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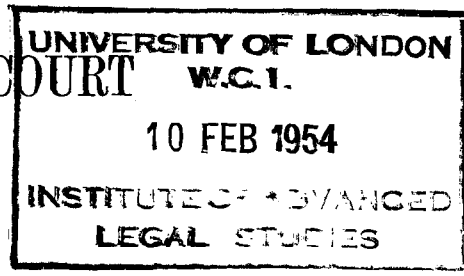
22, 1953

In the Privy Council.

33568

No. 22 of 1952.

ON APPEAL FROM THE SUPREME COURT  
OF CANADA



BETWEEN

THE CITY OF WINNIPEG ... .. APPELLANT

AND

THE CANADIAN PACIFIC RAILWAY COMPANY ... RESPONDENT.

CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal by special leave from a Judgment of the Supreme Court of Canada, pronounced on the 22nd day of October, 1951. By that judgment the Supreme Court dismissed an appeal by the Appellant from a Judgment of the Court of Appeal of Manitoba, pronounced on the 17th day of April, 1950, and allowed the appeal by the Respondent from the said Judgment. The Court of Appeal for Manitoba reversed in part a Judgment of the Court of King's Bench pronounced on the 7th day of October, 1949. By the terms of the Order granting special leave to appeal, the appeal is limited to the following questions namely :—

- 10           (1) Whether a Deed of Covenant entered into by the Respondent dated 10th October, 1881, and which constituted the consideration for an exemption from taxation granted by the Appellant by its By-law 148 in respect of the Respondent's property, was *ultra vires* the Respondent with the result that the exemption purported to be conferred by By-law 148 never became effective and
- (2) Whether, if any perpetual exemption from taxation is conferred by the said By-law, such exemption does or does not extend to the business tax.

- 20           2.—The Deed of Covenant of 10th October, 1881, and the Appellant's By-law 148, which was made on 5th September, 1881 (which are referred to in detail in paragraphs 5 and 6 below) were entered into shortly after the

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incorporation of the Respondent on 15th February, 1881. The construction of the Canadian Pacific Railway was a great national undertaking responsibility for which had been assumed by the Dominion Government upon the admission of British Columbia into union with the Dominion and the completion of which was an urgent necessity to bind eastern and western Canada together and to save western Canada from falling under the influence and dominion of the United States. The location of the main line of the railway was a matter of paramount importance both from the point of view of trade and commerce and of national defence and in the legislation of 1881, the government retained control over it.

10

As regards the portion of the main line which was to cross the Province of Manitoba, the original plan was for the railway to cross the Red River at the point near East Selkirk (about 20 miles north of Winnipeg on the east side of the Red River) and from there to proceed north westerly between Lake Winnipeg and Lake Manitoba, thence in a north-westerly direction through Edmonton, Alberta and on westerly through the Yellow Head Pass in the Rocky Mountains to the Pacific Coast. East Selkirk was selected as the crossing place by Sir Sanford Fleming, the Government Engineer-in-Chief with a view to minimising the risk of disastrous inundations which were (and are) liable to occur in the Red River Valley.

20

In 1879 the Government decided to build a bridge across the Red River from St. Boniface to Winnipeg and made plans to construct the first one hundred miles west of Winnipeg in a north westerly direction.

3.—By the 5th day of September, 1881, which was the date By-law No. 148 was enacted by the City of Winnipeg, the central section of the railway had been partially completed to East Selkirk, Manitoba. A branch line known as the Pembina Branch had been built from East Selkirk, Manitoba to Pembina, Manitoba, along the east side of the Red River. Pembina is on the U.S. boundary. The first 100 miles west of Winnipeg was under construction in 1880. By the summer of 1881 the directors of the Company had evidently reached the conclusion that Winnipeg by virtue of its location was likely to be a great centre of trade and was to be the principal city in the Province of Manitoba, and thus the most suitable place from which branch lines should radiate.

pp. 296-297

Appendix  
pp. 13-22,  
p. 19, l. 45,  
p. 20, ll. 1-8

4.—The contract between the promoters of the railway and the Government, which is dated the 21st day of October, 1880, which is a schedule to the incorporating Act, provides that for twenty years from the date thereof no line of railway would be authorised by the Dominion Parliament to be constructed south of the Canadian Pacific Railway.

Clause 13 of the Contract reads as follows :—

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Record  
p. 268, ll. 33-39

“ 13. The Company shall have the right, subject to the  
“ approval of the Governor in Council, to lay out and locate the  
“ line of the railway hereby contracted for, as they may see fit,  
“ preserving the following terminal points, namely : from Callander

“ Station to the point of junction with the Lake Superior section ;  
 “ and *from Selkirk* to the junction with the Western Section at  
 “ Kamloops by way of the Yellow Head Pass.”

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After its incorporation the Respondent obtained leave to re-route the entire line west of Winnipeg by constructing the same by a more southerly route across the plains and through the Kicking Horse Pass in the Rocky Mountains and thence to the Pacific Coast. Appendix pp. 118-120

The contract further provided for the construction and completion of the Canadian Pacific Railway. The line was to be completed and in running order on or before the 1st of May, 1891. Clause 7 provides that the completed railway will become the property of the company to be incorporated and concludes as follows : Record pp. 264-265

“ And the Company shall thereafter and forever efficiently  
 “ maintain, work and run the Canadian Pacific Railway.”

The first reference to the incorporation of the Company is found in Clause 17 of the Contract which commences : p. 269

“ The Company shall be authorised by their Act of Incorporation to issue bonds . . . .”

Clause 21 is as follows :

20 “ 21. The Company to be incorporated, with sufficient  
 “ powers to enable them to carry out the foregoing contract, and  
 “ this contract shall only be binding in the event of an Act of  
 “ Incorporation being granted to the Company in the form hereto  
 “ appended as Schedule A.” p. 271

Although Clause 21 provides that “ this contract shall only be binding  
 “ in the event of an Act of incorporation being granted to the Company in  
 “ the form hereto appended as Schedule A,” Schedule A was not enacted as a separate Statute, but the “ form ” was embodied in the Letters Patent which were issued by His Excellency the Governor-General of Canada under the Great Seal of Canada on the 16th day of February, 1881, as directed by Section 2 of the Act incorporating the Respondent company. 44 Vic. Cap. 1 assented to 15th February, 1881. pp. 262-287

5.--On the 5th day of September, 1881, the City of Winnipeg passed By-law No. 148. This By-law was amended by By-law No. 195. By-law 195 merely extended the time for constructing the branch line and the passenger station referred to in the said By-law. The first two recitals of By-law No. 148 read as follows : Record pp. 289-293  
pp. 301-306  
pp. 297-298  
pp. 289-293

40 “ Whereas it is desirable that a line of railway south-westerly  
 “ from the City of Winnipeg, towards the westerly limit of the  
 “ Province of Manitoba, through the Pembina Mountain District  
 “ should be built for the purpose of developing and advancing  
 “ the traffic and trade between the City of Winnipeg and the  
 “ southern and south-western portions of the Province.

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

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p. 290, ll. 34-43  
 p. 291, ll. 1-32  
 p. 292, ll. 41-44  
 p. 293, ll. 1-4

The By-law authorised the council to issue debentures in the total sum of two hundred thousand dollars charged on the whole rateable property in the City of Winnipeg and to deliver them to the railway company, and to, give the Railway Company a Deed of Land required for a passenger station on the performance by it of certain defined conditions. Of primary importance is sub-section 3 of Section 4 which reads as follows :

p. 292

“ The said Canadian Pacific Railway Company shall immediately after the ratification of this by-law as aforesaid, make, execute and deliver to the mayor and council of the city of Winnipeg a bond and covenant under their corporate seal that  
 “ the said company shall with all convenient and reasonable  
 “ despatch, establish and build within the limits of the City of  
 “ Winnipeg, their principal workshops for the main line of the  
 “ Canadian Pacific Railway within the province of Manitoba, and  
 “ the branches thereof radiating from Winnipeg within the limits  
 “ of the said Province, and forever continue the same within the  
 “ said City of Winnipeg.”

Sub-section 8 of Section 4 of the By-law reads as follows :

p. 293, ll. 17-23

“ Upon the fulfilment by the said company of the condition  
 “ and stipulations herein mentioned by the said Canadian Pacific  
 “ Railway Company, all property now owned or that hereafter  
 “ may be owned by them within the limits of the city of Winnipeg,  
 “ for railway purposes or in connection therewith, shall be forever  
 “ free and exempt from all municipal taxes, rates and levies and  
 “ assessments of every nature and kind.”

p. 301

By By-law No. 195, adopted by the city on October 30, 1882, By-law No. 148 was amended and re-enacted and by c. 64 of the Statutes of Manitoba 1883 assented to on July 7th of that year the Act of Incorporation of the city was amended by declaring, *inter alia*, that these two by-laws were “ legal, binding and valid upon the said Mayor and Council of the City of  
 “Winnipeg.”

Appendix  
 p. 48, ll. 30-35

Record  
 p. 294

p. 257

6.—The bond and covenant of the Respondent in purported compliance with Section 4, sub-section 3 of by-law 148 was dated 10th October, 1881, and the Respondent built a station in the City of Winnipeg together with a passenger depot and established its principal workshops.

Later after the boundaries of the City of Winnipeg had been extended the Canadian Pacific Railway Company found it expedient to remove their principal workshops to an outlying portion of the city.

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p. 258, ll. 9-13

7.—After By-law No. 148 (as amended by By-law No. 195) was passed the city did not attempt to collect any taxes from the Canadian Pacific Railway Company until it levied school taxes for the years 1890 and 1894. The city brought action against the railway company to recover these school taxes. pp. 308-334

10 The case was argued in the Court of Queen's Bench *en banc* for Manitoba in 1899 and judgment given on the 30th June, 1899, in favour of the city. See 12 M.R. 581.

This decision was reversed by the Supreme Court of Canada. See 30 S.C.R. 558. The Supreme Court held that school taxes were included in the term "municipal taxes."

8.—In the year 1900 the Legislature of Manitoba passed the Railway Taxation Act, 63 & 64 Vic. Chapter 57. This Act imposed a Provincial tax on the earnings of railway companies and exempted railway companies from all other taxes. This Act remained in effect until 1947 when the Manitoba Legislature enacted, Chapter 56, Statutes of Manitoba, 11 Geo. VI entitled 20 "An Act to suspend the Succession Duty Act, to Amend the Taxation "Suspension Act, and to authorise the execution of an Agreement between "the Government of Canada and the Government of Manitoba."

In the year 1948 the Respondent was assessed for realty and business tax by the City of Winnipeg. By By-law No. 16306, dated 23rd February, 1948, the city purported to repeal By-law No. 148 as amended by By-law No. 195, and by Statutes of Manitoba, 1948, Chapter 92, certain amendments were made to the City Charter. p. 368

9.—This action was commenced on the 3rd day of April, 1948. In the action the plaintiff, the Canadian Pacific Railway Company, alleged 30 that on or about the 5th day of September, 1881, the plaintiff and defendant entered into an agreement, the terms of which are set forth in the City of Winnipeg By-law No. 148, dated 5th September, 1881, as amended by City of Winnipeg By-law No. 195 dated 30th October, 1882. It further alleged that it had fulfilled each and every term, stipulation, condition and covenant made by it under the said agreement and by-law and that consequently it was entitled to the tax exemption provided by By-law No. 148 amended as aforesaid. The statement of claim then complained that in violation of the agreement and by-law the City had levied real property taxes and business taxes against the Railway Company. The 40 plaintiff claimed *inter alia* a declaration that their property was exempt in the terms of the by-law, and an injunction restraining the defendant city from making any further assessment or attempt to levy and collect real property taxes or business taxes. pp. 1-6

pp. 6-14

The City of Winnipeg in its statement of defence asserted so far as material hereto that the alleged agreement of the 5th day of September, 1881, and the purported bond and covenant which the Railway Company had executed and delivered in pursuance of the alleged agreement was *ultra vires* of the Railway Company and consequently the Railway Company had not fulfilled and could not fulfil the condition and stipulation provided for [by subsection 8 of Section 4 of the said By-law No. 148, and that, moreover, the said By-law No. 148 did not and could not obligate the defendant city forever to exempt the plaintiff Railway Company from all municipal taxation by the City. The defendant City also alleged that the business tax levied by the City of Winnipeg was not and did not amount to an assessment of the property owned by the Railway Company within the City of Winnipeg and that the business tax assessment was not levied against the property of the plaintiff Railway Company but was a tax *in personam*. 10

pp. 15-18

In reply to the statement of defence the plaintiff alleged that it was incorporated by Letters Patent under the Great Seal and that the Governor-General in Council did by such Letters Patent confer upon the Company all the status, privileges and powers that appertain to a company so incorporated. It also alleged that the city was estopped from denying the existence of the agreement alleged by the plaintiff in paragraph 4 of the statement of claim because the said By-law 148 had been ratified by the Statutes of Manitoba, 46-47 Victoria, Chapter 64 (1883) and by reason of the defendant's course of conduct. The plaintiff in its reply also maintained that it had the right, power and authority to enter into the agreement and to deliver and execute the bond and covenant in question. 20

Appendix  
pp. 47-48

The plaintiff by its reply also alleged that the matters raised in the statement of claim were *res judicata* by reason of the result of the action brought by the defendant City against the plaintiff Railway Company in the year 1894 to recover school taxes. 30

10.—The plaintiff Railway Company succeeded at the trial on all points. This decision was reversed in part by the Court of Appeal for Manitoba.

The following is a summary of the conclusions reached by the five Judges of the Court of Appeal for Manitoba :

“(1) That the Company, by its incorporation, was granted the powers of a common law company (Richards and Dysart JJ.A. dissenting).

“(2) That the granted powers included the right to enter into the tax-exempting agreement and the bond and covenant mentioned in the city's By-laws 148 and 195 (Dysart, J.A. dissenting). 40

“(3) That *res judicata* does not apply (Coyne, J.A. dissenting).

“(4) That the tax-tempting agreement of itself and apart  
“ from the question of validity,

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“(a) does not exempt the company from business tax (The  
“ Chief Justice and Coyne, J.A. dissenting).”

11.—The Appellant and the Respondent both appealed to the Supreme Court of Canada.

Pending the appeal to the Supreme Court of Canada that Court handed down its decision in the case of Canadian Pacific Railway Company against the Attorney-General of Saskatchewan, reported, 1951 S.C.R. 190, whereby  
10 the Court held that by virtue of Clause 16 of the contract set forth in the schedule to the incorporating act of the Railway Company the exemption from municipal taxation therein provided for extended to business taxes. Estey, J., dissented as to business taxes. p. 269, ll. 14-22

12.—The judgment of the Supreme Court in the present case was given on the 22nd October, 1951. The appeal of the Railway Company succeeded, and the appeal of the Appellant City was dismissed.

In his reasons for Judgment, Locke, J., held that it was unnecessary to decide whether or not the Respondent Company is vested with the powers of a common law Corporation. His view was that there was  
20 conferred upon the Company by Section 4 of the Letters Patent all the powers necessary or useful to enable it to discharge its obligations under the contract, and that it was undoubtedly “ useful ” to the Company to enable it to carry out its contract to construct the Railway and thereafter to operate it in perpetuity to give such a covenant in order to obtain such extensive financial assistance and exemption from Municipal Taxation. p. 379 p. 381

Rand, J., dealt chiefly with one point namely: the authority of the Company to bind itself forever to continue its principal workshops for the Province in the City. p. 386

He held that some of the powers granted to the Company impinge  
30 on common law, rights and liberties for which legislation is essential, and that he could not infer from the statute an intention to authorize faculties proceeding from both sources, and that he knew of no authority under the prerogative to add capacities to a statutory corporation. Rand, J., also referred to the public interest in the Corporation and to the high national purposes involved and to the fact that the Company was a beneficiary of substantial assistance from the public in money, lands and privileges. p. 386 p. 387  
He also found :

“ But unusual circumstances, as at times eventuated in the  
“ early days of railway projects, might necessitate changes in  
40 “ transportation plans and arrangements and we might have such  
“ a situation as was presented to the courts of Ontario in *Whitby v. Grand Trunk Railway Co.*”

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p. 388

p. 389

p. 390

p. 390

p. 395

p. 397

p. 398

p. 413

Rand, J., then proceeded on the assumption that the company could not bind itself to continue forever its principal workshops in Manitoba. He reviewed the facts and said that the question of law is whether a partial and severable failure of promissory consideration, followed by an entirety of irrevocable execution of the remaining consideration to the benefit of the other party, can be the ground on which a continuing substantial obligation on the part of the latter can be repudiated. His conclusion was that in the circumstances, i.e. part performance, the City is now estopped from taking the position that the exemption clause in the by-law never became effective.

He said further that the case is closely analogous to one of specific performance with compensation and that such a mode of adjustment may be said to substitute a conditional for a promissory term in the contract and that instead of mutual promises to maintain and exempt, the obligations would be, to exempt so long as the workshops are maintained and to recoup should that cease, and that this is no doubt modifying the legal situation. In other respects Rand, J., agreed with the findings reached by Kellock, J.

The Judgment of Estey and Cartwright, JJ., was delivered by Estey, J. He held that the Letters Patent were issued by the Governor-General in the exercise of his prerogative right and that in any event the power to execute the contract here in question would be necessarily incidental to those powers expressed in the charter. He referred to Clause 7 of the contract whereby the Company agreed to "forever efficiently maintain, work and run the Canadian Pacific Railway" and to Clause 4 of the Letters Patent whereby it is provided "that the Company shall possess all the franchises and powers necessary or useful to the Company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract." He added that it is not suggested that the contract has not proved useful to the company. In answer to the Appellant's argument that the covenant to forever continue its principal workshops for Manitoba in the City of Winnipeg, is a covenant whereby the Company undertakes to bind itself not to use or carry out its chartered powers, he held that the language of the contract does not disclose any inconsistency or incompatibility with the company's duties.

In answer to the Appellant's argument that the future possibility that the workshops, as located, might prevent the efficient management of the Railway, Estey, J., said that such eventualities should be established by evidence and not founded upon speculation as to the future.

Estey, J., further held that the alleged agreement between the City and the Railway Company was validated by Statute 46-47 Victoria, S. of M. 1883, Chapter 64, which declared the by-laws in question to be legal, binding and valid upon the City of Winnipeg.

Kellock, J., agreed with Rand, J., as to the proper relief in equity and found that the facts are eminently such as to call for the application of the principle of compensation insofar as performance on the part of the



Respondent Company may fall short of that which it would have been obliged to provide if the covenant on its part which it asserts to be binding were binding in law.

Kellock, J., agreed with the conclusion of Richards and Dysart, JJ.A., of the Manitoba Court of Appeal, that the Respondent has not the powers of a common law Corporation. He agreed in substance with the views on this point expressed by the late Mr. Justice Dysart. After reviewing the legislation and the contract and the Charter and referring to the Bonanza Creek Case (1916) A.C. 560 and to *Ashbury v. Riche* (1875) L.R.H.L. 653, and to *Attorney-General v. De Keyser's Royal Hotel* (1920) A.C. 508, Kellock, J., says that one must find in the Incorporating Act, or not at all, an intention to revive the prerogative, for the purpose of the incorporation of the Respondent Company. He found that Schedule "A" to the contract "being the 'form' of Charter to be granted" contemplates no powers being granted to the company apart from those contained within the four corners of the schedule itself. He stated further that his view is supported by subsequent legislation affecting the Respondent, Kellock, J., did not consider it necessary to decide whether the covenant to build and forever maintain the workshops in Winnipeg was a covenant which the Respondent could validly enter into.

Kellock, J., then discussed the proper relief in equity, and as mentioned above agreed with Rand, J., on this point.

The Judgment of the Chief Justice, Kerwin, Taschereau and Fauteaux, JJ., was delivered by Kerwin, J. As to the first question he found it unnecessary to consider whether the Company was incorporated by Royal Charter. He held that the enumerated powers of the Company which appear in the reasons for judgment of other members of that Court and in the reasons for judgment in the courts below were sufficient to authorise the Company to do as it had agreed.

30 AS TO WHETHER THE RESPONDENT'S BOND WAS ULTRA VIRES WITH THE RESULT THAT THE EXEMPTION FROM TAXATION PURPORTED TO BE CONFERRED ON THE RESPONDENT BY BY-LAW 148 NEVER BECAME EFFECTIVE.

13.—The Appellant first submits that the Respondent is not a common law corporation, and that its powers are limited to those defined in its constituting documents.

In answer to the contention that the Respondent Company has all the powers of a common law corporation because letters patent were issued by the Governor-General in Council under the Great Seal of Canada, the Appellant relies upon the clear and convincing reasons to be found in the Judgment of Dysart J. in the Manitoba Court of Appeal and in the Judgment of Kellock, J., in the Supreme Court. The majority of the Judges in the Supreme Court found it unnecessary to deal with this point. Rand and Kellock, JJ., considered that the company did not have the powers of a common law corporation, while Estey and Cartwright, JJ. were of the opinion that it did have such powers.

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The Appellant submits that a perusal of the Incorporating Act, the Agreement and the Charter make it clear that Parliament had no intention of granting to the proposed corporation powers beyond those agreed upon and defined in the constituting documents. It is difficult to imagine that Parliament intended that the Governor in Council should in and by Letters Patent clothe the proposed corporation with powers over and beyond those conferred by Parliament. As stated by Kellock, J. :

p. 407, ll. 12-20

“ Any power to incorporate a railway company by virtue of  
“ the Royal prerogative had been abrogated by Sec. 3 of the  
“ Joint Stock Companies Act of 1877, 40 Vic., Cap. 43.”

10

The nature of the undertaking was such as to rebut any such suggestion. The incorporating Act and the recitals in the Charter make it clear that the Governor in Council did not create a common law corporation. Sections 1 and 2 of the Incorporating Act read as follows :

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p. 11, ll. 34-37

“ 1. The said contract, a copy of which with schedule annexed,  
“ is appended hereto, is hereby approved and ratified, and the  
“ Government is hereby authorized to perform and carry out the  
“ conditions thereof, according to their purport.

p. 11, l. 1  
p. 12, ll. 1-12

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

20

30

The words “ shall be held to be ” require the charter to be treated as a statutory enactment. In this connection the Appellant refers to the opinion and the cases cited by the late Honourable Mr. Justice Dysart, of Manitoba Court of Appeal.

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p. 214

p. 272

14.—The Letters Patent recite the entire contract, which is a schedule to the Incorporating Act, and refer to Section 2 of the Act as the authority for issuing the charter.

In issuing the Letters Patent the Governor-General acted pursuant to the direction and mandate of Parliament. The Governor in Council could not and did not purport to confer additional rights and powers on the Company to be incorporated.

40

The Appellant submits that the nature of the whole undertaking was such as to exclude the prerogative right of the Crown, or at least to rebut any suggestion that the Governor in Council as viceroy of the Crown intended to exercise the prerogative or to do anything more than to follow the statutory directions.

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15.—The Respondent would not have been made subject to the Consolidated Railway Act, 1879, if there had been any intention to create a common law corporation. Section 6 of the said Act reads as follows :—

10 “ 6. Every Company established under any Special Act shall be a body corporate under the name declared in the Special Act, and shall be vested with all the powers, privileges and immunities necessary to carry into effect the intentions and objects of this Act and of the Special Act therefor, and which are incident to such corporation, or are expressed or included in ‘ The Interpretation Act ’.”

Section 7 of the said Act provides in effect that the company shall have power and authority

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pp. 8-9

20 “ (1) To receive voluntary grants ;  
“ (2) To purchase land for the construction, maintenance and use of the railway ;  
“ (8) To erect and maintain all necessary and convenient buildings, stations, and so forth ;  
“ (10) To construct and make all other matters and things necessary and convenient for the making, extending and using of the Railway in pursuance of the Railway Act and of the Special Act ;  
“ (19) Any Railway Company desiring at any time to change the location of its railway for certain named purposes or for any other purpose of public advantages, may make such a charge.”

30 Section 7 thus authorizes and provides for the operation and management of the Company in the usual and ordinary course of business. The Charter of the Respondent has been amended many times by Special Acts. For example, in 1890, 53 Vic., c. 47, it was given power to make working arrangements with railways outside of Canada. In 1902, 2 Edw. VIII, c. 57, the Respondent was given power to hold shares in land and building companies, and to own and operate hotels, engage in mining and smelting, generate and transmit electricity, and construct irrigation works. In 1919, 9 & 10 Geo. V., c. 80, the Respondent was given power to construct and operate aircraft.

40 16.—The Appellant submits that the powers of the Respondent being limited as submitted above, there is nothing in the Incorporating Act or in the Letters Patent which expressly, or by necessary implication, authorise the Respondent to covenant and agree to establish and continue their principal workshops and stockyards for the Province of Manitoba

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in the City of Winnipeg as set out in the recital to By-law 148, or to enter into a bond and covenant that the Respondent "shall establish and build within the limits of the City of Winnipeg their principal workshops for the main line of the Canadian Pacific Railway within the Province of Manitoba and the branches thereof radiating from Winnipeg within the limits of the said Province, and forever continue the same within the said City of Winnipeg."

17.—The majority of the Judges in the Supreme Court were of the opinion that the enumerated powers were wide enough to enable the Respondent to enter into the agreement recited in By-law 148 and to give the bond and covenant in question. The source of such power was said to be Section 2 of the Incorporating Act and Clause 4 of the Charter which read in part as follows:

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pp. 11-12  
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p. 274

"All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract."

From this Section and clause the word "useful" was selected as the word which gives the necessary power and authority.

It is to be noted that the generality of said Section 2 and of said Clause 4 is limited by the concluding words "agreed upon, contained or described in the said contract." Useful can only mean what is expedient from time to time, but not for all time. There was nothing agreed upon, contained or described in the contract, for example, which made it useful to agree to forever continue the principal workshops in Winnipeg. Subsequent events might have made it very impracticable and expensive, or even impossible and economically unsound for these workshops to be maintained in Winnipeg, for example by reason of natural difficulties such as floods, or by reason of considerations of national defence.

It is respectfully submitted that the inclusion of the word "useful," with similar words in Section 4, did not invest the then directors of the Respondent Company with authority to forever tie the hands of future directors so that the railroad could not be operated in the most efficient manner from time to time in all the years to come.

The problem must be considered as it existed at the date the covenant was given. (*Charrington Co. v. Wooder*, 1914, A.C. 71 at 82.) In 1881 Western Canada was sparsely settled and undeveloped. While it was then considered by some people that Winnipeg would become the centre of population of this province, this forecast might have proved inaccurate. The recurrence of disastrous floods might have made it impossible or impracticable for Winnipeg to develop as a great centre of population. Selkirk which is 20 miles to the north and situated on higher ground might have become the centre instead of Winnipeg. Sir Sanford Fleming, the Government engineer, had advised bridging the Red River at Selkirk. The 1950 flood in the Red River Valley was close to being a major disaster. No

one is able to forecast when there may be an even greater flood in the Red River Valley.

The persons who were directors of the Respondent Company in 1881 were not in a position to decide that the location and maintenance of the principal workshops and stockyards in Winnipeg would be forever compatible with the efficient operation of the railway. They were not infallible.

It is obvious, for example, that the principal workshops should be located on the main line at a central point. In order efficiently to operate the railway it might have been and still may be necessary to relocate the  
10 main line or to remove the shops to some other point in Manitoba.

18.—It is submitted that Section 2 of the Incorporating Act and Clause 4 of the Charter which are relied upon by the Respondent as confer-  
ring upon it the necessary power and authority to enter into the bond and  
covenant in question should be interpreted in the light of the high national  
purposes involved, which were previously referred to, and to the whole  
comprehensive plan involved in the construction of the railway. p. 274

Section 26 of the Letters Patent is as follows :

20 “ 26. The Company shall have power and authority to erect  
“ and maintain docks, dockyards, wharves, slips and piers at any  
“ point on or in connection with the said Canadian Pacific Railway,  
“ and at all the termini thereof on navigable water, for the  
“ convenience and accommodation of vessels and elevators ;  
“ and also to acquire, and work elevators, and to acquire, own,  
“ hold, charter, work, and run, steam and other vessel for cargo and  
“ passengers upon any navigable water, which the Canadian  
“ Pacific Railway may reach or connect with.” p. 281

The franchises and powers conferred upon the Respondent and the  
great material contributions made by the Government in aid of construction  
were all granted in order that the Respondent might have ample capacity  
30 to implement and carry out all the aims and objects of the Government.

It is submitted that the words “ necessary or useful ” which are found  
in the said Section 2 and Clause 4 were not placed there merely to enable  
the Company to build and maintain workshops or other necessary works at  
convenient places along the line, or to make contracts with local bodies in  
reference thereto. Such power and authority was conferred on the  
Respondent when it was made subject to the Consolidated Railway Act of  
1879 and particularly by Sections 6 and 7 of the Act (see paragraph 15  
above). Appendix  
p. 27  
p. 9

19.—It is suggested by Estey, J., and Locke, J., that the bargain has  
40 proved beneficial up to date and thus it has been useful and has not been  
found incompatible with the efficient operation of the railway.

It is respectfully submitted that this is not the test to be applied in  
determining whether an Act is *ultra vires* or *intra vires*. An Act cannot be  
made *intra vires* by reason of the fact that the company does something  
which it is not authorised to do.

## RECORD

The agreement to forever maintain the principal workshops and stock-yards for Manitoba in Winnipeg, is incompatible with the duty of the Respondent to forever efficiently operate the Railway in the public interest as required by Section 7 of the contract. The question of *ultra vires* is not to be decided by the pecuniary result of the bargain which was struck (*York Corporation v. H. Leetham and Sons, Ltd.*, 1924, 1 Ch. 557 at p. 569 per Russell, J.). It is submitted that the principle of construction which should be applied to the facts of this case is best illustrated by such cases as *Corporation of Whitby v. Grand Trunk Railway* (1901) 1 O.L.R. 481 a case in *pari materia* to the present and *Properties of Staffordshire and 10 Worcestershire Canal Navigation v. Properties of Birmingham Canal Navigations* L.R. 1 English and Irish Appeals 254.

20.—The above submissions are made on the question whether it was *ultra vires* the Respondent to enter into the Deed of Covenant dated 10th October, 1881. There remains for consideration the further point whether the result follows that the exemption from taxation purported to be conferred on the Respondent by By-law 148 ever became effective. On the assumption that the Deed of Covenant was *ultra vires* the Respondent, the Appellant respectfully submits as follows :—

(a) It is suggested by Rand, J., and concurred in by Kellock, J., that 20 the Appellant is estopped from pleading that the bond and covenant was *ultra vires* of the Respondent by reason of the fact that the agreement was partly performed by each party shortly after the date thereof and by reason of the fact that subsequently the workshops have been maintained in Winnipeg, and that the real property of the Railway has not been taxed.

The Appellant submits that estoppel cannot operate to make *intra vires* an agreement which was *ultra vires*, and that no act which is *ultra vires* of a corporation itself can be validated by acquiescences or otherwise than by statute.

(b) It is also suggested by Rand, J., and concurred in to some extent 30 by Kellock, J., that under the equitable Jurisdiction of the Court the agreement may be modified to read that the exemption from taxation shall continue so long as the workshops are maintained and that the exemption would cease if the Respondent should cease to maintain the workshops as agreed.

It is submitted that the Court of Equity has never exercised or purported to exercise such a Jurisdiction. As was said by Lord Macnaghten in *Samuel v. Newbold*, 1906 A.C. 461 at page 468 :

“ But the Court never remodelled the bargain. The  
“ Chancery ’—as a great judge said many years ago—‘ mends no 40  
“ man’s bargains.’ ”

The equitable principle of compensation does not apply to the present case.

Rand, J., mentioned that rescission is impossible. The Appellant contends that this is not a case of rescission, it is a case of the Respondent

attempting to obtain the benefit of an agreement which it had no power to enter into. Some of the stipulated acts which were to be performed by the respective parties within a stated time after the agreement was entered into have been performed, but the remaining part of the agreement is to be carried out and observed by the parties forever. This is the unusual and extraordinary part of the agreement, which the Appellant says the Respondent is not bound to perform because it had no power to give such a covenant.

Sub-section (8) of Section 4 of By-law 148 reads as follows :

- 10           “ Upon the fulfilment by the said company of the condition  
           “ and stipulations herein mentioned by the said Canadian Pacific  
           “ Railway Company, all property now owned or that hereafter  
           “ may be owned by them within the limits of the city of Winnipeg,  
           “ for railway purposes or in connection therewith, shall be forever  
           “ free and exempt from all municipal taxes, rates and levies and  
           “ assessments of every nature and kind.”

- 20           If it was *ultra vires* of the Respondent to make, execute and deliver the  
           bond and covenant stipulated for in sub-section (3) of Section 4 of the By-law,  
           the Railway has not complied with this condition precedent. The capacity  
           of the Respondent to enter into such a bond and covenant was assumed and  
           was a condition of the Contract. It is void for want of mutuality. See  
           *Bell v. Lever Brothers, Limited et al* (1932) A.C. 161, Judgment of Lord Atkin  
           at page 225.

- 21.—In any event, however, the Appellant submits that the purported  
           perpetual exemption of the Respondent from taxation never became  
           effective because the Appellant City did not and could not bind itself never  
           to exercise its legislative powers in the future in such a manner as forever  
           to maintain that exemption. By-law 148 was a legislative act of the  
           Appellant enactment and ratification of which, as Section 4 sub-section 3 of p. 292  
 30   the By-law makes clear, was a condition precedent to the implementation  
           by the City and the Railway Company respectively of the obligations set  
           out in the By-law. The Appellant City undertook no obligation, and in  
           its submission could undertake no obligation not, by a fresh legislative act,  
           to repeal the By-law. With regard to the Statute of Manitoba 46-47 Appendix  
           Victoria Cap. 64 (1883) which was relied upon by the Respondent and to p. 47  
           which reference was made by Estey, J., in the Supreme Court, the Appellant  
           submits that this merely conferred upon the Appellant City power to enact  
           the By-law as a By-law of the City and merely rendered it valid and effective  
           until repeal. It did not purport to restrict the legislative power of the  
 40   Appellant to repeal the By-law. Accordingly the Appellant submits that,  
           whether or not the covenant by the Respondent was *ultra vires*, the pur-  
           ported perpetual exemption of the Respondent from taxation never became  
           effective.

22.—While the plea of *res judicata* was raised by the Respondent in its  
           reply, no argument based on this plea was made in the Respondent's

RECORD

Factum in the Supreme Court of Canada, and this plea was not raised at the hearing before the Supreme Court of Canada.

### AS TO EXEMPTION FROM BUSINESS TAX.

23.—The remaining question to be determined is :

p. 420, ll. 18-20

“ whether, if perpetual exemption from taxation is conferred by  
“ the said by-law, such exemption does or does not extend to the  
“ business tax.”

Appellant's  
Factum  
p. 65, ll. 7-11

The question of business tax was not argued at length before the Supreme Court of Canada because of the judgment which had recently been delivered by that Court in *Canadian Pacific Railway Company v. The Attorney-General for Saskatchewan*, hereinafter referred to as the Saskatchewan Reference. (1951 S.C.R. 190.) 10

Record  
p. 403, ll. 18-27  
p. 418, ll. 23-25

The Judges of the Supreme Court who made reference to it merely stated that the principle of the decision in the Saskatchewan Reference resolved this issue in favour of the Company.

The Appellant contends, however, that owing to differences between Clause 16 of the contract and Sec. 4, ss. (8) of By-law No. 148 the two cases are not identical, and that an adverse decision in the Saskatchewan Reference does not determine this appeal against the Appellant.

p. 269, ll. 14-22

24.—In the Saskatchewan Reference, Clause 16 of the contract annexed 20 as a schedule to the statute provided that “ *The Canadian Pacific Railway*, “ and all stations and station grounds, work shops, buildings, yards and other “ property, rolling stock and appurtenances required and used for the “ construction and working thereof, and the capital stock of the Company, “ shall be forever free from taxation by the Dominion, or by any Province “ hereafter to be established, or by any Municipal Corporation therein.”

p. 293, ll. 17-23

In the case at bar the language of by-law 148 is “ *all property* now “ owned, or that hereafter may be owned by them within the limits of the “ City of Winnipeg, for Railway purposes, or in connection therewith shall “ be forever free and exempt from all municipal taxes, rates, and levies, and 30 “ assessments of every nature and kind.”

When By-law 148 was passed on September 5th, 1881, “ business tax ” was unknown in Western Canada, and it is submitted that this problem must be considered as it existed at the date the By-law was passed—*Charrington Co. v. Wooder* (1914) A.C. 71 at 82 *supra*.

Prior to 1873 (the year of the Appellant City's incorporation) the only tax on property known in Western Canada was what was commonly referred to as a land tax which appears to be analogous to the land tax in England described in 19 Hals., p. 590 *et seq.*

Summarized briefly the procedure followed is to assess the land at its 40 value and thereafter strike a rate of so many mills on the dollar of assessment upon which the tax is computed. Such tax is a first charge upon the land



and if not paid the land may be sold. This tax is not in the nature of the rateable occupation tax in England as described in 27 Hals., p. 351 *et seq.* From 1873 until 1893, the Appellant City levied in addition a tax on personal property calculated according to the assessed value of the property.

RECORD

25.—(a) In 1893 the (Manitoba) Municipal Assessment Act was amended so as to terminate the tax on personal property. Instead there was introduced for the first time a business tax.

Attention is directed to the following Section of the 1893 Act which the Appellant submits is worthy of note :

10

Sec. 19. " Nothing in this Act contained shall be construed  
" to make the above tax levied upon such occupants a charge upon  
" the real estate or building so occupied, but such tax is levied  
" in lieu of a tax upon personal property."

Appendix  
p. 61, ll. 37-40

The section of the amendment authorising business tax was carried forward into the 1902 Charter of the Appellant as Section 303 and Section 19 *supra* as Section 314, and also into the 1918 Charter as Sections 281 and 308 respectively.

p. 67, ll. 14-32  
p. 68, ll. 3-6

p. 81, ll. 4-43  
p. 83, ll. 3-6

(b) In 1935 the formula for calculating the business tax was altered by Section 5 of S.M. 1935, Cap. 93, under which different kinds of businesses therein enumerated were classified and different rates applied to each classification.

20

Amongst these classifications railways were not included since The Railway Taxation Act which exempted them was still in force.

p. 63, ll. 20-36

(c) Various other businesses were included from time to time and in 1940 Section 297 of the 1940 Charter (S.M. 1940 Cap. 81) was amended to read as follows :

p. 87, ll. 6-18  
ll. 23-27

30

" 297. (1) For the purpose of levying the business tax  
" hereinbefore referred to, the assessment commissioner shall  
" classify in accordance with the classifications hereinafter set  
" forth, the business of each person carrying on business in any  
" premises in the city, according to the principal business carried  
" on by him therein, and every such person shall in each year pay  
" to the city a business tax based on the assessed annual rental  
" value of the premises occupied or used by him for the purposes  
" of such business and at such rate percentum of said value as is  
" applicable to the class in which such business falls, as shown on  
" the business assessment roll, the rates within each class varying  
" according to the assessment where hereinafter indicated. The  
" said classes and the respective rates applicable thereto shall be  
" as follows :

40

" Class L. Proprietor or Conductor of Express, Freight  
" or Passenger Transportation service not otherwise exempt  
" (by rail, motor vehicle, aeroplane or other conveyance, not  
" including taxicabs) ... .. 12½%  
" Telegraph Service ... .. 12½%."

## RECORD

This covered all phases of a railway company's operations. The property of the railway company was, of course, still exempt under The Railway Taxation Act.

Appendix  
p. 98, ll. 2-4

(d) In 1948, Class L was further amended by striking out the words "not otherwise exempt," so that Class "L" now reads:

"L. Proprietor or Conductor of Express, Freight or Passenger Transportation Service (by rail, motor vehicle, aeroplane or other conveyance, not including taxicabs) ... 12½%  
"Telegraph Service ... 12½%."

p. 96, ll. 1-5

This amendment was obtained because the exemption granted by The Railway Taxation Act had been suspended by The Taxation Suspension Act, which permitted the taxation of railways. 10

Record  
pp. 199-202  
p. 228, ll. 6-10  
p. 245, ll. 26-28  
p. 403, ll. 18-27  
p. 418, ll. 23-25

26.—In the Court of Appeal for Manitoba the judgments of the majority were to the effect that the Respondent was not exempt from business tax.

In the Supreme Court of Canada the question of business tax was not dealt with at length but the Court per the Chief Justice, Kerwin, Taschereau, Fauteux, Estey and Cartwright, JJ., held that the principle of the decision in the Saskatchewan Reference resolved this issue in favour of the Company.

With respect the Appellant contends that the decision in the Saskatchewan Reference should not resolve the issue in the case at bar. 20

In the Saskatchewan Reference the "Company" and the property specified in Clause 16 of the Saskatchewan contract are exempt, while in the case at bar only certain property (i.e., owned for railway purposes or in connection therewith) was stated to be exempt.

In the Saskatchewan Reference in the Supreme Court of Canada (1951) S.C.R. 190 the Chief Justice (with whom Taschereau, J., agreed), said at p. 203:

"As for business tax, that is only a form of municipal taxation and as under Clause 16 of the contract and Section 4 of the schedule, the company is 'forever free from taxation by the Dominion or by any province hereafter to be established, or by any municipal corporation therein,' I am of the opinion that as to the business carried on as a railway . . . Clause 16 of the contract exempts and frees the Canadian Pacific Railway Company from taxation in Saskatchewan in respect of its business." 30

The learned Chief Justice based his decision on the fact that it was the exemption granted to the "company" which freed the railway from business tax.

He expresses no opinion as to whether or not a business tax is a tax on property. 40

Kellock, J., deals with this question at greater length, and after reviewing the legislation upon which the tax is based, he comes to the following conclusion at p. 218/19:

“ The business tax under the statute did not constitute a lien on the land as was the case with the real property tax, and in that sense it was not a tax ‘ on ’ land. Both, however, constituted taxes on persons with respect to their ownership or occupation of land and under the contract in question on this appeal both are within the intendment of the language employed in paragraph 16.”

In support of that conclusion he cites a number of authorities which are distinguishable on the facts but distinguishes the case of *Re Hydro Electric Power Commission of Ontario and City of Hamilton* 47 O.L.R. 155 where the question under consideration regarding assessment for business tax is similar to that in the present case.

In that case Meredith, C.J.O., stated at pages 160 and 161 :

“ The word ‘ property ’ means, I think, real property, because personal property is not liable to taxation.”

“ The business assessment . . . is a personal tax and not a tax on real or personal property. The assessment on land is used only for the purpose of determining the amount of business assessment, which is a percentage on the assessed value of the land occupied or used for the purpose of the business.”

Appendix  
p. 87, ll. 7-18

In the Appellant’s case the business tax is based on the assessed annual rental value of the premises occupied or used for the purposes of the business.

Meredith, C.J.O., continues (p. 161) :

“ The business assessment, as I have said, is a personal tax, and by no process of reasoning can it be said to be a tax upon property.”

In that case the facts and legislation were similar to those in the Appellant’s case and it is submitted with respect that the learned Judge in the Supreme Court erred in applying the judgment of the Saskatchewan case to the Appellant’s case when he held that the business tax in *re Hydro Electric Power Commission of Ontario v. City of Hamilton* constituted a tax on persons with respect to ownership or occupation of land.

In his reasons for judgment in the Saskatchewan Reference (1951) S.C.R. 190 at p. 231 *seq.* Estey, J., of the Supreme Court of Canada, dissented from the majority judgment, and the Appellant adopts and relies upon his reasons for judgment.

27.—In 1881 when By-law 148 was passed business tax was unknown in Western Canada so that it cannot be expected that the framers of that By-law had any intention of exempting the company from such a tax, and so when the tax was finally authorised in 1893 it was quite clearly set out that it was not to be a tax on property ; which was the only tax from which the Respondent was to be exempt.

p. 61, ll. 37-46

RECORD

It is significant that under By-law 148 portions only of the Respondent's property, and not the Respondent (Company) is to be exempt, which is the distinction made in *United Towns Electric Co., Ltd. v. Attorney-General for Newfoundland* (1939) 1 A.E.R. 423.

The Appellant submits that there is a fundamental difference between exempting a company from taxation and exempting only a part of the property of such company. Had it been intended to exempt the company as was done in the Newfoundland case and in the Saskatchewan Reference *supra*, then it would have been so stated. The exempting clause of By-law 148 was most carefully worded to express precisely what the parties intended, and to further ensure that there would be no doubt that the exemption given in 1881 should not be misconstrued should taxation other than on property be introduced, Section 19 was inserted in the Act of 1893 declaring it not to be a tax upon land or buildings was inserted. (See paragraph 24 (a) above.) 10

Appendix  
p. 63, ll. 20-38

By the Railway Taxation Act of Manitoba in 1900, the company was exempt from taxation by all municipal corporations within the Province. Under By-law 148 only a portion of the property of the Respondent is exempt. It should not be supposed that the framers of this By-law and agreement did not know and understand the wide difference between exempting the Respondent Company from taxation and exempting some particular property owned by the Respondent. 20

28.—The Respondent relied, in support of the contention that the business tax is a tax on its property, upon the provisions in the Winnipeg Charter which set out the remedies available to enforce payment of taxes. These are contained in Sections 360, 364, 365 and 369 of which Section 365 reads :

“ Any taxes may be recovered and may be levied on any real  
“ or personal property excepting therefrom that mentioned in sub-sections  
“ (a), (b), (d) and (h) of Section 29 of The Executions Act. ”

(The above sub-sections are not relevant.)

30

As to this the Appellant respectfully adopts and relies upon the judgment of Richards, J.A., in the Court of Appeal for Manitoba where he says :

p. 91, ll. 7-28

“ In my opinion Sections 360 (1), 364, 365 and 369 (1), which  
“ influenced the judgment of the trial judge, are not for the  
“ purposes of imposing a tax and do not impose a tax, but are  
“ merely for the purpose of collecting the tax by distress or sale of  
“ personal property, and, possibly, by levying it under Sec. 365  
“ on real property. Such provisions do not make the tax itself a  
“ levy upon property. There must be a further active move by the  
“ tax collector before there is a levy. It is true that payment may  
“ be realised out of property but all debts of every kind whatsoever  
“ are payable out of property of some kind and that is the only  
“ means of paying them.” 40

Three of the five judges in the Court of Appeal reached the same conclusion, and the Appellant respectfully relies upon the Judgment of Adamson, J., in that Court.

The Appellant contends that conclusions reached by the majority of the judges of the Court of Appeal for Manitoba and the conclusion of Estey, J., of the Supreme Court of Canada in the Saskatchewan Reference should prevail.

29.—It is submitted that the Appeal should be allowed for the following, amongst other

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## REASONS

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1. BECAUSE the Respondent is not a common law corporation and has no powers beyond those conferred by its constituting documents or by statutory extensions.
2. BECAUSE the purported bond and covenant dated 10th October, 1881, amounted to an agreement on the part of the Respondent not to exercise its statutory powers, and is therefore *ultra vires* the Respondent.
3. BECAUSE the purported bond and covenant dated 10th October, 1881, is incompatible with the obligation of the Respondent to forever efficiently operate the Railway, and is therefore *ultra vires* the Respondent.
4. BECAUSE the enumerated powers in the Special Act do not confer upon the Respondent the right to enter into the perpetual agreement alleged by the Respondent.
5. BECAUSE in the absence of such power the Respondent could not fulfil the conditions and stipulations, the fulfilment of which was a condition precedent to its right to tax exemption under Sec. 4, s.s. (8) of By-law No. 148, and has consequently no right to any such tax exemption.
6. BECAUSE the Respondent cannot acquire statutory powers by estoppel.
7. BECAUSE this is not a case for compensation under the equitable jurisdiction of the Court.
8. BECAUSE, in any event the Appellant did not deprive itself and could not, except under express statutory authority (which was not conferred) deprive itself of the power to repeal

By-law 148 and in consequence the perpetual exemption of the Respondent from taxation by the Appellant never became effective.

9. BECAUSE even if the property of the Respondent should be held to be exempt under By-law No. 148 ; the business tax is not a tax on the property of the Respondent used for railway purposes.
10. BECAUSE business assessment and the business tax consequent thereto is a tax *in personam*, not on "property" within the meaning of Sec. 4 s.s. (8) of By-law No. 148. 10
11. BECAUSE By-law No. 148 purported to exempt only the "property" of the Respondent and not the "Company."
12. BECAUSE there was no intention in said By-law 148 to exempt the Respondent from business assessment or business tax, since the tax later known as business tax was not known when By-law 148 was passed (1881).
13. BECAUSE no clear intention was expressed in By-law 148 to exempt taxation of a different nature which might be imposed in the future.
14. BECAUSE By-law 148 should be construed strictly against 20 the Respondent who seeks such exemption.
15. BECAUSE having regard to the difference between the wording of By-law 148 and Clause 16 of the contract which was dealt with in the Saskatchewan Reference the Supreme Court of Canada erred when it held that the decision in the Saskatchewan Reference with regard to business tax resolved this question.

W. P. FILLMORE. .

G. F. D. BOND.

R. O. WILBERFORCE. 30

In the Privy Council.

No. 22 of 1952.

ON APPEAL FROM THE SUPREME COURT OF  
CANADA.

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BETWEEN

THE CITY OF WINNIPEG APPELLANT

AND

THE CANADIAN PACIFIC  
RAILWAY COMPANY ... RESPONDENT.

---

CASE FOR THE APPELLANT

---

LAWRENCE JONES & CO.,  
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