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IN THE PRIVY COUNCIL.

Council Chamber, Whitehall, S.W.1.

Tuesday, 25th March, 1952.

Present:

LORD NORMAND  
LORD RADCLIFFE  
LORD ASQUITH and  
LORD COHEN.

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ON APPEAL FROM THE SUPREME COURT OF CANADA

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Between:

THE CITY OF WINNIPEG

Petitioner.

and

THE CANADIAN PACIFIC RAILWAY COMPANY.

Respondents

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Petition for Special leave to Appeal

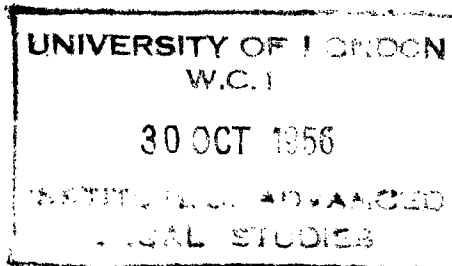
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Petition for Special Leave to Appeal.

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

MR. GEOFFREY CROSS, Q.C., instructed by Messrs. Lawrence Jones  
& Co., appeared for the Petitioner.

MR. <sup>C.F.H.</sup> CARSON, Q.C. (of the Canadian Bar), and MR. FRANK GAHAN,  
instructed by Messrs. Blake & Redden, appeared for the  
Respondents.

LORD NORMAND: In this case the same question arises about the  
intimation to the Attorney-General of Canada; does it not?

MR. CROSS: No, my Lord. One of the issues raised in this appeal  
is as to the business tax and that raises substantially the same  
question of construction as that on which Lord Hailsham and  
Mr. Carson have addressed your Lordships, but there is not an

analogous constitutional point in this case.

LORD NORMAND: Is there any other point you are going to argue today?

MR. CROSS: Yes. There are several other issues in the action besides the business tax.

A This is a petition for leave to appeal from a judgment of the Supreme Court of Canada. The petitioner is the City of Winnipeg, for which I appear, and the respondent is the Canadian Pacific Railway Company, for whom Mr. Carson and Mr. Gahan appear. The issue in the proceedings was to what extent, if at all, the Canadian Pacific Railway is exempt from municipal taxes in Winnipeg.

B The matter arose in this way. In 1881 when the railway was being built, the City of Winnipeg, in consideration of certain undertakings given to it by the Canadian Pacific Railway, passed a by-law, which was subsequently confirmed by an Act of the Manitoba legislature, to the effect that all property then owned or that thereafter should be owned by the Canadian Pacific Railway within the limits of the City of Winnipeg for railway purposes or in connection therewith should be exempt from all municipal taxes, rates and levies and assessments of every nature and kind. The undertakings by the railway company in consideration of which the by-law was passed included a covenant by the railway to build their principal workshops for their main line for the Province of Manitoba within the limits of the City of Winnipeg and forever continue the same within the City.

C From 1900 to 1947 there was legislation in Manitoba which prevented the City from levying taxes on the railway company's property, but in 1948 levies of taxes were made, including business tax, and the questions which arise for decision are, first of all, whether the covenant by the railway always to continue its workshops within the City of Winnipeg was valid at all, if it was an enforceable covenant, if it was valid, and, assuming it was not valid, whether the exemption from taxation ever really took effect at all.

D LORD COHEN: Because consideration failed?

E MR. CROSS: Yes, because a substantial part of the consideration failed. Assuming that is wrong, then these subsidiary points arise, first of all, whether the Winnipeg business tax - this is where we are in the same area as the previous petitioners - was one of the taxes from which the property was exempted, assuming it was exempted from anything, secondly, whether the limits of the City of Winnipeg meant the limits of the City in 1881 or the limits of the City from time to time, so that the property of the company which was initially outside the limits of the City and therefore not exempt might become exempt as the City grew, and, finally, whether the Royal Alexandra Hotel in Winnipeg, which is owned by the Canadian Pacific Railway and run by them, cannot be said to be owned for railway purposes or in connection therewith. That issue raises the question of the decision of your Lordships' Board in the Empress Hotel case. That was the Empress Hotel in Victoria which is owned by the Canadian Pacific Railway. Your Lordships have held that the undertaking of running the Empress Hotel in Victoria is not part of the railway undertaking of the Canadian Pacific Railway. Some of the judges of the Supreme Court thought that case bound them to hold that the Royal Alexandra Hotel in Winnipeg was not owned by the company for railway purposes. Others did not.

so that particular issue raises the question of how far your Lordships' decision in the Empress Hotel case extends.

LORD NORMAND: I think I have followed what you said, but on page 3 in your petition in paragraph 11 (i) one of the issues raised was whether the deed of covenant was ultra vires.

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MR. CROSS: That is the first issue, my Lord. That itself is sub-divided into two parts. First of all, the question arises whether or not the railway, which was incorporated by Royal Charter under authority given to the Governor by statute of Canada, has the powers that a common law corporation created by charter normally would. If it has, then no question of ultra vires can arise. Assuming it has not, and on that first point there was a great difference of opinion in the Supreme Court of Canada, and I shall submit to your Lordships, if necessary, that there is a good deal to be said for the view that it has not the powers of a common law corporation, it has only the powers properly incidental to managing and running the Canadian Pacific Railway; and the question arises whether it was competent to it to bind itself forever to maintain its workshops in the City of Winnipeg.

Your Lordships must consider what the position was in 1881. Nowadays, no doubt, the possibility of it being desirable to remove its workshops from Winnipeg would be somewhat remote.

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LORD RADCLIFFE: Are there not decisions in this country that a railway company could not bind itself to maintain a level crossing in perpetuity.

MR. CROSS: That sort of case would arise if your Lordships were in my favour on the common law corporation point.

LORD COHEN: The British railway companies were all statutory companies and the Royal Charter did not come into them at all, did it?

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MR. CROSS: No, my Lord. Undoubtedly the Canadian Pacific Railway is incorporated by Royal Charter, but in rather peculiar circumstances, because there was no power to the Governor in 1880 to create a railway company under the prerogative by Royal Charter. The power was conferred on him for that purpose by the Act and, having regard to the wording of the Act, great doubt arises as to whether the railway was intended to have all the unlimited powers of a common law corporation created by charter or not.

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The matter first came before Chief Justice Williams in the Manitoba Court of first instance and he was against the City of Winnipeg on all the points. An appeal was brought from his decision to the Court of Appeal for Manitoba and there three of the five judges were in favour of the City on the three subsidiary points, that is to say, they held that the limits of the City for the purpose of the exemption were the limits as they obtained in 1881, they held that the business tax was not a tax to which the exemption applied and they held that the hotel was not owned by the company for railway purposes or in connection therewith. But a majority of the Court of Appeal were against the City on the ultra vires point.

Then two appeals were brought - each side appealed - to the Supreme Court of Canada. In the Supreme Court of Canada on all the points, excepting the hotel point, the judges were unanimously against the City of Winnipeg. On the hotel point two of the judges of the Supreme Court, Mr. Justice Rand and

Mr. Justice Kellock, were in favour, or would have been in favour, of the City of Winnipeg.

The City asks your Lordships to grant them leave to appeal from that judgment.

A I do not think your Lordships would wish me to add anything on the business tax point, because that has been very fully dealt with and I only adopt what my friend Lord Hailsham has said and submit to your Lordships that it is a difficult and doubtful question of construction.

B With regard to the other points, first of all dealing with the ultra vires point, your Lordships will see that the facts are set out in paragraph 16 of the petition. They are the facts dealing with the incorporation of the company. "As to Issue 1, the first question which arises on this part of the case is whether the respondent which was incorporated on the 16th February, 1881, by letters patent under the great seal of Canada in pursuance of the authority given to the Governor by Section 2 of Statute of Canada 44 Victoria, Chapter 1 'An Act respecting the Canadian Pacific Railway' passed on the 15th February, 1881, had on its incorporation the powers of a common law corporation or only such powers as would have been possessed by a corporation incorporated by Statute for the purpose of carrying out the contract dated 21st October, 1880, which was scheduled to the said Statute and approved and ratified by it. (b) The said contract dated 21st October, 1880, was made between the Government of Canada and a group of individuals (therein called 'the Company') for the completion and operation of the Canadian Pacific Railway. Section 21 of that contract was in the following terms: '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'".

D As your Lordships see, it was contemplated that it should be incorporated with sufficient powers to enable it to carry out the contract.

LORD COHEN: It was apparently contemplated that it would be an act of incorporation.

E MR. CROSS: That was then contemplated. The Governor had no powers under the prerogative to incorporate a railway company by general charter. His powers had been cut down, as specifically abridged by a specific act.

LORD ASQUITH: In some parts of Canada is it not right to say that a company which is incorporated by letters patent has some of the powers of a chartered company in England?

MR. CROSS: Yes, my Lord.

F LORD ASQUITH: It is permitted to do things which it is not forbidden to do rather than limited to doing things it is expressly authorised to do?

MR. CROSS: Yes. I think this is a question of construction of these rather complicated arrangements entered into in 1881 for the creation of this body and exactly what the effect of it was.

LORD NORMAND: Has this been the subject of judicial decision in Canada?

A MR. CROSS: No, my Lord. Mr. Carson will correct me if I am wrong. In the Supreme Court, although all the judges were against us on the second part of the ultra vires point, on this point as to whether the railway has all the powers of a common law corporation or only such powers as to enable it properly to run the Canadian Pacific Railway, the judges were at variance. Mr. Justice Rand and Mr. Justice Kellock took the view that the railway company had not all the powers of a common law corporation. Mr. Justice Estey and Mr. Justice Cartwright considered that the railway company had all the powers of a common law corporation and the other five did not express any view on the point at all.

LORD NORMAND: Why did they hold it was intra vires?

B MR. CROSS: Then the second question would arise. Assuming it had not all the powers of a common law corporation, the question arises whether it could be said to be reasonably incidental to its power to conduct the railway to bind itself in 1881 forever to maintain its principal Manitoba workshops in the City of Winnipeg. That would raise the sort of problem my Lord Radcliffe referred to. Although in the Court of Appeal in Manitoba a minority of the judges were in our favour on that point, in the Supreme Court all of the judges took the view that it would be incidental to the statutory powers of the Canadian Pacific Railway. I should submit to your Lordships that the fallacy of the approach of the judges in the Supreme Court is that the matter must be judged from the standpoint of affairs pertaining in 1881. It seems rather C ridiculous now that Winnipeg is the well established capital of Manitoba to suggest that it might be desirable to remove the workshops from Winnipeg. That was <sup>not</sup> necessarily the case in 1881 and the petitioners desire to submit to your Lordships, if your Lordships give leave to appeal, that, assuming the railway company has not the powers of a common law corporation, it had not power in 1881 to bind itself forever to maintain its principal workshops in Winnipeg, however inexpedient it might prove in the future to do that, and that part of the consideration given by the railway company to the City was D nugatory, and it was a very substantial part of it, and therefore the tax exemption fell to the ground.

E Then, my Lords, there are the other subsidiary points. There is the question whether the limits of the City of Winnipeg, as referred to in the documents in 1881, meant the limits of the City as then existing or the limits of the City as they might exist from time to time. If your Lordships turn to paragraphs 4 and 5 of the petition, there the relevant parts of the document are set out. Will your Lordships look at paragraph 5.

LORD ASQUITH: I wonder if for my benefit, leaving aside the subsidiary points, you could formulate the central point quite shortly. I think I have it, but I would like to be quite sure.

F MR. CROSS: The question is whether the covenant by the railway company forever to continue its principal workshops for its main line in the province of Manitoba within the City of Winnipeg was a valid and enforceable covenant. That, as I have tried to explain, really raises two subsidiary issues, first, whether the railway company had all the powers of a common law corporation, in which case it could plainly, covenant to do anything, and, secondly, if it had not, whether such a covenant was one which it had power to enter into, incidental to its power to conduct and manage the Canadian

Pacific Railway. That is what I might call the main point. Of course, if the City is right on the main point, the subsidiary points would not arise, because the exemption from taxation would fail.

A Then the subsidiary points are, first, the business tax point, on which your Lordships have already heard arguments from Lord Hailsham, and substantially I think exactly the same questions arise on that, as far as construction is concerned, as arises on the Saskatchewan business tax. The second subsidiary point is as to the limits of the City of Winnipeg, as to what was meant by that phrase in the relevant document, and your Lordships see from paragraph 5 (iii) that what the railway company covenanted to do in 1881 was "with all convenient and reasonable despatch" to "establish and build within the limits of the City of Winnipeg their principal workshops for the main line of the respondent... and forever continue the same". It is the petitioner's submission to your Lordships that there in the covenant the limits of the City of Winnipeg must mean the limits as existing in 1881. The correlative exemption from taxation which the City gave, or purported to give, in consideration of the covenant, is set out in paragraph 4 of the petition and that is that all property now owned or that may hereafter be owned by the company within the limits of the City of Winnipeg for railway purposes or in connection therewith shall be forever exempt from taxes.

G LORD COHEN: That might be against you. It might be said that if you look at the property that may hereafter be owned within the limits of the City, you have to look at the limits of the City at the time when the question arises.

MR. CROSS: It could be so put, but in my submission it would be a curious use of language. If the limits of the City of Winnipeg in the covenant have a different meaning -----

D LORD COHEN: You are assuming it in your favour. It might be relevant to take into account the wording of the exemption in considering the meaning of the covenant, might it not? One is a by-law?

MR. CROSS: Yes. They were with all convenient and reasonable dispatch to build within the City of Winnipeg their principal workshops. In my submission, that shows that in the covenant at least the limits of the City must have been the limits at that time.

E LORD COHEN: I should doubt that very much. Surely the principal workshops are things that themselves may vary according to the amount of traffic. "With all convenient and reasonable despatch" means as and when the workshops are required. Supposing the time came when they wanted to move their workshops to another part of the City. Is it to be argued that they would not be entitled to do so?

MR. CROSS: They would be entitled to do so.

F LORD COHEN: When the question arose whether they had fulfilled their covenant, would it not be relevant to look and see what the limits of the City of Winnipeg were at that date?

MR. CROSS: In 1903 in point of fact they did move their principal workshops from where they were originally constructed within the limits as existing in 1881 to outside, but at that time, as I think I told your Lordships, there was an Act of the

Manitoba Legislature exempting all railway property from taxation, so the question did not arise until 1948. Now it has arisen because the principal workshops are not within the limits of the City as existing in 1881. That is a question of construction.

LORD ASQUITH: Taking paragraph 4, I suppose you would say the word "hereafter" qualifies property but does not qualify the limits of the City?

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MR. CROSS: Yes; that simply qualifies property.

LORD COHEN: We are not deciding the case. We are considering whether it is arguable.

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MR. CROSS: May I pray in aid what I think my Lord Cohen said to Lord Hailsham? In the Court of Appeal in Manitoba three of the five judges decided in our favour on this point, although it is true that in the Supreme Court none of them did. This point, in my submission, is by no means an easy one. Three judges of the Appellate Court in Manitoba decided that point in favour of the City.

The other subsidiary point concerns the Royal Alexandra Hotel and the facts are set out in paragraph 19 of the petition. "The determination of this issue depends on whether or not the Royal Alexandra Hotel is property owned by the respondent 'for railway purposes or in connection therewith'.

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"(b) The facts with regard to the hotel are stated as follows in the judgment of Mr. Justice Kellock in the Supreme Court. 'The Hotel is a modern high class structure of a well known type having six floors with 445 rooms available for guests. It is one of a system maintained by the appellant company across the country. While it serves to draw traffic to the appellant's railway it is not only available to the travelling public generally but serves the local community in providing suitable space for entertainment and public functions as well as for more or less permanent guests. It is also used by the appellant to lodge employees from time to time and it is a convenient place for the holding of railway conferences and passengers are at times accommodated there in emergencies. The Hotel laundry looks after some of the laundry for the railway'.

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"(c) In the case of the Canadian Pacific Railway Company v. The Attorney-General for Canada and others, 1950 Appeal Cases, page 122, which was decided after the hearing of the present case in the Court of King's Bench for Manitoba but before its hearing in the Court of Appeal for Manitoba, the Privy Council decided (*inter alia*) that the Empress Hotel in Victoria, British Columbia, which is owned and managed by the respondent was not part of the respondent's railway works and undertaking connecting the Province of British Columbia with other Provinces within the meaning of Section 92 (10)(a) of the British North America Act 1867 but was a separate undertaking.

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"(d) The connection of the Royal Alexandra Hotel with the respondent's railway undertaking is in your petitioner's submission substantially the same as that of the Empress Hotel and three of the five judges of the Court of Appeal for Manitoba (Mr. Justice Richards, Mr. Justice Dysart and Mr. Justice Adamson), and two of the seven judges of the Supreme Court (Mr. Justice Rand and Mr. Justice Kellock), considered that the decision of the Privy Council in the Empress Hotel



case covered the present case. The other judges however considered that the words which fall to be construed in the Empress Hotel case differed so much from the relevant words in the present case that the former case had no bearing on the present case.

A        "(e) Your petitioner submits that the Royal Alexandra Hotel is not part of the respondent's railway undertaking and is not owned by the respondents 'for railway purposes or in connection therewith' within the meaning of By-law 148".

B        That, again, is a very short question of construction, but it does raise the question of how far your Lordships' decision in the Empress Hotel case really went. Your Lordships undoubtedly held that the hotel, which was I think substantially in the same position as the hotel in this case, was not part of the railway undertaking of the Canadian Pacific Railway but was a separate undertaking. In point of fact, of course, the Canadian Pacific Railway in 1881 -----

LORD NORMAND: It seems to me as regards points 3 and 4 that they are really of little importance except in relation to the other questions raised in the case. They are very minor matters, are they not? If you were to be allowed leave to appeal on the first two matters, any additional argument connected with the third and fourth points would not take much time?

C        MR. CROSS: I think that is so. Of course, they are no doubt financially of some importance.

LORD NORMAND: They may be, but that is not a very conclusive matter on a question of giving leave to appeal. It would be much more important to consider what their effect would be on the duration of the proceedings in the appeal.

D        MR. CROSS: I do not think they would take up a great deal of time. As to Issue 4 undoubtedly your Lordships would have to consider the precise effect of your Lordships' decision in the Empress Hotel case. They are questions of construction which are reasonably short questions.

LORD NORMAND: They are not of great public importance in themselves?

MR. CROSS: Not standing alone.

E        LORD NORMAND: They derive such importance as they have entirely from connection with other points in the case?

MR. CROSS: Yes. We have the business tax point.

LORD RADCLIFFE: The Supreme Court did not give new consideration to the question?

MR. CROSS: A few days before they had decided the Saskatchewan case and they said there was no distinction and, in my submission, rightly said so.

F        LORD RADCLIFFE: If the other case were allowed to come here it would not be unreasonable to allow yours to come too for the same reason.

LORD NORMAND: I suggest that you confine your argument now to the first point in its two branches.

MR. CROSS: If your Lordship pleases. May I come back to paragraph 16 of the petition? Dealing with the question of whether the railway company have all the powers of a common law corporation, the contract, which was dated 21st October, 1880, provided, as is set out in sub-paragraph (B): "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".

Clause 4 of Schedule A, which I think is the material clause, is in the following terms: "All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of every condition, stipulation, obligation, duty, right, remedy, privilege and advantage agreed upon, contained or described in the said contract are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them". There again is the reference back to the powers under the contract.

Then we come to the statute which was passed in order to give effect to the contract. "Section 2 of the statute referred to in sub-paragraph (A) hereof was in the following terms: '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' - I call your Lordships' attention to those words - "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.... shall have force and effect as if it were an Act of Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract".

Your Lordships see the very extraordinary position that was created. The Governor at that time had no power under any prerogative to incorporate a railway company as a chartered corporation at all. This Act, of course, gave him a special power to incorporate the Canadian Pacific Railway by Royal Charter, but it is the submission on the City to your Lordships that the body so incorporated had not all the powers of a chartered corporation because the power under which the Governor acted, and he had no power save what was given him by the statute, said it was for the purposes of incorporating the persons mentioned in the contract and of granting to them the powers necessary to enable them to carry out the contract. There is a reference back in the Act to the contract and your Lordships see at the end of the section that it was said that the charter should have force and effect as if it were an Act of Parliament of Canada and should be held to be an Act of incorporation within the meaning of the contract. If in fact the railway had been incorporated by Act of Parliament which, as Lord Cohen pointed out, is what was obviously originally intended, it can hardly be argued that it had any powers other than such powers as were referred to in the contract. In our submission, the fact that it was actually incorporated by Royal Charter made in these circumstances really no difference at all, because the charter, it was said, was to have

A the same effect as if it was an Act of incorporation within the meaning of the contract and the company was only to have the powers necessary to enable them to carry out the contract. At all events, I do not think I need on this point do more than convince your Lordships that it is an arguable and difficult question and a question on which two of the judges of the Supreme Court were in our favour, that is, as to whether this body had all the powers of a common law corporation. Of course, that is an important question not only in this case but, perhaps, in many other cases.

B I do not know whether your Lordships would like me to refer to the judgment of Mr. Justice Kellock which was in favour of the petitioners on this point and sets out his reasons for that conclusion. I would like to refer to page 61 of the Reasons for Judgment. At the last paragraph Mr. Justice Kellock says: "With respect to the question of capacity, I agree with the conclusion of Mr. Justice Richards and Mr. Justice Dysart that the appellant has not the powers of a common law corporation. Appellant was incorporated by letters patent under the Great Seal issued pursuant to Section 2 of the Statute of Canada, 44 Victoria, Chapter 1, assented to on February 15th, 1881. The statute approved of a contract dated October 21st, 1880, for the construction of 'The Canadian Pacific Railway' as described in the Act of 1874, 37 Victoria, Chapter 14, in part by the Company and in part by the Government, the whole of which was to become the property of the Company, which obligated itself forever thereafter to 'efficiently maintain, work and run' the same. Paragraphs 21 and 22 of the contract read as follows: '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. 22. The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the company, shall apply to the Canadian Pacific Railway'. The schedule referred to in paragraph 21 above provides by paragraph 1 that certain individuals, 'with all such other persons and corporations as shall become shareholders in the company hereby incorporated, shall be and they are hereby constituted a body corporate and politic, by the name of the 'Canadian Pacific Railway''. Paragraph 4 reads as follows". That is the paragraph I have read. "All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them'. Paragraph 17 contains provisions similar to paragraph 22 of the contract, and by paragraphs 18 to 23 inclusive, certain sections of the Consolidated Railway Act are varied in their specific application to the company. The schedule, in subsequent sections, bestows further specific powers.

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"With respect to the enacting provisions of the statute itself, Section 2 reads as follows: 'For the purpose of incorporating the persons mentioned in the said contract, and

A 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.

B "The appellant contends that in the change from the method of incorporation provided for by the contract, namely, by special Act in the form of the schedule appended to the contract, to the method provided for by Section 2 of the statute, namely, by letters patent under the Great Seal, Parliament had in mind the decision in Ashbury v. Riche, Law Reports, 7 House of Lords, page 653, decided some six years earlier, and intended that the ambit of the powers of the appellant company" - of course, the company were the appellants in the Supreme Court - "should not be restricted in accordance with the principle which had been applied in that case, but should be those of a common law corporation. Appellant stresses that the letters patent recite that they are granted not only under the authority of the Special Act, but also under the authority of 'any other power and authority whatsoever in us vested in this behalf', and counsel refers to the judgment of the Judicial Committee in the Bonanza Creek case, 1916, 1 Appeal Cases, page 566.

C "As stated by Viscount Haldane in the course of his judgment in that case, the question thus raised is simply one of interpretation of the language employed by Parliament. The words employed, to which the corporation owes its legal existence, must have their natural meaning, whatever that may be. Their Lordships, after tracing the prerogative power as to the incorporation of companies by the Governor-General and the Lieutenant-Governors respectively, considered the question whether there was, in the case before them, any legislation of such a character that the power to incorporate by charter from the Crown had been abrogated or interfered with to the extent that companies so created no longer possessed the capacity which would otherwise have been theirs. Reference is made to the Act of 1864, 27-28 Victoria, Chapter 23, which authorised the Governor to grant charters for incorporation of companies for certain purposes named in the statute. Section 4 provided that every company so incorporated should be a body corporate 'capable forthwith of exercising all the functions of an incorporated company as if incorporated by a Special Act of Parliament'.

E "Their Lordships construed this provision as enabling, and not as intended to restrict the existence of the company to what could be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions. They therefore held that the doctrine of Ashbury v. Riche does not apply where the company purports to derive its existence from the act of the Sovereign and not merely from the words of a regulating statute.

F "It is to be observed that the Act of 1864 and the Dominion and provincial Companies Acts in question in the Bonanza case were each enacted at a time when the prerogative

power to incorporate was unaffected by other legislation. In the case at bar, however, when the Act of 1881 was passed, any power to incorporate a company for the construction and working of railways by virtue of the prerogative, had previously been expressly abrogated by Section 3 of the Joint Stock Companies Act of 1877, 40 Victoria, Chapter 43, and prior thereto by Section 3 of the Act of 1869, 32-33 Victoria, Chapter 13. Accordingly, the language in paragraph 1 of the letters patent, so much relied upon by counsel for the appellant company, namely, 'and of any other power and authority whatsoever in us vested in this behalf', is meaningless, there being in 1881 no power vested in the Governor-General in Council with respect to the incorporation of a railway company, apart from that bestowed by the statute of 1881 itself. One must therefore find in that Act, or not at all, an intention to revive the prerogative for the purpose of the incorporation of the appellant company". The learned judge considers Attorney-General v. De Keyser's Royal Hotel.

He goes on: "Before considering the language of the statute, it is not irrelevant to observe that had it been the intention of Parliament to create the appellant company with the powers of a common law corporation, one would have expected, at that date at least, that something in the nature of express language would have been used. That the decision in Ashbury v. Riche had nothing to do with the form of Section 2 of the statute is, I think, indicated by the provisions of Sections 14 and 15 of the Canadian Pacific Railway Act of 1872, 35 Victoria, Chapter 71, which make provision for incorporation by letters patent, in the circumstances there mentioned, of a corporation for the construction and operation of the railway later to be the subject of the contract with the appellant. In the case of these sections, it is not possible, in my opinion, to say that by the letters patent so authorised, a common law corporation would have emerged.

"Moreover, in my opinion, it is not possible to construe Section 2 of the statute of 1881 as enabling in relation to a co-existent power to incorporate, existing apart from the statute. Such a power did not then exist. Further, the authority given by Section 2 of the Act of 1881 for the purpose of incorporating the persons named in the contract, and of granting to them 'the powers necessary to enable them to carry out the said contract according to the terms thereof', was to grant to them 'in conformity with the said contract' a charter conferring upon them 'the franchises, privileges and powers embodied in the schedule to the said contract'.

"Pausing there, I find nothing in this language which operates to constitute such letters patent, letters issued by virtue of any royal prerogative or any authority apart from the statute itself, and in my opinion, the following language" ----

LORD NORMAND: It is certainly a very unusual proceeding, making a statute of incorporation by charter. What the result is it is very difficult to say.

MR. CROSS: Your Lordships have this, that two judges of the Supreme Court were in our favour on that point, two of them were against us and the others did not express a concluded opinion on the point. I do submit that it is a point of great general importance, whether this body has all the powers of a common law corporation.

LORD NORMAND: That is only of general importance because of the widespread activities of the Canadian Pacific Railway.

MR. CROSS: Yes. I do submit that that issue and the issue as to the business tax are both matters of great importance and considerable difficulty.

A The other two points I do concede are points of minor importance, although my submission is that they are questions of difficulty on construction.

LORD NORMAND: They are scarcely of general importance.

B MR. CROSS: No, I concede that. If your Lordships were minded to give leave to appeal by reason of the two main points, I would have submitted that the two minor points might be dealt with at the same time. I do not know whether your Lordships would wish me to read any more of what Mr. Justice Kellock said. I think what I have read indicates that the point is one of very considerable difficulty.

C MR. CARSON: On the first main point, that is, whether the agreement for tax exemption is valid and binding, your Lordships are, perhaps, aware from something that has been read that the by-law setting out the exemption agreement was declared to be legal, binding and valid by a special enactment of the legislature of Manitoba in 1883 and until the present action was brought in 1948 the validity of this agreement has never been questioned by the City. I quite agree that from 1900 to 1947 the City was not in a position to tax, but it was in a position to tax from 1881 to 1900, a period of nearly 20 years.

D The main contention of the City in respect of this question is that the railway company had no power to enter into the agreement. In the Canadian Courts the trial judge, four judges of the Court of Appeal and seven judges of the Supreme Court of Canada have held that the railway company had the power and that, accordingly, the agreement was valid and binding. It is quite true that their Lordships, Mr. Justice Estey and Mr. Justice Cartwright put it on the basis that we had the powers of a common law corporation, but the other five judges who upheld the power put it on the basis that, assuming we were a statutory corporation, the thing was broad enough to give us power to enter into this agreement. Mr. Justice Rand and Mr. Justice Kellock proceeded in their judgments on the assumption that there was no power to repudiate or, rather, held that the City could not repudiate this agreement, having enjoyed the benefit of it for almost 70 years.

E LORD COHEN: That cannot be right. I did not think that was quite how they put it. You cannot make a thing intra vires if it is ultra vires by doing that. I thought they put it on the ground that it was reasonably incidental to the powers expressly conferred.

F MR. CARSON: Mr. Justice Kellock says that if he had to go to that point, what was laid down in the cases had to be kept in mind. I am saying that out of 15 judges in Canada only one judge, Mr. Justice Dysart, had held that the exemption ----

LORD RADCLIFFE: You could say that if the contract was not legally binding they had had 70 years of performance of it which might provide some consideration.

LORD COHEN: The answer might be that you have had 70 years exemption.

MR. CARSON: Yes, my Lord, but we have given them 70 years of very good consideration, we think. Our whole plan for Manitoba was brought about in 1881 and this was a very large contract.

A LORD ASQUITH: You are saying that of 15 judges only one did what?

MR. CARSON: Only one held that the exemption was not available to us.

LORD COHEN: He was against you on all grounds?

MR. CARSON: He was against us on all grounds, on that point, certainly; but he is the only one.

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C My friend has read from the judgment of Mr. Justice Kellock and I would like to read a brief extract from the judgment of Mr. Justice Locke on this first point because his is the judgment that examines the question, perhaps, at greater length. At page 8 he says: "In the view I take of this matter, it is unnecessary to decide whether or not the Canadian Pacific Railway Company is vested with the powers of a common law corporation. I think that, if it be assumed for the purpose of argument that the powers of the Company are simply those it would possess if the incorporation had been by statute and the terms of the letters patent contained in that statute, to enter into the bond and covenant was within those powers."

D "By the contract of October 21st, 1880, which was approved and ratified by Chapter 1 of the Statutes of 1881, the contractors assumed the vast obligation of building the major portion of the proposed railway through a country largely unsettled and following a route only generally defined and thereafter together with those portions of the proposed road to be constructed by the Government, to: 'thereafter and forever efficiently maintain, work and run' the railway". Then he refers to certain terminal points that are unimportant.

E Further down the page he goes on: "By Section 21 of the contract, the company to be incorporated was to have 'sufficient powers to enable them to carry out the foregoing contract' and it was apparently realised that wide powers must be given to the proposed Company to enable it to advantageously carry out its terms. It was, in my opinion, for this reason that Section 4 of Schedule A to the contract was expressed in such wide language". That is the section my friend read from his petition about powers that were necessary or useful. "It is clear that when the contract was signed, that the proposed incorporation was to be by an Act of Parliament which, I think, explains the very broad powers described in paragraph 4". Then he refers to some of the same matters which Mr. Justice Kellock referred to.

F May I go to page 11 to the continuation of his reasoning: "The comment of Lord Selborne on the decision of the House of Lords in Ashbury Railway Co. v. Riche, in Attorney-General v. Great Eastern Railway Co., 1880, 5 Appeal Cases, page 473, at page 478, is that the doctrine of ultra vires as explained in the earlier case is to be maintained but that it should be reasonably understood and applied and that whatever may fairly be regarded as incidental to or consequential upon those things



which the legislature has authorised ought not, unless expressly prohibited, be held by judicial construction to be ultra vires. There is nothing in the letters patent or in the Act of 1881 which prohibited the railway company from entering into such a covenant as the one here in question. It was, in the language of Section 4, 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". He is referring to the covenant to keep the principal workshops for Manitoba in Winnipeg. He says that is undoubtedly a useful thing to enable them to work the railway efficiently for ever. "In my opinion, the contention that it was beyond the powers of the Canadian Pacific Railway Company to enter into the bond and covenant, fails".

Then Mr. Justice Estey and Mr. Justice Cartwright base their judgments on the view that we had the powers of a common law corporation, because while it is quite true that there was a statute which prohibited the incorporation of railways by charter, by letters patent, the submission we have put forward is that all this statute did was to rid us of the impediment of the other statute and this statute merely empowered the Governor to do something which without power he could not do, to carry through a charter with the great seal on it, which was the source of our incorporation. Mr. Justice Estey went on to say this: "Even if I am wrong on the view of the company having the powers of a common law corporation" -- and he proceeds to follow a line of reasoning similar to that of Mr. Justice Locke and says it was undoubtedly useful to this company to get a perpetual tax exemption when it had the obligation to operate this railway forever across Canada. I will not refer to that in detail.

I should like to refer to the judgment of Mr. Justice Kerwin on this point. It is very short and it expresses the view not only of himself but of the Chief Justice of Canada, Mr. Justice Taschereau and Mr. Justice Fauteux. The judgment begins at page 85 and in the middle of page 87 he says: "On this first point I find it unnecessary to determine whether the company", that should be, instead of "City", "was incorporated by Royal Charter and hence had all the powers of a natural person, and therefore it is inadvisable to say anything upon the subject. The enumerated powers of the company, which appear in the reasons for judgment of several of the members of this Court, and in the reasons for judgment in the Courts below are sufficient in my view to authorise the company to do as it agreed, and as was subsequently carried out". He then refers to a decision that is not applicable.

Mr. Justice Kerwin puts it in that short way because he took the view, looking at the enumerated powers, that it really did not need any elaborate reasoning because of the word "useful". That was elaborated in greater detail by Mr. Justice Locke and Mr. Justice Estey.

My Lords, my submission is this. It matters not for this case whether we have the power as a common law corporation or whether we have the power by virtue of the enumeration in the charter. From whatever source we get our power, except for Mr. Justice Dysart, the exemption has been assured and 14 judges have held that the exemption is



available to us, with Mr. Justice Rand and Mr. Justice Kellock adopting different reasoning but reaching the same conclusion and maintaining the exemption. I also ask your Lordships to keep in mind on that point that we have the trial judge, the Chief Justice of Manitoba, Chief Justice McPherson, Mr. Justice Coyne and Mr. Justice Adamson <sup>holding</sup> all that we had that power because we had been incorporated by letters patent under the great seal.

A LORD ASQUITH: Where does the word "useful" come in from?

MR. CARSON: It is quoted in the petition on page 5, paragraph 16.

LORD ASQUITH: It comes in Schedule A?

B MR. CARSON: Yes. They put that beside the obligation of perpetual operation of this railway and say that it was useful to get a good tax exemption in Winnipeg. In my respectful submission, having in mind the principles referred to in the Daily Telegraph case which I referred to earlier there is no adequate ground for doubting the result reached in my favour on that point. I have to accept my Justice Dysart, and, of course, Mr. Justice Rand and Mr. Justice Kellock reached the same conclusion by a different line of reasoning.

C As to the City limits point I say very little, because there I have, as my friend pointed out, a unanimous judgment of nine judges of the Supreme Court. Mr. Justice Kellock in his judgment said it is a point without merit and then he goes on to say that it is not even a plausible contention. I think I should briefly say something to indicate why, in our submission, his Lordship is right in saying that it is not a plausible contention. On that point we have 12 out of 15 judges in our favour, nine of them being judges of the Supreme Court of Canada.

D Apart from the question of construction as to "within the City limits" their Lordships in the Supreme Court did go on to say: "If ambiguity is suggested we are entitled to look at the subsequent behaviour of the parties and we have had the consistent conduct of the City from 1881 to 1900 of recognising as area after area was brought in" -----

LORD COHEN: Is that not a rather dangerous argument? It has been said that the subsequent conduct of the parties ought not to be looked at.

E MR. CARSON: It is an argument I do not go to, because in my submission there is no ambiguity.

LORD ASQUITH: If you get a preceding course of conduct it may be that that can be looked at. The other way round, ex post facto, it is not so clear.

F MR. CARSON: My Lord, certainly we have had it laid down in the Supreme Court of Canada that in a case of ambiguity in a matter of construction one can look at the subsequent conduct of the two parties to the agreement as a helpful clue to resolve the ambiguous matter. I do not have to go to that. I say it is not ambiguous. The other side were saying, "It is clearly my way" and we were saying, "It is clearly my way".

There is one case in the Supreme Court of Canada to which I attach importance on this particular point. It was a case in 1900 between the same parties, the City of Winnipeg and the Canadian Pacific Railway. It is reported in 30,

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Supreme Court Reports at page 558. That was a case which arose towards the end of the last century in which a question was raised as to the construction of this very exemption agreement. The question there was whether school taxes were municipal taxes within the meaning of the exemption. The City was contending in the Supreme Court that school taxes did not come within the exemption and they were not municipal taxes. They did not contend, as they could have contended, that in any event the exemption did not apply to school taxes in the very considerable areas that had been added to Winnipeg since 1881. The Supreme Court by a unanimous judgment held that the school taxes were within that exemption. That was a case dealing with the much larger Winnipeg of 1900 than the smaller original area in 1881. I do submit, with respect, that it is inconceivable that if the City considered there was any merit in the point now put forward it would not have been raised in that case, because it would have saved a very substantial sum of money in respect of the school taxes which were held to be exempt.

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There is one other matter on the point and that is a passage, again on the point which I am saying is not a plausible contention, at page 50 of the judgments. Mr. Justice Estey makes this observation: "It is significant that between the passage of by-laws 148" - that is the one of 1881 - "and 195 the area of the City of Winnipeg was more than doubled. By-law 148 was passed on September 5th, 1881. The legislation providing for the enlargement of the City boundaries was assented to on May 30th, 1882. About five months thereafter, on October 30th, 1882, by-law 195 was passed amending by-law 148. Therefore, the amendment to by-law 148 contained in by-law 195 was passed at a time when the extension of the boundaries would be present to the minds of the Mayor and the Council of the City. If, therefore, the parties had intended in their contract, as evidenced by by-law 148, that the words 'within the limits of the City of Winnipeg' meant the limits as they then existed, and those limits only, the possibility of misunderstanding and the desirability of clarification would have been equally present to their minds when amending by-law 148 by the passing of by-law 195. In these circumstances, had it been intended that the contract should forever apply only to the limits as fixed at the date of the contract, apt words would have been included in by-law 195 to give expression to that intention".

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Then on page 52 the learned judge refers to the fact that in 1903 the railway company, as my friend Mr. Gross mentioned, moved their principal workshops out of the original Winnipeg and he points out that as far as the record discloses the City is now for the first time complaining of that as something that constitutes a breach of the condition. He then goes on to deal with the subsequent conduct.

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May I refer to a line or two of Mr. Justice Kellock's judgment on this point at page 77? He says: "It is next argued for the respondent that the obligation to maintain the workshops and stockyards 'within the City of Winnipeg' means within the limits of the city as they existed at the date of the by-law, and that the removal of the workshops in 1903 from their location within the original city to a location outside that area but within the limits of the city at the time of removal, was a breach of contract. It is contended that even if this did not put an end to the exemption in toto, no lands of the appellant company outside

the existing limits at the date of the contract are entitled to the exemption. In my opinion, this contention is without merit".

A He develops his reasoning on that and on the next page at line 9 he says: "That that is not even a plausible contention is, I think, borne out by reference to the first recital of the by-law, which is as follows: 'Whereas it is desirable that a line of railway southwesterly from the City of Winnipeg, towards the westerly limit of the province of Manitoba, through the Pembina Mountain District should be built for the purpose of developing and advancing the traffic and trade between the City of Winnipeg and the Southern and South Western portions of the province'. When one looks at the words 'the City of Winnipeg' where they secondly appear in the above recital, it is plain, in my opinion, as in the case of paragraph 8, that the city spoken of there, with respect to which traffic and trade was to be 'developed and advanced', meant the City of Winnipeg as it should from time to time develop and expand".

B I do adopt what Mr. Justice Kellock said, and I think it is fully supported by his reasoning, that not only is it a point without merit but it is not one that is even entitled to the adjective "plausible".

0 LORD ASQUITH: I suppose if one wrote a book and entered into a contract with regard to the copyright, giving the right to publish throughout the British Empire throughout the next 20 years, you take the chance of the British Empire expanding or contracting.

MR. CARSON: Yes.

LORD ASQUITH: One knows that cities do enlarge.

D MR. CARSON: Yes. The thing about this case is that the Canadian Pacific was coming into this relatively little developed area in 1880 and it was bound, by the very presence of this trans-continental railway, to cause expansion.

E On the question of the hotel and restaurant, as my Lord Normand pointed out, it does not raise any question of law of widespread importance. It relates only to that hotel and applies to that particular hotel in Winnipeg. There is no other hotel affected by that. The trial judge, two judges in the Court of Appeal and seven judges in the Supreme Court held that it came within the exemption. Two of the judges in the Court of Appeal held, having regard to the Empress Hotel decision of your Lordships' Board, that the hotel in Winnipeg did not come within the exemption. The other judge who arrived at the same result did not do so as a matter of interpretation, not thinking he was bound by the Empress Hotel decision. In the Supreme Court of Canada none of the nine judges, even as I read the judgment of Mr. Justice Kellock and Mr. Justice Rand, held that the question was concluded by the judgment of your Lordships' Board in the Empress Hotel case, but Mr. Justice Kellock, and Mr. Justice Rand concurred, took the view that this hotel was in the nature of a separate business and his view was similar to the view the Judicial Committee took regarding the Empress Hotel when they held that it could not be considered as part of a railway connecting one province with another within the head of Section 92 (10)(a).

F The question with respect to the Royal Alexandra Hotel is entirely different to the question in the Empress Hotel case

because here the question is whether the Royal Alexandra Hotel is owned by the company, looking at the exemption clause, for railway purposes or in connection therewith. In the Empress Hotel case the question was whether the hotel was part of the railway as that word is used in Section 92 (10)(a) of the British North America Act, so as to bring it within the Dominion legislature rather than the provincial legislature. The decision that the Empress Hotel was not part of the railway within the meaning of the British North America Act is, in my submission, not at all conclusive and it is hardly relevant to the question, and I say that, with respect, because of the view of Mr. Justice Kellock, with respect to the Royal Alexandra Hotel.

May I turn to Mr. Justice Locke's distinction of the Empress Hotel case at page 20 of his judgment? He says at the beginning of the second paragraph: "It has been contended in argument that the decision of the Judicial Committee in Canadian Pacific Railway v. Attorney-General for British Columbia, 1950 Appeal Cases, page 122, affects the matter, but I think that this is not so. The issue in that litigation was as to whether the hours of work of the employees of the Empress Hotel in Victoria, owned and operated by the present appellant, were regulated by The Hours of Work Act of British Columbia. Three questions were considered on the appeal: the first of these was raised by the contention that the Empress Hotel being an integral part of the railway system of the company and its activities having become such an extensive and important element in the national economy of Canada, the regulation of its activities did not come within the class of matters of a local or private nature comprised in the enumeration of the classes or subjects assigned by Section 92 exclusively to the legislatures of the provinces, so that Parliament was entitled under the general powers conferred by the first part of Section 91 to regulate its affairs; the second was as to whether the hotel was part of the appellant's railway works and undertaking connecting the Province of British Columbia with other provinces and thus within the exception contained in head 10(a) of Section 92; the third was as to whether the hotel, as part of the company's railway system, fell within head 10(c) of Section 92 as a work which had been declared by Parliament to be for the general advantage of Canada or of two or more of its provinces. All of these questions were decided contrary to the contentions of the railway company. None of them appear to me to bear upon the present matter which, as I have said, is simply one of the construction of the particular language of the by-law.

"For these reasons, I think the Royal Alexandra Hotel property is entitled to the exemption provided for by the by-law and which is enjoyed by other properties of the company within the present limits of the City of Winnipeg owned for railway purposes or in connection therewith".

Without reading it, I would draw your Lordships' attention to the fact that at page 55 Mr. Justice Estey points out similar distinctions between the two cases.

I should pause to say this. I would submit that if a similar question came up under the British North America Act as to the legislative jurisdiction over the Royal Alexandra Hotel, then we would have a binding decision, but likewise I would submit that if in Victoria we had a similar exemption clause to what we have here the Empress Hotel would have been

exempt as being a hotel owned for railway purposes or owned in connection with railway purposes. That question, in my submission, is one of construction and one of fact. Accordingly, the answer, apart from the question of construction, is mainly dependent upon the evidence given at the trial. May I read one short passage of Mr. Justice Locke's summary of the evidence, because my friend read from some other passages summarising the evidence? I think this is probably a little fuller summary. It is at page 18 at the beginning of the last paragraph. Mr. Justice Locke has just put the question as to whether it is for railway purposes or in connection therewith. "The Royal Alexandra Hotel is built on railway property at the corner of Higgins Avenue and Main Street, in the City of Winnipeg, and is physically connected with the railway station. Part of the station building itself is used by the Royal Alexandra Hotel as a coffee shop which provides meals to the travelling public and railway employees. The hotel was originally constructed in 1906 and considerably enlarged in the year 1914. According to Mr. William Manson, Vice-President of the Prairie Region of the railway company, the railway uses the hotel services of this hotel extensively. All linen from the sleeping and dining cars is laundered in the hotel laundries". Winnipeg is the halfway point and it enables the train to carry that much less linen if they can get it laundered halfway across.

"Accommodation is furnished to extra sleeping and dining car conductors and dining car crews during periods of heavy traffic, meals are provided to these employees and some railway conferences and staff meetings are held there. In the same manner as the other hotels operated by the railway company in Toronto, Regina, Calgary and elsewhere, the Royal Alexandra Hotel provides food and lodging for the travelling public. Speaking generally of all the railway company's hotels, Mr. Manson said that they have been established for the traffic that they would draw to the railway and that it is considered essential to proper railway service to have an adequate hotel system. The Royal Alexandra, however, does not restrict its activities to those above described but is used by the general public, irrespective of whether they are making use of the railway's other facilities: balls and entertainments are held there and other public functions.

"The question is simply one of construction of the language of the by-law. While the hotel is clearly not used exclusively for railway purposes or in connection therewith, to the extent that it furnishes lodging and meals to persons other than those travelling on the railway and its facilities are used for functions unrelated to any railway activity, I do not think this affects the matter to be decided. The railway company was, at the time the by-law was passed, empowered by Section 4 of its letters patent to carry on such activities as might be useful to it to enable it to carry out its obligations under the contract. The evidence of the witness Manson is not contradicted. The operation of railway hotels, where the station and the hotel are incorporated in one building, is commonplace in England and has been for a very long time. I think Section 4" - that is the "useful" section - "empowered the railway company to maintain and operate hotels in connection with their railway activities if it was considered that this would assist the development of its railway properties and the discharge of its obligation to operate the Canadian Pacific Railway in perpetuity. The language of the by-law is not that the properties exempted

were those then or which might thereafter be owned exclusively for railway purposes or in connection therewith, and I think the language should not be construed in a manner so restricting it". He then distinguishes the Empress Hotel case.

A Then Mr. Justice Estey, who reaches the same conclusion, points out in addition that the exempting clause did not say that it must be owned exclusively for railway purposes or exclusively in connection with railway purposes. It is "owned for railway purposes or in connection therewith". That is the view of Mr. Justice Locke and the other judges, except Mr. Justice Kellock.

B I do not wish to say anymore on that point except to conclude it by pointing out that on that evidence and on the construction that has been put on it, this hotel was plainly owned for railway purposes or owned in connection with railway purposes, within the meaning of the exemption provision and, since the point does not raise a question of any widespread importance, my respectful submission would be that it is not a point that your Lordships would generally consider fit for the purpose of granting leave to appeal.

I shall say nothing on the business tax point, because I have said all I can say on that in answer to the other petition.

C LORD RADCLIFFE: Supposing we accepted the view you have been putting that points 1, 3 and 4 are, in a sense, minor points?

MR. CARSON: That is leaving out the business taxation point?

LORD RADCLIFFE: Yes. It still remains true that the substance of the case depends on the answer to issue No. 2, does it not?

MR. CARSON: That is the ultra vires point?

D LORD RADCLIFFE: No, the business tax point.

MR. CARSON: I am sorry, my Lord; we have our numbering different. May I say this? If your Lordships should be disposed to grant leave in the Saskatchewan petition on the business tax point, I would only say this. The language in the two provisions is somewhat similar, but the Winnipeg exemption, as Mr. Justice Estey points out, is broader in its terms. I say that because I do not think a decision in the Saskatchewan case against me on the business tax point would necessarily conclude the matter in the Winnipeg case.

E LORD NORMAND: That would be a point for the merits.

F MR. CARSON: I am not satisfied, however, that there is sufficient distinction between the two exemption provisions to justify my suggesting to your Lordships that if you granted leave in the Saskatchewan case you should not grant leave here. What I would submit is that if your Lordships should conclude that the business tax point should be argued in the Saskatchewan case and in this case, these other points I have mentioned are so plainly points that do not admit of doubt, and two of them are not of general importance, <sup>that</sup> your Lordships might exclude these other points from the appeal, because if the points are left in there has to be preparation for argument of those points and sometimes it means that another Counsel has to come over to divide up the work and that sort of thing. I do hope, if I have convinced your Lordships about

the points other than the business tax point, those points would be excluded.

LORD NORMAND: Mr. Cross, do you wish to add anything about the two points that have been dealt with, that is to say, the hotel and the limits of the City?

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MR. CROSS: As to the limits of the City, Mr. Carson has said that it is a point devoid of merit. Your Lordships will remember that three of the judges in the Court of Appeal of Manitoba were in favour of my client on that point. That shows, in my submission, that it is an arguable point. I have put the point to your Lordships that, of course, in the covenant to erect the principal workshops within the limits of the City it was to be done with reasonable despatch after the passing of the by-law. The limits of the City there must, in my submission, mean the limits of the City as existing in 1881. I should submit that it would be prima facie odd if the  
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correlative language in the by-law had a wider meaning. I say it is a difficult point of construction. I cannot suggest that it is of wide public importance. I should have submitted that if your Lordships were minded to give leave on the major point it would not be right to exclude that point on the ground that it was obvious that the decision should be against my client.

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Similarly in the hotel case your Lordships will remember that three of the judges of the Court of Appeal and two of the judges in the Supreme Court were in favour of my client on the point as to whether this hotel could be said to be owned for railway purposes or in connection therewith. I do submit that if your Lordships are minded to give leave to appeal on the major point I should not be excluded on these minor points.

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LORD RADCLIFFE: With regard to the first point, I think what Mr. Carson has been saying is: although it may be important and a difficult question as to what exactly is the nature of the powers that the Canadian Pacific Railway have got, in fact nearly everybody in the case has thought, whatever their powers, they were not incapable of giving this covenant, which is really a small point with regard to the covenant itself.

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MR. CROSS: I think the view that Mr. Justice Rand and Mr. Justice Kellock took was this. They decided in favour of my clients that the railway company had not the common law powers of a chartered corporation. They did not give an express decision on whether or not, assuming them to be a statutory corporation, they would have sufficient power. They went on to say that under principles of equity so long as in fact the workshops were maintained in Winnipeg the railway company ought to be entitled to the exemption and the question would only arise if the workshops were removed. My submission on that point is that there is no authority for that. Something is ultra vires or it is not. There is no equitable principle, such as Mr. Justice Kellock and Mr. Justice Rand thought to invoke. It is true that the other judges of the Supreme Court did take the view, assuming the railway company had not all the powers of a common law corporation, that the giving of this covenant was within its statutory powers. Your Lordships will remember that it was fettering its discretion as to how it would run this railway. No doubt it is useful for a railway company to obtain exemption from municipal taxes. It is useful for anybody. The question is: What consideration can it properly give for that? In my submission,

A if a statutory corporation is incorporated efficiently to run a railway company, it cannot fetter itself as to how it should run it, even to get exemption from tax. It could not covenant, for example, to use one type of engine when, through invention, a better type might be available later on. A corporation, incorporated in order to run a railway, assuming it is not a chartered corporation with common law powers, cannot fetter its power as to how it shall run the railway advantageously, even to obtain the result of exemption from municipal tax. I do submit that is an important point and, like the business tax point, is one of wide importance.

The City limits point and the hotel point I do concede are of minor importance, but I submit they are points of difficulty and if your Lordships are minded to give leave to appeal on one or other of the major points, in my submission, the minor points should be allowed in with the rest. They will not add appreciably to the length of the case.

B MR. CARSON: I should say that they did in Canada.

MR. CROSS: I should have submitted that they would not add appreciably to the length of the case before your Lordships' Board.

(Counsel and parties were directed to withdraw, and after a short time were again called in).

C LORD NORMAND: Their Lordships will give their decision upon granting leave to appeal in this case at the same time as they give their decision in the case which was heard earlier today.

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