. BLAKE.—In resuming my argument in reply I wish to advert for one moment again to that portion of the argument upon which I touched last night consisting of the question whether the case before your lordships is one touching the crossing of the Canadian Pacific Railway as distinct from a branch line, and just to add to the suggestions which I made in answer to that argument this further suggestion, that looking, as my learned friends quite rightly argued, your lordships were entitled to look at the ground for another purpose when they pointed out that it was possible to construct a railway from Portage la Prairie to Winnipeg without crossing the Canadian Pacific Railway—looking at the ground and ascertaining that this is a crossing of the Pembina Mountain Branch which is on the south side of the Canadian Pacific Railway proper, so to speak, it is clear that it would be impossible to achieve the obvious and notorious objects of the branch at all, without crossing the main line of the Canadian Pacific Railway. Those obvious and notorious objects were to form a connection with the interior of the country by means of the Manitoba & Northwestern Railway which, itself, strikes the Canadian Pacific Railway at the town of Portage la Prairie. It was not the mere 65 miles between Winnipeg and Portage la Prairie that was in question, but it was the fact that Portage la Prairie is the point at which the Canadian Pacific Railway is touched on the north side by the Manitoba & South-

western. To achieve these objects, therefore, it is necessary in their completion, to strike what must be, confessedly, the main line of the Canadian Pacific Railway and to cross it, for without crossing it is impossible to achieve the connection with the Manitoba & Northwestern Railway or to get into the interior of the country. I may suggest hypothetically what I show to be a matter of fact, that at the time the question was settled there was before the Railway Committee an application for the crossing of what we call the main line of the Canadian Pacific Railway at the other end, and it is with reference to the necessary eventualities of the case that it was stated in this manner. I happen to have before me the proposal of the crossing on the 2nd October presented by the Railway Commissioner in which he proposes to cross what he calls the main line near Portage la Prairie in order to make his connection with the Manitoba & Northwestern Railway. Therefore it would be, as I said, even in advance of the information I have since derived as to the actual intention, to the last degree unfortunate if by any such suggestions as my learned friends have made the question were to be blinked.

TASCHEREAU, J.—In view of the case as submitted we must decide the question.

STRONG, J.—The question of crossing the Canadian Pacific Railway?

MR. BLAKE.—I think that is conclusive, but it is desirable to have before your lordships the fact if that argument was to be entertained.

STRONG, J.—For the benefit of all parties, the question which has been submitted to us should be distinctly answered.

MR. MOWAT.—Perhaps your lordships would add something to show that the other point is involved.

MR. BLAKE.—The answer must follow the question.

MR. MOWAT.—Still, the answer should show that the case as submitted does not mislead.

MR. BLAKE—It will not mislead if the answer do not. I had concluded what I had to submit to your lordships upon the first great question involved in this case, namely whether within the British North America Act it was competent to the Parlia-

ment of Canada to make a declaration which should assume to that Parliament the exclusive jurisdiction over such a work as this by such a description as this, and I was engaged, when your lordships rose, in answering the propositions upon the second great question, namely whether in point of fact if the Parliament of Canada had that power, that power had been exercised by the legislation under which we alleged it has been exercised in this case—whether it had been effectually exercised. And it seems to me that it is impossible to escape from the conclusion that it has been effectually exercised. As I have said, although at one stage of the argument, my learned friend appeared disposed to contend that this language should apply only to the time when the work should be constructed or should approach the Canadian Pacific Railway, in other branches of their argument they appeared to admit that the time anterior to the completion at any rate, or the attempt at crossing, would not come within the meaning of the enactments. If that be conceded, as I think it must be conceded, the question is what time? What earlier time? Where is the line to be drawn between the day and hour at which the work is proposed physically to interfere with the ten named main lines of railway, and the day and hour at which the jurisdiction may be assumed or has been assumed by the legislation, the legislation providing that each and every branch line of railway now or hereafter connecting with or crossing the lines of any one of them is a work for the general advantage of Canada? First of all I maintain that (repeating the words of the British North America Act, speaking of a work for the general advantage of Canada,) having beforehand repeated by the preamble the authority in the language of the British North America Act, we must assume that it was intended to take the power, and to use the words in a sense and after the fashion in which they are used in the authorizing legislation, the British North America Act itself. Therefore when it speaks of the work there it speaks of the work in as large a sense, in as liberal a sense, applicable to the same condition of the work, the same circumstances, as that same word is used in the Act which gives the authority to make the declaration at all. You must find some limiting phrase in an Act of Parliament of Canada in order to give a different and narrower interpretation or

the term "work" than you find in the British North America Act under which the Parliament of Canada is itself acting. I do not think my learned friends have at all met the argument of construction arising from the 2nd sub-section of the Act of 1883 and the analogous sub-sections or provisions of the Acts of 1886 and 1888. I maintain that it is no answer to say to the use which I make of those provisions that probably but for those provisions, provisions of the Act of the local legislature theretofore passed would have been valid. The purpose for which I am using this section is entirely different; it is to throw light upon a sense in which the words in the main enacting clause have themselves been used, and I say that no clearer or more direct light can be thrown—no more satisfactory exposition by the legislature itself can be given of the meaning of the words which it has used, than is given by these negative words of this *proviso* so to speak which is found immediately following them, for when you find the Legislature declaring that the words which it has used shall not have the effect of voiding, destroying or nullifying, past provincial legislation authorizing the construction of works of the character with which it is dealing, you find a declaration as distinct as it is possible to have of the intention that future legislative acts authorizing such works shall be and have been by the preceding legislation made altogether void, because those works have been taken under the control of the Central Parliament. But then that is not all. To the proviso is annexed another proviso, or an exception out of it:—

"Nothing in this Act shall be held to affect or render inoperative the provisions of any act of a local legislature heretofore passed, authorizing the construction and running of any such railway or branch line or any act amending the same, but hereafter the same shall be subject to the legislative authority of the Parliament of Canada."

Thereafter that railway? After what? After the Local Act? No, but after the passing of this Act—after the 25th May, 1883, the railway itself, the project, in whatever shape, shall be subject to the legislative authority of the Parliament of Canada, and if subject to the legislative authority, subject as I have shown your lordships to the exclusive legislative authority of the Parliament of Canada. That that is the true construction and force of that proviso is made more manifest by the reiterations of it which are

found in the subsequent legislation. In the second sub-section of section 121 of the Act of 1886 it is provided :—

"Every such railway and branch line shall hereafter be subject to the legislative authority of the Parliament of Canada; but the provisions of any act of the Legislature of any province of Canada, passed prior to the twenty-fifth day of May, one thousand eight hundred and eighty-three, relating to any such railway or branch line, and in force at that date, shall remain in force so far as they are consistent with any act of the Parliament of Canada passed after that date."

But for that, acts passed before by the Local Legislature might have been voided. Consequently after that date the Parliament of Canada has exclusive legislative authority, consequently by implication and by expression any local legislation subsequent to that date is excluded from the competency of the Local Legislature. And then, when you come to the second re-enactment, the one which was passed a few days after the provincial legislation in question was passed, you find, as I pointed out to your lordships, the same proviso throwing the same light; but you also find attaching to it, as I do, the greatest possible consequences, I must reiterate, the section 308 which it seems to me makes beyond the possibility of cavil that which was not open to reasonable doubt before. That section 308, passed when the policy of Parliament had been altered with reference to Manitoba and the North-West, passed with reference to existing conditions, showing in its own terms that it is passed with reference to the conditions of the day, because in direct contradistinction to the preceding section which deals with questions up to the 25th May, 1883, and thereafter, this speaks of anything up to the passing of this Act, up to this date of the 22nd May, 1888. You find that the Government may, from time to time, and at any time—

"By proclamation, confirm one or more of the acts of the Legislature of any province of Canada, passed before the passing of this Act, relating to any railway which, by any act of the Parliament of Canada, has been declared to be a work for the general advantage of Canada, and from and after the date of any such proclamation the act or acts thereby declared to be confirmed shall be confirmed, ratified and made as valid and effectual as if the same had been duly enacted by the Parliament of Canada."

Now, you have those two sets of provisions as to Provincial

legislation. You have the express declaration that Provincial legislation with reference to this class of works, passed before the 25th May, 1883, has its effect, but that it is treated practically as being from that date, legislation subject to be repealed, amended or modified by the Parliament of Canada, and by it exclusively; then you have the declaration here, no longer by implication as was the case up to the passage of this Act, but by expression, as to what is to be the fate thereafter of Provincial legislation passed after the 25th May, 1883. Before the 25th May, 1883, no proclamation is required; no action of the executive is required, the Acts stands; but after the 25th May, 1883, and before the passing of this Act—that is to say between the 25th May, 1883, and the 22nd May, 1888, what is the position of those Acts? Confessedly they are void, because provision is made for a machinery by which they may be made valid and effectual; yet my learned friends say they were valid and effectual without it. This therefore, was useless; the Provincial Act was good, and therefore no proclamation was required to make it good. That is, we are to wipe this clause out of the Act of Parliament, and treat it after the fashion in which my learned friends treated it, with absolute silence. Now, I say it has everything to do with the case. I say that considering the circumstances of the case—considering the notorious facts to which I alluded at the opening, and which have not been contradicted—considering the legislation on the statute book itself, with reference to the Canadian Pacific Railway and the recitals therein, I cannot doubt as to the intention, I cannot doubt as to the application of this clause 308. We cannot doubt it was intended to provide some machinery whereby this very Act itself might be made valid and effectual, and therefore we cannot doubt it is a legislative exposition contemporaneously with the re-enactments of the clauses which we contend is the legislative meaning of these clauses, showing their effect and showing conclusively that under them this Act was void, and that provision was made whereby it might be validated. Now, my learned friends endeavor to support their argument with reference to the limited meaning which they would assign to this legislation by a reference to sections 173, &c., which we may call the crossing sections. I do not think that that reference is at all material.

I admit frankly to your lordships, that if we were unable to indicate to your lordships a possible application of the crossing sections to the set of circumstances which we contend has arisen under the sections to which we refer, there might be some argument in favor of the view that our construction of those sections was not accurate.

STRONG, J.—If this 306th section, instead of being limited to the ten named railways, applied to all Dominion railways, then of course the argument would hold good, and would be unanswerable.

MR. BLAKE.—Yes, the question would be, which should govern?

STRONG, J.—The question is whether the ten named railways are not an excepted class of railways.

MR. BLAKE.—Precisely. Certain consequences follow from the crossing of those railways, which confessedly do not follow from the crossing of any other Dominion railways. Then there remains the Provincial jurisdiction to charter railways, which shall cross all other Dominion railways. There remains a necessity which was established in 1877, for making arrangements for Dominion control as to the regulation of those crossings, and all that has occurred is that the occasions in which the Provincial legislature can charter railways to cross, to which section 173 shall apply, have been narrowed—have been limited. There are fewer of them.

GWYNNE, J.—There may be Dominion railways which the Dominion has authorized, and which the Legislature may not have thought were railways coming within the description of railways for the general advantage of Canada, and therefore it was necessary to point out what railways were for the general advantage of Canada.

MR. BLAKE.—My position is just this: the Legislature gave a sort of cardinal and primary importance to the ten named railways. It recognized the existence, as we must recognize the existence, of a great number of other Dominion railways. It recognized the continual possibility of the Local Legislature of any Province chartering a railway which should cross those other

railways. It continued the legislation which should provide the proper security in respect of such crossing, but of course the moment it took away from the Provincial Legislature the power to charter railways to cross the ten named railways, then that limitation had a narrower application.

GWYNNE, J.—It seems to me that those Dominion railways are all railways for the general advantage of Canada.

MR. BLAKE.—Yes, I think that is probably a reason for it; otherwise it would be entirely unnecessary. I have reconsidered the question, and my recollection of this legislation is that every one of those railways had already been declared and was a railway for the general advantage of Canada.

GWYNNE, J.—Not all declared to be so.

MR. BLAKE.—No, not all of them declared to be so, but they are certainly under the British North America Act, Dominion works.

GWYNNE, J.—Still they might be Dominion works and not come under the class of works referred to in clause 173—works for the advantage of Canada.

MR. BLAKE.—They might be Dominion works and yet to the detriment of Canada. What is really the legislation? My learned friend suggests that we argue, that this is an exception from clause 173. I pointed out to your lordships that section 173 and subsequent sections apply only to the cases of railways which the Provincial Legislature were authorized to build, and we pointed out that this particular railway is not a railway which the Provincial Legislature was authorized to build, crossing the Canadian Pacific Railway, and, once you find that it is not such a railway under the operation of the Act it is not within the exception, but it does not come within the general language of the Act. They did not profess to give a definition in the crossing sections of what railways the Provincial Legislature was authorized to build at all, but speaking of all those it was authorized to build it then made provision for the crossing, and then you have to find out at any time when it is proposed to apply this crossing section what kind of Provincial roads is the Provincial Legislature authorized to build. If it is one of them those sections apply; if not, they do not apply, because they are applied only to railways which the Prov-

incial Legislature is authorized to build. So that my learned friend's arguments upon that subject appear to me not to possess force, and I do not think it is necessary for me to comment under those circumstances upon that proposed degree of graduated strength to his argument which my learned friend suggested arose from the greater proximity of the clause about the crossings to the clause now in question which exists in one of the Acts as compared to other Acts. I think they might have been actually annexed to one another without making the slightest difference or adding in the slightest degree to learned friend's contention. And this answers the whole of that argument which my learned friend elaborated at some length, in which he took the ground that a judicial construction of a Statute is deemed to be a re-enactment of it in the sense of that judicial construction. But there is no appliction even by analogy of that doctrine in the present case. Then both my learned friends argued on the materiality of the recital of the Act of 1883 as explanatory of the meaning of the later clauses. I am not satisfied at all to agree to the position my learned friend the Attorney General took upon that subject. I apprehend that if you find upon re-enactments and revision of legislation alterations in the legislation, the circumstance that those alterations have been made, if they do materially affect the sense, produces that result. I think that it is not to be said that this legislation is to be read to day as if that preamble and recital were in it when we find the recital deliberately omitted for convenience. It may have been omitted for brevity on the principle of abolishing preambles. That I do not know, but I find whereas the section was very long, it is now very short. We all know that material changes have been made in the revision and consolidation of the Railway Acts, and we find this change, and if the change be one which is to the petriment of my learned friends construction, I do not see why or how they are entitled to take advantage of the abolished and eliminated preamble in order to enable them to establish that construction. But I do not think that their argument from the preamble has the force which they attach to it. I find that it begins by reciting the British North America Act, authority : it then recites that not only the main line but also all branch lines of railway connecting with or crossing the named lines shall be works

for the general advantage of Canada, and having made that recital it says "Whereas for the better and more uniform government of all such works it is desired that Parliament should, etc" and then it proceeds to declare. My learned friend says that means after construction, that the goverment of the work does not begin until a determination as to when, or how, or by whom or after what system the work shall be constructed—that that is no part of it—that it is only the completed railway, and that therefore it would require, after this, a special declaration as to each specific work before the Parliament of Canada should assume the jurisdiction. Now I wish to ask your lordships to consider this proposition. I maintain that after that general declaration an Act of the Parliament of Canada which should without any recital that the work was for the general advantage of Canada, incorporate a company to build a road from Winnipeg to Portage La Prairie crossing the Canadian Pacific Railway, would be a valid Act. I maintain that it would not be necessary, in order that the Parliament of Canada should be able to authorize the existence and provide for the construction of such a work, to make any new or fresh declaration, because the declaration is in the Statute book or because it has been already declared that the railway from Winnipeg to Portage La Prairie crossing the Canadian Pacific Railway is a work for the general advantage of Canada, because it has been already brought within the exclusive jurisdiction and that is the potency, so far as any of these subsequent Acts can have any potency at all. So far as they have any potency at all, that is the application of the enactment to which my learned friend, Mr. Robinson referred with regard to the Montreal Island Railway in which the recital is just as my learned stated. The Act of 1888, cap., 63, is as follows:—

"Whereas the construction and operation of a railway from a point in or near Montreal, passing by Maisonneuve, Longue Pointe, Pointe aux Trembles, Riviere des Prairies, Sault au Recollet, Bord à Plouffe, St. Laurent, Ste. Genevieve, Ste. Anne, Point Claire and Lachine, is desirable; and whereas the said railway, if constructed, will cross the Grand Trunk Railway and the Canadian Pacific Railway, and will therefore, under the provisions of section one hundred and twenty-one of "The Railway Act," be a work for the general advantage of Canada."

You find the Legislature not declaring it is a work, but saying it will cross the Canadian Pacific Railway and will therefore be under the provisions of this Act a work for the general advantage. I say it is not necessary to put in those words. I say that those words do not constitute a declaration but a statement simply that that is the effect of the prior Act. If that is the effect of the prior Act it is not necessary to repeat it. I say therefore that an Act to construct this little road across one or other of those named railways would without any other recital or description at all, be within the competence of the Dominion Parliament, because your lordships, if asked to apply the general legislation to which I have referred, would find already existing on the Statute book that declaration, and would find the enterprise drawn within the legislative jurisdiction of the Parliament of Canada and would therefore find the anthority which was necessary to incorporate it.

TASCHEREAU, J.—You find in the same Statute book charters in which the statement is made that the works are for the general advantage of Canada.

MR. BLAKE.—It is a work of supererogation.

TASCHEREAU, J.—Just so. The Ottawa & Parry Sound Railway for instance, on page 265 &c.

MR. BLAKE.—In fact I will undertake to do with these Railway Acts what one might undertake to do with reference to any proposition of law: If your lordships will give me the Statute I will prove anything out of it as I will prove any proposition of law out of American reports if your lordshps will allow me a sufficient range of the States of the American Union. So I do not attach any importance to those things. Then my learned friend went a little fur ther and said "Oh, but I will show you more—I will show you there are six or eight incorporations, which, according to the present construction now proposed were voided corporations, and which have yet been so far recognized by Parliament as they have been subsidized at the expense of the public treasury." I do not think that argument is of much weight either. If one looks at the history of the negotiations which precede and at the period and circumstances under which the railway legislation of the country generally takes place, it is impossible with reason to suppose that these questions are the questions which are considered, nor

can the extreme position which can be taken with reference to any such transaction as that which was taken with reference to the Grand Junction Railway in the case of the Grand Junction and Peterborough, by some of the learned Judges, and which was ultimately confirmed by the judicial committee in that part of the case. If an Act, which is an Act of the legislature which created the company has any effect it has the effect of recognizing the existence of the corporation in any case. It might have been the wisdom of Parliament in these particular cases by this short method to recognize the existence of those corporations. They were *de facto* corporations not *de jure* corporations. Parliament sometimes makes mistakes; it chose to recognize them in this way without passing another Act, but that is the most that can be said of them, and the circumstance that my learned friend has been able to show half a dozen cases of grants or subsidies to railways could prove no more than that.

STRONG. J.—It is like the cases of corporations which by implication are under royal charter. If a royal charter is granted by a corporate name to "a" "b" and "c," granting them money or land it is held to make them a corporation. I suppose that if the granting of charters by the Provincial Legislatures did not make these corporations, the granting of subsidies by the Dominion Parliament had the the effect of doing so by implication.

MR. BLAKE—Yes, my lord. In that view, I do not propose, to go over the list of roads to which my learned friends referred as to some of which it might well be pointed out that on the face of them it did not appear that they were beyond the Provincial jurisdiction, but it would be a waste of time to analyze this Provincial legislation with any such view on the present occasion.

Then my learned friend argued that to take away the right of the Provincial Legislatures, the language should be very clear and undoubted, and he argued that section 306 does not mention the legislatures, and that it ought not to be considered as included, and he argued that there was a sort of analogy between the Provincial Legislatures and the Crown, and he assumed that it was not intended to affect the Provincial legislation at all. It is impossible to give this legislation effect without, to some extent, affecting the Provincial legislation. My learned friend admits that, because he

admits that Provincial legislation is affected, and that Provincial roads are affected and Provincial jurisdiction is affected; but I think that the analogy does not apply—that it is imperfect. My learned friend has so long been in possession of a little crown in his own Province, that he no doubt desires your lordships to recognize his tenure, and demands that he should be expressly named before his rights and prerogatives should be attempted even by the Central Parliament; but, after all, you cannot give any effect to the legislation of the Central Parliament, I am afraid, without touching my learned friend's crown or treading on his corns, and I am afraid that must be done on this occasion.

RITCHIE, C. J.—This road was contemplated by the British North America Act, because it passes through more than one Province, and is therefore under the exclusive jurisdiction of the Dominion Parliament. Then how could the Local Legislature without interfering with that jurisdiction, claim to give another line a right to cross it?

MR. BLAKE—I do not think it could.

MR. MOWAT—I quite admit that the Dominion Government must approve of the crossing.

MR. BLAKE—My learned friend is obliged to admit that wherever a Dominion road is crossed, the Dominion Government may regulate the crossing.

RITCHIE, C. J.—But they claim now that they have a right to cross.

MR. MOWAT—Only with the approval of the Railway Committee of the Privy Council.

RITCHIE, C. J.—Now supposing that there was no legislation with reference to the approval—suppose that this crossing section had not been enacted by Parliament, would it then be contended that the Local Legislature had a right to pass an Act authorizing the crossing of the Canadian Pacific Railway?

MR. MOWAT—That would be difficult, no doubt.

MR. BLAKE—The answer which my learned friend makes to that suggestion, which would otherwise possess very great force, is that he finds on the statute book crossing provisions which do answer the exigency. He says, "I could not cross, I admit, but

for Dominion legislation, but I call your lordship's attention to the fact that there is Dominion legislation which enables us to cross."

STRONG, J.—Suppose that the Dominion legislation did not exist, how could this line cross the Canadian Pacific Railway?

MR. BLAKE—I think that is just one of the cases which one must say rests entirely with the political department of the Government—that in order to effectuate the British North America Act properly, Dominion legislation would have been necessary, and without that Dominion legislation the plain intent of the Act could not have been carried out, and that was the view that the Dominion Parliament took, and as early as 1877, the moment the exigency arose, they did legislate. All the tribunals before whom the question has come have held that the legislation is within their power.

GWYNNE, J.—The only question is, whether the effect of sections 306 and 307 is not to prohibit, instead of to sanction, the crossing?

STRONG, J—If we had not the crossing sections at all, in this statute, they would be obliged to go to the Dominion Parliament to get some similar enactment.

MR. BLAKE—I apprehend so.

STRONG, J.—Then, is it not as plain as anything could well be, that the effect of sections 306 and 307 is to take these specified railways out of the operation of these crossing sections, and therefore to restore things to the same condition in which they would have been, as regards this particular railway, as if there had been no legislation at all?

MR. BLAKE—I apprehend so, and therefore this gentleman has not been validly authorized by the Provincial legislation to cross. That is the position I take. My learned friends minimized rather, I think, the importance of the physical connection. I think your lordships will see that not merely is my argument reasonable, that the physical connection ought to be considered as an important matter of government, but that the legislature has recognized that importance, and has provided for it in a way which lends color to the very enlarged conception of the results of the crossing

or connection with a Dominion railway—with a railway which goes from one Province to another.

TASCHEREAU, J.—Could the Dominion Parliament authorize the crossing of a Provincial railway against the wish of a Province?

MR. BLAKE.—I think they could, probably, but I do not know how that is.

PATTERSON, J.—One would think that the province within its own domain is quite as potent as the Dominion.

MR. BLAKE.—What has been done, by the good sense of both Parliaments, has been to provide concurrent legislation. I remember one case in which Vice Chancellor Proudfoot decided that there was, in a sense, concurrent power, and that each one had a right. and that it was properly exercised in that case. It is one of those cases in which probably each legislature would have a duty to act. I refer to the case of the Credit Valley Railway *vs.* the Great Western Railway, 25 Grant, 507. I may also advert to two cases which my learned friend, Mr. Robinson, referred to, Barbeau *vs.* the St. Catherines & Niagara Central Railway, 15 Ontario, Chancery Division, 586. What I was endeavoring to present to your lordships was that the question of the physical connection was really a very important one, and I think my argument derives force from the 240th section of the Railway Act of 1888, which is only a re-enactment of regulations which have been for a very considerable time on the Statute Book:—

"Every company shall, according to its power, afford all reasonable facilities to any other railway company, for the receiving and forwarding and delivery of traffic upon and from the several railways belonging to or worked by such companies respectively, and for the return of carriages, trucks and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatsoever—nor shall any such company subject any particular person or company, or any particular description of traffic to any undue and unreasonable prejudice or disadvantage in any respect whatsoever; and every company which has or works a railway which forms part of a continuous line of railway—"

That is to say, there are two pieces of railway, and they touch so as to form one line:—

"Or which intersects any other railway, or has any terminus

station or wharf near to any teminus, station or wharf of any other railway, shall afford all due and reasonable facilities for receiving and forwarding by its railway all the traffic arriving by such other railway, without any reasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction is offered to the public desirous of using such railway as a continuous line of communication, and so that all reasonable accommodation, by means of the railways of the several companies, is, at all times, afforded to the public in that behalf; and any agreement made between any two or more companies contrary to this section shall be unlawful and null and void."

Now, there you find, as I have said, that the public is regarded as entitled, from the very circumstance of the physical connection, or even the proximity, to the practical uses which may grow therefrom, to the facilities of connection, to the facilities for continuous communication. Apply that, if your lordships please, to this very line from Winnipeg to Portage la Prairie, running one way or the other. Suppose a passenger gets aboard at some intervening station between Winnipeg and Portage la Prairie on this line, then it forms, if it touches the Canadian Pacific Railway, a continuous line of communication east or west or both, and the theory sought to be engrafted on the law of the land by this 240th section is that such communication, and the benefit of it, shall be afforded to the passenger and the goods which go over it; and this follows: that the local railway which touches one of the through great railways is, according to the theory of the law, as well as in accordance with the facts, according to the means of communication, not merely within the province, but from one province to another. This follows, that the 240th section recognized the view that that which exists physically should be the fact that the short line which touches the main line should be by it made a means of continuous communication by which passengers and goods may pass, not merely within the limits of the province, which is what a short line could do, but beyond the limits of the province altogether, and that, of course, gives a general and greater importance to the local line from the mere circumstance of contact, connection or crossing than it could otherwise by any possibility have.

TASCHEREAU, J.—Of course this only applies to federal railways.

MR. BLAKE.—Yes, my lord, I presume it does.

TASCHEREAU, J.—The Act itself only applies to federal railways.

MR. BLAKE.—There are certain portions of the Act which apply. Your lordships will see that the fourth section provides--

"In addition, the provisions of this Act relating to any subject or matter within the legislative authority of the Parliament of Canada and for greater certainty but not so as to restrict the generality of the foregoing terms, all provisions relating to railway crossings and junctions, offences and penalties and statistics, apply to all persons, companys and railways whether otherwise within the legislative authority of Parliament or not.

So the attempt was, and I fancy properly was, to make this of general application, provided it affected one company at any rate that was for all purposes under the legislative authority of Canada Then, my learned friend Mr. Mowat argued to your lordships that the results of this construction of this legislation would be extremely serious; that they would disappoint the just expectations of the Province; would interfere to a very large extent with the useful domain of legislation of the Provinces, and that they were in a sense contrary to the spirit of the British North America Act, but with reference to the whole of this question, I think that line of argument is out of place before a judicial tribunal. The question with which we have to deal is limited to this —first: can the Canadian Parliament do this thing; second, has the Canadian Parliament done this thing; and if they could do it and having the power have done it, all questions as to the supposed unfortunate effect of that action, as to the supposed unfortunate results from that action—want of discretion, policy, departure from what is regarded as the spirit of the constitution—are beyond the scope of this discussion. They belong to the political department of the Government, and to that exclusively. Two views, as I said in opening so I state in closing, are held with reference to the constitution itself, and with reference to this particular exercise of power under the constitution. There are arguments upon both sides. The question is one of policy, and that question must be determined elsewhere. It seems to me that it is impossible to deny that there are serious reasons to be alleged on the one side and on the other. The pre-

ponderance of those reasons, in my mind, weighs very much one way, but whichever way it weighs, I submit that with it your lordships have nothing whatever to do. The corporation which is presenting this case to your lordships, is acting as it has acted upon two grounds; first of all, its view is, and it is a very natural view for any one of those great ten named railway corporations to have, that convenience, simplicity and efficacy would all be promoted by a centralization of power in this respect, and believing that the law of the Parliament of Canada has accomplished that result, it desires to maintain a proposition which it conceives is in its interest to maintain. It does not dispute the view that the Parliament of Canada, if it pleases at any time to alter or modify that policy, has a perfect right to do it; and that this corporation has not, any more than any other personal or corporate entity in the Dominion, any special right to complain of such interference; but it argues—and I submit successfully argues—that so long as the law is so, it is entitled to insist upon the law. Secondly, this corporation alleges that the law of all modern countries has recognized the view that the construction and working of railways, and the interference by railways with other railways is a special privilege to be conferred by some competent legislative authority on persons or corporations; that the public good which requires that there should be facilities for such construction or working requires also that those facilities should be put in hands which the competent legislature deems proper hands, and placed under restrictions which the competent legislature deems adequate to the public good. Believing, as I have submitted to your lordships with great confidence, that the person who is constructing this railway, under the name of the Railway Commissioner of Manitoba, has not, under the law of the land, any more power to strike a blow with a pick, or lay a rail than plain Joseph Martin would have, the Canadian Pacific Railway insists that his authority must be shown, and if it is to be interfered with, as any private individual is to be interfered with, in the enjoyment and possession of his property, only by persons who are authorized under the law of the land to effect that interference. If then the law of the land does not authorize this interference, there seems to be a sound and by no means a technical reason for objecting to its taking place. Nor

can it be said that the application before your lordships is one which could properly speaking, cause any obstruction or delay: on the contrary, I think it was a most beneficial provision in the Railway Act, which gave to the railway committee not a judicial tribunal, and susceptible at any rate of being influenced by political considerations—conferred, and therefore imposed upon it in some sense, the responsibility of seeking the highest legal light in the construction of the important legal questions with which it was called upon to deal. And it was important in another respect, in that it provided a summary and expeditious method for reaching these conclusions. An expeditious method for reaching conclusions, which otherwise might have to drag their very slow course along, from the inferior courts up to this court, at an interval not of days or weeks, but of months and years. Notice was given of this application on the 10th September last. The day appointed for hearing was the 2nd of October. Upon that day the Canadian Pacific Railway Company applied to the tribunal to refer this question to the court. On the 9th of that month the reference was ordered, and since that time, with no delays interposed, at any rate by this corporation, proceedings have been pending. I am sorry that there has been so much delay, but with all the delay that has taken place at a rate incomparably more rapid than the ordinary course of the law which was open to my clients, the opinion of the Supreme Court of the Dominion has been sought, and is to be obtained. Under these circumstances it is that we ask your lordships to answer this question, confident that the course which has been pursued is the course best calculated to settle upon sound principles the important subject to which it relates, at the earliest day which was compatible with its solution. I should add that the railway company has felt that very considerable inconvenience was occasioned by the necessary circumstance that there is no factum in the case, and learning that a full report of the arguments on both sides has been taken, they propose to have copies printed and deposited with the Registrar.

MR. MARTIN.—Allow me to correct one statement on the other side—that is with regard to the connection with the Manitoba & North Western Railway. My learned friend has stated

that it is impossible for us to complete the system of railways without crossing the main line of the Canadian Pacific Railway. That is not the fact. The fact is that all the roads that are contemplated, by this chapter five may be completed, and the connection had with the Manitoba & North Western Railway, which we desire to have without at all crossing the Canadian Pacific Railway main line. The way that would be done, as a matter of fact, would be the Manitoba & North Western Company have power, as a Dominion railway, and have power to cross, under the proper limitations and applications, the main line of the Canadian Pacific Railway Company. If they cross, then we could connect with them south of the main line.

MR. BLAKE.—I quite admit that if the Manitoba & North Western Railway does get south of the Canadian Pacific Railway —I am speaking of things as they are, and not as my learned friend proposes they shall be—it is not necessary for the Railway Commissioner's road to get north of the Canadian Pacific Railway.

MR. MARTIN.—That is not this application. It was suggested by one of your lordships that it would be better for the Province of Manitoba and for all parties that the broad question of crossing the main line should be decided. I would submit that it is not better for us, because it would be unfortunate for us if the law prevents us from crossing the main line, that we should be prevented crossing the branch lines, which are the only ones we desire to cross.

RITCHIE, C. J.—We must answer the question as it is given.

MR. MOWAT.—Could not your lordships add something to make it clear that you did not propose to decide the other question ?

RITCHIE, C. J.—I think it would be very indiscreet of us to go outside of the line of our duty, which is to answer the question sent to us.

MR. MOWAT.—If the answer to the question would have a tendency to mislead, your lordships could prevent that by adding a few words of explanation.

STRONG, J.—There is some ambiguity in the case which would probably render it necessary to do as you say and distinguish

between branches of the Canadian Pacific Railway and the Canadian Pacific Railway main line, because in the early part of the case is set out the Pembina Mountain Branch of the Canadian Pacific Railway, and, when the question is put below, the reference is to crossing the Canadian Pacific Railway. I suppose it is intended to refer to that description in the early part of the case—that specific part known as the Pembina Mountain Branch?

MR. MARTIN.—I suggested the use of the words, in the early part of the case, "Canadian Pacific Railway meaning the Pembina Mountain Branch which is a part of the Canadian Pacific Railway."

MR. MOWAT.—I may mention to your lordships that though the season is very far advanced, it is still an object to have a decision as early as possible, at your lordships convenience.

N. B.—This report is published without revision by counsel on either side.

HOLLAND BROS.,
Reporters.