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22, 1953

UNIVERSITY OF LONDON
W.C.1.
10 FEB. 1954
INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

No. 22 of 1952.

33570

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN :

THE CITY OF WINNIPEG APPELLANT

AND

THE CANADIAN PACIFIC RAILWAY COMPANY ... RESPONDENT.

RECORD OF PROCEEDINGS

LAWRENCE JONES & CO.,
Winchester House,
Old Broad Street,
London, E.C.2,
Solicitors for the Appellant.

BLAKE & REDDEN,
17 Victoria Street,
S.W.1,
Solicitors for the Respondent.

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In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR
MANITOBA

Record
Court of
King's Bench

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY,
(Plaintiff) Appellant,
and

THE CITY OF WINNIPEG,
(Defendant) Respondent.

10

BETWEEN:

THE CITY OF WINNIPEG,
(Defendant) Appellant,
and

CANADIAN PACIFIC RAILWAY COMPANY,
(Plaintiff) Respondent.

RECORD OF PROCEEDINGS

PART I

In the Court of King's Bench for Manitoba

20 BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY,
Plaintiff,
and

THE CITY OF WINNIPEG,
Defendant.

No. 1

Amended Statement of Claim

Amended this 3rd
day of November
A.D., 1948 by
Order of the Referee
dated the 1st day of
November A.D.
1948.
"J. A. Robins"
Deputy
Prothonotary

No. 1
Amended State-
ment of Claim.
April 3rd, 1948.

1. The plaintiff is a corporation incorporated and constituted by Letters Patent issued by His Excellency the Governor General of
30 Canada under the Great Seal of Canada dated the 16th day of February, 1881. The head office of the plaintiff is at the City of Montreal, in the Province of Quebec.

2. The defendant is a corporation incorporated as a Municipality in the Province of Manitoba by Chapter 7 of the Statutes of the Province of Manitoba, 37 Victoria, and has been continued as a municipal corporation by various subsequent statutes including chapter 81 of the Statutes of Manitoba, 4 George VI.

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 ment of Claim.
 April 3rd, 1948.

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3. The plaintiff owns, maintains and operates within the limits of the City of Winnipeg, for railway purposes or in connection therewith, lines of railway, lines of telegraph, passenger stations and depots, offices, an hotel and restaurants, freight sheds, loading and unloading platforms, large railway workshops, large and commodious stock and cattle yards and other works and facilities.

4. On or about the 5th day of September, 1881, the plaintiff and the defendant entered into an agreement, the terms of which are set forth in City of Winnipeg By-law No. 148 dated 5th September, 1881, 10 as amended by City of Winnipeg By-law No. 195 dated 30th October, 1882. By chapter 64 of the Statutes of Manitoba, 46-47 Victoria, section 6, the said By-law No. 148 and the said amending By-law No. 195 were declared to be legal, binding and valid upon the defendant.

5. The effect of the said agreement was that the plaintiff covenanted and agreed that it would on or before 1st February, 1883, commencing within the said City of Winnipeg, construct and complete and fully equip 100 miles of railway running southwesterly towards the westerly limits of the Province of Manitoba, and that it would on or before 1st November, 1883, build, construct and complete within 20 the City of Winnipeg a substantial and commodious general passenger railway depot, and that it would, immediately after the ratification of By-law No. 148, make, execute and deliver to the Mayor and Council of the City of Winnipeg a bond and covenant under its corporate seal that it would with all convenient and reasonable despatch establish and build within the limits of the City of Winnipeg its principal workshops for the main line of its railway within the Province of Manitoba and the branches thereof radiating from Winnipeg within the limits of the said Province and forever continue 30 bond and covenant bind itself as soon as it consistently could to procure and erect within the City of Winnipeg large and commodious stock and cattle yards, suitable and appropriate for the central business of its main line of railway and the several branches thereof. The Mayor and Council of the City of Winnipeg were by the said by-law authorized and empowered, upon the plaintiff making, executing and delivering to the said mayor and Council the bond and covenant hereinbefore mentioned, to make, seal and deliver to the plaintiff a deed of the lands upon which the passenger station aforesaid was to be erected. The Mayor and Council were further empowered by the 40 said By-law No. 148, as amended by said By-law No. 195, to issue debentures for the sum of \$200,000.00 payable to the plaintiff or bearer on the 20th day of September, 1901, bearing interest in the meantime at 6% per annum. The said By-law No. 148, amended aforesaid, further provided that upon the fulfilment by the plaintiff of the conditions and stipulations therein mentioned, all property then owned, or that thereafter may be owned by the plaintiff within

the limits of the said 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.

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Court of
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ment of Claim.
April 3rd, 1948.

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6. The plaintiff has fulfilled each and every term, stipulation, condition and covenant made by it under the said agreement and by-law and is not now and never has been in default in respect of any such term, stipulation, condition or covenant.

7. City of Winnipeg By-law No. 219, passed on 30th March, 1883, after reciting that the plaintiff had completed and performed all the conditions mentioned in the said By-law 195 amending and incorporating said By-law 148, and in all respects complied with the same, authorized delivery to the plaintiff of the securities in the amount of \$200,000.00 hereinbefore mentioned. A conveyance dated the 18th day of April, 1882, of the lands upon which the said general passenger railway depot was to be erected was executed and delivered by the defendant to the plaintiff pursuant to the said Agreement and By-law 148 amended as aforesaid.

8. The defendant has recognized and acknowledged that all the conditions and stipulations to be fulfilled by the plaintiff under the said agreement and By-law 148 as amended to entitle it to exemption from taxation as therein provided, have been fulfilled by the plaintiff, and the defendant has heretofore recognized and granted freedom and exemption of the plaintiff's properties within the City of Winnipeg from assessment and taxation until service of the assessment notices hereinafter mentioned.

9. Two agreements were made between the plaintiff and the defendant and were set forth in Memorandums of Agreement dated the 4th day of August, 1906, and the 28th day of April, 1942, respectively, the effect of each of which agreements was that the defendant recognized and acknowledged that the plaintiff is under no legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith. An agreement was made between the plaintiff and the defendant and was set forth in a Memorandum of Agreement dated the 29th day of May, 1914, the effect of which agreement and of the findings made pursuant thereto by the Committee thereby established was that the defendant recognized and acknowledged that the plaintiff is under no legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith.

10. The said agreement made on the 4th day of August, 1906, was approved by resolution of the council of the defendant passed on the 6th day of August, 1906. The said agreement made on the 29th day

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ment of Claim.
April 3rd, 1948.

Continued

of May, 1914, was ratified and confirmed by By-law 8721 of the City of Winnipeg dated the 15th day of June, 1914, and the said agreement made on the 28th day of April, 1942, was authorized and adopted by By-law 15455 of the City of Winnipeg, dated the 27th day of April, 1942.

11. In violation of and in breach of the said agreement and By-law 148 as amended and notwithstanding the said Statute of Manitoba, 46-47 Victoria, chapter 64, the defendant has served upon the plaintiff notices of assessment of the properties now owned by the plaintiff
10 within the limits of the City of Winnipeg, for railway purposes or in connection therewith, which assessments will form the basis of realty tax levies at rates to be fixed by the defendant, and the defendant will, unless restrained by this Honourable Court, levy realty taxes upon and in respect of the said properties. According to the said notices the assessments aforesaid appear on the defendant's 1948 realty assessment roll as Ward 1 numbers, 11044, 11288, 12883, 16799, 16799-1, 12883-1; Ward 2 numbers 273, 517-1, 518, 530, 669, 674, 675, 1180, 1183-1, 1185, 1539, 1879, 2085, 2090, 2094, 2318, 2458, 2461, 2467, 2523, 2694, 9920, 9963, 10132, 10137-1, 10854, 10857,
20 10865, 10869-2, 11233, 11162, 11551, 12014, 12162, 12198, 12392, 12399, 12404, 12405, 12691, 12923, 12980, 13415, 13666-1, 13709, 13846, 14352, 14439, 14450, 14452, 14471, 14488, 14491, 14554, 14555, 14562, 14586, 14610, 14617, 14641, 14708, 14727, 14730, 14746, 14747, 14849, 14850; Ward 3 numbers 3, 13, 100, 605, 1765, 1767, 2225-1, 2264-1, 2462, 2768, 3677, 4006, 4486, 5605, 5692, 5995, 7194, 7473, 9671, 10102, 10483, 11016, 12241, 12248, 12423, 13447, 13449, 14622, 15096, 15451, 15762, 16486, 17175 and 17591.

11A. In violation of and in breach of the said agreement and By-law 148 as amended and notwithstanding the said Statute of Manitoba
30 46-47 Victoria, chapter 64, the defendant has served upon the plaintiff notices of business assessment of certain properties now owned by the plaintiff within the limits of the said City of Winnipeg for railway purposes or in connection therewith, which assessments form the basis of business tax levies at the rate fixed by the defendant and shown in the said notices and the defendant will, unless restrained by this Honourable Court, continue to levy business taxes in accordance with such notices of assessment. According to the said notices, the assessments aforesaid appear on the defendant's 1948 Business Assessment Roll as Numbers 4516-1, 6654-15 and 9034.

40 12. The plaintiff says that by virtue of the said agreement and By-law 148 as amended and the said Statute 46-47 Victoria, chapter 64, all property now owned or that may hereafter be owned by the plaintiff within the limits of the City of Winnipeg, for railway purposes or in connection therewith, is forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and

kind, and that the notices of assessment hereinbefore referred to are invalid and of no effect.

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13. The defendant threatens to assess and tax, and to continue to assess and tax, all properties now owned, or that hereafter may be owned by the plaintiff within the limits of the City of Winnipeg, for railway purposes or in connection therewith, and, unless restrained by this Honourable Court, will assess and tax and will continue to assess and tax the said properties, all in violation of and in breach of the said agreement and By-law 148 as amended, and notwithstanding
10 the provisions of the said Statute 46-47 Victoria, chapter 64.

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ment of Claim.
April 3rd, 1948.

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14. The plaintiff therefore claims:

(a) A declaration that all property now owned, or that hereafter may be owned by the plaintiff within the limits of the City of Winnipeg, for railway purposes or in connection therewith, is forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind;

(b) A declaration that the plaintiff is not liable to the defendant for any real property tax **or business tax** in respect of any property within the limits of the City of Winnipeg now owned by the plaintiff
20 for railway purposes or in connection therewith;

(c) A declaration that the defendant has committed a breach of the said agreement and By-law 148 as amended by serving the plaintiff with the said notices of assessment and by purporting to make the assessments therein set forth;

(d) An injunction to restrain the defendant, its officers, employees, servants and agents or any of them from making any assessment of or in respect of any property now owned or that hereafter may be owned by the plaintiff within the limits of the City of Winnipeg, for railway purposes or in connection therewith, for any municipal
30 taxes, rates and levies and from making any assessment of any nature or kind of or in respect of the said property.

(e) An injunction to restrain the defendant, its officers, employees, servants and agents or any of them from levying or collecting or attempting to levy and collect any real property taxes **or business tax** or taxes of any other nature or kind in respect of any property now owned or that hereafter may be owned by the plaintiff within the limits of the City of Winnipeg, for railway purposes or in connection therewith;

(f) An order that **Canadian Pacific Railway Company** and the said
40 properties shown on the Realty Assessment Roll as Ward 1 numbers 11044, 11288, 12883, 16799, 16799-1, 12883-1; Ward 2 numbers 273, 517-1, 518, 530, 669, 674, 675, 1180, 1183-1, 1185, 1539, 1879, 2085, 2090, 2094, 2318, 2458, 2461, 2467, 2523, 2694, 9920, 9963, 10132,

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10137-1, 10854, 10857, 10865, 10869-2, 11233, 11162, 11551, 12014, 12162, 12198, 12392, 12399, 12404, 12405, 12691, 12923, 12980, 13415, 13666-1, 13709, 13846, 14352, 14439, 14450, 14452, 14471, 14488, 14491, 14554, 14555, 14562, 14586, 14610, 14617, 14641, 14708, 14727, 14730, 14746, 14747, 14849, 14850; Ward 3 numbers 3, 13, 100, 605, 1765, 1767, 2225-1, 2264-1, 2462, 2768, 3677, 4006, 4486, 5605, 5692, 5995, 7194, 7473, 9671, 10102, 10483, 11016, 12241, 12248, 12423, 13447, 13449, 14622, 15096, 15451, 15762, 16486, 17175 and 17591, be struck off the said Roll and an **Order that**
10 **Canadian Pacific Railway Company and the premises shown on the Business Assessment Roll as Numbers 4516-1, 6654-15 and 9034 be struck off the said Roll.**

(g) The costs of this action;

(h) Such further and other relief as the nature of the case may require and this Honourable Court deems meet.

ISSUED the 3rd day of April A.D. 1948, by H. A. V. Green, K.C., of Room 99, C.P.R. Station, Higgins Avenue, in the City of Winnipeg, in the Province of Manitoba, Solicitor for the plaintiff.

No. 2

No. 2
Amended State-
ment of Defence.
Nov. 29th, 1948

20

Amended Statement of Defence

1. Defendant denies that plaintiff is a corporation incorporated and constituted by letters patent issued by His Excellency the Governor General of Canada under the Great Seal of Canada.

2. Defendant says as the fact is that the plaintiff was incorporated and constituted by the Statutes of Canada (1881) being 44 Victoria, chapter 1, the contract appended thereto and the schedule thereto and the plaintiff is subject to the provisions of the said Act, contract and schedule and to the Consolidated Railway Act, Statutes of Canada, 1879, chapter 9, and amendments thereto and to the Railway
30 Act, Revised Statutes of Canada, 1927, chapter 170, and to the Transport Act, being Statutes of Canada, 1938, chapter 53. The said statute, 44 Victoria, chapter 1, and the contract appended thereto and the schedule thereto and said Consolidated Railway Act are hereinafter referred to as the "charter" of the plaintiff.

3. The defendant admits paragraph 2 of the plaintiff's Statement of Claim.

4. The defendant admits paragraph 3 of the plaintiff's Statement of Claim except that defendant denies that the plaintiff owns, main-

tains or operates for railway purposes or in connection therewith an hotel and restaurant and denies that the plaintiff owns, maintains and operates within the limits of the City of Winnipeg large and commodious stock and cattle yards.

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ment of Defence.
Nov. 29th, 1948

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5. In answer to paragraph 4 of the plaintiff's Statement of Claim defendant denies that on or about the 5th day of September, 1881, or at any time the plaintiff and defendant entered into an agreement as alleged or any agreement and defendant denies that the terms of an agreement between the plaintiff and defendant are set forth in City
10 of Winnipeg By-law No. 148 as amended by City of Winnipeg By-law No. 195 and denies that there was or is any agreement between the plaintiff and defendant as alleged.

6. In further answer to paragraph 4 of the plaintiff's Statement of Claim the defendant says that the purport and effect of chapter 64 Statutes of Manitoba (1883) 46 and 47 Victoria, section 6, was to validate and confirm said by-law as a by-law of the City of Winnipeg and it had no other effect.

7. In answer to paragraph 5 of the plaintiff's Statement of Claim defendant says that there was no agreement between the plaintiff and
20 defendant as alleged. If there was such an agreement, which is denied, the defendant says that the plaintiff did not make, execute or deliver to the defendant a bond and covenant under its corporate seal that the plaintiff would 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.

8. If the plaintiff did deliver to the defendant what purported to
30 be such a bond and covenant on the part of the plaintiff the defendant says that the plaintiff had no right, power or authority under its charter or otherwise to make or execute or deliver such a bond and covenant.

9. The defendant says that plaintiff had no such right, power or authority to make or execute or deliver such a bond and covenant in that it is not empowered, authorized or permitted under the plaintiff's charter or otherwise to covenant or agree to build within the limits of the City of Winnipeg or at any place or point its principal workshops for the main line of its railway within the Province of Manitoba and
40 the branches thereof radiating from Winnipeg within the limits of the said province and to forever continue the same within the said City of Winnipeg.

10. The defendant further says that if there was an agreement between the plaintiff and the defendant as alleged, which is denied,

that the same was and is void for want of mutuality in that it was not binding on the plaintiff.

11. The defendant says that the railway operated by the plaintiff was and is and has been declared by statute to be a work for the general advantage of Canada and is not subject to provincial jurisdiction.

The defendant further says that in and by the terms of section 7 of the contract which forms part of plaintiff's charter it is *inter alia* provided as follows: "and the company shall thereafter and forever
 10 efficiently maintain work and run the Canadian Pacific Railway."

The defendant says that it was and is contrary to the provisions of the plaintiff's charter and contract appended thereto and to the terms and policy of the Consolidated Railway Act, being chapter 9, 42 Victoria, Statutes of Canada 1879 and amendments thereto and of "The Railway Act" for the plaintiff to covenant and agree to forever continue its principal workshops or any works essential to the operation or efficient operation of the railway within the City of Winnipeg or within the limits of any designated municipality and any such covenant on the part of the plaintiff was and is invalid, illegal, null
 20 and void.

12. The defendant further says that if the plaintiff delivered such a bond and covenant to the defendant, which is denied, the same is invalid, illegal, null and void in that the effect thereof was and is to limit and restrict the plaintiff in the exercise of the powers conferred upon it by its charter.

13. The defendant further says that if there was a purported agreement between plaintiff and defendant as alleged, which is denied, that the same is too vague, indefinite and uncertain in its terms to amount to a binding agreement and it is not enforceable by either party.

30 14. The defendant further says that if there was a purported agreement between the plaintiff and the defendant as alleged, which is denied, it was subject to an implied term that same might be terminated by either party at any time.

15. The defendant further says that the said By-law No. 148 dated September 5th, 1881, contained *inter alia* the following provisions:

40 "(8) Upon the fulfillment by the said Company of the conditions and stipulations herein mentioned by the said Canadian Pacific Railway Company, all property now owned, or that hereafter may be owned by them within the limits of the City of Winnipeg, for railway purposes or in connection therewith, shall be forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind."

The conditions and stipulations in said by-law to be fulfilled by the plaintiff are as follows:

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10 “(3) 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.”

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ment of Defence.
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Continued

The plaintiff did not make, execute and deliver to the Mayor and Council of the City of Winnipeg a bond and covenant that the plaintiff would 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
20 forever continue the same within the said City of Winnipeg.

16. If the plaintiff did make, execute and deliver to the Mayor and Council of the City of Winnipeg such a form of bond and covenant, which is denied, the defendant says as the fact is that the same was of no force or effect and was not binding upon the plaintiff by reason of the matters set out in paragraphs 8, 9, 10, 11, 12, 13 and 14 hereof.

17. Defendant further says that if the plaintiff did make, execute and deliver to the Mayor and Council of the City of Winnipeg such a form of bond and covenant, which is denied, that the same is vague, indefinite and uncertain in its terms and does not amount to a binding
30 agreement and is not binding on the plaintiff.

18. The defendant further says that if there was an agreement as alleged, which is denied, and if the said By-law No. 148 as amended by By-law No. 195 was passed and was validated by chapter 64 Statutes of Manitoba, 1883, that the said agreement does not bind or obligate the defendant, and the said by-law does not bind or obligate the defendant to forever free and exempt all property then owned or that might thereafter be owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith from municipal taxes, rates and levies and assessments,
40 in that there never was any consideration received by the defendant for said agreement or for enacting said by-law or for granting such a freedom and exemption from taxation.

The defendant says that the plaintiff did not as a result of or in reliance upon said agreement or any term or terms thereof exercise

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 ment of Defence.
 Nov. 29th, 1948.

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any forbearance or change its plans or incur any expense or make any investment or in any way change or alter or prejudice its position or the location, construction or operation of its railway or of any works connected with its railway or give any consideration.

19. The defendant further says that the plaintiff did not as a result of the defendant having passed said By-law No. 148 as amended by said By-law No. 195, or as a result of the defendant having been empowered by chapter 64, Statutes of Manitoba, 1883, to make such by-law, exercise any forbearance or change its plans or incur any
 10 expense or make any investment or in any way change or alter or prejudice its position or the location, construction or operation of its railway or of any works connected with its railway or give any consideration.

20. The defendant further says that the defendant had no right, power or authority under its charter or otherwise to pass said By-law No. 148 or said By-law No. 195 as the plaintiff well knew.

Defendant further says that the plaintiff had prior to the 7th day of July, 1883, when chapter 64 Statutes of Manitoba 46-47 Victoria was assented to, completed or substantially completed all works which
 20 plaintiff alleges it had agreed to complete under the terms of the agreement alleged in paragraph 5 of the plaintiff's statement of claim.

21. The defendant denies paragraph 6 of the plaintiff's Statement of Claim and each and every allegation therein contained.

22. The defendant denies paragraphs 7, 8, 9, 10 and 12 of the plaintiff's Statement of Claim and each and every allegation contained therein.

23. In further answer to paragraphs 7, 8, 9 and 10 of the plaintiff's Statement of Claim the defendant says that if it did pass the by-law referred to in paragraph 7 of the plaintiff's Statement of Claim and if
 30 it did enter into the agreements referred to in paragraph 9 of the plaintiff's Statement of Claim and if it did pass the by-laws referred to in paragraph 10 of the plaintiff's Statement of Claim, all of which is denied, and if the plaintiff in By-law No. 219 recited that the plaintiff had completed and performed all the conditions mentioned in said By-law No. 195 which amended By-law No. 148, and had in all respects complied with the same, and if the defendant has recognized and acknowledged that all conditions and stipulations to be fulfilled by the plaintiff under said alleged agreement and By-law No. 148, as amended, to entitle the plaintiff to exemption from taxation as therein
 40 provided have been fulfilled, and if the defendant has recognized and granted freedom and exemption of the plaintiff's property from assessment and taxation, and if the defendant has recognized and acknowledged in the manner alleged that the plaintiff is under no legal necessity to pay taxes in respect to the property owned by the

plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith, all of which is denied, the defendant says that any such recital or recognition or acknowledgment was incorrect and not in accordance with the facts as the plaintiff well knew.

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24. In further answer to paragraphs 7, 8, 9 and 10 of the plaintiff's Statement of Claim the defendant says the defendant had no power under its charter or otherwise to exempt or free the plaintiff's property within the City of Winnipeg from assessment or taxation by entering into any of the agreements referred to in the said paragraphs or by
10 passing the resolution or any of the by-laws referred to in the said paragraphs.

25. Defendant further says that the defendant had no power under its charter or otherwise to recognize or acknowledge that the plaintiff was or is under no legal necessity to pay taxes in respect to property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith.

26. The defendant further says that the said agreements and the said by-laws refer and relate only to property of the plaintiff in the City of Winnipeg commonly known as the Royal Alexandra Hotel.
20 The said hotel property is not owned by the plaintiff for railway purposes or in connection therewith.

27. In further answer to paragraph 8 of the plaintiff's Statement of Claim the defendant says that prior to the 1st day of April, 1947, the defendant was prohibited from assessing or taxing the railway properties of the plaintiff by reason of "The Railway Taxation Act," Revised Statutes of Manitoba, 1940, chapter 210, which first came into effect in the year 1899.

28. The defendant admits that it served upon the plaintiff notices of assessments of properties now owned by the plaintiff within the
30 limits of the City of Winnipeg as alleged in paragraph 11 of the plaintiff's Statement of Claim, but the defendant denies that such notices were in violation of or in breach of the alleged agreement and By-law No. 148 as amended, and states that there is no such agreement and that the said by-law is not binding on the defendant for the reasons and on the grounds hereinbefore set out.

29. The defendant further says as the fact is that the said By-law No. 148 as amended by the said By-law No. 195 was repealed by the defendant by By-law No. 16306 passed on the 23rd day of February, 1948, and that the said By-law No. 148 as amended by said By-law
40 No. 195 is no longer of any force or effect.

30. The defendant further says that the covenants and agreements as set out in clause 8 of the By-law No. 148 were subject to termination at any time by the defendant by the repeal of said by-law or otherwise

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in that the respective provisions of said clause 3 and said clause 8 are so grossly and palpably unequal and so unjust in their operation that neither the plaintiff or defendant could have contemplated that said clause 8 could remain in effect forever.

31. The defendant further says that if the said By-law No. 148 does exhibit the terms of an agreement between the plaintiff and the defendant, which is denied, that the terms of such agreement are so grossly imprudent and unfair and so palpably unequal and so unjust in their operation that their effect could not have been fully appre-
 10 hended by the defendant, and it is not such an agreement as the court will enforce by way of injunction or otherwise.

32. The defendant further says that the provisions of said clause 3 of the said By-law No. 148 and the provisions of any bond and covenant delivered pursuant thereto are of such a nature that the same could not be enforced against the plaintiff, by reason whereof the court should not enforce the provisions of said clause 8 against the defendant.

33. In answer to paragraph 11 of the plaintiff's Statement of Claim the defendant admits that it has served on the plaintiff notices of
 20 assessment as alleged but denies that defendant served same in violation of or in breach of the alleged agreement or said By-law No. 148 as amended.

34. Defendant denies paragraph 12 of the plaintiff's Statement of Claim and each and every allegation therein contained.

35. In answer to paragraph 13 of plaintiff's Statement of Claim defendant admits it proposes to assess and tax the plaintiff as alleged but denies that such assessment and taxation is in violation of or in breach of the said alleged agreement and said By-law No. 148 as amended and denies that such assessment and taxation is prohibited
 30 by the said statute 46 and 47 Victoria, chapter 64.

35. (a) In answer to paragraph 11A of plaintiff's amended state-
 ment of claim the defendant admits that it has served upon the
 plaintiff notices of business assessment which assessments together
 with the relevant sections of the charter of the defendant form the
 basis of business tax levied at the rate fixed by the defendant and
 shown on the said notices. Defendant denies that said notices are
 notices of business assessment of certain properties owned by the
 plaintiff within the limits of the City of Winnipeg but states as the
 fact is that the said business assessments are in respect to the busi-
 40 ness carried on by the plaintiff in or upon said properties pursuant to
 and as authorized by Sections 290 to 310, both inclusive, of The Win-
 nipeg Charter, 1940, Statutes of Manitoba, chapter 81 as amended.

35. (b) The defendant admits that it will continue to levy business

taxes in accordance with such notices of assessment. The defendant admits that according to said notices the assessments aforesaid appear on the defendant's 1948 business assessment roll as Nos. 4516-1, 6654-15 and 9034. The defendant denies that it has served said notices and made said assessments in violation of and in breach of the alleged agreement or of By-law No. 148 as amended or in violation of the Statute of Manitoba 46-47 Victoria, chapter 64.

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35. (c) Defendant says as the fact is that the said business assessments are not and do not amount to an assessment of the property of the plaintiff. The defendant further says that if the alleged agreement referred to in paragraph 4 of the plaintiff's Statement of Claim or said By-law No. 148 as amended by By-law No. 195 are legal, valid and binding upon the defendant (which is denied) that said business assessments do not come within the terms of the said agreement or said by-law or the said chapter 64 Statutes of Manitoba 46-47 Victoria in that the said business assessments are not levied against the property of the plaintiff but are a tax in personam for which the plaintiff is liable. Section 369, subsection (3), of the said The Winnipeg Charter, 1940 provides as follows:

20 '369. (3) The business tax shall not be a charge upon the land or building occupied, but such tax is levied in lieu of a tax upon personal property;'

and defendant pleads and relies thereon.

35. (d) In further answer to the plaintiff's Statement of Claim and amended Statement of Claim the defendant says that if the plaintiff and defendant did enter into an agreement as alleged in paragraph 4 of the plaintiff's Statement of Claim, or if the said By-law No. 148 or the said By-law No. 195 therein referred to is or are binding on the defendant, or if the plaintiff did deliver to defendant a bond and 30 covenant as alleged, all of which is denied, or if the defendant did on or about the 5th September, 1881 agree to exempt all property then owned or that might thereafter be owned by the plaintiff within the City of Winnipeg for railway purposes or in connection therewith from all municipal taxes, rates and levies and assessments of every nature and kind, all of which is denied, that the plaintiff is not entitled to any such exemptions because the plaintiff did not fulfill and has not fulfilled the conditions and stipulations mentioned in the said By-law No. 148 or in said alleged bond and covenant or in said alleged agreement in that the plaintiff has not continued within the City of Winnipeg 40 as then constituted 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. The defendant says as the fact is that in or about the year 1903 the plaintiff established and built their principal workshops or a substantial part thereof outside the limits of the City of Winnipeg

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as defined and constituted in the year 1881, namely at a place commonly known as Weston.

35. (e) In further answer to the plaintiff's Statement of Claim and amended Statement of Claim the defendant says that if defendant agreed to exempt the properties of the plaintiff as alleged (which is denied), that the boundaries of the City of Winnipeg were enlarged by the Statutes of Manitoba, 1882, chapter 36, and again in the year 1906 and again in the year 1907 and that the properties designated as Nos.:

10	Ward 1	Ward 2	Ward 2	Ward 2	Ward 3
	11044	675	2523	12405	11016
	11288	1180	2694	13846	12241
	12883	1183-1	9920	14352	12248
	12883-1	1185	9963	14849	12423
	16799	1539	10854	14850	13447
	16799-1	1879	10857	Ward 3	13449
	Ward 2	2085	10865	1767	14622
	273	2090	10869-2	2768	15096
	517-1	2094	11162	7194	15451
20	518	2318	11551	7473	15762
	530	2458	12014	9671	16486
	669	2461	12399	10102	17175
	674	2467	12404	10483	17591

on the 1948 assessment roll of the City of Winnipeg are outside the original limits of the said City and are in such added territory and the same are not exempt from taxation under the terms of the alleged agreement or by-laws mentioned in the plaintiff's Statement of Claim.

36. The defendant submits that the plaintiff's Statement of Claim discloses no cause of action or ground for relief against the defendant.

30 37. The defendant submits plaintiff's claim should be dismissed with costs.

FILED by G. F. D. Bond, K.C., of the City of Winnipeg, in Manitoba, this 29th day of November A.D. 1948, Solicitor for the defendant.

No. 3

Reply to Amended Statement of Defence

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1. In answer to paragraph 2 of the Amended Statement of Defence, the plaintiff says as the fact is that pursuant to Statutes of Canada, 44 Victoria, chapter 1, the Governor-General-in-Council did grant by Letters Patent a charter incorporating and constituting the plaintiff a corporation under the corporate name of the Canadian Pacific Railway Company and did by such Letters Patent confer upon the plaintiff all the status, privileges and powers that appertain to a
10 company so incorporated.

2. In answer to paragraph 5 of the Amended Statement of Defence, the plaintiff repeats paragraph 4 of the Amended Statement of Claim and says that the defendant is in any event estopped from denying the existence of the said agreement referred to in paragraph 4 of the Amended Statement of Claim by the said Act of ratification, Statutes of Manitoba, 46-47 Victoria, chapter 64, and by reason of the facts set forth in paragraphs 6, 7, 8, 9 and 10 of the Amended Statement of Claim and by reason of the defendant's course of conduct since the said agreement was entered into.

20 3. In answer to paragraphs 8 and 9 of the Amended Statement of Defence, the plaintiff says that it had full power and authority to enter into the bond and covenant referred to in the Amended Statement of Claim and that, in any event, for the reasons stated in paragraphs 6, 7, 8, 9 and 10 of the Amended Statement of Claim, the defendant is estopped from denying that the plaintiff had no right, power or authority to make, execute or deliver such a bond and covenant.

4. In answer to paragraph 10 of the Amended Statement of Defence, the plaintiff denies that the said agreement referred to in
30 paragraph 4 of the Amended Statement of Claim is void for want of mutuality.

5. In answer to paragraph 12 of the Amended Statement of Defence, the plaintiff denies that the said bond and covenant is invalid, illegal, null and void and denies that the effect thereof was and is to limit and restrict the plaintiff in the exercise of its powers.

6. In answer to paragraph 13 of the Amended Statement of Defence, the plaintiff denies the allegations contained therein and says that the said agreement between the plaintiff and the defendant is not too vague, indefinite or uncertain in its terms to amount to a
40 binding agreement and says that it is enforceable by either party.

7. In answer to paragraph 14 of the Amended Statement of Defence, the plaintiff denies that the said agreement is subject to an implied term that the same might be terminated by either party at

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any time, and says that the said agreement, having been declared to be legal, binding and valid upon the defendant by Statutes of Manitoba, 46-47 Victoria, chapter 64, cannot be terminated by either party but only by the authority of the Legislative Assembly of the Province of Manitoba.

8. In answer to paragraphs 16 and 17 of the Amended Statement of Defence, the plaintiff says that as set out in the Amended Statement of Claim the plaintiff did make, execute and deliver to the Mayor and Council of the City of Winnipeg a bond and covenant, and the plaintiff denies that the said bond and covenant is of no force and effect and says that the said bond and covenant is binding on the plaintiff.

9. In answer to paragraphs 18 and 19 of the Amended Statement of Defence, the plaintiff denies that no consideration was received by the defendant for the said agreement or for enacting By-law No. 148 and By-law No. 195 amending and re-enacting said By-law No. 148 or for granting the said exemption from taxation.

10. In answer to paragraph 20 of the defendant's Amended Statement of Defence, the plaintiff says that if the defendant had no right, power or authority under its charter or otherwise to pass said By-law No. 148, as amended and re-enacted by said By-law No. 195, by said Chapter 64, Statutes of Manitoba, 46-47 Victoria, the said by-laws were declared to be legal, binding and valid on the defendant.

11. In answer to paragraph 23 of the Amended Statement of Defence, the plaintiff denies that the facts recited, recognized and acknowledged by the defendant as set out in paragraphs 7, 8, 9 and 10 of the Amended Statement of Claim were incorrectly set out in such recital, recognition and acknowledgment and were not in accordance with the facts, and the plaintiff says that in any event the defendant is estopped for the reasons set forth in paragraphs 6, 7, 8, 9 and 10 of the plaintiff's Amended Statement of Claim and by its course of conduct from alleging that the said recital, recognition or acknowledgments was or were incorrect and not in accordance with the facts.

12. In answer to paragraphs 24 and 25 of the Amended Statement of Defence, the plaintiff says the defendant is estopped by the said Act, 46 and 47 Victoria, chapter 64, and by its course of conduct from denying that it had no power to exempt or free the plaintiff's property within the City of Winnipeg from assessment or taxation.

13. In answer to paragraph 26 of the Amended Statement of Defence, the plaintiff denies that the said Agreements and the said by-laws referred to in paragraphs 7, 8, 9 and 10 of the Amended Statement of Claim refer and relate only to the property of the plaintiff in the City of Winnipeg commonly known as the Royal Alexandra Hotel. The plaintiff repeats that the said hotel is owned, maintained

and operated by the plaintiff for railway purposes or in connection therewith.

14. In answer to paragraph 29 of the defendant's Amended Statement of Defence, the plaintiff denies that the said By-law No. 148, as amended and re-enacted by said By-law No. 195, was repealed by By-law No. 16306, passed on February 23rd, 1948, and the plaintiff further denies that said By-law No. 148, as amended and re-enacted by said By-law No. 195, is no longer of any force and effect, and the plaintiff says that said By-law No. 16306 is invalid and of no effect, 10 in that it is in conflict with chapter 64, Statutes of Manitoba, 46 and 47 Victoria, and chapter 81, Statutes of Manitoba, 4 George VI, Section 2, Sub-section 7, and further says that By-laws Nos. 148 and 195 are still in full force and effect.

15. (a) In answer to paragraph 35 (a) of the defendant's Amended Statement of Defence, the plaintiff says that the notices of business assessment are assessments of the properties named therein, notwithstanding the fact that they may be calculated with reference to the business carried on on said properties.

15. (b) The plaintiff says that in any event the said notices of 20 business assessment are notices of assessment of property and the said business assessments are assessments of property within the meaning of the words "property now owned or that hereafter may be owned within the limits of the City of Winnipeg for railway purposes or in connection therewith" as used in By-law No. 148, as amended and re-enacted by By-law No. 195, and in reply to paragraph 35 (b) of the amended Statement of Defence the plaintiff says the said notices were served and the said assessments were made in violation of and in breach of the By-law No. 148, the amending and re-enacting By-law No. 195 and of Statutes of Manitoba, 46-47 Victoria, chapter 30 64.

15. (c) In answer to paragraph 35 (c) of the defendant's Amended Statement of Defence, the plaintiff says that the said business assessments are and do amount to an assessment of the property of the plaintiff and that the said business assessments do come within the terms of the agreement referred to in paragraph 4 of the plaintiff's Amended Statement of Claim and By-law No. 148, as amended and re-enacted by By-law No. 195 and as ratified by Statutes of Manitoba 46-47 Victoria, chapter 64.

15. (d) In answer to paragraphs 35 (d) and 35 (e) of the defendant's 40 Amended Statement of Defence, the plaintiff says that it did fulfil all the conditions and stipulations mentioned in said By-law No. 148, as amended and re-enacted by By-law No. 195, and says that its principal workshops for the main line of its railway within the Province of Manitoba and the branches thereof radiating from Winnipeg

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within the limits of the said Province were established and have been continued within the City of Winnipeg.

The plaintiff says that the City of Winnipeg has since its incorporation by Statutes of Manitoba 37 Victoria, chapter 7, been one and the same corporation and that the said agreement between the plaintiff and the defendant and By-law No. 148, as amended and re-enacted by By-law No. 195 are and always have been operative in and co-extensive in effect with the said corporation the City of Winnipeg as from time to time existing.

10 The plaintiff further says that the said By-law No.148 was amended and re-enacted by By-law No. 195, dated the 30th day of October, 1882, and was validated by Statutes of Manitoba, 46-47 Victoria, chapter 64, assented to on 7th July, 1883, both dates being subsequent to the extension of the boundaries of the City of Winnipeg made by Statutes of Manitoba 45 Victoria, chapter 36, assented to on 30th May, 1882, and that in any event the said principal workshops have always been maintained within the boundaries of the City of Winnipeg, as fixed by the said Statute, 45 Victoria, chap. 36.

16. The plaintiff says that the defendant is estopped from denying
 20 that the agreement between the plaintiff and the defendant, set out in paragraph 4 of the Amended Statement of Claim, is valid and binding upon the defendant or that said By-law No. 148, as amended and re-enacted by said By-law No. 195, is valid and binding upon the defendant by reason of *res judicata*, in that the same issues were raised by the defendant and were decided in favour of the plaintiff in the action brought by the defendant against the plaintiff in this Honourable Court and numbered 894 of A.D. 1894.

17. As to all other allegations made in the Amended Statement of Defence and not specifically denied, the plaintiff joins issue with the
 30 defendant.

FILED the 4th day of December, A.D. 1948, by H. A. V. Green, K.C., of Room 99, C.P.R. Station, Higgins Avenue, in the City of Winnipeg, in the Province of Manitoba, Solicitor for the plaintiff.

No. 4

Opening of Proceedings at Trial and Filing of Plaintiff's Exhibits

Trial of this action held before Chief Justice Williams at Winnipeg, Manitoba, on the 7th to 11th days of March, A.D. 1949.

R. D. Guy, K.C., H. A. V. Green, K.C., F. S. Burbidge
 for the Canadian Pacific Railway Company.

40 W. P. Fillmore, K.C., G. F. D. Bond, K.C., F. J. Sutton, K. C.
 for the City of Winnipeg.

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Mr. Guy—Have you read the pleadings, my lord?

The Court—I have read them, but they are rather lengthy. I think it might help if you would summarize them for me, pointing to the principal issues, and I assume there are a number of collateral issues.

Mr. Guy—The action is brought for an injunction to restrain the City of Winnipeg from taxing the properties of the Canadian Pacific Railway Company within the limits of the City. Exemption from taxation is contained in a by-law of the City, By-law 148, amended 10 by By-law 195, which was ratified by the Legislature of the Province of Manitoba.

The exemption was granted in 1881, and nothing transpired in connection with the taxation until the City attempted in 1894 and 1900 to collect school taxes. Litigation ensued, which carried through to the Supreme Court, in what is known as the School Tax case. Leave to appeal to the Privy Council was refused.

In 1948 the City having served assessment notices upon the Canadian Pacific Railway Company attempted to assess the properties of the Company, claiming on the ground, I take it, that this 20 exemption which was granted in 1881 is invalid and of no effect, and that they can go ahead and tax the properties of the Company. The real issue in this case is the validity of the exemption granted in 1881 by that by-law, which was ratified by the Legislature of Manitoba.

One of the collateral issues is whether or not the by-law related only to the City of Winnipeg as it existed in 1881, or whether it continued to cover the limits of the City of Winnipeg, or the total of the City of Winnipeg in its extended boundaries, which were extended from time to time.

The defence is made up of a number of grounds under which they 30 claim that this contract was nullified. There are a long list of defences and I will not enumerate them at this time. The real issue in this case is the validity of the Company's exemption from taxation.

Mr. Fillmore—If my friend is finished reviewing the case I only want to make one observation. He did not call the attention of your lordship to the fact that the action is to restrain the collection of not only property tax but business tax. So another question will arise if the exempting by-law is valid as to whether or not it relates to business taxes as distinguished from tax on real property.

Mr. Guy—That is quite true, my lord. Our contention is that it 40 relates to all taxes.

The Court—I wonder if it would be possible for me to be supplied with copies of by-laws and of the statute and any other documents?

Mr. Guy—Yes, I quite appreciate that, and we have anticipated that would be convenient for your lordship.

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The first document I wish to put in are the Letters Patent of incorporation of the Canadian Pacific Railway. We have a photostatic copy of these Letters Patent, and it is agreed that it should go in.

The Court—Very well.

(Letters Patent of Canadian Pacific Railway Company, referred to, produced and marked Exhibit 1.)

Mr. Guy—First of all I direct your attention to the fact that these Letters Patent are issued in the usual form of Letters Patent. They
10 are under the Great Seal of the Dominion, which appears in the lefthand corner, and are signed by the Governor-General of Canada the Marquis of Lorne. Mr. McDonald was Attorney General of Canada, and he also signed. They are also signed on the last page by John O'Connor, Secretary of State, and dated the 16th of February, 1881.

These Letters Patent incorporate within their provisions the contract for the construction of the Canadian Pacific Railway. The contract is in the recital. On the first page of the Letters Patent I would draw your lordship's attention to paragraph 7:

20 "The Railway constructed under the terms hereof shall be the property of the Company; and pending the completion of the Eastern and Central sections, the Government shall transfer to the Company the possession and right to work and run the several portions of the Canadian Pacific Railway already constructed or as the same shall be completed. And upon the completion of the Eastern and Central sections, the Government shall convey to the Company, with a suitable number of station buildings and with water service (but without equipment), those
30 portions of the Canadian Pacific Railway constructed or to be constructed by the Government which shall then be completed; and upon completion of the remainder of the portion of railway to be constructed by the Government, that portion shall also be conveyed to the Company, and the Canadian Pacific Railway shall become and be thereafter the absolute property of the Company. And the Company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway."

The Court—The Company is the individual parties under this agreement, Mr. Guy?

40 Mr. Guy—Yes, the Company was to be incorporated.

The Court—I notice the last sentence of clause 1 says: "The individual parties hereto, are hereafter described as the Company; and the Government of Canada is hereinafter called the Government."

Mr. Guy—Yes.

The Court—What was the statute of 37 Victoria, chapter 14?

Mr. Green—That was the Act of 1874 under which the Government intended to construct the Canadian Pacific Railway, and actually did construct certain portions, which were afterwards turned over to the new Company which was formed under the Letters Patent.

The Court—Does anything turn on 37 Victoria?

Mr. Green—No, my lord.

Mr. Guy—Then section 8 reads as follows:

10 “Upon the reception from the Government of the possession of each of the respective portions of the Canadian Pacific Railway, the Company shall equip the same in conformity with the standard herein established for the equipment of the sections hereby contracted for, and shall thereafter maintain and efficiently operate the same.”

On page 2 of the Letters Patent, section 13:

20 “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.”

The point in that is that the Company did not have the right to locate altogether, it was subject to the approval of the Governor in Council, it had the right subject to the approval of the Governor in Council to lay out and locate the Railway.

Paragraph 16:

30 “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; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.”

Paragraph 21:

40 “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.”

Paragraph 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 incon-

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sistent with or contrary to the provisions of the Act of incorporation to be granted to the Company, shall apply to the Canadian Pacific Railway."

Then follows about the center of the middle column of the recital in the Letters Patent:

10 "And whereas, in conformity with the expressed desire of Parliament, a contract has been entered into for the construction of the said portion of the main line of the said Railway, and for the permanent working of the whole line thereof, which contract with the schedule annexed has been laid before Parliament for its approval and a copy thereof is appended hereto, and it is expedient to approve and ratify the said contract, and to make provision for the carrying out of the same; and the said contract and agreement with the said Schedule A thereto was approved and ratified, and We were authorized to perform and carry out the conditions thereof according to their purport; and for the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with them in the under-
20 taking and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, it was enacted that our Governor-General of Canada might 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 said schedule to the said contract."

The following down to the central column, section 4:

30 "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."

On the third page of the Letters Patent, under "Powers,":

40 "17. 'The Consolidated Railway Act, 1879,' in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith."

I would like to refer to the Act of 44 Victoria, chap. 1.

Mr. Fillmore—If I might interrupt I don't know whether he intends to put in evidence the Order-in-Council pursuant to which the charter was issued. If so, it seems to me this would be the logical place, along with the charter.

The Court—As I understand it, Mr. Guy is not putting the Act

in as an exhibit, he is merely referring to it. I take judicial notice of the Act, so it is not a question of an exhibit.

Mr. Guy—No, I am pointing out the authority under which the Letters Patent of incorporation were issued. This is the Act of 44 Victoria. I refer to section 1:

“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.”

10 That is the same contract we have been referring to, and which is recited in the Letters Patent.

20 “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.”

The Court—When did this Act come into force?

Mr. Guy—Assented to February 15, 1881.

The Court—At that time did Dominion companies come into force on assent or a period of days after assent?

30 Mr. Guy—I think they came in on assent, but I am not positive on that.

The Court—I would be glad if you would check that.

Mr. Guy—Following the Act, which is quite short, is the contract that appears in the Letters Patent. I think it is exactly the same. They refer to section 21 which is already referred to in the Letters Patent.

40 “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.”

Schedule A follows. In Schedule A, section 4 is verbatim as it is in the Letters Patent:

“4. 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

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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."

Now I wish to put in a copy of By-law 148 under which the exemption was granted. 148 and 195 are together—By-law 195 was a By-law amending 148.

(By-law No. 148 referred to, produced and marked Exhibit 2.)

(By-law No. 195 referred to, produced and marked Exhibit 3.)

10 The Court—When was each by-law passed?

Mr. Guy—At the end of By-law 148 it has these words: "Done and passed in Council at the City of Winnipeg the 5th day of September in the year of our Lord one thousand eight hundred and eighty-one."

By-law 195: "Done and passed in Council at the City of Winnipeg this thirtieth day of October, in the year of our Lord one thousand eight hundred and eighty-two."

Mr. Fillmore—Does By-law 148 not say it is to take effect from and after the 21st day of September in the year of our Lord one thousand eight hundred and eighty-one?

20 Mr. Guy—Yes, it says that. But By-law 195 was not passed until the 30th of October, 1882.

Mr. Fillmore—That is right.

Mr. Guy—I think we should read the relative portions of By-law 148.

"A By-law to aid and assist the Canadian Pacific Railway Company in consideration of certain undertakings on the part of said Company.

30 "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.

40 "And whereas it is also desirable to secure the location of the workshops and stockyards of the said Company for the Province of Manitoba in the City of Winnipeg as a central point on the Main Line of the Canadian Pacific Railway, and the several branches thereof, and the said Company have agreed to construct a railway south and southwesterly, as aforesaid, at the time and in manner as in this by-law hereinafter mentioned, and have agreed to establish and continue their principal workshops and stockyards for the Province of Manitoba in the City of Winnipeg aforesaid.

"And Whereas it is expedient for the City of Winnipeg to lend their aid to the said Company in consideration of the premises, upon the terms hereinafter mentioned, by granting them by way

of bonus, debentures of the City of Winnipeg to the amount of two hundred thousand dollars payable in twenty years from the day this By-law takes effect, with interest at six per centum per annum payable half yearly, and by exempting the property now owned or hereafter to be owned by the said Railway Company for Railway purposes within the City of Winnipeg from taxation forever, and by conveying to the said Company lands sufficient and suitable for a passenger station within the said City of Winnipeg."

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10 The other recitals following relate to the bonds.

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

20 "(1) For the purposes aforesaid it shall be lawful for the Mayor and Council of the City of Winnipeg, to issue debentures of the Mayor and Council of the City of Winnipeg, for the sum of Two Hundred Thousand dollars of lawful money of Canada, in denominations of not less than One Hundred dollars each, payable to the Canadian Pacific Railway Company or bearer, on the Twentieth day of September, one thousand nine hundred and one, bearing interest in the meantime at six per centum per annum, payable half yearly, on the Twentieth day of March and September in each and every year, with coupons attached to each debenture to represent the respective half yearly payments of interest.

30 "(2) For paying the interest as aforesaid and creating an equal yearly sinking fund for redeeming and paying off the principal of the said debentures so to be issued as aforesaid, at the maturity thereof a special rate of four and four-tenths mills in the dollar on the whole rateable property in the said City of Winnipeg, shall be rated and levied in each year during the currency of the said debentures, in addition to all other rates and assessments whatsoever.

40 "(3) The said debentures shall be issued forthwith upon the ratification of this by-law in accordance with the provisions of the Statutes of this Province in that behalf, and after issued shall be, by the Mayor and Council of the City of Winnipeg, within one month thereafter delivered to—the Manager for the time being of the Winnipeg Branch of the Merchants Bank of Canada, upon the following trusts, that is to say, upon trust that the said the Manager for the time being of the Winnipeg branch of the Merchants Bank of Canada, shall hold the said debentures, and every of them until the said Canadian Pacific Railway Company shall have performed the conditions and each and every of them hereinafter specified and stipulated to be performed by them."

Those are the words that are important, they shall hold those bonds until the said Canadian Pacific Railway Company shall have per-

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formed the conditions and each and every of them hereinafter specified and stipulated to be performed by them.

“and to collect and to hold the half-yearly interest maturing on the said debentures (retaining thereout as commission one half of one percent upon the amount so collected) and to deposit the balance so collected in some chartered bank doing business in the City of Winnipeg to his credit as such trustee at interest if possible, and upon the completion of the conditions by the Canadian Pacific Railway Company hereinafter mentioned, upon the further trust to pay over the monies so deposited, and any accumulations of interest thereon, and also deliver over the said debentures with coupons attached (except such as may have been paid) to the Canadian Pacific Railway Company.”

10

Then under section 4 are enumerated the conditions:

“(4) The conditions hereinbefore referred to, are as follows:

“1. The said Canadian Pacific Railway Company shall on or before the first day of February one thousand eight hundred and eighty-three,”—

Mr. Bond—1882.

20 Mr. Guy—I am reading from By-law 195, or By-law 148 as amended which says 1883.

“commencing within the City of Winnipeg, construct and complete and fully equip one hundred miles of the railway running southwesterly towards the westerly limits of the Province upon a course starting within the said City of Winnipeg, crossing the Assiniboine river, running within the limits of townships nine, eight, seven, six and five, in range one east of the principal meridian; townships five and four in range one west of the principal meridian; township four, in range two west of the principal meridian; townships four and three in range three west of the principal meridian, and township three in range four, five, six, seven and eight west of the principal meridian (all according to the Dominion Government survey of the Province of Manitoba) or within a distance of six miles upon either side of a line which may be drawn through the said townships to the extent of the said one hundred miles in the direction above described south.

30

“(2) The Canadian Pacific Railway Company shall on or before the first day of November one thousand eight hundred and eighty-three, build, construct, and complete, within the City of Winnipeg, on lots four and five in block one, eleven and twelve on the east side of Austin street, and forty-four and forty-five on the west side of Maple street, east of the Main street, on the Point Douglas Common property, as laid down on the map or plan of said City, registered in the registry office in and for the County of Selkirk (which are to be conveyed to the said Company on or immediately after the ratification of this By-law as afore-

40

said, by the Mayor and Council of the City of Winnipeg for that purpose) a substantial and commodious general passenger railway depot, with all the modern improvements for the accommodation and convenience of the public at large, and the business of the said Company.

10 “(3) 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.

20 “(4) And by such bond and covenant the said Company shall bind themselves as soon as they conveniently can to procure and erect within the City of Winnipeg large and commodious stock or cattle yards, suitable and appropriate for the central business of their main line of railway and the several branches thereof.”

Then the question of penalties arise. I would follow along to subsection 8 of 4:

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

Mr. Guy—I would like to put in a copy of By-law 198.

By-law 198 is submitting 195 to the ratepayers.

Mr. Fillmore—I submit those are not admissible in evidence because not passed pursuant to any statutory authority.

The Court—Is this referring to By-law 148 and By-law 195, Mr. Fillmore?

40 Mr. Fillmore—With reference to By-laws 148 and 195 we say there was no statutory power at the time to pass those by-laws, but of course there was a validating Act in 1883, so the objection would not be so strong with regard to these, but as to any subsequent by-laws.

The Court—When By-laws 148 and 195 were tendered there was no objection to them and I admitted them as exhibits. Do you wish now to raise a point as to their admissibility?

Mr. Fillmore—I only want to make the point that they were not authorized by any statute at the time they were passed, and their validity depends entirely on the effect of the validating Act.

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The Court—The fact that those two have been admitted would not prevent you from making that argument?

Mr. Fillmore—No.

The Court—Then we come to By-law 198, and any other by-laws would be in a different position.

Mr. Fillmore—Yes.

The Court—What I thought I would do in the case of any of these documents that are admitted to which objection is taken was that I would admit them subject to objection and reserve the objection
10 to be dealt with when the full case is argued. That would be the quickest way to dispose of the matter.

Mr. Guy—Yes, my lord.

The Court—Then I will note that Mr. Fillmore is objecting to the admissibility of By-law 198, and reserving my decision on his objection, and marking it subject to that objection Exhibit 4. The original can be marked and a copy substituted for the original.

(By-law 198, referred to, produced and marked Exhibit 4 subject to objection.)

Mr. Guy—This by-law is a by-law submitting By-law 195 to the
20 ratepayers for their approval.

Mr. Fillmore—I said there was no statutory authority for such a by-law, or the submitting of such a by-law to the ratepayers.

Mr. Guy—That it wasn't necessary to submit any by-law to the ratepayers?

Mr. Fillmore—There is nothing in the charter on the subject.

Mr. Guy—They did submit it to the ratepayers but the particular part that this by-law plays is to define the polling places. The ratepayers to whom they submitted it were ratepayers within the extended boundaries of the city, in the six wards of the city which
30 was extended by the Act of 1882. This was done and passed on the 20th of September, 1882, and when they submitted it it enumerates the different wards that were created by the enlargement of the boundaries in May of 1882.

Mr. Guy—Counsel for the City and the Company have agreed on certain admissions of fact and I now wish to file these.

The Court—Those admissions will be filed as Exhibit 5.

(Admission of Fact referred to produced and marked Exhibit 5.)

Mr. Fillmore—It also covers the admission of documents.

The Court—This has been signed by counsel?

40 Mr. Guy—Yes, it is signed by counsel.

“In the King's Bench

No. 120/48

“Between Canadian Pacific Railway Company, Plaintiff, and
“The City of Winnipeg, defendant.”

Admission of Facts

The parties to this action, for the purposes of this action only, hereby admit each and every one of the facts hereunder specified.

Facts Admitted

"1. That Letters Patent under the Great Seal of Canada were issued by His Excellency the Governor-General of Canada to Canadian Pacific Railway Company on February 16, 1881, and that a photostatic copy thereof will be admitted in evidence in lieu of the original Letters Patent."

10 The Court—That is Exhibit 1 on the trial.

"2. That on August 24, 1881, By-law No. 148 of the City of Winnipeg was submitted to and approved by the ratepayers of the City of Winnipeg as then constituted."

The Court—That is Exhibit 2 on the trial.

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

The Court—That is Exhibit 3 on the trial, and that By-law is dated the 30th of October.

20 Mr. Green—Yes, my lord, but it was submitted on the 22nd of October.

The Court—That is what I wanted to be clear about because the date of the by-law is the 30th. All right.

"4. That the plaintiff

30 "(a) constructed, completed and fully equipped before February 1, 1883, one hundred miles of railway running south-westerly from the City of Winnipeg to the westerly limits of the Province of Manitoba, on the prescribed route as set forth in paragraph 4 (1) of By-law No. 148, as amended and re-enacted by By-law No. 195 but the defendant does not admit the power of the City to pass said by-laws.

"(b) built, constructed and completed before November 1, 1883, a substantial and commodious general passenger railway depot with all the modern improvements, in the City of Winnipeg, on the lots described in paragraph 4 (2) of By-law No. 148, as amended and re-enacted by By-law No. 195, and has maintained a substantial and commodious general passenger railway depot in the City of Winnipeg to this date.

40 "(c) executed and delivered to the Mayor and Council of the City of Winnipeg a bond and covenant under its corporate seal which is produced by the City in its affidavit of documents No. 17, but the defendant does not admit the power of the plaintiff to give the said bond and covenant."

The Court—Do you intend to mark that as an exhibit?

Mr. Guy—We should mark the bond as an exhibit.

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(Bond dated October 10, 1881, referred to, produced and marked Exhibit 6.)

Mr. Guy: (Reads.)

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

20 I would like to put in the plan, my lord.

(Plan referred to, produced and marked Exhibit 7.)

The Court—The plan by the three different colorings shows the original corporate limits and the two extensions of the corporate limits.

Mr. Guy—There were several extensions.

The Court—I was referring to the legend in the right hand corner which deals with 1873, 1875 and 1882. It is understood that the other colorings with the dates on represent extensions of the original limits on the dates set out on the respective colors.

30 Mr. Guy—Yes.

The Court—And that the legend is not exclusive.

Mr. Guy—(Reads.)

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

Evidence will be submitted on that, my lord.

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

"8. That the lands upon which the said passenger station was to be built were conveyed by the defendant to the plaintiff by a

deed dated April 18, 1882, which deed was registered in the Winnipeg Registry Office on July 24, 1882, as No. 31520." We will put in a copy of that deed, my lord.

(Deed dated 18th April, 1882, referred to, produced and marked Exhibit 8.)

Mr. Fillmore—I don't want any misunderstanding about those words "in due course." You might take that in due course of time. I am not making any other admission except that the bonds were released in due course of time.

10 The Court—Isn't this the language that counsel have agreed on? Mr. Fillmore—Yes, but it just struck me hearing it read aloud.

The Court—Perhaps you should not have agreed to it in that form.

Mr. Fillmore—I don't know whether those words are capable of being read or understood in different ways, but I wanted to point out now that what we intended to admit was that the bonds were delivered in due course of time.

Mr. Green—There was no sudden signing of these admissions. They were submitted backward and forward several times between my friend Mr. Fillmore, Mr. Bond, Mr. Guy, and myself, and were
20 very carefully arrived at by us all.

Mr. Fillmore—I didn't hear what Mr. Green said.

The Court—He said that the admissions were not signed hurriedly but were the subject of considerable conference between counsel, and that they went backwards and forward three or four times.

Mr. Fillmore—That is right, but you can, with the leave of the court, at any time withdraw an admission. I just want to point out the way in which I agreed and understood that admission. I did not take it to be an admission that the Railway Company did fulfill their stipulation and condition which entitles them to succeed
30 in the action. We are simply admitting that these bonds were created as a result of By-laws 148 and 195 and were delivered in course of time. That is all we are intending to admit by that.

The Court—As I understand it the bonds were to be held in this trustee and delivered when certain conditions were fulfilled, and this admission that the bonds were delivered, I take it Mr. Guy is going to argue, is an admission that these conditions were fulfilled.

Mr. Fillmore—He is at liberty of course to draw whatever inference he likes, or make whatever argument he likes, from the fact that the bonds were delivered. We are admitting that they were delivered.

40 Mr. Guy—In the deed we have just submitted now, Exhibit 8, dated 18th April, 1882, this is the recital:

"Whereas by a By-law of the City of Winnipeg numbered one hundred and forty-eight and passed on the fifth day of September one thousand eight hundred and eighty-one it was among other things enacted that the Mayor and Council of the City of Winnipeg are hereby authorized and empowered upon the said

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Company making execution and delivering to the Mayor and Council of the City of Winnipeg the bond and covenant in the third subsection of the fourth section of These Presents mentioned to make seal and deliver to the said Company a deed of the lands upon which the passenger station in the second subsection of the fourth section of these presents mentioned is to be erected.

10 "And Whereas the said bond has been by the said Company made executed and delivered as required in the said By-law mentioned"

And then the deed goes on. Paragraph 9 of the Admission:

20 "9. That the Memorandum of Agreement dated August 4, 1906, referred to in paragraph 9 of the amended statement of claim, was executed by the plaintiff and the defendant on the said date and a resolution purporting to approve said agreement was passed by the council of the defendant on the 6th day of August 1906, but the defendant does not admit the power of the council of the defendant to execute said agreement or to pass said resolution or to recognize or acknowledge that the plaintiff was or is not under any legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith."

I will now put in the agreement dated August 4, 1906.

(Agreement dated 4th August, 1906, referred to, produced and marked Exhibit 9.)

Mr. Guy—I will now read paragraph 10 of the Admission.

30 "10. That the Memorandum of Agreement dated May 29, 1914, referred to in paragraph 9 of the amended statement of claim, was executed by the plaintiff and the defendant on the said date and a by-law numbered 8721 and dated 15th June, 1914, purporting to ratify and confirm said agreement was passed by defendant but the defendant does not admit the power of the council of the defendant to execute said agreement or to pass said by-law or to recognize or acknowledge that the plaintiff was or is not under any legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith."

Mr. Guy—I take it in all these cases when we produce the originals we can leave copies with the Court for reference?

40 The Court—Yes, and preserve the original records in the hands of the custodian.

(Copy of agreement referred to, produced and marked Exhibit 10.)

(Copy of By-law 8721 referred to, produced and marked Exhibit 11.)

Mr. Guy—I should have put in the resolution referred to in paragraph 9 of the Admission.

The Court—We will mark that as Exhibit 9A.

Mr. Guy—(Reads.)

“Extract from Minutes of Council, being Clause 4 of the report of the Finance Committee, dated August 3, 1906, as adopted by Council on August 6th, 1906.

10 ‘4. Your Committee submit herewith form of agreement between the City and the Canadian Pacific Railway Company, re taxes on the Company’s Hotel, and would recommend that the same be approved and executed by the proper officers.’ ”

(Extract from Minutes dated August 3, 1906, referred to, produced and marked Exhibit 9A.)

Mr. Guy—I will read paragraph 11 of the Admission:

“11. That one of the findings made pursuant to the said agreement dated May 29, 1914, by the committee thereby established was as follows:

20 ‘18. Taxes on Royal Alexandra Hotel. The City contended that in as much as the railway company had increased the size of the hotel, the present arrangement as to payment of taxes should be revised and that the company should pay on a larger assessment. The company agrees to pay on the hotel as enlarged annually the sum of \$10,500.00. The terms of the agreement already in existence respecting the taxes on the hotel is amended only as to the amount. This understanding is to apply to taxes for 1915 and thereafter.’

30 but the defendant does not admit that this finding is relevant to any issue.

40 11. That the Memorandum of Agreement dated April 28, 1942, referred to in paragraph 9 of the Amended Statement of Claim was executed by the plaintiff and the defendant on the said date and a by-law numbered 15455 and dated 27th April, 1942, purporting to authorize and adopt said agreement was passed by defendant but defendant does not admit the power of the council of the defendant to execute said agreement or to pass the said by-law or to recognize or acknowledge that the plaintiff was or is not under any legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith.”

(Agreement referred to, produced and marked Exhibit 12.)

(Copy of By-law 15455 referred to, produced and marked Exhibit 13.)

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Mr. Guy—If I might refer to the agreement of 1942, it relates to taxes on the Royal Alexandra Hotel. The last two paragraphs are as follows:

10 “And the City hereby further covenants and agrees that during the period from the date hereof until the expiry of ten years from the 1st day of January, A.D. 1943, it will not ask the Company for any further payment in respect of taxes or in lieu thereof on or in connection with the said Royal Alexandra Hotel or the business carried on therein and will not seek or apply for any legislation which would in any way enable the City to impose any taxation upon the Company or upon the said hotel property.

“It is distinctly understood and agreed that what the Company has herein agreed to do and to give are concessions made and given by the Company without legal necessity on the part of the Company and that the same are made and given without prejudice to the rights of either party under any pre-existing agreement or agreements whatsoever made between the city and the Company.”

Mr. Guy—I will read paragraph 13 of the Admission:

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

40 “14. It is also agreed that copies of all maps, plans, letters, memoranda, minutes and all other papers and documents produced by the parties hereto in their respective affidavits as to documents and also Sessional Papers (Dominion) and a certified copy of the plan referred to in letter dated 2nd June, 1881, from C. Drinkwater, secretary of the plaintiff to the Honorable Secretary of State, shall be admitted on behalf of either party without formal proof, subject to the right of either party to object to the relevancy of any or all of the said maps, plans, letters, memoranda, minutes, Sessional Papers and other papers and documents.”

Mr. Guy—I want now to produce By-law 219 of the City of Winnipeg.

Mr. Fillmore—I take formal objection.

The Court—Yes, subject to your objection which I will dispose of on the main argument.

(By-law No. 219 referred to, produced and marked Exhibit 14.)

“A By-law to authorize the delivery over of debentures referred to in By-law No. 195.

“Whereas pursuant to said By-law No. 195 the debentures mentioned therein were delivered to the manager of the Winnipeg branch of the Merchants Bank of Canada as trustees;

10 “And Whereas, The Canadian Pacific Railway Company mentioned in said By-law No. 195 have completed and performed all the conditions mentioned in the said by-law, and in all other respects complied with the same; and it is desirable that the said Trustee should be instructed to deliver the bonds mentioned therein, with the coupons still unmatured, to the said Canadian Pacific Railway Company, or their proper officer in that behalf.

“Now Therefore, the Mayor and Council of the City of Winnipeg enacts as follows:

20 “That the said Trustee, being the manager for the time being of the Winnipeg Branch of the Merchants Bank of Canada, be and he is hereby authorized and instructed, by and on behalf of the Mayor and Council of the City of Winnipeg to deliver over to the said The Canadian Pacific Railway Company the said bonds and coupons aforesaid in the said By-law No. 195 mentioned.

“Done and passed in Council assembled, this thirtieth (30) day of March A.D. 1883.

“A. McMicken,
Mayor

“A. M. Brown
City Clerk.”

30

Mr. Fillmore—It is obvious it could not comply with all stipulations because they have not forever maintained their workshops in the City of Winnipeg.

The Court—Perhaps equity looks upon what ought to have been done and extends it into the future, Mr. Fillmore. I might reserve my judgment for several centuries just to see if they are complying with the requirement.

Mr. Guy—I would like to file By-law 2790 of the City of Winnipeg.

40 (By-law 2790, dated 15th January, 1904, referred to, produced and marked Exhibit 15.)

Mr. Guy—There is an agreement part of the by-law.

Mr. Fillmore—I will make my objection.

The Court—The same objection. I will deal with that in the same way.

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Mr. Fillmore—Mr. Bond has not found that. What does it refer to?

Mr. Guy—Paragraph 16 is the relevant one.

10 "16. That the Company will build a suitable station and office building fronting towards Higgins avenue and at a place between Main and Meade streets and that the Company will build an hotel near the northeast corner of Main street and Higgins avenue and in case of its destruction by fire within ten years from the first day of March 1903 will rebuild the same. The work on said station, office building, and also on the hotel shall be commenced not later than three months after the ratification and confirmation by the Legislature of the terms on the part of the City of this agreement, and the by-laws as hereinbefore mentioned, and shall be completed within twenty-seven months after such ratification and confirmation. It is agreed that delay beyond said time caused by strikes, fires, accidents, or other causes beyond the Company's control shall not be deemed to constitute a breach of the agreement in this section contained."

Mr. Fillmore—This is new to us.

20 Mr. Green—It is in the supplementary affidavit as to documents. The Court—Certified by the City Clerk's office under date of 25th February last.

(The Court adjourned at 12.30 p.m., March 7, 1949, to 2.15 p.m., the same date.)

2.15 p.m., March 7, 1949.

Mr. Guy—Your lordship was inquiring as to when the Act became effective.

The Court—Yes.

30 Mr. Guy—The Interpretation Act, chap. 1 of the Statutes of Canada, 1867, section 4 provides as follows:

40 "The Clerk of the Senate shall endorse on every Act of the Parliament of Canada, immediately after the title of such Act, the day, month and year when the same was by the Governor General assented to in Her Majesty's name, or reserved by him for the signification of Her Majesty's pleasure thereon,—and in the latter case, the Clerk of the Senate shall also endorse thereon, the day, month and year when the Governor General has signified either by speech or message to the Senate and House of Commons, or by proclamation, that the same was laid before Her Majesty in Council, and that Her Majesty was pleased to assent to the same;—And such endorsement shall be taken to be part of such Act, and the date of such assent or signification, as the case may be, shall be the date of the commencement of the Act, if no later commencement be therein provided."

The Court—Thank you very much. In Ontario it doesn't come

into force until it is specifically stated to do so at the expiration of a certain time.

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No. 5

Evidence of Harold Leslie Pratt

Plaintiff's Evidence

HAROLD LESLIE PRATT, being first duly sworn, testified as follows:

No. 5
Harold Leslie Pratt.
Examination

Direct Examination by Mr. Guy:

Q. You are employed by the Canadian Pacific Railway Company?

A. Yes.

10 Q. What is your position? A. Right of Way and Tax Agent.

Q. How long have you occupied that position? A. Three and one half years.

Q. What has your connection been with the Company during your employment? A. I have been with the Company for forty-three years. Prior to my appointment as Right of Way and Tax Agent I was Property and Tax Agent, having jurisdiction over the assessment and tax matters on the Prairie and Pacific regions, which was formerly called Western Lines.

20 Q. What territory would that cover? A. From Fort William to the Pacific Coast—Port Arthur I should say to the Pacific Coast.

Q. Have you always been stationed in Winnipeg? A. Yes.

Q. What are your duties? A. I have jurisdiction in connection with lease and siding contracts; miscellaneous contracts and agreements in connection with the privileges exercised by others on the Company's property; purchase of lands required by the operating department, and jurisdiction in connection with the assessment and tax matters on the Prairie and Pacific regions.

Q. So that the question of assessment of the Company's property in Winnipeg would come within your duties? A. Yes.

30 Q. And you have been looking after this for a period of years? A. Yes.

Q. Are you familiar with the issue in this action? A. Yes, I have read the pleadings.

Q. Are you familiar with the Company's properties within the City of Winnipeg? A. Yes.

Q. Just how familiar are you with them? A. I have examined the assessment notices, and checked them with our property and railway plans, and otherwise.

40 Q. You know, of course, the Canadian Pacific Railway Company claims exemption for all its properties in the City of Winnipeg under By-law 148 amended by By-law 195? A. Yes.

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Court of
King's Bench

Plaintiff's Evidence
No. 5
Harold Leslie Pratt.
Examination
Continued

Q. That is to say, all properties owned for railway purposes or in connection therewith? A. Yes.

Q. You also know that these properties were assessed by the City of Winnipeg in 1948 notwithstanding those By-laws? A. Yes, I have examined the assessment notices.

Q. Have you the notices? A. They have been in my possession but they are not now.

Q. I show you notices. Are those the notices served by the City on the Company for 1948? A. Yes.

10 Q. Do they correspond, or have you checked them with the numbers in the statement of claim? A. Yes.

Q. You checked them with the numbers in the statement of claim and they correspond? A. Yes.

Mr. Guy—I would like to file these notices.

The Court—Are these real estate assessment notices?

Mr. Guy—These are real estate notices.

(Bundle of assessment notices referred to, produced and marked Exhibit 16.)

By Mr. Guy:

20 Q. These real estate notices speak for themselves but generally what do they include? A. They include the roll number, name, occupation and address of the party assessed; description of the property, and the assessed value of the lands and buildings.

Q. Did you check the notices in order to determine just what property had been assessed? A. Yes, I checked the notices with our property and railway plans.

Q. Where are they located? A. In the City of Winnipeg.

Q. And they are, of course, as you said all mentioned in the statement of claim here? A. Yes.

30 Q. I would like you to look at the map or plan, Exhibit 7. Can you tell us generally where these parcels described in the notices are located? A. In the parcels marked 1873, 1875, 1882, 1906 and 1907.

Q. Give us the colors. A. 1872 is colored red, 1875 blue, 1882 yellow, 1906 green, and 1907 brown.

Q. The properties which are referred to in those assessment notices, can you tell us what they are used for? A. They are used for railway purposes or in connection therewith.

40 Q. Did the Company receive any realty assessment notices other than these? A. Yes, they received a number of realty assessment notices for property not railway property, and those have been paid, including some of the notices listed in the statement of claim.

Q. Before making that statement did you ascertain the purpose for what those properties were being used? A. Oh, yes.

Q. The notices you have produced are notices which relate to the

property for railway purposes? A. For railway purposes, and there are a few parcels which include parcels which are not used for railway purposes and taxes have been paid on those.

Q. Can you tell us which ones were and which are not used for railway purposes?

Mr. Fillmore—Referring now to Exhibit 16?

Q. Just explain them, Mr. Pratt. A. Without examining these in detail I could not identify each separate parcel, but there are a number of them in respect of which we have secured a duplicate tax bill, and paid the taxes on those portions that we regard as not being owned for railway purposes.

Q. Are there any notices there of those which you paid? A. Yes, No. 65. We paid a proportionate amount of that. No. 4 we paid a proportionate amount of that to the extent that we regard it—

Q. What is No. 4? A. Uptown office building.

Q. You paid some taxes on that? A. Yes.

Q. Because it is only partially used for railway purposes? A. Yes.

Q. What is No. 65? A. That is what we call the Express Building down near the subway. There is a fixed assessment agreed to a number of years ago by the Company, and we have continued to pay on that fixed assessment.

Q. Is any portion of it used for railway purposes? A. Some portion of it.

Q. You haven't paid any taxes on any that was used for railway purposes? A. Not intentionally.

Q. Now—. A. I have to say, no; I have no knowledge that we have.

Q. Was the Royal Alexandra Hotel included in the property assessed by the City for 1948? A. No, except for the Greater Winnipeg Water District levy.

Q. Did you pay taxes on it as a result of the assessment? A. No, except for the Water District levy. I may add that the Company claims exemption on the Hotel, but as a result of a number of agreements entered into over the years, 1906, 1914, and 1942, the Company agreed to pay and has paid a stated amount in lieu of taxes without admitting liability.

Q. Does the question of business taxes come within your jurisdiction as well? A. Yes, it does.

Q. You received some business tax assessment notices? A. Yes.

40 Q. Have you those? A. Yes.

Q. Those were received for what year? A. 1948 business tax assessment.

Q. From the City of Winnipeg? A. Yes.

Q. Purporting to assess the Canadian Pacific Railway Company in respect of business tax? A. Yes.

Q. In relation to certain property? A. Yes.

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Plaintiff's Evidence

No. 5
Harold Leslie Pratt.
Examination

Continued

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 Court of
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 Plaintiff's Evidence
 No. 5
 Harold Leslie Pratt.
 Examination
 Continued

Mr. Guy—I will file these all together, my lord.

(Business tax assessment notices referred to, produced and marked Exhibit 17.)

Q. These notices likewise speak for themselves but can you tell us generally what they contain? A. They have their own number, the name of the party assessed, description of the premises, rental value, classification, type of business, and the percentage rate.

Q. Where are these properties located the subject of the business assessment? A. All in the City of Winnipeg.

10 Q. Are these properties owned by the Railway Company for railway purposes?

A. Yes, all owned by the Railway Company for railway purposes.

Cross-Examination by Mr. Fillmore—

Cross-examination

Q. Have you received a realty tax assessment notice for the Royal Alexandra Hotel? A. I have not seen one.

Q. At any rate, it is not in Exhibit 16? A. No.

Q. Have you received a business tax notice for the Royal Alexandra Hotel? A. No, I haven't seen one of those either.

20 Q. There is no business tax notice for the Royal Alexandra Hotel in Exhibit 17? A. That is correct.

Mr. Fillmore—That is all.

Mr. Guy—My lord, in paragraph 4 of the Amended Statement of Defence “the defendant admits paragraph 3 of the plaintiff's Statement of Claim except that defendant denies that the plaintiff owns, maintains or operates for railway purposes or in connection therewith an hotel and restaurant and denies that the plaintiff owns, maintains and operates within the limits of the City of Winnipeg large and commodious stock and cattle yards.” Those are the two denials. I am calling Mr. Barry to give evidence as to the maintenance of the stock-
 30 yards within the City of Winnipeg in a certain time. The Admissions go down to 1911 but they do not admit it after that. Paragraph 6 of the Admission deals with that:

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

40 That is the part I want to cover by this witness.

No. 6

Evidence of Michael Joseph Barry

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MICHAEL JOSEPH BARRY, being first duly sworn, testified as follows:

Plaintiff's Evidence

No. 6
Michael Joseph
Barry,
Examination

Direct Examination by Mr. Guy:

Q. Mr. Barry, you are employed by the Canadian Pacific Railway Company? A. Yes.

Q. And have been for a good long while? A. Yes.

Q. How long? A. Better than forty-one years.

10 Q. What is your present position with the Company? A. Superintendent of Winnipeg Terminal Division.

Q. How long have you held that position? A. Since 1941.

Q. What positions did you hold prior to that? A. Well, I have had a rather checkered career. I started in a clerical capacity in the local freight offices of the Canadian Pacific Railway in 1907, and transferred to the yard the same year.

Q. What do you mean by transferring to the yard? A. Well, to our Winnipeg yard, what is known as our freight yard, and worked in various clerical capacities in the yard office until 1915. I then
20 went to Broadview as night yardmaster during the grain rush. Returning to Winnipeg I assumed the position of Assistant Yard Master in 1915 until 1917. I assumed the position of Assistant Yard Master in the City of Winnipeg Terminals until 1927, at which time I was promoted to night Yard Master. In 1931 I was promoted to General Yard Master. From 1937 to 1941 I was Assistant Superintendent, and in 1941 I was promoted to Superintendent.

Q. During all this period of your services would you be more or less familiar with the question of the stockyards property? A. Yes, I might say I was more or less in touch with the stockyards from the
30 time I went to the yard first in 1907.

Q. So it is fair to say you have a pretty fair knowledge of the property in the Winnipeg Terminals with the exception of a short time in 1917, from 1907 up to the present time? A. Only one occasion when I was away from Winnipeg Terminals was in 1915 for a few months.

Q. Are you acquainted with the issue in this action? Do you know what it is all about? A. Yes, I think I know what it is about.

Q. You know about the Company's claim for exemption from taxation in connection with all railway property or property in con-
40 nection therewith? A. Yes.

Q. And also about the stockyards, and the agreement to keep the stockyards within the City of Winnipeg? A. Yes, I am more or less familiar with that too.

Q. Since 1911 has the Company kept the stockyards within the

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Plaintiff's Evidence

No. 6
Michael Joseph
Barry,
Examination

Continued

limits of the City of Winnipeg? A. Yes, we have maintained stock-yards continually all the time.

Q. All the time? A. Yes, sir.

Q. They are still there? A. Yes.

Q. Has there been any time when the stockyards were not kept in the City of Winnipeg? A. I can't say for that because I can only go back as far as my own tenure of office with the Company, from 1907. From 1907 they have been virtually within the City of Winnipeg.

Q. Where are they located? A. They are located immediately
10 east of McPhillips street, south of what is known as our main lines, and they extend down to I would say—I can't say the streets exactly—Arlington street bridge would be a pretty fair way of describing the location, from McPhillips to the Arlington street bridge.

Q. Could you pick out on the map where they are? A. Nos. 5 and 6 marked on the plan would describe the location of the stock-yards all right. No. 7—of course that was before my time. That stockyard has been in the position it is since my time, No. 7. I do recall—I was born in the City of Winnipeg—I recall the stockyards always being in that area, in the black shaded area, particularly this
20 No. 7.

Q. But that is all within the red area? A. Yes, that is right.

Q. It would be fair to say from what you tell us, Mr. Barry, that from 1907 on the stockyards have always been located at No. 7, marked on the plan, as far as your recollection goes? A. That is correct.

Q. Will you explain to his lordship what you know about the operations of the stockyards since 1907? A. As I recall, when I first started with the C.P. Railway, the C.P.R. Stockyards at that time were for the exclusive purpose of handling all stock that arrived over
30 the Canadian Pacific Railway. A volume of business was handled through the years up until the building of the public markets or the Union Stockyards, after which our business diminished considerably. The use for the setup at the time of the diversion was not necessary, with the consequence that our C.P. Stockyards were considerably diminished. But they have continued to operate as stockyards from the time I first entered the service up to the present date, but not to the extent they did prior to the building of the public markets. We still have three chutes, and three ramps, and eight or nine pens.

Q. Are the present stockyards large enough to handle the business
40 that offers now? A. Yes, sir.

Mr. Guy—That is all.

Cross-Examination by Mr. Fillmore—

Cross-examination

Q. You say you have had a somewhat checkered career, I take it to mean in connection with the railway and not outside of it? A. That is correct, sir.

Q. Are you able to say how many acres or how many square feet

are comprised in the stockyards as indicated by No. 7 on the plan?
A. No, sir, I can't give you that information.

Q. How many pens are there? A. We have eight pens at the present time.

Q. Are there any other buildings there used in connection with the stockyards? A. Yes, sir, there is a shed there or a stable rather, it is owned by a private enterprise, Diamond & Kare.

Q. Is there anything there in the nature of a market? A. No, sir, there is no marketing done there whatever, they simply utilize their
10 portion of the stockyards on a rental basis for the purpose of handling their stock to and fro.

Q. There is just one private enterprise that has a building there now, I take it? A. That is right, sir.

Q. Do you know how many cattle of each kind or any kind are handled through your stockyards in one year? A. No, I have never gone into those statistics, and I wouldn't be prepared to say offhand.

Q. Has there been a marked reduction in the number since Public Markets Limited were established? A. Not to any extent, it fluctuates at times but not to any marked extent since the Public
20 Markets. Our business at the C.P.R. stockyards, I might say, was pretty well levelled off each year.

Q. What do you mean by levelled off? A. During the years the proportions are about the same. Take any one year after the other I figure the stock handled in the stockyards run about the same.

Q. Are you familiar with the Public Markets Limited which owns and operates stockyards, I believe, in St. Boniface? A. Yes, sir.

Q. Are you in position to compare the number of cattle now handled by the Public Markets in one year with the number that goes through the C.P.? A. No, I am not able to give you that information.

30 Q. Do you know the area of the Public Markets? A. No, sir.

Q. Do you know what buildings are there? A. Vaguely, not precisely.

Mr. Guy—I don't think my friend should go into this. We are not comparing the Public Markets business with the business of the City of Winnipeg.

The Court—I will take it subject to objection, Mr. Guy.

By Mr. Fillmore:

Q. Is there a building there called the Stock Exchange Building?

A. I am not prepared to say in as much as I have nothing to do with
40 the Union Stockyards.

Q. Are you able to say whether or not that Public Markets Limited, commonly referred to as St. Boniface stockyards, does not handle the bulk of the livestock business? A. Oh, I would be prepared to say yes, very definitely.

Q. Do cattle come in to the St. Boniface stockyards on all railways which run into Winnipeg? A. That is correct, not exclusively by rail;

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Plaintiff's Evidence

No. 6
Michael Joseph
Barry,
Cross-examination

Continued

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 No. 6
 Michael Joseph
 Barry,
 Cross-examination
 Continued

trucks handle a tremendous lot of stock into the Union stockyards.

Q. Do you know if there is a cattle market there where buyers go to inspect cattle and buy and sell cattle? A. I do know that.

Q. In other words, a public market is operated at the St. Boniface stockyards? A. That is correct.

Q. Are you not in a position to say whether the area is not several times the area of the C.P. stockyards? A. That depends on what is meant by several times.

Q. Are you able to say twice as much or three times? A. I would
 10 say it is three times as much.

Q. Do you know how many pens they have there? A. No, sir, I do not.

Q. Do you know what the capacity is? How many cattle they can handle at one time? A. No, sir, I do not.

Q. Would you know whether the sales in the Winnipeg cattle market in the year 1937 amounted to 269,520 head? A. I could not dispute the figures, sir.

Q. I take it you don't know how many were handled through the C.P.R. stockyards? A. No, sir.

20

No. 7

Evidence of William Manson

Plaintiff's Evidence
 No. 7
 William Manson,
 Examination

WILLIAM MANSON, being first duly sworn, testified as follows:

Direct Examination by Mr. Guy:

Mr. Guy—This evidence to be given by Mr. Manson is in the same paragraph in the statement of defence, where it is denied "that the plaintiff owns, maintains or operates for railway purposes or in connection therewith an hotel and restaurant." We want to cover the point as to the hotel and restaurant being used and operated in connection with the railroad.

30 *By Mr. Guy:*

Q. How long have you been connected with the C.P.R. A. Since October, 1909.

Q. That is forty years ago? A. Yes, sir.

Q. What is your position with the Company now? A. Vice-president of the Prairie Region.

Q. How long have you held that position? A. Since April, 1948.

Q. What territory comes under your jurisdiction? A. The Prairie Region extends from Fort William, Ontario, to Field, and Crow's Nest in British Columbia.

40 Q. Generally speaking, what are your duties? A. I am responsible

for the conduct and operation of the Company's business on the Prairie Region which includes the City of Winnipeg.

Q. Are you familiar with this action in connection with the exemption of the Company's property? A. Yes.

Q. You know the Company claims exemption on all property of the Company in the City of Winnipeg used for railway purposes or in connection therewith? A. Yes.

Q. What kind of business does the railway do? A. The Railway is a carrier of freight, passengers, mail, and express. It has its steamship operations, communication department, and it runs its hotels.

Q. Generally speaking, then you would say it is to furnish transportation service, and service in connection with transportation? A. Yes.

Q. To what extent are all these services integrated, forming part of one.

Mr. Fillmore—That question assumes that they are integrated.

Q. You say now that the Company carries on various services, and you have enumerated them, and to what extent are these connected with each other? A. Each service has a department, such as the steamship department or the freight department or the passenger department, or the mail department, and all together they go to make up the railway proper.

Q. All together they go to make up the Railway proper. I repeat the question, to what extent are they connected with each other? You say there are various departments? A. Each service is run as a department such as the freight, passenger, or express department, and they are all connected and coordinated as the Railway Company proper.

Q. In the hotel department does the Royal Alexandra Hotel come within that category? A. Yes, and as Vice-president of the Prairie Region I am responsible for the activities of the hotels in the Prairie Region. Of course, the day to day operation of the hotel is handled by the department.

Q. Just what hotels are there in the Prairie Region? A. Royal Alexandra Hotel, Saskatchewan Hotel at Regina, Palliser Hotel at Calgary, which are year-round hotels; and seasonal hotels such as Banff Springs Hotel, Chateau Lake Louise, and a number of bungalow camps in the mountains, and Devil's Gap Lodge at Kenora, Ontario.

Q. And in addition to those in the Prairie Region the Company owns and operates a lot of other hotels? A. Yes.

Q. Outside of the Prairie Region what hotels does it operate? A. Outside of the Prairie Region there is the Empress Hotel at Victoria, Royal York Hotel in Toronto, Chateau Frontenac, Quebec City, the McAdam Hotel in McAdam, New Brunswick, and Cornwallis Hotel in Kentville, Nova Scotia, and a number of seasonal hotels in the Maritimes.

Q. Where is the Royal Alexandra Hotel located? A. On the corner of Higgins avenue and Main street in the City of Winnipeg.

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No. 7
William Manson.
Examination

Continued

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No. 7
William Manson.
Examination

Continued

Q. Is it on Railway property? A. It is on Railway property, yes.

Q. It is located on Railway property? A. Yes.

Q. To what extent is it connected with the Railway? A. It is connected with the Railway in many ways. The hotels provide two main functions in the business of the Railway. Primarily they are for the purpose of providing food and lodging for the travelling public, and the first Canadian Pacific hotels were established in the mountains because of the very heavy grades in the early days of the Railway, trains were not able to handle diners, and the trains were
10 stopped at appropriate intervals to permit the passengers to take food and rest. That day, of course, is past, but it is still considered essential to proper railway service to have an adequate hotel system. Secondly, hotels are established for the traffic that they would draw to the Railway. I think a good illustration of that is the Banff Springs Hotel, and the Chateau Lake Louise; they were built for the traffic they would draw, and for their advertising value to the Railway proper.

Q. Those are the two main functions of the hotels in connection with the Railway business? A. Yes.

20 Q. The Royal Alexandra Hotel is situate in the City of Winnipeg and on Railway property; physically how is it connected with the Railway? A. It is attached to the railway station on railway property.

Q. Does it form part of it? A. It forms part of it. The Royal Alexandra Hotel coffee shop uses part of the station building, and immediately abuts the hotel.

Q. What function does it serve, the restaurant? A. It is used for the feeding of the travelling public, and also provides meals for employees.

30 Q. The hotel was enlarged at one time, was it not? A. It was built in 1906.

Q. And it was enlarged, was it not? A. Yes, it was enlarged and the extension was completed in 1914.

Q. Could you give us the reason for that expansion? A. It was to cope with the increase in travel.

Q. You mentioned particularly the Banff Springs Hotel and the Chateau Lake Louise as being constructed partially for the purpose of inducing traffic to the Railway. How do those operate financially?

A. The revenues or earnings from the hotels are not commensurate
40 with the investment. They were built for advertising purposes to draw traffic to the Railway.

Q. What have you to say, if anything, about the relationship of the employees in the hotels to the Railway? A. The employees participate in the same pass privileges as the Railway employees, treated in somewhat similar fashion. Their vacation privileges are the same as the Railway employees. The hotel employees belong to the Canadian Brotherhood of Railway Employees and Transport

Workers, and they sit in on the conciliation board proceedings along with the other organizations, and they were all awarded the same increases in rates as the Railway employees.

Q. They all went up together? A. They all went up together, that is correct.

Q. Does that apply elsewhere than in connection with the Royal Alexandra?

Mr. Fillmore—I submit that is a matter of company policy, hardly having any bearing.

10 The Court—Like all the rest of this evidence I will take it subject to objection, and winnow it out afterwards.

Q. Does the same relationship between employees of the Railway apply elsewhere than in Winnipeg with the Royal Alexandra? A. Yes, it applies throughout I think all of the hotels.

Q. What particular service does the Royal Alexandra perform for the Railway? A. The Railway uses the hotel services extensively. There is one illustration in the case of the Royal Alexandra Hotel laundries. For example, sleeping and dining cars leaving Toronto and Montreal, all soiled linen is removed at Winnipeg, and put
20 through the Royal Alexandra Hotel laundries. Sleeping and dining cars on their eastbound journey after they leave Calgary the linen that is soiled after they leave Calgary is removed and laundered. All our enginemen and bunkhouse linen in this area is shipped to the Royal Alexandra Hotel and laundered there. Our engine wipers used to clean our engines in our round house shops are likewise sent in to the Royal Alexandra Hotel laundry. The rail services use the hotel for the accommodation of extra sleeping and dining car conductors, and extra dining car crews during the period of the summer or heavy traffic. They are accommodated there, and these men are fed, as are
30 the porters on their probationary period, in the Royal Alexandra coffee shop.

The hotel provides space, due to the shortage in accommodation proper for the handling of railway conferences and staff meetings. Railway officers and employees transferred to Winnipeg are accommodated in the Hotel.

Conversely the Railway heating plant in the express building is used to heat the Royal Alexandra Hotel and supply steam for other purposes in addition to supplying steam to the station, coach yard, local freight, and the tracks where the cars are kept warm.

40 Our Railway purchasing agent purchases all the supplies, food stuffs, furniture, linen and cutlery, etc., for the hotels.

Our investigation department, if there are any extra activities at the hotels supply constables to patrol the premises.

Our public relations department handles advertising for the hotel, and our audit department functions in the hotels as well.

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No. 7
William Manson.
Examination

Continued

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No. 7
William Manson.
Examination

Continued

Q. Have you covered the ground pretty well now? A. There are some of a more minor nature.

Q. Just recently we have had a lot of mountain slides out in British Columbia. What happens when there is a mountain slide and the train is delayed? A. During the time that the train is stopped, if the slide or interruption to traffic is a serious one, the passengers so inconvenienced are taken to the hotel and allowed to use the hotel in that fashion.

Q. That is, if the hotels are open? A. Yes.

10 Q. If they are not open what do you do? A. If other interruptions occur on the prairies they are permitted to use the facilities in the Royal Alexandra or in the other prairie hotels.

Q. Do you know that the boundaries of the City of Winnipeg have been altered from time to time, and have been enlarged by taking in additional territory? A. Yes.

Q. In 1903 the workshops of the Company were moved out from the portion colored red on the map to the portion colored yellow on the map? A. Yes.

20 Q. Did the C.P.R. receive any complaint from the City about the moving of those workshops from the red portion to the yellow portion?

Mr. Fillmore—I object.

The Court—Subject to objection.

A. I am informed that a thorough search was made but there was no record of any complaint having been made and I am satisfied that none was made.

Q. Is the Canadian Pacific Railway Company still operating the Pembina Mountain branch? A. Yes, it is being operated as the La Riviere sub-division of the Railway.

Cross-Examination by Mr. Fillmore—

Cross-examination 30 Q. You said, Mr. Manson, amongst other things you operated hotels for the convenience of the travelling public? A. Yes.

Q. If a man gets off one of your passenger trains in Toronto and goes up to the desk at the Royal York Hotel would he always get a room? A. No.

Q. Can you tell me, Mr. Manson, if the hotel is not run as a separate department financially, in other words if the income revenue of the hotel is not separated from the operating income revenue? A. I don't know what happens to the financial arrangement after they leave here.

40 Q. Is it not a fact that the income from steamship lines, for example, is kept by the C.P.R. under what is known as other income? A. I can't answer that definitely.

Q. Is not the hotel operation likewise segregated in your financial statement into what is known as "other income"? A. I can't tell you what is in the "other income." I have no knowledge of what goes into these various accounts.

Q. You can find that out between now and tomorrow morning?
A. Yes.

Q. I would ask if you would be good enough to do that.

In the Royal Alexandra Hotel in Winnipeg I believe you have a public beer parlor? A. Yes.

Q. And that is operated for public purposes the same as the beer parlor in any other hotel in Winnipeg? A. Yes.

Q. Your coffee shop or restaurant to which you refer is likewise open to the public? A. That is correct.

10 Q. I take it that it is used by people who reside or are in business in that neighborhood? A. That is right.

Q. The hotel, I believe, is connected with the Railway station by a tunnel? A. Yes.

Q. Do you know how many feet it is from the station house by the tunnel until you get under the hotel proper? A. No, I don't know accurately the number of feet, I could guess.

Mr. Green—There is just a door in between, one step. You go from the door of the station and you are in the hotel.

20 Q. Is the tunnel entirely underneath the hotel? In other words, is the hotel structure above the tunnel for the full length? A. No, I would say the tunnel is under the station proper.

Q. Until it reaches the hotel? A. Until it reaches the hotel.

Q. And then there is a door in the tunnel? A. Yes.

Q. I believe your hotel is used for a great many local functions, is it not? A. That is correct.

Q. That is to say, you have a hotel ballroom, or ballrooms—how many are used for balls? A. There are several, probably three main ballrooms, and a number of smaller places where functions are held.

30 Q. Do Clubs, commonly called Service Clubs, use your hotel for luncheons and other functions? A. Yes.

Q. Are you able to say how many times a week one of your dining rooms is occupied by a Club or some public body of that sort? A. No, it fluctuates, I could not even estimate it.

Q. But I believe your hotel accommodation is pretty well taken up in advance for affairs of that kind? A. I think that comes pretty well under the scope of the day-to-day operation, but I am not familiar with the detail.

Q. When was the laundry put into the hotel, do you know? A. I think it was put in in 1906, but I could not say definitely.

40 Q. Is the work in the laundry which comes in from another department charged to that department? A. It is charged to that department. There is no exchange of cash, it is merely a voucher arrangement.

Q. During the last ten years have many local people had permanent rooms in your hotel? A. Possibly during the depression years, not recently.

Q. At the present time are rooms in your hotel rented to guests

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No. 7
William Manson.
Cross-examination

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 Cross-examination

Continued

who are there, you might say, from month to month? A. There may be a few.

Q. Do you know how many? A. No.

Mr. Fillmore—I would like to defer further cross-examination of Mr. Manson until he gets that additional information. I think that is an important thing on which he should have been prepared to answer.

The Court—Aren't you confusing the cross-examination of a witness in the box with the examination for discovery? A witness
 10 can only answer what he knows, but I understand Mr. Manson is prepared to get the information you want. I take it there were no examinations for discovery in this case.

Mr. Fillmore—No.

The Court—That is information which could have been got that way if required.

Mr. Fillmore—It seems to me that is an item which, with due respect, a man in his position, Vice-president, should be able to answer. However, if he can't answer, or my friends do not want to give the information, we can subpoena a witness and put it in as part
 20 of our case.

The Court—As I understand it, Mr. Guy is not objecting to Mr. Manson giving the evidence, but what I am saying is the cross-examination of the witness in the witness box is not examination for discovery. I am just pointing out that examination for discovery was available to all parties in the trial, and it does shorten the trial, not that you gentlemen have been taking too much time.

Mr. Fillmore—I realize that, my lord.

The Court—Then Mr. Manson will leave the box and get the information, and be subject to further cross-examination when he is
 30 recalled.

Mr. Green—I wonder if we could have it tied down as to how far Mr. Fillmore wants to go.

Mr. Guy—He has asked whether or not the hotel revenues were included in the income of the Railway.

Mr. Fillmore—Oh, no.

The Court—He wanted to know if the hotel revenues were classified under other income than Railway income.

Mr. Fillmore—I want to know whether it is put in the common pot with freight revenue and passenger revenue, or kept separate, such as
 40 steamships or other investments of the Company.

No. 8

Filing of Further Exhibit by Plaintiff

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Mr. Guy—I want to file the pleadings in the School Tax case.

(Documents in Q.B. 894/94, Winnipeg vs. C.P. Railway, produced and marked Exhibit 18.)

No. 8
Filing of Further
Exhibit by
Plaintiff.
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Mr. Guy—If I might endeavor to lessen the labor of all parties I might shortly summarize these pleadings so that they may be of some value to you. The City alleges that the Company owned land in Winnipeg and carried on business there, and that in 1890 it was
10 assessed and placed on the assessment roll, and the assessment was confirmed. That the Public School District, known as the School District of Winnipeg No. 1, had boundaries co-terminus with the boundaries of the City of Winnipeg. That in order to raise the money necessary to defray the expenses of the School District the City had levied taxes on the Company's property, including the Company, but the Company had not paid.

There followed similar allegations for the years 1891 to 1894.

To that the Company answered and pleaded among other things that the land was exempt from taxation within the meaning of The
20 Assessment Act, and that the land was not liable to be assessed, rated, or taxed being legally exempt therefrom by By-laws 148 and 195, and that all conditions were performed, and all things happened, and all times elapsed necessary to entitle the Company to the benefit of the exemption in the By-laws.

To this the City in general joined issue, and as regards the plea that the Company was exempt under the by-law the City pleaded the by-law in full, and then pleaded "save and except by the by-laws above mentioned the said lands of the defendants are not in any way exempt from any taxation whatever."

30 To this the Company demurred saying that certain replications were bad in substance, and "that the said replications confessed the truth of the facts alleged in the pleas to which they are respectively replications but do not state any new facts in avoidance. That the said replications are no answer to the pleas to which they are replications."

To this the City said that the replications were good in substance. Then the matter went to trial. That in substance are the pleadings in that case.

The Court—Are you going to put in the judgment in this case?

40 Mr. Guy—I think the judgments are reported, whether it is necessary to put them in or not as exhibits—

The Court—I think you should have copies. I think the formal judgments should be in if you are relying on *res judicata*.

Mr. Guy—Yes, my lord.

This by-law exempting the Company's property was passed in 1881.

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In 1900 the Manitoba Railway Taxation Act prevented any municipality from taxing the Railway if they paid the Provincial Government a certain percentage in an amount not exceeding three percent, but prior to 1900 when that legislation came into effect the Company and the City of Winnipeg made assessment rolls of the property in the various districts right up to 1900, and those assessment rolls have been examined, and I understand that the City is prepared to admit that on these rolls up to 1900 there appear notations opposite the Company's Railway property to the effect that they are exempt
10 from taxation under By-law 148, or words to that effect, or some similar term, exempt from taxation. I think some of them say exempt from school tax, or exempt from municipal tax, or under By-law 148. I understand the City is now prepared to admit those notations are on those assessment rolls for the years up to 1900.

Mr. Bond—That is correct, my lord.

Mr. Guy—The purpose of this was to avoid the necessity of bringing all those assessment rolls to the Court.

Subject to the putting in the formal judgments and the reasons for judgment in typewritten form that concludes the plaintiff's case.
20 I take it we are at liberty to put those in.

Mr. Fillmore—I assume that the reasons for judgment are in a convenient form in volume 12 Manitoba Reports and 30 Supreme Court Reports.

The Court—Yes, but I thought the formal judgment should be a part of the record. Now, you will want to finish your cross-examination of Mr. Manson. Are you sufficiently advised now to say whether you will present any evidence?

Mr. Fillmore—As far as we are presently advised we will only put in documents.

30

No. 9

Filing of Defendant's Exhibits

The Court—Mr. Fillmore?

Mr. Fillmore—I would like to tender in evidence By-law No. 115 of the City of Winnipeg dated the 6th day of January, 1880, being a by-law to provide for raising debentures of \$200,000 to build a bridge, a railway and ordinary traffic bridge across the Red River in Winnipeg.

Mr. Guy—I am afraid I will have to object to that on the ground of relevancy.

40 The Court—I am going to let all of these documents in subject to the objections of various counsel, and decide after I have heard the

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argument, because I expect to get a great illumination from both sides. My decision as to its admissibility will be reserved to be dealt with after the argument.

I will reserve the figure 19 for the judgments, and we will mark this Exhibit 20.

Mr. Guy—I don't think this by-law was produced in the defendant's affidavit on production.

The Court—The admissions cover everything in the affidavits as to documents on both sides subject to relevancy.

10 Mr. Guy—Yes, but this is not in the affidavit as to documents.

The Court—I think probably as it is all going in subject to objection I will allow them to mark it.

Mr. Guy—That is another ground other than relevancy.

The Court—Yes, I realize that, but I want to hear argument from both sides before I feel qualified to express an opinion one way or another.

Mr. Guy—I quite appreciate that, because there are a number of connecting links that have been left out and not referred to in the evidence.

20 (By-law No. 115 of the City of Winnipeg, referred to, produced and marked Exhibit 20.)

Mr. Fillmore—I tender By-law 143 of the City of Winnipeg, passed on the 23rd of March, 1881, being a by-law granting certain rights of way in the City of Winnipeg and running rights over the Louise bridge to the Canadian Pacific Railway Company.

(By-law No. 143 referred to, produced and marked Exhibit 21.)

The Court—These are by-laws that unquestionably the City had the power to pass?

Mr. Fillmore—I suppose we must be taking that stand; we can't
30 very well say they are not.

I tender By-law No. 16306, passed on the 23rd of February, 1948.

Mr. Guy—That is objected to as well. This is by-law repealing By-laws 148 and 195. Those are objected to on the ground that the City has no power to pass that by-law.

The Court—We will mark it as exhibit 22 being subject to all of these questions.

(By-law No. 16306, referred to, produced and marked Exhibit 22.)

Mr. Fillmore—I would like to tender in evidence sessional paper No. 48.

40 Mr. Guy—I object to those sessional papers. I think I know the purpose of them.

Mr. Fillmore—The volume is from the Provincial Library, and the memorandum on the back is as follows:

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"Sessional papers 22 to 48, volume 15, No. 9, 1882," and the papers which I am tendering in evidence are designated "48 n," page 49, and the heading is,

"Return to an address of the House of Commons dated 15th February, 1882. For copies of all correspondence of the Canadian Pacific Railway Company on the subject of the route of any part of the Canadian Pacific Railway Company, including any branch thereof, and all reports, Orders in Council relating thereto."

- 10 This Return occupies pages 49 to 69, and it ends with the words "Collingwood Schreiber, Engineer in Chief." Those words are at the end of a statement which begins at page 68, entitled "Canadian Pacific Railway, office of the engineer in chief, Ottawa, March 13, 1882."

The Court—Is this directed to interpretation of the charter or of the statute?

- Mr. Fillmore—No, it is directed to the question of consideration. It is directed to the question of whether an injunction will be granted. It is directed to the allegation that the Railway could do anything or
20 refrain from doing anything as a result of By-law 148, and without elaborating on it those are two of the things on which I claim that this Return is material.

The Court—What do you propose to do? Do you want to mark that as an exhibit?

Mr. Fillmore—I think that this Return might be marked as an exhibit. Perhaps the book should be marked.

The Court—I think only the part you are referring to should be marked, and that will be exhibit 23, and that is also taken subject to objection.

- 30 (Pages 49 to 69 of Sessional Papers Vol. 15, 1882, produced and marked Exhibit 23.)

Mr. Fillmore—I would ask my friend to produce certain documents set out in his schedule to his affidavit as to documents. No. 19, a memo. to Sir Charles Tupper. It refers to a proposed new line from Winnipeg to Portage la Prairie.

Mr. Guy—We take objection to the relevancy of that, my lord.

The Court—Quite. Which part of the plaintiff's affidavit was this in?

Mr. Fillmore—The first part of the first schedule.

- 40 (Letter of Collingwood Schreiber dated June 20, 1881, referred to, produced and marked Exhibit 24.)

Mr. Fillmore—I also ask for the production of No. 16.

Mr. Guy—That also is subject to our objection. I would like to draw your attention to the fact that if your lordship should declare these documents are admissible we would have a number of docu-

ments to put in in rebuttal. Perhaps your lordship could give a direction now as to how that could be handled.

The Court—I think the only thing for you to do is to put in in rebuttal such documents that you think should go in on the same basis. I do not feel I would be competent to rule one way or the other until I have heard argument on the law.

Mr. Guy—We do not think our own documents are relevant in rebuttal unless you rule that the defendant's documents are relevant, and we would not tender them until then.

10 The Court—Argument on the admissibility of these documents would in effect be argument on the whole case so far as I am concerned and I think I will continue the way I am doing. I allow Mr. Fillmore to put this in subject to objection, and I will also allow you to put in any that you think should be in in the event of our holding they are relevant.

Mr. Green—Yes, that would be without prejudice.

The Court—Yes, the other alternative would be to stop here and argue the whole case right now.

Mr. Fillmore—I would ask for a letter No. 16 on the schedule of
20 the plaintiff's affidavit of documents, being a letter from Collingwood Schreiber Engineer-in-Chief dated April 12, 1881. The copy does not show to whom it was addressed, but it is a copy from the Transport Department file 3556-29, and is apparently taken from the records of the Transport Commission.

The Court—Is it suggested that the defendant ever had these documents or saw them or had any knowledge of them at the time they came into existence?

Mr. Fillmore—No, I suggest that the defendant had no knowledge of these documents. I am suggesting that these letters indicate
30 what the settled plans and intentions of the Canadian Pacific Railway were regardless of whether or not By-law 148 was passed.

The Court—And the plaintiff has made an affidavit as to documents in which it says that these documents relate to the matters in question in the action, and it has no objection to producing them.

Mr. Green—We did produce them.

The Court—But you say the documents relate to the matters in question in the action.

Mr. Green—They do relate to the matters raised in the defence, but we never admitted that we had any knowledge of them at the
40 time.

The Court—I will mark them subject to the same understanding.

(Letter from Collingwood Schreiber dated April 12, 1881, referred to, produced and marked Exhibit 25.)

Mr. Fillmore—The next I would ask the production of is No. 23 of the affidavit, letter from R. B. Angus to Duncan McIntyre, dated July 5, 1881. Mr. McIntyre is described as the Vice-president, and

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both of these gentlemen are gentlemen who are named in the Letters Patent.

Mr. Green—The same objection.

Mr. Fillmore—I would like to comment on this letter in argument. It gives the reasons which led the railway company to change the line as originally planned and contemplated under the contract.

The Court—Are you going to tender at some stage or other the life and times of Lord Strathcona too?

Mr. Fillmore—I haven't got that, my lord.

10 (Letter dated July 5, 1881, referred to, produced and marked Exhibit 26.)

Mr. Fillmore—Then I wish to have marked a letter from C. Drinkwater, Secretary of the plaintiff, to Mr. A. B. Stickney dated 13th August, 1881, a letter enclosing a copy of the Order-in-Council.

(Letter dated 13th August, 1881 referred to, produced and marked Exhibit 27.)

Mr. Fillmore—Then No. 30 on the affidavit, a letter from R. B. Angus to A. B. Stickney, dated 13th August, 1881.

Mr. Guy—These are all objected to.

20 The Court—Yes, subject to objection.

(Letter dated 13th August, 1881, referred to, produced and marked Exhibit 28.)

Mr. Fillmore—Then No. 31, a letter from C. Drinkwater to A. P. Bradley of the 16th August, 1881. That merely relates to the Order-in-Council of August 6th.

(Letter dated August 16, 1881, referred to, produced and marked Exhibit 29.)

30 Mr. Fillmore—No. 32, a letter from A. P. Bradley to Charles Drinkwater dated August 18, 1881. That refers to the construction of the Pembina Mountain branch.

Mr. Guy—Objected to.

(Copy of letter of A. P. Bradley to Charles Drinkwater, referred to, produced and marked Exhibit 30.)

The Court—I don't think it is necessary to repeat the objection. I am letting these in subject to the objection.

Mr. Fillmore—No. 35. Letter from C. Drinkwater to J. H. Pope, Acting Minister of Railways & Canals, dated 27th August, 1881. That relates to the change in the line Winnipeg to Portage.

40 (Letter dated 27th August, 1881, referred to, produced and marked Exhibit 31.)

Mr. Fillmore—No. 39, a letter from C. Drinkwater to A. B. Stickney of the 2nd September, 1881. That merely encloses a copy of the Order-in-Council.

(Letter dated September 2, 1881, referred to, produced and marked Exhibit 32.)

Mr. Fillmore—No. 43 in the plaintiff's affidavit as to documents, a letter from Drinkwater to Stickney of the 7th September, 1881. It relates to the Pembina Mountain branch.

(Letter dated September 7, 1881, referred to, produced and marked 10 Exhibit 33.)

Mr. Fillmore—No. 45, a letter from Drinkwater to Stickney dated September 14, 1881.

(Letter dated September 14, 1881, referred to, produced and marked Exhibit 34.)

Mr. Fillmore—No. 46, a letter from Drinkwater to F. Braun, Secretary of the Department of Railways and Canals, dated September 20, 1881. That relates to the Pembina Mountain branch.

(Copy of letter 20th September, 1881, referred to, produced and marked Exhibit 35.)

20 Mr. Fillmore—No. 54, a letter from Drinkwater as Secretary of the C.P.R., to the Railway Committee of the Privy Council dated October 27, 1881, notifying the Government that within one month they will open the line.

(Copy of letter October 27, 1881, referred to, produced and marked Exhibit 36.)

Mr. Fillmore—No. 55 of the plaintiff's affidavit as to documents, a letter from Drinkwater to Sir Charles Tupper, Minister of Railways, relating to the application by the Company for Government approval on the location of the main line dated 27th October, 1881.

30 (Copy of letter October 27, 1881, referred to, produced and marked Exhibit 37.)

Mr. Fillmore—No. 56, a letter from Collingwood Schreiber to Department of Railways & Canals dated 27th October, 1881, and relates to getting the approval of the Government and the re-location of the main line of the C.P.R.

(Copy of letter October 27, 1881, referred to, produced and marked Exhibit 38.)

Mr. Fillmore—I wish to tender in evidence a certified copy of a map which is said to have accompanied a letter of the 2nd of June,

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1881, from the Secretary of the plaintiff railway Company to the Secretary of State:

The letter is in with the sessional papers.

Mr. Green—That is in the same category, my lord.

The Court—Yes, this map that is said to be enclosed in the letter of 2nd June, 1881, will be marked.

(Map referred to, produced and marked Exhibit 39.)

The Court—Subject to all objections.

Mr. Fillmore—I now tender in evidence a certified copy of an
10 Order-in-Council P.C. 1165, approved by His Excellency on the 6th
of August, 1881. This in part approves the application of the
Railway Company for a change in the location of the line between
Winnipeg and Portage la Prairie.

Mr. Green—Between the eastern terminus and Portage la Prairie.

Mr. Fillmore—And this in part approves the change.

The Court—Subject to objection.

(P.C. 1165 dated 6th August, 1881, produced and marked Exhibit
40.)

Mr. Fillmore—Then Order in Council P. C. 1227, approved by
20 His Excellency on the 25th August, 1881, recommending that the
approval of His Excellency and Council be now given to further
extension of the line from a point named in Range 4 Township 13
section 13 or 14, to a point of junction with the existing line of
Railway.

(P.C. 1227 August 25, 1881, referred to, produced and marked
Exhibit 41.)

Mr. Fillmore—In order that your lordship may not be entirely in
the dark perhaps if your lordship would refer to the map, exhibit 39—
at the time the C.P.R. took over the Government had under con-
30 struction a line from Winnipeg to Stonewall, and then from Stone-
wall to Portage la Prairie. On the 2nd of June the Company applied
for permission to change the line from Winnipeg to Portage la
Prairie, being a more direct route, following the north boundary of
the Assiniboine river, so that the line from Stonewall to Portage was
never completed, and the line from Winnipeg to Stonewall was
retained as a branch line.

Mr. Green—The line from Stonewall to Portage was completed.

Mr. Fillmore—It was abandoned, in any event, and the letters will
explain why.

40 I tender in evidence a certified copy of Order-in-Council P.C.
1458, approved by His Excellency the Governor in Council on the
19th of November, 1881.

(Order in Council P.C. 1458 dated 19 November, 1881, produced and marked Exhibit 42.)

Mr. Fillmore—I think that is all we have to offer, my lord.

The Court—How about your rebuttal, Mr. Guy?

Mr. Guy—We will have to have time to consider what we are going to put in in reply to this material.

The Court—Then I think perhaps we might adjourn. Mr. Manson will be back in the morning to complete his cross-examination, and then you will decide what you want to put in in rebuttal. It
10 will be understood that it is being put in on the supposition that the documents tendered by Mr. Fillmore are admissible. If they are not admissible it will be understood there is no necessity for rebuttal.

Mr. Fillmore—I intended to suggest to the Court that perhaps we could put in a map of Manitoba. I think it would be of convenience when it comes to argument.

The Court—I think we can reserve that, and if in the course of argument we need to look at it we can refer to it.

(The Court adjourned at 5 p.m., March 7, 1949, to 10.30 a.m., 20 March 8, 1949.)

10.30 a.m., March 8, 1949.

The Court—Are you going to complete the cross-examination of Mr. Manson now?

Mr. Fillmore—Yes, my lord.

No. 10

Evidence of William Manson, (Recalled)

WILLIAM MANSON, recalled:

Continuation of Cross-examination by Mr. Fillmore:

Mr. Fillmore—I don't think there is anything before the Court to
30 indicate the size of the Royal Alexandra Hotel in Winnipeg, and I propose to ask the witness the number of rooms in the Hotel, and one or two questions along that line.

The Court—All right.

By Mr. Fillmore:

Q. How many floors are there in the Royal Alexandra Hotel?

A. Six floors.

Q. Can you tell me the number of rooms which are available for

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guests? A. There is a total of 445 rooms in the Hotel, most of them are available for guests. I can't tell you how many are set aside for the staff.

Q. Less those which are occupied by what you might call permanent residents? A. Less those occupied by the staff.

Q. And some permanent? A. A few permanent, yes.

Q. Are you in a position to give me the dimensions, the number of feet on Higgins avenue, the number east and west by the number north and south? A. No, I haven't that information, but I can get 10 it if you wish.

Mr. Fillmore—If my friends are agreeable they can inform the Court later.

Mr. Green—The Hotel is one story at one place where the coffee shop is. There may be some difficulty.

Mr. Fillmore—I thought it might be of some assistance. However, the witness is not in a position to give it and it is not volunteered.

Mr. Green—I don't like that statement to go on the record that it is not volunteered.

The Court—No, there is no necessity to volunteer it, Mr. Green.

20 *By Mr. Fillmore:*

Q. Do you receive the annual reports made by the President of the Canadian Pacific Railway Company to the shareholders? A. Yes.

Q. Is this the annual report of the Company for the year 1946? A. Yes.

Q. Is this the annual report of the Company for the year 1947? A. Yes.

Q. I will refer now to page 10 of the 1946 report. The heading of the paragraph is "Other Income."

30 "Other Income amounted to \$22,779,794, an increase of \$7,672,837. The net earnings of ocean and coastal steamships increased by \$2,139,299, due principally to the additional earnings derived from the five new Beaver ships which came into service during the year.

While net earnings of your Hotels in 1945 were the highest up to that time, net earnings in 1946 were \$383,800 higher. The summer resort hotels, which had remained closed during the war years, were all re-opened and enjoyed the largest trade in their history. A record volume of business was done at your city hotels and the larger proportion of civilian business resulted in improved earnings."

40 Is the Royal Alexandra Hotel in Winnipeg one of the hotels referred to in this report? A. Yes.

Q. I will turn now to page 24 of the 1946 report. The heading is "General Balance Sheet, December 31, 1946." And under the heading of "Assets" there is a heading "Property Investment." Under this heading there is: "Railway, Rolling Stock and Inland Steamships." There are four other items under that heading, the last one of which is "Hotel, Communication and Miscellaneous

Properties, \$97,780,479.” Is the Royal Alexandra Hotel one of the hotel properties there included? A. It is.

Q. I will now refer to page 36 of the 1946 report. On this page there is a paragraph entitled “Other Income,” one item of which is “Net earnings from hotel, communication and miscellaneous properties \$2,550,862.” That would include net earnings from the Royal Alexandra Hotel in Winnipeg? A. That would include earning from the Royal Alexandra Hotel in Winnipeg. The accounts are broken down into revenue from land transportation and revenue
10 from other sources, and the Royal Alexandra Hotel is included in revenue from other sources. Each department keeps its own income account, and during the year 1946 I am informed that the hotel system showed a substantial loss.

Q. I take it that the Balance Sheet at page 24 of this 1946 report is the Balance Sheet of the Canadian Pacific Railway Company?

Mr. Guy—Has that any bearing? I have been allowing this to go on subject to my friend showing the relevancy of it.

Mr. Fillmore—I submit it indicates how the Railway Company keeps their accounts, and the segregation of them.

20 Mr. Guy—It is purely a matter of accounting in any event, and can’t have any relevancy to this action so far as I can see.

Mr. Fillmore—I would ask to have the 1946 report marked.

Mr. Guy—Subject to objection.

The Court—Yes, it will be marked subject to objection.

(1946 Annual Report of Canadian Pacific Railway Company, produced and marked Exhibit 43.)

Mr. Fillmore—I now tender the 1947 annual report.

The Court—It will be Exhibit 44 subject to the objections.

(1947 Annual Report of Canadian Pacific Railway Company,
30 produced and marked Exhibit 44.)

By Mr. Fillmore:

Q. I take it wherever we see the word “hotels” in the 1947 Annual Report that the Royal Alexandra Hotel will be likewise included?

A. In a general way, yes, where it refers to hotels generally.

Q. I mean in the items in this report similar to the items in the 1946 report where the word “hotel” or “hotels” appear that would include the Royal Alexandra Hotel? A. Yes.

Q. Referring now to page 33 of this report. I take it that the net earnings from hotel, communication and miscellaneous properties
40 was \$2,414,124? A. That is correct.

Q. So it does not show any loss for 1947? A. (There was no answer.)

Mr. Fillmore—That is all.

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(Recalled)
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Re-examination

Re-Examination by Mr. Guy—

Q. I take it that the segregation of income is a matter of keeping of accounts under certain classification, is that true, Mr. Manson?

A. Well, each department has its separate income account.

Q. Each department has its separate income account, but I think you stated that you had a certain classification for income, that is real property or railway property? A. Income from land or rail operations, and income from other sources.

Q. Is that an internal accounting method of your Company for 10 Company purposes or something required to be done? A. I have no knowledge of that.

Q. So far as you know it is the method of accounting that the Company had adopted? A. A method that the Company has adopted down through the years.

Mr. Fillmore—There is one more question I would like to ask. Don't answer this, Mr. Manson, until it has been ruled on.

By Mr. Fillmore:

Q. Do you know whether the Railway Companies through the Canadian Railway Association, made an application for increase in 20 freight rates in December, 1946.

Mr. Guy—I object to that.

The Court—I am not going to allow that question. I am counting on you to show the relevancy of what has been put in just recently, establishing to my satisfaction that the evidence is relevant, but I can't see how this can possibly be relevant. If it means opening up the application for an increase in freight rates which it would probably what would it lead to? I am certainly not going to be a party to it. That is all, Mr. Manson, thank you.

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30

Filing of Exhibits by Plaintiff in Rebuttal

The Court—Mr. Guy?

Mr. Guy—There is a matter which I would ask your lordship to take judicial notice of, chapter 14 of the Act of 1879.

The Court—Isn't that the one referred to in the charter?

Mr. Guy—No, this is a prior Act.

Mr. Fillmore—You are not putting it in as an exhibit?

Mr. Guy—No, I am asking the Court to take judicial notice of it.

The preamble to this Act is as follows:

“Whereas it is expedient to provide for the connection of the

main line of the Canadian Pacific Railway Company with the City of Winnipeg and the Pembina branch of the said Railway: Therefore Her Majesty by and with the consent of the Senate and House of Commons of Canada, enacts as follows:

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1. A branch of the Canadian Pacific Railway shall be constructed from some point west of the Red river, on that part of the main line running south of Lake Manitoba, to the City of Winnipeg, there to connect with the branch line from Fort Garry to Pembina; and all the provisions of 'the Canadian Pacific Railway Act, 1874,' with respect to branches of the said Railway, not inconsistent with this Act, shall apply to the branch to be constructed under this Act.

10

2. A sum not exceeding One million dollars, may be expended on that part of the main line west of the Red River, to the branch hereby authorized," etc.

Then I want to put in Sir Sandford Fleming's report of 1880.

Mr. Fillmore—Are you tendering the whole report?

Mr. Guy—No, certain portions of the report. This is a report to Sir Charles Tupper by Sir Sandford Fleming, Engineer in Chief of the C.P.R. dated 8th of April, 1880, and there are certain portions of this report to which I am referring and which I ask to be included in the evidence.

20

Mr. Fillmore—That is subject to objection.

The Court—Oh, yes, that is understood.

Mr. Guy—The first thing is a map on page 24, showing the main line through Selkirk, and directly west, with a branch from Stonewall to Winnipeg. We will have a photostatic copy made and we propose with your lordship's permission to file the photostatic copy of that plan.

30 The Court—Yes.

Mr. Guy—(Refers to Sir Sandford Fleming Report of 1880 at pages 24, 25, 29, 265 to 272.)

(Extract above referred to from report of Sir Sandford Fleming produced and marked Exhibit 45.)

Mr. Guy—I wish to put in as an historical document the story of the Canadian Pacific as told by the newspapers available at the time.

Mr. Fillmore—I would certainly object to newspaper accounts of what took place at the time. I think that is going a little too far. I don't think in any lawsuit newspaper reports have been taken as historical documents. A historical document is an approved or accredited history. I have a reference to the last edition of Phipson, which I would like to quote, p. 367:

40

"Histories. Approved public and general histories are admissible as in the nature of public documents or reputation, to prove ancient facts of a public or general, though not those of a private, particular or local nature."

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I don't think newspaper reports at the time can be put in the class of approved or accredited history, because we know that newspaper reports do not always give all the facts. The value of any report depends on the ability of the particular reporter who made the report or wrote the article, and if some references are made from one newspaper we would naturally want the privilege of putting in other extracts from other newspapers. But I strongly urge that this is carrying it a little too far. It is not one of the documents which we have agreed to admit.

10 Mr. Guy—Oh, yes, it is not one that we agreed to admit. They are in the affidavit as to documents.

Mr. Fillmore—I know they are in the affidavit of documents, but I am urging that newspaper reports are certainly not in a class of public documents the same as the reports made by Government engineer or a Royal Commission. Certainly newspaper reports of no matter what the date, at least a date of 1881, should not be admitted because they could not have any evidential value as there is no way of testing them. Why should they be put in? All the by-laws are in. What could they possibly prove? What benefit would
20 it be to my friends to show what was in the newspapers, or what was not in the newspapers. What was not published might be more important than what was published. So I can't really follow that at all. I can't see what assistance newspaper reports would be to the Court.

The Court—They were produced in the affidavit as to documents, and doesn't that section of the Admissions allow them to be put in, subject to the argument as to relevancy? I am again in the same position I was yesterday. I don't want to even express an opinion about a large number of documents that have been put in until I
30 have heard the argument on them. You say the by-laws are in and what more do we need? That may be the solution of the whole problem, but I am not going to form any opinion, I am going to allow them to be marked and reserve my decision.

Mr. Fillmore—The Admission is that they will be admitted without formal proof. All we said is you do not have to find the editor of the newspaper and prove that was a newspaper published in Winnipeg at the time. That is as far as that goes.

The Court—Quite, and the question of relevancy is a matter of argument.

40 Mr. Fillmore—It seems to me that furthermore if they put in some extracts from one paper they should put in all that was before the public, everything that was in any newspaper at the time on the subject. I think these documents are in a different class to the reports which are in the nature of public documents, printed under Government authority.

The Court—These were not tendered as part of the plaintiff's case. You put in certain documents, and these are being tendered in

rebuttal, and I am going to do what I have done with the others. I have a strong feeling at the present time, subject to being instructed otherwise by counsel, that I have allowed in a lot of irrelevant material, but I can't come to the conclusion until I hear argument. I would ordinarily have dealt with admissibility at the beginning but that would have meant arguing the whole case at the start. I will allow Mr. Guy to file these, and I will reserve admission as to relevancy, and your objection is on the record.

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Mr. Fillmore—I make this objection. The admission was to admit
10 them without formal proof subject to objection as to relevancy, but we did not say that they could just put in copies. I don't know whether these are copies or not.

Mr. Guy—The document which we are producing is the one in our affidavit on production, a copy of which was given to Mr. Fillmore sometime ago.

Mr. Fillmore—I haven't seen them. I think, in any event, the witness who made the copies should go in the box and say that he made the copies because I want to ask him, without waiving my objection, if those contain everything that appeared in other news-
20 papers over the same period.

The Court—Haven't we admitted copies which have not been proved by the person who made them during the course of this trial, Mr. Fillmore?

Mr. Fillmore—Those were documents produced by the plaintiff.

The Court—Isn't this a document produced by the plaintiff?

Mr. Fillmore—This is a different proposition where the plaintiff wishes to produce the document and then wishes to put it in evidence. We have a different situation where the opposite party calls for a document.

Mr. Guy—These things took place a great many years ago, in 1880.
30

The Court—I think I am going to have argument now on the admissibility of this document. You gentlemen can go ahead and argue the whole case right now, because I want argument on the whole case.

Mr. Guy—I think we have to have an argument on the whole case to determine the admissibility.

Mr. Fillmore—Could they not be marked for identification and not read?

The Court—No, I have gone as far as I am going to go on the understanding that we would argue it all at once, but we will argue
40 the case now.

Mr. Fillmore—Perhaps I might ask my friend if he has any other evidence.

The Court—No, I will deal with this question right now. This document is tendered, and it is objected to, and I want to know how it is relevant, and all about it. Perhaps I should have done this yesterday.

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Mr. Guy—This document would not now be tendered were it not for the submission of other documents.

The Court—I fully realize that, and I thought we had worked out a plan by which we were going to solve the problem, but apparently we haven't been able to.

Mr. Guy—It seems to me that Mr. Fillmore first of all should show these documents are relevant to some issue in this case. I take it all of this is on the basis of consideration, but he has not argued on what ground any of this evidence is material, and until I know what he is going to argue about it I just don't know what I am going to meet.

The Court—I will call on Mr. Fillmore to tell me why the documents which he submitted yesterday to which these are submitted as rebuttal should be admitted.

Mr. Fillmore—In fact, I might as well start in and give my argument.

The Court—I think that would be the best way.

Mr. Guy—I have the Minutes of Judgment in Canadian Pacific Railway Company and the City of Winnipeg.

The Court—Exhibit 19 was reserved for that document.

20 (Judgment of the Supreme Court of Canada in C.P.R. vs. City of Winnipeg referred to, produced and marked Exhibit 19.)

(Argument followed by Mr. Fillmore on behalf of the defendant, Mr. Guy, on behalf of the plaintiff as to the admissibility of the said documents.)

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Ruling of Trial Judge on Admissibility of Documents

The Court—I am satisfied, Mr. Fillmore, that the documents are not admissible. Having cleared the air, and if I rule these documents 30 are inadmissible, as I do, then you have no further rebuttal.

Mr. Guy—No further rebuttal.

The Court—Very well then, I will hear you now.

Mr. Guy—I take it the documents are the by-laws authorizing the construction of the bridge, No. 115, and then By-law 143 giving the railway company running rights over the bridge.

The Court—Yes, I can't see the relevancy of Exhibits 20 and 21. Exhibit 22, which is the by-law purporting to repeal 148, is a different thing.

I can't see the relevancy of the sessional papers, Exhibit 23. So 40 all of the other documents beginning with Exhibit 24 and going down to Exhibit 42, the last Order-in-Council of the 19th of November,

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1881, go out. Then we have the general Balance sheet, and those documents were put in this morning, those two documents I will reserve my decision on because you have some argument in connection with whether or not the hotel property does come within this.

Mr. Fillmore—Yes.

The Court—I will hold those out. I think Exhibit 45 is not relevant, Sir Sandford Fleming's report, because it was put in as rebuttal to documents admitted, and the ones put in by Mr. Fillmore going out, the ones put in by Mr. Guy will also go out. The collection of
10 newspaper clippings which was sought to be put in as Exhibit 46, and which precipitated the land slide I think would not be relevant or admissible. So now we get down to the argument of the main issue, and, Mr. Guy, I will hear you.

Mr. Guy—The evidence relating to these documents which were admitted will be struck out?

The Court—Yes, they will all be struck out.

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No. 13

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20 Stating the matter as concisely as possible, the plaintiff brings this action to restrain the defendant from taxing its realty in the city and from imposing a business tax upon it, on the ground that it has always been, and is forever, exempt from such taxation.

This action raises matters of very great importance to each party. The amount of taxes involved for the year in question is very large and might be larger in future years if assessments, or rates, or both, were increased. If the plaintiff is right, its exemption is perpetual.

30 As was to be expected, the number of different points involved is much greater than usual. The case took five days to argue and all counsel dealt fully and carefully with the arguments on the branches of the case to which they addressed themselves. I am greatly indebted to them all for the assistance I have received from their excellent arguments.

I consider that I should deal with all the arguments put forward by the various counsel on behalf of their clients; indeed, they have specifically asked me to do so. This judgment will, therefore, be a long one, and for purposes of convenience and easier cross-reference I have divided it into sections and numbered paragraphs. The sections deal with the following matters:

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- Section I. Statement of the principal facts and issues: paras. 1 to 29.
- Section II. Did the parties enter into an agreement in September 1881?: paras. 30 to 37.
- Section III. Were the agreement embodied in By-Laws 148 and 195, and the bond and covenant, *ultra vires* the plaintiff?: paras. 38 to 110.
- 10 Section IV. Were the agreement embodied in By-Laws 148 and 195 and the said by-laws *ultra vires* the defendant and what was the effect of the Validating Act (1883) 46 & 47 Vict., c. 64?: paras. 111 to 132.
- Section V. What issues in the present case are *res judicata*?: paras. 133 to 190.
- Section VI. Other defences raised: paras. 191 to 227.
- Section VII. The business tax: paras. 228 to 315.
- Section VIII. Estoppel, other than by *res judicata*, and other matters: paras. 316 to 346.
- Section IX. Conclusions: paras. 347 to 350.

I have cross-referenced these paragraphs rather extensively. For 20 my own convenience in writing these reasons I prepared a Table of Cases, in which I have listed many, though not all, of the cases I have had to consider. This Table shows the paragraphs in which the various cases are noted, discussed or referred to. It may be of assistance to counsel and I am therefore attaching it to these reasons.

SECTION I

STATEMENT OF THE PRINCIPAL FACTS AND ISSUES

1. By notices dated 29th March 1948, the defendant notified the plaintiff that it had assessed the plaintiff for realty taxation for the year 1948 on certain lands and buildings and on certain other lands 30 owned by the plaintiff and situate within the defendant's territorial limits.

2. By other notices dated 11th June 1948 the defendant notified the plaintiff that it had assessed the plaintiff for business tax in respect of certain premises situate within the territorial limits of the defendant, owned, occupied, and used by the plaintiff, and the business there carried on.

3. On 3rd April 1948 the plaintiff issued its statement of claim in this action, in which it alleged that the properties then in question were exempt from taxation and prayed a declaration to that effect

and an injunction. After the notices of assessment to business tax were served, the plaintiff amended its statement of claim to set up that it was exempt from business tax and asked for a declaration to that effect and an injunction.

4. The plaintiff bases its claim to these exemptions on an agreement which it alleges it made with the defendant in 1881, the terms of which it alleges are set out in By-law 148 of the defendant passed 5th September 1881, amended by By-law 195 passed 30th October 1882, and validated in 1883 by 46-47 Vict., c. 64, s. 6.

10 5. The terms of By-law 148 fully appear from By-law 195, and that by-law reads:

“Whereas the Canadian Pacific Railway Company have asked to have the time fixed in By-Law No. 148 for the completion of certain works therein specified extended, and it is expedient to grant such request,

“Therefore the Mayor and Council of the City of Winnipeg in Council assembled enacts as follows:

20 “That the said By-Law No. 148 is hereby amended by striking out the words ‘November one thousand eight hundred and eighty-two’ in subsection one of section four of said by-law, and substituting in lieu thereof the words ‘February, one thousand eight hundred and eighty-three’ and by striking out the words ‘eighty-two’ in subsection two of said section four, and substituting therefor the words ‘eighty-three,’ and also by adding to said By-Law No. 148, the following section, which shall be numbered as Section 10, of said by-law, viz:

30 “ ‘10. That notwithstanding anything in this by-law contained, the coupons on each of the Debentures issued under this by-law, representing the first two half-yearly payments of interest be detached from said debentures and be delivered up to the Mayor and Council of the City of Winnipeg, and be cancelled.’

“And the said by-law when so amended, shall read as follows:

“BY-LAW NO. 148.

“ ‘A by-law to aid and assist the Canadian Pacific Railway Company in consideration of certain undertakings on the part of the said Company.

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 advancing and developing the

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traffic and trade between the City of Winnipeg and the southern and south-western portions of the Province.

10 “ ‘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 the 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’

20 “ ‘And whereas it is expedient for the City of Winnipeg to lend their aid to the said Company in consideration of the premises upon the terms hereinafter mentioned by granting them by way of bonus debentures of the City of Winnipeg to the amount of two hundred thousand dollars, payable in twenty years from the day this by-law takes effect with interest at 6 per centum per annum, payable half-yearly, and by exempting the property now owned or hereafter to be owned by the said Railway Company for railway purposes within the City of Winnipeg from taxation forever, and by conveying to the said Company lands sufficient and suitable for a passenger station within the said City of Winnipeg.

“ ‘And whereas the amount of the whole rateable property of the City of Winnipeg according to the last revised assessment roll is four million, eight thousand, two hundred and ninety dollars.

30 “ ‘And whereas the total amount required to be raised annually for the paying of the said debentures and interest is seventeen thousand dollars.

“ ‘And whereas it will require an annual special rate of four mills and four tenths of a mill in the dollar over and above all other rates and assessments for paying the interest and providing an equal yearly sinking fund for redeeming and paying off the principal of the debt thereby to be created.

“ ‘Now, therefore, the Mayor and Council of the City of Winnipeg enacts as follows:

40 “ ‘1. For the purposes aforesaid it shall be lawful for the Mayor and Council of the City of Winnipeg to issue debentures of the Mayor and Council of the City of Winnipeg for the sum of two hundred thousand dollars of lawful money of Canada in denominations of not less than one hundred dollars each payable to the Canadian Pacific Railway Company or bearer on the

twentieth day of September, one thousand nine hundred and one, bearing interest in the meantime at six per centum per annum, payable half-yearly on the twentieth day of March and September in each and every year, with coupons attached to each debenture to represent the respective half-yearly payments of interest.

10 “2. For paying the interest as aforesaid and creating an equal yearly sinking fund for redeeming and paying off the principal of the said debentures so to be issued as aforesaid at the maturity thereof, a special rate of four mills and four tenths of a mill in the dollar on the whole rateable property in the said City of Winnipeg shall be rated and levied in each year during the currency of the said debentures in addition to all other rates and assessments whatsoever.

20 “3. The said debentures shall be issued forthwith upon the ratification of this by-law in accordance with the provisions of the statutes of this Province in that behalf, and after issued shall be by the Mayor and Council, of the City of Winnipeg, within one month thereafter delivered to the Manager, for the time being, of the Winnipeg branch of the Merchants Bank of Canada, upon the following trusts, that is to say: upon trust that the said “The Manager, for the time being, of the Winnipeg branch of the Merchants Bank of Canada, shall hold the said debentures and every of them until the said Canadian Pacific Railway Company shall have performed the conditions and each and every of them hereinafter specified and stipulated to be performed by them, and to collect and to hold the half-yearly interest maturing on the said debentures (retaining thereout as
30 commission one half of one per cent upon the amount so collected) and to deposit the balance so collected in some chartered bank doing business in the City of Winnipeg to his credit as such Trustee, at interest, if possible, and upon the completion of the conditions by the Canadian Pacific Railway Company hereinafter mentioned upon the further trust to pay over the monies so deposited and any accumulation of interest thereon, and also deliver over the said debentures with coupons attached (except such as may have been paid) to the Canadian Pacific Railway Company.

“4. The conditions hereinbefore referred to are as follows:

40 “(1) The said Canadian Pacific Railway Company shall on or before the first day of February one thousand eight hundred and eighty-three, commencing within the City of Winnipeg, construct and complete and fully equip one hundred miles of the railway running southwesterly towards the westerly limits of the Province upon a course starting within the said City of Win-

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nipeg, crossing the Assiniboine River, running within the limits of townships nine, eight, seven, six and five, in range one east of the principal meridian; townships five and four in range one west of the principal meridian; township four, in range two west of the principal meridian; townships four and three in range three west of the principal meridian, and township three in range four, five, six, seven and eight west of the principal meridian (all according to the Dominion Government survey of the Province of Manitoba) or within a distance of six miles upon either side of a line which may be drawn through the said townships to the extent of the said one hundred miles in the direction above described south.

20

“(2) The Canadian Pacific Railway Company shall on or before the first day of November one thousand eight hundred and eighty-three, build, construct, and complete, within the City of Winnipeg, on lots four and five in block one: eleven and twelve on the east side of Austin Street, and forty-four and forty-five on the west side of Maple Street, east of the Main Street, on the Point Douglas Common property, as laid down on the map or plan of said City, registered in the registry office in and for the County of Selkirk (which are to be conveyed to the said Company on or immediately after the ratification of this by-law as aforesaid, by the Mayor and Council of the City of Winnipeg for that purpose) a substantial and commodious general passenger railway depot, with all the modern improvements for the accommodation and convenience of the public at large, and the business of the said Company.

30

“(3) 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.

40

“(4) And by such bond and covenant the said Company shall bind themselves as soon as they conveniently can to procure and erect within the City of Winnipeg large and commodious stock or cattle yards, suitable and appropriate for the central business of their main line of railway and the several branches thereof.

“(5) If the said Company shall make default in any of the conditions herein mentioned to be by them performed, the said trustee shall thereupon and in any such case deliver all the said bonds with the coupons attached, not paid, and all the moneys in his hands by virtue of the trust hereby created, to the Mayor and Council of the City of Winnipeg.

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10 “(6) The Mayor and Council of the City of Winnipeg are hereby authorized and empowered upon the said Company making, executing and delivering to the Mayor and Council of the City of Winnipeg the bond and covenant in the third subsection of the fourth section of these presents mentioned to make, seal and deliver to the said Company a deed of the lands upon which the passenger station in the second subsection of the fourth section of these presents mentioned is to be erected.

20 “(7) Should any difference or dispute arise between the Mayor and Council of the City of Winnipeg and the Canadian Pacific Railway Company in respect of any matter or thing concerning the terms of this by-law or the terms or conditions thereof, the same shall from time to time be submitted to the arbitration of three persons, one to be chosen by the Mayor and Council of the City of Winnipeg, one to be chosen by the said Canadian Pacific Railway Company, and one to be appointed on application of either party, and on reasonable notice to the other party by the Chief Justice of Manitoba and the award of a majority of such arbitrators of and concerning the premises submitted to them shall be final and binding upon both parties, and the same may be made a rule of court.

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

“(9) That this by-law shall take effect from and after the twenty-first day of September, in the present year of our Lord one thousand eight hundred and eighty-one.

40 “(10) That notwithstanding anything in this by-law contained the coupons on each of the debentures issued under this by-law representing the first two half-yearly payments of interest be detached from said debentures and delivered up to the Mayor and Council of the City of Winnipeg and be cancelled. Done and passed in Council at the City of Winnipeg this fifth day of

September, in the year of our Lord one thousand eight hundred and eighty-one.'

"Done and passed in Council at the City of Winnipeg this Thirtieth day of October, in the year of our Lord one thousand eight hundred and eighty-two."

6. The plaintiff duly constructed the line of railway described in para. 4(1) of the by-laws, erected its depot and workshops, and executed and delivered to the defendant its bond and covenant dated 10th October 1881.

10 7. By deed dated 18th April 1882, the defendant conveyed to the plaintiff the lands referred to in the by-laws as the site of the plaintiff's depot.

8. In 1882, by S.M. (1882) 45 Vict., c. 36, assented to 30th May 1882, the territorial limits of the defendant were enlarged by taking in the area indicated on the Map, Exhibit 7.

9. The debentures referred to in paras. 1 and 2 of the By-laws were duly issued and delivered to the trustee, and by him—under authority of defendant's By-law 219 to the plaintiff. This By-law, passed 30th March 1883, reads:

20 "A by-law to authorize the delivery over of Debentures referred to in By-law No. 195.

"Whereas pursuant to said By-law No. 195 the debentures mentioned therein were delivered to the Manager of the Winnipeg Branch of the Merchants Bank of Canada as trustee;

30 "And whereas The Canadian Pacific Railway Company mentioned in said By-law No. 195 have completed and performed all the conditions mentioned in the said by-law and in all other respects complied with the same and it is desirable that the said Trustee should be instructed to deliver the bonds mentioned therein with the coupons still unmatured to the said Canadian Pacific Railway Company or their proper officers in that behalf.

"Now therefore the Mayor and Council of the City of Winnipeg enacts as follows:

40 "That the said Trustee, being the manager for the time being of the Winnipeg Branch of the Merchants Bank of Canada be and he is hereby authorized and instructed by and on behalf of the Mayor and Council of the City of Winnipeg to deliver over to the said The Canadian Pacific Railway Company the said bonds and coupons aforesaid in the said By-law No. 195 mentioned."

10. By-laws 148 and 195 were validated by statute of the Legislature (1883) 46 & 47 Vict., c. 64, assented to 7th July 1883.

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11. This Act was passed on the petition of the defendant. It recites that the Mayor and Council of the City of Winnipeg have, by their petition, prayed that the Act of Incorporation of the said City be further amended and that it is expedient to grant the prayer. It also recites that the Mayor and Council of the City of Winnipeg have passed certain by-laws and that it is deemed expedient to set at rest all doubts that may exist as to the validity of any or all the in part
10 recited by-laws and the debentures issued thereunder, and to legalize and confirm the same and each of them respectively.

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12. By-laws 148 and 195 are referred to in the said recital as:

“By-law No. 148 to authorize the issue of debentures granting by way of bonus to the Canadian Pacific Railway Company the sum of two hundred thousand dollars in consideration of several undertakings on the part of such company; and By-law No. 195 amending By-law No. 148 and extending the line (sic) for the completion of the undertakings expressed in By-law No. 148 by the Canadian Pacific Railway Company.”

20 13. Amongst other things, the Act in question divided the City into six wards and made provisions necessitated by the change; authorized the City to issue debentures for extending King Street; and dealt with certain taxes which were to belong to outside municipalities. The final section of the Act is section 6, which provides, *inter alia*:

30 “. . . By-law No. 148 to authorize the issue of debentures granting by way of bonus to the Canadian Pacific Railway Company the sum of two hundred thousand dollars in consideration of certain undertakings on the part of the said company; and By-law 195 amending By-law No. 148 and extending the time for the completion of the undertakings expressed in By-law No. 148, by the Canadian Pacific Railway Company and all debentures and coupons for interest issued under each and every of the said by-laws, be and the same are hereby declared legal, binding and valid upon the said the mayor and council of the City of Winnipeg, and the said the mayor and council shall pay the said debentures and coupons and each and every thereof according to the tenor thereof, when they and each of them shall respectively become due and payable.”

40 14. From the time of its incorporation in 1873 by 37 Vict., c. 7, until 1886, the defendant operated under its own charter. In that year its charter was repealed by 49 Vict., c. 52, assented to 28th March 1886, proclaimed 15th November 1886. The defendant then came under

the general Municipal Acts of the Province and it was not until 1902 that the defendant obtained another charter: see paras. 277, 279, and 292, *infra*.

15. The Act of 1886 provided by sec. 741:

10 "From and after the passing of this Act all existing by-laws heretofore passed by the mayor and council of the City of Winnipeg prior to the 29th of June, 1884, when the charter of that year became law, shall in all courts of law or in any other place or at any other time, all rates struck for the collection of taxes together with percentages in regard to the same be held to apply to the said city, including the limits thereof extended by the said charter of 1884, and all existing by-laws passed by the mayor and council of the said city prior to the said 29th day of June, 1884, or by the council of the said city since that time in regard to assessments shall be and shall be held to be valid and binding, and the same are hereby ratified and confirmed, and all assessments heretofore made by way of frontage tax or other assessment in the said city, and all by-laws passed in pursuance thereof shall be valid and binding upon all lands and persons affected thereby, and applicable to the whole city, including the extended boundaries now named in the said charter of 1884. This section in no way to interfere with litigation, if any, now pending."

20

16. In each of the years 1890 to 1894, both inclusive, the defendant purported to assess certain lands of the plaintiff to school taxes, and, the plaintiff not paying, on 16th September 1896 commenced action in this Court to recover the amount of such taxes. In that action the defendant did not succeed and the case was determined against it by a judgment of the Supreme Court of Canada dated 8th October 30 1900. That litigation will be considered later: see Section V *infra*.

17. Except on the last mentioned occasion, the defendant made no attempt to tax the plaintiff until 1948, and that attempt has given rise to the present action.

18. On 4th August 1906 the plaintiff and defendant entered into an agreement under seal by which the plaintiff agreed to pay the defendant (1) \$8500.00 annually in lieu of all taxation of the plaintiff's hotel property, its contents and business, "if the same were any way liable to taxation"; (2) a sum which would be equivalent to the business tax in respect of the commercial telegraph business carried on 40 by the plaintiff in premises apart from its railway and railway station property "if the company were liable to be assessed for such business tax"; (3) all taxes on lands not actually used by the plaintiff for railway purposes but held for sale or leased. Clause 5 of the agreement reads:

“And the City covenants and agrees with the Company that the City will not ask or seek for any further contributions or concessions from, by or on the part of the Company in respect of any of the matters hereinbefore mentioned, and it is distinctly understood that what the Company has herein agreed to do and give are concessions made and given by the Company without legal necessity on the part of the Company.”

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This agreement was recommended by the Finance Committee of the defendant in a report dated 3rd August 1906, adopted by Council 10 6th August 1906.

19. By agreement under seal dated 29th May 1914, the plaintiff and defendant agreed to submit all claims or demands outstanding, or unsettled matters which either might have against the other, to a committee for consideration and disposal. This agreement was ratified and confirmed by By-law 8721 of the defendant passed 15th June 1914.

20. It is admitted (see para. 29, clause 11, *infra*) that one of the findings made by the Committee appointed pursuant to the agreement of 29th May 1914 was:

20 “18. Taxes on Royal Alexandra Hotel.

The City contended that in as much as the railway company had increased the size of the hotel, the present arrangement as to payment of taxes should be revised and that the company should pay on a larger assessment. The company agrees to pay on the hotel as enlarged annually the sum of \$10,500.00. The terms of the agreement already in existence respecting the taxes on the hotel is amended only as to the amount. This understanding is to apply to taxes for 1915 and thereafter.”

21. The plaintiff and defendant entered into an agreement under seal dated 28th April 1942, authorized and adopted by defendant's 30 By-law 15455, by which the plaintiff agreed, *inter alia*, to pay in each of the years 1943 to 1952, both inclusive, \$10,000.00 in addition to the sum of \$10,500.00 referred to in the preceding paragraph. The agreement concluded with the following clauses:

40 “AND THE CITY HEREBY FURTHER COVENANTS AND AGREES that during the period from the date hereof until the expiry of ten years from the 1st day of January, A.D. 1943, it will not ask the Company for any further payment in respect of taxes or in lieu thereof on or in connection with the said Royal Alexandra Hotel or the business carried on therein and will not seek or apply for any legislation which would in any way enable the City to impose any taxation upon the Company or upon the said hotel property.

"IT IS DISTINCTLY UNDERSTOOD AND AGREED that what the Company has herein agreed to do and to give are concessions made and given by the Company without legal necessity on the part of the Company and that the same are made and given without prejudice to the rights of either party under any pre-existing Agreement or Agreements whatsoever made between the City and the Company."

22. On 23rd February 1948 the defendant, by its By-law 16306, purported to repeal By-laws 148 and 195.

10 23. At the 1948 Session of the Manitoba Legislature, the defendant obtained certain amendments to its charter which are set out and discussed later: see para. 308 *infra*.

24. Such other facts as may be relevant will be referred to in the discussion of the various issues.

25. In its statement of claim the plaintiff alleges that it is a corporation incorporated and constituted by Letters Patent issued by the Governor-General of Canada under the Great Seal of Canada dated 16th February 1881. It pleads the agreement made with the defendant and By-laws 148 and 195, and that it has fulfilled each and every 20 term, stipulation, condition and covenant made by it under the said agreement and By-law and is not now and never has been in default in respect of any such term, stipulation, condition or covenant.

26. The defendant denies that the plaintiff is a corporation incorporated and constituted by letters patent issued by the Governor-General of Canada under the Great Seal of Canada, and by para. 2 of its statement of defence says:

30 "Defendant says as the fact is that the plaintiff was incorporated and constituted by the Statutes of Canada (1881) being 44 Victoria, chapter 1, the contract appended thereto and the schedule thereto and the plaintiff is subject to the provisions of the said Act, contract and schedule and to the Consolidated Railway Act, Statutes of Canada, 1879, chapter 9, and amendments thereto and to the Railway Act, Revised Statutes of Canada, 1927, chapter 170, and to the Transport Act, being Statutes of Canada, 1938, chapter 53. The said statute, 44 Victoria, chapter 1, and the contract appended thereto and the schedule thereto and the said Consolidated Railway Act are hereinafter referred to as the 'charter' of the plaintiff."

40 27. The defendant denies that any agreement for exemption from taxation was ever made between the plaintiff and defendant and then pleads a large number of defences, of which the following should be noted at this stage:

1. If there was an agreement as alleged:

- (a) it was not binding on the plaintiff and so was void for want of mutuality;
- (b) it is too vague, indefinite and uncertain in its terms to amount to a binding agreement and is not enforceable by either party;
- (c) it was subject to an implied term that it might be terminated by either party at any time;
- 10 (d) that the covenants set out in clause 8 of By-law 148 were subject to termination at any time by the defendant by repeal of the by-law, in that the respective provisions of clauses 3 and 8 are so grossly and palpably unequal and so unjust in their operation that neither the plaintiff or defendant could have contemplated that clause 8 could remain in effect for ever;
- 20 (e) that the terms of the whole agreement are so grossly imprudent and unfair and so palpably unequal and so unjust in their operation that their effect could not have been fully apprehended by the defendant, and the agreement is not one that the Court will enforce by way of injunction or otherwise;
- (f) the plaintiff did not deliver to the defendant the bond and covenant referred to in clauses 4(3) and 4(4) of the by-laws; but if it did deliver what purported to be such a bond and covenant
- (i) the plaintiff had no right, power or authority under its charter or otherwise to do so;
- 30 (ii) the plaintiff had no right, power or authority to make, execute or deliver such a bond and covenant, because it is not empowered, authorized or permitted under its charter or otherwise to covenant or agree to build within the limits of the defendant, or at any place or point, its principal workshops for the main line of its railway within the Province of Manitoba and the branches thereof radiating from Winnipeg within the limits of the Province, and to continue same for ever within the City;
- 40 (iii) as the railway operated by the plaintiff has been declared by statute to be a work for the general benefit of Canada, and as the plaintiff's charter and contract is subject to the terms of the Railway Act, and as the plaintiff by its contract agreed for ever efficiently to maintain, work and run the Canadian Pacific Railway

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it is contrary to the provisions of the plaintiff's charter and contract for the plaintiff to covenant and agree for ever to continue its principal workshops or any works essential to the operation or efficient operation of the railway within the city or within the limits of any designated municipality, and any such covenant on the part of the plaintiff is invalid, illegal, null and void;

- 10 (iv) the bond and covenant is invalid, illegal, null and void in that the effect thereof was to limit and restrict the plaintiff in the exercise of the powers conferred upon it by its charter;
- (v) the bond and covenant is vague, indefinite and uncertain in its terms and does not amount to a binding agreement and is not binding on the plaintiff.

(g) The plaintiff has otherwise broken the agreement in the manner discussed later.

2. The defendant, to the knowledge of the plaintiff, had no right, power or authority under its charter or otherwise to pass by-laws 148 or 195, and that the purport and effect of 46 and 47 Vict. ch. 64, sec. 6, 20 was to validate and confirm the by-laws as by-laws of the City of Winnipeg and the statute had no other effect, and that by-law 148, as amended by by-law 195, was repealed by the defendant by by-law 16306 passed 23rd February 1948.

3. Other defences to be dealt with later.

28. By its reply the plaintiff pleads, *inter alia*, *res judicata* and estoppel.

29. The parties have agreed upon certain admissions of facts for the purposes of this action only, as follows:

30 "1. That Letters Patent under the Great Seal of Canada were issued by His Excellency the Governor General of Canada to Canadian Pacific Railway Company on February 16, 1881, and that a photostatic copy thereof will be admitted in evidence in lieu of the original Letters Patent.

"2. That on August 24, 1881, By-law No. 148 of the City of Winnipeg was submitted to and approved by the ratepayers of the City of Winnipeg as then constituted.

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

40 "4. That the plaintiff

(a) constructed, completed and fully equipped before February 1,

1883, one hundred miles of railway running south-westerly from the City of Winnipeg to the westerly limits of the Province of Manitoba, on the prescribed route as set forth in paragraph 4 (1) of By-law No. 148, as amended and re-enacted by By-law No. 195 but the defendant does not admit the power of the city to pass said by-laws.

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10 (b) built, constructed and completed before November 1, 1883, a substantial and commodious general passenger railway depot with all the modern improvements, in the City of Winnipeg, on the Lots described in paragraph 4(2) of By-law No. 148, as amended and re-enacted by By-law No. 195, and has maintained a substantial and commodious general passenger railway depot in the City of Winnipeg to this date.

(c) executed and delivered to the Mayor and Council of the City of Winnipeg a bond and covenant under its corporate seal which is produced by the city in its affidavit of documents No. 17, but the defendant does not admit the power of the plaintiff to give the said bond and covenant.

20 "5. The plaintiff established and built, as shown on a plan to be filed as an exhibit, in the City of Winnipeg its principal workshops for its main line in Manitoba and the branches thereof radiating from the City of Winnipeg and has continued to this date the said workshops in the locations in the City of Winnipeg shown on the said plan. In the year 1882 the plaintiff established and built its principal workshops for its main line within the Province of Manitoba and the branches thereof radiating from Winnipeg at the location shown and numbered 1 on the said plan, and in the year 1887 the plaintiff enlarged the said workshops to the location shown and numbered 2 on the said plan. 30 The said workshops were moved to the location shown and numbered 4 on the said plan in the year 1903 and have been continued in this location to the present date. An engine house has been maintained by the plaintiff at the location numbered 3 on the said plan from 1903 to the present date.

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

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

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"8. That the lands upon which the said passenger station was to be built were conveyed by the defendant to the plaintiff by a deed dated April 18, 1882, which deed was registered in the Winnipeg Registry Office on July 24, 1882, as No. 31520.

10 "9. That the Memorandum of Agreement dated August 4, 1906, referred to in paragraph 9 of the amended statement of claim, was executed by the plaintiff and the defendant on the said date and a resolution purporting to approve said agreement was passed by the council of the defendant on the 6th day of August 1906, but the defendant does not admit the power of the council of the defendant to execute said agreement or to pass said resolution or to recognize or acknowledge that the plaintiff was or is not under any legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for Railway purposes or in connection therewith.

20 "10. That the Memorandum of Agreement dated May 29, 1914, referred to in paragraph 9 of the amended statement of claim, was executed by the plaintiff and the defendant on the said date and a by-law numbered 8721 and dated 15th June 1914 purporting to ratify and confirm said agreement was passed by defendant but the defendant does not admit the power of the council of the defendant to execute said agreement or to pass said by-law or to recognize or acknowledge that the plaintiff was or is not under any legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith.

"11. That one of the findings made pursuant to the said agreement dated May 29, 1914, by the committee thereby established was as follows:

30 '18. Taxes on Royal Alexandra Hotel

The City contended that in as much as the railway company had increased the size of the hotel, the present arrangement as to payment of taxes should be revised and that the company should pay on a larger assessment. The company agrees to pay on the hotel as enlarged annually the sum of \$10,500.00. The terms of the agreement already in existence respecting the taxes on the hotel is amended only as to the amount. This understanding is to apply to taxes for 1915 and thereafter.'

40 but defendant does not admit that this finding is relevant to any issue.

"12. That the Memorandum of Agreement dated April 28, 1942, referred to in paragraph 9 of the amended statement of claim was executed by the plaintiff and the defendant on the said

date and a by-law numbered 15455 and dated 27th April 1942 purporting to authorize and adopt said agreement was passed by defendant but defendant does not admit the power of the council of the defendant to execute said agreement or to pass the said by-law or to recognize or acknowledge that the plaintiff was or is not under any legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith.

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10 "13. That from the year 1881 until the year 1948, the defendant has not demanded and the plaintiff has not paid real estate and business taxes on the plaintiff's properties in the City of Winnipeg used for railway purposes or in connection therewith, with the exception that in the year 1894 an action was brought by the City of Winnipeg against the Canadian Pacific Railway Company to recover taxes imposed by the authorities of the City of Winnipeg for school purposes for and upon the estimates of the Board of Public School Trustees of the School District of Winnipeg for the years 1890 to 1894, both inclusive, upon certain property of the Canadian Pacific Railway Company, and in the 20 years pending the final determination of said action, taxes for school purposes were likewise imposed and claimed, but the plaintiff did not pay the said taxes."

SECTION II

DID THE PARTIES ENTER INTO AN AGREEMENT IN SEPTEMBER, 1881?

30. By paragraph 4 of its statement of claim the plaintiff alleges:

30 "On or about the 5th day of September, 1881, the plaintiff and the Defendant entered into an Agreement, the terms of which are set forth in 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. By Chapter 64 of the Statutes of Manitoba, 46-47 Victoria, Section 6, the said By-law No. 148 and the said amending By-law No. 195 were declared to be legal, binding and valid upon the Defendant."

31. In answer to this, the defendant, in paragraphs 5 and 6 of its defence, says:

40 "5. In answer to paragraph 4 of the plaintiff's Statement of Claim defendant denies that on or about the 5th day of September, 1881, or at any time the plaintiff and defendant entered into an agreement as alleged or any agreement and defendant denies that the terms of an agreement between the plaintiff and defendant are set forth in City of Winnipeg By-law No. 148 as

amended by City of Winnipeg By-law No. 195 and denies that there was or is any agreement between the plaintiff and defendant as alleged.

"6. In further answer to paragraph 4 of the plaintiff's Statement of Claim the defendant says that the purport and effect of chapter 64 Statutes of Manitoba (1883) 46 and 47 Victoria, section 6, was to validate and confirm said by-law as a by-law of the City of Winnipeg and it had no other effect."

32. In my opinion, and apart from the question of *res judicata* dealt with in Section V *infra*, there can be no doubt but that the plaintiff and defendant had made an agreement before By-law 148 was passed. I think it equally clear that the terms of the agreement are embodied in By-law 148. The parties later agreed on certain changes, and the agreement, with these changes, is embodied in the amending By-law 195.

33. It is important to consider what the agreement provided. Forthwith upon the ratification of the by-laws the defendant was to issue its debentures and deliver them to a trustee, who, on the performance by the plaintiff of certain conditions, was to deliver them to the plaintiff. On or immediately after the ratification of the by-law "in accordance with the provisions of the statutes of this Province in that behalf," and upon receiving the plaintiff's bond and covenant given under the terms of clauses 4(3) and 4(4), the defendant was to convey to the plaintiff the land upon which the passenger depot was to be built. The conditions which the plaintiff was to fulfill were

- (1) to construct a described line of railway within a specified time (clause 4(1));
- (2) to build a passenger depot within a specified time (clause 4(2));
- 30 (3) to deliver to the defendant immediately after the ratification of the by-law the bond and covenant referred to in clauses 4(3) and 4(4).

34. The plaintiff

- (1) built the line of railway;
- (2) built the passenger depot;
- (3) gave its bond and covenant;
- (4) built the workshops which it had agreed by its bond and covenant to build;
- 40 (5) built the stock yards which it had agreed by its bond and covenant to build.

35. All this was done within the times specified and evidently done to the satisfaction of the defendant, which then:

- (1) authorized the trustee to deliver (and he did deliver) the debentures;
- (2) conveyed the land for the depot;
- (3) did not attempt (except unsuccessfully, for the years 1890-1894, in 1894) to tax the plaintiff until 1948.

36. I am also of opinion that this question is *res judicata*: see Section V para. 158 *infra*.

10 37. While satisfied the parties entered into an agreement, the question of their powers to do so must next be considered.

SECTION III

WERE THE AGREEMENT EMBODIED IN BY-LAWS 148 AND 195, AND THE BOND AND COVENANT, *ULTRA VIRES* THE PLAINTIFF?

38. The defendant contends that the plaintiff is a statutory corporation and that its Act of Incorporation does not empower it to enter into the agreement or to give the bond and covenant. The plaintiff says that it is incorporated by Letters Patent under the 20 Great Seal of Canada; that it is a common law corporation, and that no question of *ultra vires* can arise so far as it is concerned. This involves a consideration of certain Dominion Statutes and of the Letters Patent of 16th February 1881, which, it is admitted, were granted to the plaintiff: see para 29, clause 1, *supra*.

39. In 1874 Parliament passed an Act, 37 Vict., c. 14, to provide for the construction of the Canadian Pacific Railway, in which the railway proposed to be built was described in general terms.

40 30 40. On 21st October 1880 certain individuals entered into a contract and agreement—hereinafter called the contract—with Her Majesty the Queen represented by the Honourable Sir Charles Tupper, K.C., M.G., Minister of Railways, for the construction of the Canadian Pacific Railway. This contract is set out in full in the Letters Patent of 16th February 1881 which were granted to the individuals named in the contract, and in the Dominion Statute of 1881 referred to in paras. 42 and 43, *infra*.

41. The contract is a lengthy one, and in it the individuals are described as “the Company.” The following provisions of the contract are relevant and were fully discussed in argument.

40 “7. The Railway constructed under the terms hereof shall be the property of the Company: and pending the completion of the

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10 Eastern and Central sections, the Government shall transfer to the Company the possession and right to work and run the several portions of the Canadian Pacific Railway already constructed or as the same shall be completed. And upon the completion of the Eastern and Central sections, the Government shall convey to the Company, with a suitable number of station buildings and with water service (but without equipment), those portions of the Canadian Pacific Railway constructed or to be constructed by the Government which shall then be completed; and upon completion of the remainder of the portion of railway to be constructed by the Government, that portion shall also be conveyed to the Company, and the Canadian Pacific Railway shall become and be thereafter the absolute property of the Company. And the Company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway.

20 "8. Upon the reception from the Government of the possession of each of the respective portions of the Canadian Pacific Railway, the Company shall equip the same in conformity with the standard herein established for the equipment of the sections hereby contracted for, and shall thereafter maintain and efficiently operate the same."

"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."

30 "16. 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; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown."

40 "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 incorpora-

tion being granted to the Company in the form hereto appended as Schedule A.

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"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. . . ."

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42. On 15th February 1881, Parliament passed an Act respecting
10 The Canadian Pacific Railway—44 Vict., ch. 1—the preamble of which reads:

"Whereas by the terms and conditions of the admission of British Columbia into Union with the Dominion of Canada, the Government of the Dominion has assumed the obligation of causing a Railway to be constructed, connecting the seaboard of British Columbia with the Railway system of Canada;

20 "And whereas the Parliament of Canada has repeatedly declared a preference for the construction and operation of such Railway by means of an incorporated Company aided by grants of money and land, rather than by the Government, and certain Statutes have been passed to enable that course to be followed, but the enactments therein contained have not been effectual for that purpose;

30 "And whereas certain sections of the said Railway have been constructed by the Government, and others are in course of construction, but the greater portion of the main line thereof has not yet been commenced or placed under contract, and it is necessary for the development of the North-West Territory and for the preservation of the good faith of the Government in the performance of its obligations, that immediate steps should be taken to complete and operate the whole of the said Railway;

40 "And whereas, in conformity with the expressed desire of Parliament, a contract has been entered into for the construction of the said portion of the main line of the said Railway, and for the permanent working of the whole line thereof, which contract with the schedule annexed has been laid before Parliament for its approval and a copy thereof is appended hereto, and it is expedient to approve and ratify the said contract, and to make provision for the carrying out of the same:

"Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—"

43. Then follow sections 1 and 2:

"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.

10 "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 44. The contract forms a schedule to the Act, and the form of the proposed Act of Incorporation is Schedule A to the contract.

45. The Letters Patent set the contract out in full, then recite the statute 44 Vict., ch. 1, setting out the preamble in full, then state that the said persons have prayed for a charter for the purpose aforesaid, and go on to provide, *inter alia*:

30 "1. NOW KNOW YE, that, by and with the advice of our Privy Council for Canada, and under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in Us vested in this behalf, WE DO, by these our Letters Patent, grant, order, declare and provide that the said George Stephen, Duncan McIntyre, John S. Kennedy, Richard B. Angus, James J. Hill, the firm of Morton, Rose and Company, and the firm of Kohn, Reinach and Company; 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 Company.' "

40 "4. 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."

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"17. '*The Consolidated Railway Act, 1879*,' in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith."

10 46. It will be observed—and in my view this is important—that Parliament did not enact Schedule A. to the contract as an Act of Parliament, as might appear to have been originally intended. It chose to empower the Governor to grant "a charter conferring . . . the franchises, privileges and powers embodied in the Schedule to the said contract." It is, I think, a fair inference that Parliament intended that the plaintiff should have the fullest possible powers and provided for a charter that would give such powers. The Crown was also granting franchises. The plaintiff had not only contracted to construct the railway, but "thereafter and forever efficiently (to)

20 maintain, work and run" it.

47. I do not understand the defendant to argue that the statute did not empower the Governor to grant a charter. It does argue, however, that the statute did not empower the Governor to grant a charter under the Great Seal of Canada, and that the Great Seal which is affixed to the charter must be disregarded. This submission is really only a step towards the next argument, namely, that the charter granted, read without the Great Seal, is an Act of Parliament and the plaintiff is a statutory corporation only, with all that that implies.

48. I shall take these two arguments in order. I asked counsel for

30 the defendant how the Governor could, in 1881, grant a charter other than by Letters Patent under the Great Seal, but he was unable to indicate an alternative method. I am unable to see how, in 1881, the Governor could grant a charter except by Letters Patent under the Great Seal. As Mr. Wegenast points out, in his "Canadian Companies" (p. 11):

" . . . strictly speaking a charter is in the form of letters patent."

49. The statute of the Province of Canada (1864) 27-28 Vict., c. 33, "An Act to authorize the granting of Charters of Incorporation to Manufacturing, Mining and other companies," provided by sec. 1

40 that the Governor in Council might, by Letters Patent under the Great Seal of the Province, grant a Charter of Incorporation for any of the purposes mentioned in the Act.

50. The first Dominion Act respecting the incorporation of Joint-Stock Companies (1869) 32-33 Vict., c. 13, for any purposes or objects to which the legislative authority of the Parliament of Canada extended, except, *inter alia*, the construction and working of railways, provided (sec. 3) that the Governor in Council might, by Letters Patent under the Great Seal, "grant a charter," etc.

51. When the Department of the Secretary of State was first constituted by (1868) 31 Vict., c. 42, the statute provided by sec. 4:

10 "The Secretary of State shall be the Registrar General of Canada, and shall as such register all Instruments of Summons, Commissions, Letters Patent, Writs, and other Instruments and Documents issued under the Great Seal."

52. It was not until many years later that Letters Patent of Incorporation of Companies were issued in the Dominion under the seal of the Secretary of State, or, in a Province, of a Provincial Secretary, and that was specially provided for by appropriate legislation.

53. The Letters Patent of 5th October 1878 appointing the Earl of Dufferin Governor-General of Canada and settling the Office, printed in Clement's "Law of the Canadian Constitution" (1915) 3rd ed., at 20 p. 959, provide:

"And we do hereby authorize and empower our said Governor-General to keep and use the Great Seal of our said Dominion for sealing all things whatsoever that shall pass the said Great Seal."

54. A charter of the kind authorized by the Act of 1881 is a King's grant, and I shall only refer to a few authorities:

"The King's grants are also matter of public record. . . .

30 These grants, whether of lands, honours, liberties, franchises, or ought besides, are contained in charters, or letters patent, that is, open letters, *litterae patentes*: so called because they are not sealed up, but exposed to open view, with the great seal pendent at the bottom . . ."; Blackstone, Book II., c. 21, p. 346.

"The principal documents by means of which the Crown carries into effect or makes known its intentions with regard to such matters as are left to its control, either by the common or statute law, are treaties, Orders in Council, writs, proclamations, letters patent under the Great Seal, and warrants, commissions, instructions, or orders under the sign manual": 6 Hals., p. 461, s. 549.

40 "Letters patent, grants, and charters under the Great Seal are used for conferring titles or dignities, franchises and other rights of property, or for creating and conferring offices, or incorporating towns or other bodies": 6 Hals., p. 603, s. 778.

55. The defendant argues that if Parliament had intended to authorize a charter under the Great Seal, specific words to that effect would have been used and were essential. But as a charter could then only be granted in Canada by Letters Patent under the Great Seal, such words were not necessary.

56. But as I understand the defendant's case, it argues that the very language of the Act of 1881 shows that Parliament did not intend the plaintiff to have a charter under the Great Seal but only something which would be an Act of Parliament. In support of this
10 argument the defendant laid great stress upon the words in sec. 2 of the Act:

“ . . . and such charter, being published” etc., “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.”

57. The necessity for such a provision as this becomes apparent when we look at secs. 21 and 22 (para. 41 *supra*) of the contract. Section 21 provides that the contract shall only be binding in the event of an Act of Incorporation being granted to the company in
20 the form, Schedule A. The wording of the statute just quoted took care of this. Section 22 made the Railway Act of 1879 applicable to the company so far as the same was applicable to the undertaking, etc., and in so far as it was not inconsistent with or contrary to the provisions of the Act of Incorporation to be granted to the company. The wording of the statute above quoted also covered this.

58. I am satisfied that these words in the statute had no other effect and did not cut down the effect of the Letters Patent under the Great Seal.

59. The defendant supports its last two arguments by another.
30 It says that the Act of 1881 has been amended over two hundred times and points especially to the Dominion Act of 1902, 2 Edw. VII., cap. 52 (An Act Respecting the Canadian Pacific Railway Company) referred to in para. 214 *infra*, which empowered the plaintiff to purchase and hold land and buildings, to build hotels and restaurants, and to engage in mining, smelting iron and steel manufacture, lumbering, electrical works, irrigation, and so forth. The defendant says that from this it follows that the plaintiff did not have these powers and must be considered to be a statutory and not a common law corporation.

40 60. An examination of this statute of 1902 shows that it was applied for by the plaintiff, and that it makes no reference to any “Act of Incorporation.” I have not looked at all the so-called “amending Acts,” but I have read some. In my opinion they are all enabling Acts, probably obtained *ex majore cautela*; they do not

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contain anything that would suggest that the plaintiff was incorporated other than by Letters Patent, and this argument fails.

61. Parliament empowered the Governor to grant the Charter. The Crown has, at common law, power to incorporate by charter any number of persons assenting to be incorporated: 8 Hals., p. 19, s. 30. Whether the charter were granted pursuant to common law powers or pursuant to powers given by the special Act of 1881, once Letters Patent under the Great Seal were granted, the plaintiff was in my opinion constituted a corporation with a status resembling that of
10 a common law corporation.

62. The powers and capacity of such a corporation are clearly defined. Two quotations will suffice:

“A corporation created by charter has at common law power to deal with its property and to incur liabilities in the same way as an ordinary individual. Even if the charter expressly prohibits a particular act the corporation can do the act, but if it does that which is prohibited or is not authorized by its charter, its charter may be recalled by the Crown by proceedings on a *scire facias*”: 8 Hals., p. 71, sec. 125.

20 “At common law a corporation created by the King’s charter has, *prima facie*, and has been known to have ever since Sutton’s Hospital Case (10 Rep. 13), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might
30 contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created”: per Bowen L. J. in *Baroness Wenlock v. River Dee Co.* (1887) 36 Ch. D. 674 at p. 685(n).

63. I have no doubt that in 1881 the Governor-General was entrusted with the exercise of the prerogative power of the Sovereign to incorporate companies. But Parliament also conferred upon the Governor-General by a special and peculiar statute the power to incorporate a particular company—namely, the plaintiff. The statute
40 detailed the very terms to be used, and the statute itself contained no restrictions on the powers.

64. Speaking of the effect of the Act of 1864 (para. 49 *supra*), Lord Halsbury said in *Bonanza Creek Gold Mining Co. Ltd. v. Rex*, (1916) 1 A.C. 566, at p. 581:

“Prior to confederation, the granting of letters patent under the Great Seal of the province of Canada for the incorporation of companies for manufacturing, mining, and certain other purposes was sanctioned and regulated by the Canadian statute of 1864. This statute authorized the Governor in Council to grant a charter of incorporation to persons who should petition for incorporation for the purposes of the enumerated kinds of business. Applicants for such a charter were to give notice in the Canada Gazette of, among other things, the object or purpose for which incorporation was sought. By s. 4 every company so incorporated under that Great Seal for any of the purposes mentioned in this Act was to be a body corporate capable of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament. Their Lordships construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions. It appears to them that the doctrine of *Ashbury Railway Carriage and Iron Co. v. Riche* (1875) L. R. 7 H. L. 653 does not apply where, as here, the company purports to derive its existence from the act of the Sovereign and not merely from the words of the regulating statute. No doubt the grant of a charter could not have been validly made in contravention of the provisions of the Act. But, if validly granted, it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings. There is nothing in the language used which, for instance, would preclude such a company from having an office or branch in England or elsewhere outside Canada.”

65. In his written argument counsel for the defendant said:

“The Bonanza Creek case has only been discussed on one occasion in the Supreme Court of Canada and in that case it was distinguished or extinguished. See the *Canadian Bank of Commerce v. The Cudworth Rural Telephone Co.* (1923) S.C.R. 618. . . .”

He also refers to the criticism of The Bonanza Creek Case by the late J. S. Ewart, K.C., in two articles in (1916) 36 *Can. Law Times*, 679, 769; to Masten & Fraser’s “*Company Law of Canada*,” p. 76; and 40 cites *In re Northwestern Trust Co.* (1926) 35 M.R. 433 (C.A.), *A.-G. v. De Keyser’s Royal Hotel* (1920) A.C. 508, *British Coal Corporation v. The King* (1935) A.C. 500, *Toronto Finance Corporation Ltd. v. Banking Service Corporation Ltd.* (1926) 59 O.L.R. 278, and other authorities.

66. While the Bonanza Creek case has been criticized and dis-

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tinguished, it is authority binding on this Court for what it did decide, and for everything decided as necessary in arriving at the final decision. And, I may be permitted to say, I think it was well decided.

67. I can find nothing in the authorities referred to in para. 65, *supra*, which runs contrary to the view I have taken, and, with respect, I think counsel for the defendant is approaching the matter from a wrong point of view.

68. The words of sec. 4 of the Act of 1864 quoted by Viscount Haldane "as if incorporated by a special Act of Parliament," and the 10 words of sec. 2 of the Act of 1881 (para. 43, *supra*) "as if it were an Act of the Parliament of Canada," are in my opinion of identical effect, and that effect is stated in the portion of Viscount Haldane's judgment just quoted.

69. I think the position of the plaintiff here is even stronger than the position of the Bonanza Creek Company. The Act of 1864 was a general companies' Act; the Act of 1881 applied only to the plaintiff.

70. In *Ashbury Railway Carriage & Iron Co. v. Riche*, (1874) L.R. 9 Ex. 224, Blackburn J., in the Exchequer Chamber, dealing with the powers of a corporation created by statute, started by assuming the 20 legislature meant to create a company with a capacity resembling that of a natural person. The House of Lords held that in so doing he had fallen into error: (1875) L.R. 7 H.L. 653. And in the *Bonanza Creek* case, Viscount Haldane, referring to the argument based on the principle laid down in the *Ashbury* case, said (p. 577):

30 "The words of the British Companies Act were construed as importing that a company incorporated by the statutory memorandum of association which the Act prescribes could have no legal existence beyond such as was required for the particular objects of incorporation to which that memorandum limited it. A similar rule has been laid down as regards companies created by special Act. The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the Legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which Blackburn J. and the judges who agreed with him had fallen when they decided in *Riche v. Ashbury Railway Carriage and Iron Co.* (L.R. 9 Ex. 224) in the Court below that the analogy of the status and powers of a corporation created by charter, as expounded in the *Sutton's Hospital Case* ((1613) 10 Rep. 1a.), should in the first instance be looked to.

40

For to look to that analogy is to assume that the Legislature has had a common law corporation in view, whereas the wording may not warrant the inference that it has done more than concern itself with its own creature. Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and if the corporation attempts to act as though they were not, it is doing what is *ultra vires*, and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by charter, independently of the statute itself, which some authority, such as a Lieutenant-Governor, possessed before it came into operation, has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn J. will be the true one."

10

20

71. In the case at bar we have a corporation created by Letters Patent and it seems to me that it is from that point the present argument must start.

72. In the Bonanza Creek Case the Court was considering a company incorporated by Letters Patent under the Great Seal of Ontario. These Letters Patent were authorized by the general Companies Act of that Province. The Privy Council considered the provisions of the similar Dominion Act of 1864, para. 49 *supra*, and said (p. 582):

"No doubt the grant of a charter could not have been validly made in contravention of the provisions of the Act. But, if validly granted, it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings."

73. Their Lordships then applied the same principles to the company incorporated under the similar Ontario statute. I should again emphasize that the Act of 1864 contained some, and the Ontario Act contained many, provisions governing the companies incorporated under them, and this caused the reference to the restrictions which are imposed on their proceedings in the passage last quoted. But

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the plaintiff was not incorporated pursuant to a power given by a general Companies' Act. The Act empowering the Governor-General to grant it a charter stands alone.

74. The real question which was determined in the Bonanza Creek Case was whether the company incorporated by provincial Letters Patent could have capacity to acquire and exercise powers and rights outside the territorial boundaries of the province? It was held that it had such capacity.

75. As is well-known, the Provincial Legislatures shortly after this
 10 decision amended their respective Companies' Acts to declare the capacity of companies incorporated under them or by general or special Act. The effect of such legislation first came before the Courts in Ontario in *Edwards v. Blackmore* (1918) 42 O.L.R. 105. In that case the defendant company was incorporated by Letters Patent under the Ontario Companies Act to carry on a real estate business. The action was brought on a promissory note given on account of machinery and patent rights for the manufacture of machines for pressing clothes. The company defended on the ground that it was beyond its powers to give the note. Masten J.
 20 at the trial gave judgment for the plaintiff, following the Bonanza Creek case. This judgment was affirmed by the Appellate Division, Meredith C.J.C.P. dissenting. Ferguson J.A., and Lennox J. affirmed the judgment, following the Bonanza Creek Case, and held that the declaratory section endowed the company with all the capacity which a corporation created by charter had at common law; that is, almost unlimited capacity to contract. Rose J., the other member of the Court of four, did not discuss this question, but affirmed the judgment on other grounds. It will be observed that *Edwards v. Blackmore* was disproved by the Manitoba Court
 30 of Appeal in *In re Northwestern Trust Company*, *supra*, and in *Canadian Bank of Commerce v. Cudworth*, *supra*. In the Supreme Court Mignault J. distinguished *Edwards v. Blackmore* on the ground that the Ontario Statute was differently worded and that the company was of a different nature, stating that he desired to be understood as expressing no opinion as to the decision of the Ontario Court.

76. I do not intend to deal with all of the other cases separately. Suffice it to say that they all turned on the effect of the legislation declaring capacity as distinguished from powers.

77. In *re Northwestern Trust Company*, para. 65 *supra*, the com-
 40 pany was incorporated by special Act of the Manitoba Legislature for the purposes of a trust company exclusively, and it was held that the declaratory Act did not give it power to bind itself by guaranteeing payment of a debt proposed to be incurred by one trading company to another.

78. In *Canadian Bank of Commerce v. Cudworth*, para. 65 *supra*, the defendant, a Rural Telephone Company, was a non-trading corporation organized under The Rural Telephone Act of Saskatchewan for a specific purpose. Afterwards it became incorporated under The Companies Act which incorporated companies by Memorandum of Association. The question to be decided was whether the defendant had power to make a promissory note. It was held that it had no such power under The Rural Telephone Act, and that the section of the Companies Act declaring capacity did not confer such a power on it.

79. I cannot see that these cases are relevant to the point I am now deciding. I think they are clearly distinguishable.

80. I hold that the plaintiff was duly incorporated by Letters Patent under the Great Seal of Canada and has all the powers possessed by a corporation created by the King's Charter at common law. I hold that there was nothing in the Act of 1881, para. 42 *supra*, to preclude the Governor from exercising the prerogative power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person: see per Viscount Haldane, (1916) 1 A.C., p. 584.

81. If I am correct in this, then there can be no doubt that the plaintiff had the power to enter into the agreement embodied in By-laws 148 and 195 and to give the bond and covenant of the 10th October 1881, and this would seem to dispose of this phase of the case.

82. But I must deal with several other arguments addressed to me on behalf of the defendant.

83. In the *Bonanza Creek Case*, Viscount Haldane said, p. 583 (and see para. 65 *supra*):

30 “In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter.”

The defendant says there are restrictions written in the charter which prevent the plaintiff from entering into the agreement and giving the bond and covenant.

84. I think this argument is answered by the next two sentences of Lord Haldane's judgment:

40 “Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires*, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter.”

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85. In order to acquire a right, namely the right to an exemption, the plaintiff entered into the agreement and gave its bond and covenant, and in my view it was doing nothing *ultra vires*. I refer again to the language of Bowen L.J. quoted in para. 62 *supra*.

86. If the agreement and bond and covenant were not *ultra vires*, the argument of the defendant, that if the plaintiff did not carry out the terms of its agreements the defendant could have no recourse against the plaintiff because it could raise the defence of *ultra vires*, fails.

10 87. This brings me to an argument by the defendant based upon the decision of the Ontario Court of Appeal in Corporation of Whitby v. Grand Trunk Railway Co. (1901) 1 O.L.R. 480. Counsel for the defendant places great reliance upon this decision, and indeed it seems to me that his whole submission on this branch of the case is built upon it. In his written argument he says:

20 "This case is of particular value because the statutory powers of the Port Whitby and Port Perry Railway Company were similar to the statutory powers of the Canadian Pacific Railway Company in 1881. . . . In view of the fact that the Court had under consideration statutory powers and authority similar to those granted to the Canadian Pacific Railway, the case of the Corporation of Whitby v. Grand Trunk Railway Co. is of utmost importance."

88. My finding that the plaintiff is not a statutory corporation but a corporation incorporated by Letters Patent seems to render the decision in the Whitby case entirely inapplicable. The defendant however lays such stress upon that decision that I should examine it carefully to see if it affects my finding in any way.

89. The headnote to the report of the Whitby case reads:

30 "By its Act of incorporation a railway company had power to receive and take grants and donations of land and other property made to it, to aid in the construction and maintenance of the railway, and any municipality was authorized to pay, by way of bonus or donation, any portion of the preliminary expenses of the railway, or to grant to the railway sums of money or debentures by way of bonus or donations to aid in the construction or equipment of the railway. The railway company in consideration of a bonus by a municipality, agreed to keep for all time its head office and machine shops in the municipality:—Held, that
 40 the recital of the agreement in a bond signed by the railway company amounted to a covenant on their part to observe its terms, but that such an agreement was not justified by statutory provisions, and was not enforceable. Judgment of Boyd, C., (1900) 32 O.R. 99, reversed."

90. The railway company ceased to maintain its head office and shops at Whitby and the Town brought action to compel it to restore and maintain the shops or for damages. At the trial before Boyd, C., the question of *ultra vires* does not seem to have been raised. The defences seem to have been that the terms of the bond only applied to the original railway which entered into the agreement and did not bind the defendant, with which the original railway—and others with which it had later amalgamated—were amalgamated; that on the first amalgamation the business and traffic of the railway was so much
 10 in excess of that of the original railway that it became impracticable to maintain the head office and shops at Whitby, and that it would be inequitable to compel their maintenance there. Boyd, C. had no difficulty with these defences and gave the Town a reference to fix the damages.

91. In the Court of Appeal the defendant raised, and succeeded upon, the defence of *ultra vires*, the Court applying the principle enunciated in *Ashbury Railway Carriage & Iron Co. v. Riche*, para. 70 *supra*. In his judgment, p. 484, Armour C. J. O. pointed out that the agreement to maintain the shops was not made a part of the
 20 by-law of the Town which was to aid in assisting the construction of the original railway and to grant the company certain debentures, but was an agreement made after the by-law had been submitted to and carried by the ratepayers and before it was finally passed by the Council. I do not need to consider whether the result would have been different if the agreement had been a part of the by-law, although Armour C. J. O. seems to suggest it might.

92. Armour C. J. O. continued (p. 485):

30 “. . . the power of the railway company to make the said agreement, if any there was, was derivable only from the provisions of the Act incorporating the railway company. . . . These provisions give no express power to the railway company to enter into such an agreement, and I do not think that the power to make such an agreement, so onerous upon the railway company and binding upon them for all time, can be held to be derived by reasonable implication from these provisions, or can be fairly regarded as incidental to, or consequential upon, the things authorized by them.”

And he refers to *Baroness Wenlock v. River Dee Company* (1885) 10 A.C. 354, and other cases.

40 93. I can see nothing here that is applicable to a corporation such as the plaintiff.

94. I now return to the argument referred to in para. 83 *supra*, that the plaintiff's charter places restrictions upon its powers. While

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in para. 84 I have answered the general argument, I should deal with the restrictions suggested by the defendant.

95. The first is based upon the provisions of s. 17 of the charter by which The Consolidated Railway Act, 1879, is incorporated. But those provisions are only incorporated in so far as they are applicable to the undertaking authorized, and are not inconsistent with the charter and save and except as in the charter provided: see the wording in para. 45 *supra*. The argument based on this provision is accompanied or supplemented or supported by a reference to the
 10 Statute (1883) 46 Vict., C. 24, s. 6, assented to 25th March 1883, by which the Canadian Pacific Railway Company was declared to be a work for the general advantage of Canada. It is also mentioned that the plaintiff is subject to the jurisdiction of the Board of Transport Commissioners. Then it is pointed out that sec. 7 of the contract, para. 41 *supra*, ends with the clause:

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

The defendant says, too, that “a covenant to forever continue certain railway works in a particular locality is most unusual if not
 20 unique.” (See also para. 217 *infra*.)

96. The argument develops as follows: the covenant to establish and build within the limits of the city the plaintiff's 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 to continue the same within the said City (para. 5 *supra*), might prevent the Company from “forever” efficiently maintaining, working and running the Canadian Pacific Railway; a situation might arise where it would be impossible to maintain the workshops in the City and efficiently
 30 run the railway. The defendant in support of this argument referred to the fact that Winnipeg had on occasions been inundated by flood waters and that such a situation might occur again which would make it impossible to maintain the workshops in Winnipeg. This was the only contingency suggested in argument. There have been occasions in the past when Winnipeg was flooded but there is no suggestion that the plaintiff was, by reason thereof, unable to maintain its railway services efficiently. There is no suggestion that such a situation would be other than a temporary one and it is easy to think of other temporary happenings such as a great fire in the city, or even the
 40 destruction of the part of the city in which the workshops were situate as a result of bombing from enemy action. It was also suggested that a covenant such as this ties the hands of the Transport Board in the event that it directed the plaintiff to maintain its workshops elsewhere, but there is no suggestion that the Transport Board has ever considered such a matter or that it is ever likely to do so.

97. The defendant referred to the decisions holding that a company possessing certain statutory powers may not bind itself not to exercise those powers, and then argued:

“If the Canadian Pacific Railway Company could agree to forever continue its workshops in a particular locality then it could enter into any sort of contract restricting the exercise of its statutory powers and its public obligation to ‘efficiently maintain, work and run the railway.’ ”

It is also urged that:

10 “There is nothing in the Railway Act or the Special Act (cap. 1, S. of C. 1881) or the agreement which indicates that the company may agree to establish and continue its principal stockyards in a particular locality or to forever continue its principal workshops in any particular locality. As pointed out above such a covenant is foreign to the obligations of the railway to operate in accordance with the relevant statutes and in the public interest and is a negation of and restriction on its statutory powers rather than the exercise thereof.”

98. How an agreement to build certain shops within the territorial limits of a certain city and to maintain them forever within those limits can be said to be an agreement by the plaintiff not to exercise its powers, even if they were statutory only, I cannot see. Nor can I see that the cases cited: *Montreal Park & Island Ry. Co. v. Chateauquay & Northern Ry. Co.* (1904) 35 S.C.R. 48, *Town of Eastview v. Roman Catholic Episcopal Corporation of Ottawa* (1917) 47 D.L.R. 47, *In re South Eastern Ry. Co. and Wiffin's Contract* (1907) 2 Ch. 366, *Mulliner v. Midland Ry. Co.* (1879) 11 Ch. D. 611, *Maritime Electric Co. v. General Dairies Ltd.*, (1937) A.C. 610, (1937) 1 D.L.R. 609, and *Town of Cobalt v. Temiskaming Telephone Co.* (1919) 59 S.C.R. 62, advance the argument.

99. Still dealing with the alleged restriction on the powers of the plaintiff, the defendant says (1) the franchises and powers given by sec. 4 of the Charter, para. 45 *supra*, are limited to those required to enable it to carry out its obligations under the contract; (2) the obligations were to complete the railway in accordance with the terms of the contract and thereafter and forever efficiently to maintain, work and run that railway; (3) the plaintiff was given power by sec. 14 of the contract to construct, equip, maintain and work branch lines; and (4) the powers which may be exercised by the plaintiff are found in sec. 7 of The Consolidated Railway Act, 1879.

100. The defendant sums up this part of its submission as follows:

“There is therefore nothing in chapter 1 of the Act of 1881 or in the agreement thereby authorized, or the Act of incorporation

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therein set out which expressly or, by necessary implication, authorizes the Canadian Pacific Railway to enter into any contract with any municipality, and certainly there is no express authority to enter into any contract agreeing to maintain any part of the railway or any station or workshops or stockyards forever in any locality."

101. It also says the only powers given by sec. 7 of The Consolidated Railway Act 1879 which require consideration are contained in the following subsections of that section:

10 "1. To receive, hold and take all voluntary grants and donations of land or other property made to it, to aid in the construction, maintenance and accommodation of the railway; but the same shall be held and used for the purpose of such grants or donations only";

.

20 "8. To erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, and from time to time to alter, repair or enlarge the same, and to purchase and acquire stationary or locomotive engines and carriages, waggons, floats and other machinery necessary for the accommodation and use of the passengers, freight and business of the railway";

.

"10. To construct and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of this Act, and of the Special Act";

.

30 "19. Any railway company desiring at any time to change the location of its line of railway in any particular part for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting such line of railway, or for any other purpose of public advantage, may make such change; and all and every the clauses of this Act shall refer as fully to the part of such line of railway, so at any time changed or proposed to be changed, as to the original line; but no railway company shall have any right to extend its line of railway beyond the terminal mentioned in the Special Act":

102. I can see nothing in the foregoing argument to alter the view I have already expressed in para. 81 *supra*, but I also can not see any restrictions in these provisions on the general power of the plaintiff to enter into the agreement embodied in the By-laws 148 and 195, to give the bond and covenant, and to erect and maintain the shops and yards which it did erect. I have already noted the limited application of sec. 17 of the Charter: para. 95 *supra*.

103. Section 7 of the contract (para. 41 *supra*) shows that the Government was to deliver to the plaintiff those parts of the railway constructed by the Government with a suitable number of station buildings.

Section 10 of the contract contains this provision:

10 “In further consideration of the premises, the Government shall also grant to the Company the lands required for the road bed of the railway, and for its stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards and other appurtenances required for the convenient and effectual construction and working of the railway. . . .”

Section 14 of the contract providing for the construction, equipment, maintenance and working of branch lines contains this provision:

20 “And the Government shall grant to the Company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches. . . .”

Section 16 of the Letters Patent providing for tax exemptions refers to:

“stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof. . . .”

104. It seems to me that, contrary to the defendant's argument, it clearly appears on the face of the Letters Patent—if it were necessary to approach the matter from this point of view—that the plaintiff had the express right to build and maintain stations, workshops and cattle 30 yards; that it was obligated to do so, and that it was given the “necessary or useful” franchises and powers to do so by section 4 of the charter: see para. 45 *supra*.

105. There was much argument as to whether or not the agreement which the plaintiff entered into was void at common law as being incompatible with the due discharge of the company's duties. The following cases and the authorities referred to in them were discussed at length: *Foster v. London, Chatham & Dover Ry.* (1895) 1 Q.B. 711, *South Eastern Railway Co. v. Cooper* (1924) 1 Ch. 211, *Birkdale District Electric Supply Co. Ltd. v. Corporation of Southport* (1926) 40 A.C. 355. All these decisions dealt with the powers of statutory corporations and so are, in my opinion, inapplicable. But even if they do apply, I cannot see on the facts of this case that the plaintiff

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has done or agreed to do anything incompatible with the due discharge of its duties in maintaining and operating its railway.

106. I would also hold, if necessary, that the clear intendment of sec. 16 of the contract which provided for tax exemptions by the Dominion or by any Province thereafter to be established, or by any municipal corporation therein (see para. 41 *supra*), was that the plaintiff should have the right to bargain for and obtain similar tax exemptions from any Province theretofore established, or any municipal corporation therein, and that the "necessary or useful" franchises and powers were given to the plaintiff by sec. 4 of the Charter as well as by its incorporation by Letters Patent under the Great Seal of Canada.

107. This brings me to the final argument on this branch of the case to which I must refer. In its written brief the defendant says:

20 "The Province of Manitoba could not make any agreement binding on the Canadian Pacific Railway which is entirely under Dominion jurisdiction: *Manitoba v. C.N.R.* (1925) 1 D.L.R. 601, (1925) S.C.R. 18, 30 C.R.C. 27; *C.P.R. v. Parish of Notre Dame de Bonsecours* (1899) A.C. 367; *Wilson v. Esquimalt & Nanaimo Railway Co.* (1922) 1 A.C. 202 at 208, and *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board & A.-G. (Alta.)* (1933) S.C.R. 629 at 645. 'It is questionable whether it is competent to a Legislature to sanction measures for the enforcement of a tax imposed on a Dominion railway which would involve the dismemberment of the railway.'

108. I admit that I find this argument hard to follow. It seems to me that it is intended to be an answer to an argument which the plaintiff might make based on the validating legislation discussed in Section IV., paras. III *et seq.*, *infra*. But the plaintiff does not argue 30 that the validating Act in any way affected its powers or gave it any powers it did not possess, nor does it argue that the validating Act made or attempted to make the agreement binding on the plaintiff. I refer to this last mentioned matter in para. 127 *infra*. I do not see that the argument set out in para. 107 assists the defendant.

109. I deal with the question of *res judicata* as it applies to this branch of the case in Section V *infra*, and the arguments based on estoppel other than by judgment in Section VIII *infra*.

110. In conclusion, on this branch of the case I see no reason to depart from the views expressed in para. 81 *supra*.

SECTION IV

WERE THE AGREEMENT EMBODIED IN BY-LAWS 148 AND 195 AND THE SAID BY-LAWS *ULTRA VIRES* THE DEFENDANT AND WHAT WAS THE EFFECT OF THE VALIDATING ACT (1883) 46 & 47 VICT. C. 64?

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111. Besides denying that any agreement was entered into—a point which I have decided adversely to the defendant, Section II (*supra*)—the defendant pleads:

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10 “20. The defendant further says that the defendant had no right power or authority under its charter or otherwise to pass said By-law No. 148 or said By-law No. 195 as the plaintiff well knew.”

“6. . . . the defendant says that the purport and effect of Chapter 64 Statutes of Manitoba (1883) 46 and 47 Victoria, section 6, was to validate and confirm said By-law as a By-law of the City of Winnipeg and it had no other effect.”

(See para. 31 *supra*.)

112. Fifty years ago, in *City of Winnipeg v. C.P.R.* (1899) 12 M.R. 581, (1900) 30 S.C.R. 558, it was argued by the present defendant 20 (then plaintiff) upon the wording of the description of By-laws 148 and 195 contained in the validating Act (see para. 12 *supra*), that while the statute may have validated the bonus, it did not validate the exemption. I did not understand counsel for the defendant to repeat this argument, although he did draw attention to, and emphasize, the wording of the statute describing the by-laws. The argument failed in 1899, and, if it was intended to be raised in this case, so far as I am concerned it fails now; and this is apart entirely from the question of *res judicata* with which I deal in Section V *infra*.

113. Whether or not the defendant had the right, power or author- 30 ity under its charter or otherwise to pass By-laws 148 and 195 when it did, is, in my view, only of academic interest. The Legislature passed the Act of 1883 “to set at rest all doubts” etc.: para 11 *supra*.

114. I am also of opinion that the effect of the Act was to make the by-laws “legal, binding and valid upon” the defendant as from the day each such by-law was passed. I point out that the Act came into force on 7th July 1883. The debentures provided for by the by-law had already been issued, delivered to the trustee, and by him delivered to the plaintiff on or about 30th March 1883, the date of By-law 219 (para. 9 *supra*), and the plaintiff had, as is established by 40 By-law 219 (see para. 9 *supra* and paras. 330 to 333 *infra*), carried out the terms of its agreement.

On the question of the effect of the validating Act, I was referred to, and have considered, the following cases: *Manchester Ship Canal*

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Co. v. Manchester Race Course Co. (1900) 2 Ch. D. 352, (1901) 2 Ch. D. 37; Seven Oaks, Maidstone and Tunbridge Ry. Co. v. London, Chatham & Dover Ry. Co. (1879) 11 Ch. D. 635; Aylott v. West Ham Corporation (1927) 1 Ch. 30; Montreal (City) v. College St. Marie (1921) 1 A.C. 288; R.M. Springfield v. La Corporation Archi-episcopal Catholique Romaine de St. Boniface (1895) 10 M.R. 615, and the authorities referred to in these decisions. I refer to some of them later.

115. This brings me to the defence sought to be set up by para. 6 10 of the Statement of Defence (para. 111 *supra*), that the Act of 1883 had no other effect than to validate and confirm the by-laws as by-laws of the defendant. I am still not sure that I understand this defence.

116. It is apparently based upon a passage in the judgment of Lord Buckmaster, L.C., in Ontario Power Co. of Niagara Falls v. Municipal Corporation of Stamford (1916) 1 A.C. 529 and a passage in the judgment of Mathers J. (later C.J.K.B.) in Winnipeg (City) v. Winnipeg Electric Co. (1910) 20 M.R. 337 (and see this case in the Privy Council (1912) A.C. 355). These passages are quoted in the 20 defendant's written argument:

117. Lord Buckmaster said (p. 534):

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

Mathers J. said (p. 354):

30 "I have found no case which has gone the length of holding that a contract confirmed by the Legislature thereby ceases to be a contract, and becomes an Act of the Legislature."

118. The headnote in Ontario Power Company v. Municipal Corporation of Stamford (para. 116 *supra*) reads:

40 "By the Public Schools Act, 1892 (Ontario), s. 4, 'No municipal by-law hereafter passed for exempting any portion of the rateable property of a municipality from taxation, in whole or in part, shall be held or construed to exempt such property from school rates of any kind whatsoever.' In 1904 the respondents passed a by-law fixing the assessment of the appellants' property at 100,000 dollars for the next twenty years. This by-law required a statutory confirmation, since it had not received the assent of two-thirds of the voters, as provided by the consolidated Municipal Act, 1903, s. 591a. By an Act of the Ontario Legislature

the by-law was 'declared to be legal, valid and binding notwithstanding anything in any Act to the contrary':

"Held, that the confirming Act gave statutory effect to the by-law subject to the construction imposed upon it by the Public Schools Act, 1892, and that the property could be assessed at over 100,000 dollars in respect of school rates."

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119. What happened in that case was that for the year 1914 the municipality assessed the property of the company at \$100,000.00 for general rates and at \$900,000.00 for school rates, and the action
10 was brought by the municipality against the company to recover the general and school rates payable on the basis of such an assessment and succeeded in all Courts.

120. The question with which Lord Buckmaster was dealing when he wrote the words above quoted was a question of construction, and he continued:

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

30 "In their Lordships' opinion, the former is the true view of the case. The by-law did not attempt in express language to include the school rate among the rates for which exemption was granted. It did, indeed, use wide and sweeping terms to describe the exemption; but had any question arisen upon the construction of that by-law between its passage and the passage of the Act of Parliament by which it was confirmed, it would have been necessary to construe it so as to limit the general words to rates other than the rate received for school purposes, and the school authority would have been entitled to rely on this as the true construction.

"Their Lordships cannot think that the statute has altered this construction. It has enabled the by-law to be passed, it has confirmed the by-law and made it legal, but it still remains what it always purported to be—a by-law of the municipal authority carrying within it the meaning which the statute of 1892 had assigned.

40 "It was strongly urged on behalf of the appellants that the words used in the Act meant the same as though a school rate had been expressly mentioned, and that, had the school rate been expressly mentioned, confirmation by the Legislature would necessarily have confirmed, as the Legislature had full

power to do, a deviation from the ordinary statutory obligation. Their Lordships are not satisfied that this would have been the inevitable result, but, assuming that it were, it does not follow that the same result ensues when other and general language has been used. It should be remembered that the Act in question was promoted by the appellant company. It lay in their hands to make plain that which they desired. It does not at all follow that if the by-law had contained express words relating to the school rate it would have been accepted by the Legislature. 10 Their Act must be assumed to confirm the by-law as it was drawn and with the meaning with which it was endowed; and speculation as to what might have happened had other words been used is unprofitable in an attempt to construe the actual language in which the Act was framed."

121. In *Winnipeg v. Winnipeg Electric Railway Company*, para. 116 *supra*, Mathers J. was also dealing with the question how the by-law there under consideration was to be construed; that is, whether as a statute or as a contract. The by-law in question provided that the company should place and keep within the city limits 20 all their engines, machinery, power-houses, repair shops and construction shops (if any). The legislation in question provided that the by-law was to be "validated and confirmed in all respects as if the said by-law had been enacted by the Legislature."

122. After considering the authorities and the special wording of the confirming Act, Mathers, J., said:

30 "There is no doubt that this enactment gives the by-law statutory validity and excludes the possibility of either contracting party contending that it was beyond its powers. But are the rights and remedies of either parties against the other in any other way altered?"

He followed this by the statements quoted by the defendant (see para. 117 *supra*) and concluded:

"There is nothing in the language of the judgment to indicate that a contract, although confirmed by the Legislature, does not still remain a contract, the provisions of which can be waived by the parties thereto, or that the Court cannot award damages for its breach just as if it had not been so confirmed."

123. Useful as these cases may be when construing the Act, by-laws, and the agreement embodied in the by-laws,—with respect, I 40 do not think they support the argument I am now considering. It seems to me that this argument is intended to lead up to the defendant's next proposition stated in counsel's written argument as follows:

“The Special Act which validated by-law No. 148 does not authorize the City of Winnipeg to enter into any agreement. (See Ontario Power Company of Niagara Falls v. Stamford, (1916) 1 A.C. 529 at 534. . . .)”

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124. I think this argument misconceives the whole situation. The defendant had already made its agreement with the plaintiff; the terms of that agreement were embodied in the by-law; the Legislature was not concerned with giving the defendant power to make an agreement; it was concerned with setting all doubts at rest as to the power of the defendant to enter into the agreement already made under which each party had already done what it agreed to do.

125. The Legislature said—as it was entitled to say—that the by-laws were to be, and to be deemed to be, legally binding and valid upon the said the Mayor and Council of Winnipeg; that is, upon the defendant. To my mind this places the matter beyond doubt: the action of the defendant was validated and declared to be legal and binding upon it. The Legislature made it binding and the defendant cannot now be heard to say the by-laws in question are not binding upon it.

20 126. The defendant also argues that:

“The Special Act which validated By-law No. 148 does not purport to authorize the Canadian Pacific Railway to enter into any agreement. In fact the Province of Manitoba had no right or power to pass any legislation affecting the management, operation or powers of a Dominion railway. Such legislation is within the exclusive jurisdiction of the Dominion.”

127. There are many implications in this argument, or rather statement; but the short answer, as I see it, is that the statute “does not purport to authorize the Canadian Pacific Railway to enter into any agreement,” because there was no necessity for it to do so. The powers of the plaintiff to enter into the agreement were not in question; it was the doubts as to the power of the defendant which were to be removed. See also the language of Farwell J. in Manchester Ship Canal Co. v. Manchester Racecourse Co. (1900) 2 Ch. 352 at 359.

128. Finally the defendant argues:

“The Province of Manitoba could not make any agreement binding on the Canadian Pacific Railway which is entirely under Dominion jurisdiction. . . .”

129. The Province of Manitoba did not even attempt to make the agreement binding on the plaintiff. It did not need to do so. The question did not arise.

130. Paras. 123 to 129, *supra*, must be read in conjunction with paras. 107 and 108 *supra*.

131. In my opinion the defendant cannot rely upon any defence that the agreement or by-laws were *ultra vires* the defendant. The effect of the validating Act, as I see it, is as set out in para. 114 *supra*.

132. I am also of opinion that these matters are *res judicata*: see Section V *infra*.

SECTION V

WHAT ISSUES IN THE PRESENT CASE ARE *RES JUDICATA*?

133. In this Section the plaintiff will be referred to as the Company 10 and the defendant as the City.

134. By paragraph 16 of its reply, the Company raised the question of *res judicata* as follows:

20 “The plaintiff says that the defendant is estopped from denying that the agreement between the plaintiff and the defendant, set out in paragraph 4 of the Amended Statement of Claim, is valid and binding upon the defendant or that said by-law No. 148, as amended and re-enacted by said by-law No. 195, is valid and binding upon the defendant by reason of *res judicata*, in that the same issues were raised by the defendant and were decided in favour of the plaintiff in the action brought by the defendant against the plaintiff in this Honourable Court and numbered 894 of A.D. 1894.”

135. In 1894 the City sued the Company to recover the amounts assessed against the Company for taxes for school purposes for the years 1890 to 1894, both inclusive. The declaration contained separate counts for each year's taxes. The Company set up, amongst many others, the following plea to each of those counts:

30 “and for a twenty-second (44th, 66th, 88th and 110th) plea to the first count, that the said land was not liable to be assessed, rated or taxed as in the said count mentioned, being legally exempt therefrom by by-law numbered 148 of the plaintiffs as amended by by-law numbered 195 of the plaintiffs, and all conditions were performed and all things happened and all times elapsed necessary to entitle the defendants to the benefit of the exemption in the said by-laws mentioned.”

40 136. To each of these pleas the City filed the following replication: “and for a replication to the twenty-second (44th, 66th, 88th and 110th) plea of the defendants the plaintiffs say that the by-law numbered 148 therein referred to, and as amended by by-law numbered 195, is in writing and is in the words and figures following” (the by-law was then copied in full) “and save and

except by the by-laws above mentioned, the said lands of the defendants are not in any way exempt from any taxation whatever."

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137. The Company demurred to these replications on the grounds that they were bad in substance, adding

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10 "Some matters of law intended to be argued: that the said replications confess the truth of the facts alleged in the pleas to which they are respectively replications but do not state any new facts in avoidance. That the said replications are no answer to the pleas to which they are replications."

Continued

138. The City answered that the replications were good in substance.

139. It is to be observed that the City's replication really put the by-law forward as a valid by-law and as one entitling the Company to some exemptions, but not to an exemption from school tax. There is not in any pleading any reference to the validity of the by-law—that came later—nor do the pleadings contain any mention of an agreement to exempt from taxation. It seems to have been assumed by all parties that there was an agreement and that it was embodied
20 in the by-law.

140. The demurrer was argued before Bain, J., who overruled it. His reasons for judgment were not reported; but Mr. Russell, the Assistant-Secretary of the Law Society, with his usual efficiency and speed, found the original reasons and I have had copies made and placed in the file.

141. When the matter came on before Bain J. the Company's pleading did not contain the allegation that all conditions were performed and all things happened and all times elapsed necessary to entitle the defendant to the benefit of the exemption in the by-laws
30 mentioned. Bain J. drew attention to this in his judgment, but said:

"It was agreed, however, that all formal defects in the pleadings might be amended."

This was done before the case came before the Full Court.

142. The Company then appealed from the decision of Bain J. to the Full Court: Killam C. J., Dubuc and Richards JJ., which dismissed the appeal—Dubuc J. dissenting. The three Judges gave reasons, which are reported in (1899) 12 M.R. 581.

143. The Company then appealed to the Supreme Court of Canada. That Court: Sir Henry Strong C. J., and Taschereau, Gwynne,
40 Sedgewick, and Girouard JJ., unanimously allowed the appeal and dismissed the action: see (1900) 30 S.C.R. 558.

144. The formal judgment of the Supreme Court reads:

10 “The appeal of the above named appellants from the judgment of the Court of Queen’s Bench for Manitoba, pronounced in the above cause on the 30th day of June in the year of our Lord, one thousand eight hundred and ninety nine, affirming the judgment of the Honourable Mr. Justice Bain one of the Justices of the said Court of Queen’s Bench rendered in this cause on the 15th day of October in the year of our Lord one thousand eight hundred and ninety-eight, having come on to be heard before this Court on the 22nd and 23rd days of May in the year of our Lord nineteen hundred in the presence of counsel as well for the appellant as the respondent, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment and the same coming on this day for judgment this Court did order and adjudge that the said judgment of the Court of Queen’s Bench for Manitoba, and the said judgment of the Honourable Mr. Justice Bain should be and the same were reversed and set aside, and that the plaintiffs replications to the defendants’ 22nd, 20 44th, 66th, 88th, 110th pleas are bad in substance and that the plaintiffs take nothing by their said writ and that the defendants do go thereof without day, and that the action be dismissed.

“AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said respondents should and do pay to the said appellants the costs incurred by the said appellants as well of the trial before the Hon. Mr. Justice Bain and in the said Court of Queen’s Bench for Manitoba as in this Court.”

145. When the case came before the Court in Banc, Killam C. J. said (12 M. R. 587) that:

30 “Both parties expressed the desire that the real question in dispute should be decided upon the merits, without regard to the form of the pleadings. . . .”

The matter was subsequently dealt with in the Supreme Court on the same footing.

146. It was, so far as the available material shows, before the Full Court that the City first raised the question that the By-laws were *ultra vires*. The issue was again raised in the Supreme Court.

40 147. It appears from the report in 12 M.R., and some of the judgments, that before the Full Court, Mr. Howell, Q.C. (later Howell C.J.M.), counsel for the City, argued that By-law 148, as amended by 195, was *ultra vires* and not legalized, so far as the exemption was concerned, by 46 & 47 Vict., ch. 64 (para. 10 et seq., *supra*). He argued that the Act perhaps validated the bonus but not the exemp-

tion. The latter branch of his argument was based upon the terms of the validating statute which, as has been observed (paras. 12 and 112 *supra*), speaks of By-law 148 as a by-law to authorize the issue of debentures and makes no reference to any tax exemption.

148. Both these arguments were referred to in the Full Court as follows:

By Killam C.J. (1889) 12 M.R., at p. 598:

10 "The question of the construction of the Act 46 & 47 Vict., c. 64, s. 6, relied on as validating the by-law, does not appear a difficult question, but it has seemed to me more satisfactory to determine the real meaning of the by-law, and the result renders it unnecessary to discuss the other point."

By Dubuc J., at p. 600:

"The question of *ultra vires* cannot now be raised, as the by-law was specially ratified and validated by 46 & 47 Vict., c. 64, and again confirmed and legalized generally with other by-laws of the City of Winnipeg by 49 Vict., c. 52, s. 741."

And at p. 607:

20 "There is nothing in the statute to indicate or suggest that one portion only of the by-law was intended to be legalized to the exclusion of the other portion. The by-law was passed for the one purpose of aiding and assisting the railway company, in consideration of their undertakings therein mentioned. The aid and assistance to be given consist of two things—the giving of debentures and the exemption from taxation. One of these two things is mentioned by way of further description to show what was the purport of the by-law; and it cannot be inferred or legitimately presumed that the omission of the other thing was meant to exclude it from the intended legalization. If such had
30 been the intention of the Legislature it would naturally have been expressed by stating that such portion only of the by-law was legalized. But it is clear that it was the by-law itself described by its number and one of its objects that was validated and legalized, and not a mere portion thereof. I cannot see that any other construction can be given to that validating statute."

By Richards J., at p. 611:

"In view of the above, it becomes unnecessary to consider how far the objections taken to the legalizing Act are valid."

149. The matter was definitely determined in the Supreme Court—40 Sedgewick J. saying ((1900) 30 S.C.R. 561):

"A question was discussed at the argument as to whether the

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Act validating the by-law in question really made valid the exemption clause. I entertain no doubt upon this point. The whole and every part of the by-law was in express words confirmed, and it would be in violation of the plain meaning and express words of the enactment to hold otherwise. Exemption from taxation was as much a bonus to the company, as perhaps a larger one than, the two hundred thousand dollars issue of debentures, and it might just as well be argued that the Act, while validating the exemption, did not validate the debenture issue."

10

150. Coming to the chief question to be determined by the Court in the School Tax case, we find Killam C.J. saying (p. 587, 12 M.R.) that the real question in dispute was:

"whether, having regard to the by-laws mentioned and the statutes affecting them, the City is entitled to recover from the company rates assumed to be levied in the years mentioned, for the support of public schools under The Public Schools Act, upon the company's property situate in Winnipeg and used for railway purposes or in connection therewith."

20 Dubuc J. said (p. 599):

"The plaintiffs contend that the exemption created by the by-law did not apply to school taxes and, if it did, it was *ultra vires* of the mayor and council of the City of Winnipeg."

Sedgewick, J., speaking for the Supreme Court, said ((1900) 30 S.C.R. 561):

30 "The chief question arising upon this appeal is as to the extent of the exempting privileges created by the by-law as confirmed by the Act of 1883. In other words, is the exemption sufficiently wide to embrace the monies raised by the city of Winnipeg for public school purposes? Are school taxes included in the phrase 'municipal taxes, rates and levies and assessments of every nature and kind?'"

151. On the "chief question" the Supreme Court held, as Dubuc J. had held, that "municipal taxes" included school taxes, and that the property of the Company was exempt from any liability to contribute towards the support of the City schools.

152. In the course of the School Tax case there was considerable argument as to the interpretation to be given to the phrase "exempt from all municipal taxes, rates and levies and assessments of every nature and kind." As this question was argued in the present case, and as it has a bearing on the question of liability to business tax to be discussed later on in this judgment, I quote what Sedgewick J. said on this point (p. 563):

40

“Apart from the main inquiry, the words themselves are not altogether free from ambiguity. I think, according to the rules of grammatical expression, the adjective ‘municipal’ applies only to ‘taxes, rates and levies,’ and does not qualify ‘assessments.’ If the first conjunction ‘and’ were not there, the adjective would qualify ‘assessments,’ but it is there, and, according to the literal construction of the sentence the property is exempt not only from all ‘municipal taxes, rates and levies’ but also from ‘assessments of every nature and kind.’ If this literal construction is to be given, and I think it should be given, the case is at an end.”

10

But Sedgewick J. added that the Court much preferred to rest its judgment upon the main ground already referred to.

153. I think it clear that the Full Court and the Supreme Court in the School Tax case addressed themselves to whether or not there was a contract between the parties in pursuance of which the by-law was passed, and decided that there was: see per Killam C. J., 12 M.R. 597; and Sedgewick J. said (30 S.C.R. 559):

20

“The original design of the Canadian Government in fulfilment of its obligations with British Columbia and of its successor in the enterprise, the present appellant company, contemplated the crossing of the Red River by the railway at Selkirk, some thirty miles down the river from the City of Winnipeg, thence westerly by the North Saskatchewan Valley, through the Yellow Head Pass of the Rocky Mountains and on to the Pacific Ocean. The City of Winnipeg, a few years before created by the legislature of the province a municipality, was anxious that the main line of the railway should pass through the city limits, and was prepared to offer very great inducements to secure that end. An agreement was consequently entered into between the city and the company, which was afterwards embodied in a by-law passed by the city council on the 5th of September, 1881.”

30

154. It seems clear, too, that the decision of the Supreme Court determined that the Company had fulfilled all the conditions set out in the By-laws. Indeed it could not be entitled to the exemption it claimed unless it had. Such a finding would be necessary to the decision arrived at. The Company had alleged the fulfilment of all conditions precedent and, while the City joined issue thereon, it apparently did not contest the point—probably because it felt it had no ground to do so.

40 Sedgewick, J., said (p. 560):

“The Company, within the proper time, carried out its part of the contract, the city doing the same. . . .”

155. I have followed as my guide in considering the question of *res judicata* the judgments of Dysart J. (now J.A.) and other judges

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of the Court of Appeal who upheld his decision in *Johanesson v. C.P.R.* (1922) 32 M.R. 210.

Dysart, J. said (p. 214):

10 “From the foregoing authorities and from numberless decisions, it is clear that the principle of *res judicata* has its roots stuck deep in the necessity of having some end and finality to litigation over the same matters between the same parties; that the principle has its sanction not in superficial or technical considerations, but in the inherent jurisdiction of Courts of law; that it is of wide and general application, and that it applies notwithstanding that the second action is different in form from the first, or that the plaintiff in the second action is virtually or actually a defendant in the first. So long as any point of fact or law was put in issue—whether pleaded or not—and was tried in the former action in which the present parties were on opposing sides, it matters not that the decision on those points may not be sound or was reached on insufficient or false evidence, or on erroneous views of the law, or because of some matter omitted which might have been supplied or has since been discovered—so long as that decision or judgment stands on the records unattacked or un-

20 appealed from, it stands with all that is necessarily involved and included in it—as *res judicata*—as matter finally and conclusively settled between these parties and their privies.”

156. I cannot see that the fact that in the earlier action the City was suing the Company for taxes which it claimed the right to impose and collect, while in this action the Company is seeking to restrain the City from imposing and collecting taxes which the City admits it intends to impose and collect if it can (see para. 35 of the Statement of Defence), makes any difference.

30 157. Nor does the fact that in the previous action the taxes involved were designated “school” taxes, while the taxes in question here—and I exclude the business tax, which I treat separately—are general taxes, affect the matter. In the first place the “school” taxes were in the earlier case held to be municipal taxes, and the general taxes are also municipal taxes. In the second place, if the City is entitled to maintain its assessment of the Company, the rate that it has imposed will result in the City collecting school taxes from the Company.

158. I hold that the following issues which were, of necessity,
40 decided in the earlier action are sought to be put in issue here:

1. There was an agreement between the parties.
2. The terms of the agreement were embodied in By-laws 148 and 195.

3. The terms of the agreement were varied by mutual consent.
 4. The terms of the agreement as varied were embodied in By-law 195.
 5. The exemption clause in the agreements and by-laws is an exemption forever, and it applies to all municipal taxes which the City might otherwise be entitled to impose upon the property of the Company, including school taxes.
 6. The Company fulfilled all the conditions to make the exemption clause effective.
- 10 7. The By-laws and agreement were *intra vires*.

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159. Clause 6 requires some comment. The City says that in 1882 the Company moved its shops into an area newly added to the City but not part of the City in 1881, and has thereby broken its agreement. This fact was known to the City when the earlier case was decided and was not raised. I deal with this question later to see whether apart from *res judicata* the argument is sound (paras. 204 to 299 *infra*); but my view is that it must be taken as *res judicata* and as concluded against the City.

160. But the City says that while the Company did give the City
20 a document called a bond and covenant, it was not a valid bond and covenant because the Company had not the power to give it. It also says that if it were invalid as being *ultra vires*, the principle of *res judicata* does not apply.

161. I have already held that the bond and covenant was valid and *intra vires* the Company, but in case I am wrong in this I must consider the validity of this argument. Certainly it was never suggested in the earlier suit that anything the Company did was *ultra vires*. This does not seem to have occurred to anyone until 1948.

162. Counsel for the Company says that as it was open to the City
30 to raise the point in the earlier action, and as it did not do so, no matter for what reason, it cannot raise it now. He cites the following authorities: *Johanesson v. C.P.R.*, para. 155 *supra*; *Humphries v. Humphries* (1910 1 K.B. 796 (D.C.), affirmed (1910) 2 K.B. 531 (C.A.); *Cooke v. Rickman* (1911) 2 K.B. 1125; *Lockyer v. Ferryman* (1877) 2 A.C. 519 (H.L.); *Hoystead v. Commissioner of Taxation* (1926) A.C. 155, and 13 Hals., 410.

163. Counsel for the City refers, in answer, to the Duchess of
40 Kingston's case and the notes on it in 2 Smith's Leading Cases (12th ed.) p. 787; *Langmead v. Maple* (1865) 18 C.B. (N.S.) 255; *Harriman v. Harriman* (1909) P. 123; *Carroll v. Erie County Natural Gas & Fuel Co.* (1899) 29 S.C.R. 591; *Kennedy v. Kennedy* (1914) A.C. 215; *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*

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(1926) A.C. 94; Canadian Leaf Tobacco Co. Ltd. v. Chatham (City) (1944) O.R. 458; County of Wentworth v. Hamilton Radial Electric Ry. Co. (1917) 41 O.L.R. 524; Johannesson v. C.P.R., para. 155 *supra*; Manitoba Vinegar Co. v. City of Winnipeg (1947) 2 W.W.R. 721, (1948) 2 W.W.R. 431; Outram v. Morewood (1803) 3 East 346; New Brunswick Ry. Co. v. British & French Trust Corp. Ltd. (1939) A.C. 1; Spencer Bower on Estoppel, pp. 121, 102; 13 Hals., pp. 409, 411, 412.

164. This is perhaps the most difficult of the many difficult points
10 in this case. I find it hard, if not impossible, to reconcile all the authorities.

165. "The doctrine of estoppel by record . . . finds expression in two legal maxims—*Interest reipublicae ut sit finis litium*, and *Nemo debet bis vexari pro eadem causa.*" 13 Hals. 403.

166. The problem is not rendered simpler by the fact that the earlier cases, in which certain rules were enunciated, were decided when the rules of pleading were quite different from what they are now.

In *Howlett v. Tarte* (1861) 10 C.B. (N.S.) 813, 31 L.J.C.P. 146,
20 which is cited in many of the later cases, Williams J. said (10 C.B. (N.S.) p. 825):

"I think it quite clear upon the authorities to which our attention has been called, and upon principle, that, if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel."

In *Hoystead v. Commissioner of Taxation*, para. 162 *supra*, Lord Shaw said ((1926) A.C. p. 168):

30 "Two authorities were relied upon by counsel for the respondent. Taking them in order of date they are *Carter v. James* (13 M. & W. 137), decided in 1844, and *Howlett v. Tarte* (10 C.B. (N.S.) 813), decided in 1861. As is shown by passages in the judgment of Alderson B. in the one and Byles J. in the other, they depended upon the old rules of pleading. The rule that pleadings must not be double, as expressed by Stephen on Pleading (ch. 3, s. 3), and Bullen & Leake (3rd ed., p. 441), prevented a defendant from pleading more than one plea to the declaration, or if there were several counts in the declaration more than one plea to each count, and prevented a plaintiff from pleading more than one
40 replication to each plea. The strictness of the common law rule was relaxed by the statute 4 & 5 Anne, c. 16, s. 4, enabling a defendant with leave of a judge to plead several pleas, and by the Common Law Procedure Act, 1852, and the rules of Hilary

Term, 1853, extending this principle to replications, and allowing certain specified pleas to be pleaded as of right without leave. But till the Judicature Acts, 1873 and 1875, it remained the law that, except in those cases specially mentioned, several pleas and several replications could only be pleaded by the leave of the Court or a judge, and this leave was by no means obtainable as a matter of course, and was indeed not seldom refused. It was customary in order to save a possible estoppel for a defendant who had two answers each of which seemed to be good, but who was limited by the rules to one, to insert in his plea or accompany his plea with a protestation, and the pleading was known as a protestando. In this way the defendant, while protesting that he had other answers to the declaration, nevertheless being confined to one answer, put forward one only. Alderson B. refers in his judgment already cited to 'the ancient practice' of pleading the facts with a protestation. Protestandos, however, were abolished by the Rules of Court of 1834, and their value was always doubtful. While the rules against double pleading were in force, it would have led to much injustice if a suitor who had two answers to a claim, or two replies to a defence, but was prevented from raising more than one, was deemed to have admitted that he had no other answer or reply than that to which he had to confine himself, and this is the ratio decidendi of the two cases on which reliance was placed for the respondent. Thus explained they in no way derogate from the general principles of law. It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision."

167. Counsel for the City said he would not deny that if the issue of *ultra vires* were alleged as a traversible plea, were controverted and finally decided in the first action, it would be *res judicata*. But he said it was not pleaded, was not controverted and was not decided. As I read the authorities, this is too narrow a view. Dysart, J. pointed out in the portion of his judgment already quoted (para. 155 *supra*) that all that is required is that the point of fact or law be put in issue, whether pleaded or not, and be tried.

40 168. In *Hoystead's Case*, *supra*, there were no pleadings and the earlier judgment had been pronounced upon the admission of a fact, namely, joint ownership. Lord Shaw said ((1926) A.C. p. 168):

"It might be sufficient to say, in answer to the entire argument on this head, that whether the point as to joint ownership depended upon admission of fact upon evidence led or upon

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argument upon construction of a statute, that is, as already stated, nothing to the point in considering the question of estoppel."

169. Lord Shaw also said ((1926) A.C. 165):

10 "In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating
 20 that principle. Thirdly, the same principle—namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

170. The system of pleading in force in Manitoba when the School Tax case was decided was different from that in force when *Carter v. James, supra*, and *Howlett v. Tarte, supra*, were decided and several pleas and several replications could have been pleaded, and the case was dealt with on its merits as has already appeared.

171. The authorities indicate that a plea of confession and avoidance might always be set up in the second action, and this point was much debated during the argument. But such a plea must be consistent "with a confession by the defendant of all findings necessary to warrant the judgment in the first case": see per Phillimore J. in *Humphries v. Humphries, supra*, (1910) 1 K.B. at p. 802, and
 40 that learned judge added:

"... but a plea which merely calls the attention of the Court to a conclusion or inference from facts proved in the former trial does not raise new matter within this principle, and cannot be admitted in the second trial. In the first action counsel for the

plaintiff alleged that there was an enforceable agreement for a lease. It may be that the defendant did not avail himself of all the points he might have taken. He did not give notice of any special defence under the Statute of Frauds; but he had an opportunity of doing so, if he had been minded to raise the point. The agreement was found to be enforceable, and it is idle for the defendant to contend that at this stage he is at liberty to set up that defence."

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172. The headnote in *Humphries v. Humphries* (1910) 1 K.B. 10796, when the case was in Divisional Court, reads:

20 "The plaintiff brought an action for arrears of rent alleged to be due under an agreement for a lease. The defendant relied on the defence that no agreement had been concluded, but did not raise any defence under s. 4 of the Statute of Frauds. Judgment was given for the plaintiff. Further arrears of rent having accrued due, the plaintiff brought a second action. In this action the defendant raised the defence that there was no memorandum or note in writing of the agreement for the lease sufficient to satisfy the requirements of s. 4 of the Statute of Frauds: Held, that the defendant, not having raised this defence in the former action, was precluded from raising it in the second action."

This judgment was affirmed by the Court of Appeal (1910) 2 K.B. 796, and the decision was followed in *Cooke v. Rickman* (para. 162 *supra*), where a defence of no consideration was not allowed to be set up in a second action on an agreement to pay rent.

173. The defendant argues that I should follow the decision of the Appellate Division of Ontario in *County of Wentworth v. Hamilton Radial Electric Ry. Co.* (para. 163, *supra*) which in turn followed 30 *Howlett v. Tarte* (para. 166 *supra*) and distinguished *Humphries v. Humphries*, *supra*, and *Cooke v. Rickman*, *supra*.

174. The material facts in the *Wentworth v. Hamilton* case were that in 1902 the County passed a by-law by which the Company was given the privilege of running cars over a county road on paying to the County a certain sum for each mile of road operated. The Company, by agreement with the County, accepted the by-law and operated the cars. In 1909 the Ontario Railway and Municipal Board made an order annexing part of one of the Townships of the County to the City of Hamilton. Part of the road in question ran 40 through the portion of the Township so annexed. After the annexation for three years the County permitted the City to collect a proportionate part of the rentals payable by the Company. In 1912 the County questioned the validity of the order of the Board and sued the Company for the whole rental. On the application of the

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Company, which paid the amount in dispute into Court, the City was joined as a party defendant. The action then proceeded to determine the issue between the County and the City. The County succeeded; see *County of Wentworth v. Hamilton Radial Electric Ry. Co. and City of Hamilton*, (1914) 31 O.L.R. 659, (1916) 35 O.L.R. 434, and (1916) 54 S.C.R. 178. Meantime, in 1913, the Company tore up part of its track but continued to operate the balance of the road. It then contended that it was bound to pay only such part of the annual rental as was proportioned to the mile-
 10 age actually operated. The County sued the Company, claiming that its rights were determined by the previous judgment. The Company contended that there had been a change of circumstances of such a character as to render the judgment no longer applicable which prevented the County from raising the plea of *res judicata*. At the trial Sutherland J. held the matter was *res judicata* and gave judgment for the County. The Appellate Division affirmed the judgment on other grounds but held that the doctrine of *res judicata* did not apply. Meredith C.J.O., speaking for the Court, held that the causes of action were different and followed *Howlett v. Tarte*,
 20 *supra*, distinguishing *Humphries v. Humphries supra*, and *Cooke v. Rickman, supra*.

175. The judgment at the trial was for the full amount of the rental as if the whole line, including the torn-up part, had been operated. On appeal it was held that the Company had covenanted to operate the whole line and the County was given leave to amend to claim damages in the amount of the loss of the yearly payment in respect of the torn-up portion of the road.

176. Meredith C.J.O. said, at p. 532 (41 O.L.R.):

30 "The former action between the parties to this action was for the recovery of the instalment payable in 1914 and in previous years. The admission of the agreement made in the former action doubtless precludes the setting up in any subsequent action that the agreement was invalid or not binding on the appellant, even though there might be a good ground for impeaching it which was not set up in the former action; and, if the appellant had in it set up the contention which is now set up, and judgment had gone against it, that contention could not now be raised. That was not done, and the question was not
 40 passed upon in the former action. The cause of action which the respondent is now asserting is a different cause of action from that in the former action; and, nothing that the appellant is setting up in this action having been set up or passed upon by the Court in that action, there is nothing to estop or preclude the appellant from now setting it up."

177. If the decision in *County of Wentworth v. Hamilton Radial*

Electric Ry. Co. is correct, I think it is distinguishable on the ground that the first action was really an action between the County and the City in which the Company occupied the position of stake-holder, as well as on the ground put forward by Meredith C.J.O. that the causes of action were different.

178. But, with respect, I am of opinion that Sutherland J. took the correct view. I consider that Howlett v. Tarte, *supra*, must be read in the light of the changes in pleading since it was decided; that Humphries v. Humphries, *supra*, carried the matter farther, and 10 that Hoystead v. Commissioner of Taxation, *supra*, has brought the development of the modern principle to its logical conclusion—a result which, as I see it, was anticipated by the Manitoba Courts in Johannesson v. C.P.R. *supra*.

179. The City of Winnipeg could unquestionably have raised the question of the Company's powers in the earlier suit just as it raised the other question of *ultra vires*. It had its prior opportunity to raise a point which would have gone to the root of the matter, and it passed the opportunity by.

180. Now let us suppose that the City had raised the point and 20 the Court had decided, as I have decided, that the agreement and the bond and covenant were not *ultra vires* but *intra vires* the Company. Then again, to employ the words of Dysart J. (see para. 155 *supra*):

“ . . . It matters not that the decision . . . was reached . . . on erroneous views of the law . . . so long as that decision or judgment stands on the record unattacked or unappealed from, it stands with all that is necessarily involved and included in it—as *res judicata*—as matter finally and conclusively settled between these parties and their privies.”

30 181. In other words, if in the first case the Courts had erroneously decided that everything the Company had done was *intra vires*, then no matter how sure a Court in the second case might be that this decision was obviously wrong, it would be bound to give effect to it as *res judicata*. This would mean that a transaction which, in the views of those later addressing themselves to the question, was *ultra vires* beyond peradventure, had effect as an *intra vires* transaction.

182. If I am right in holding that the finding in the earlier case that the Company had carried out its part of the contract was a necessary step in the Court's judgment—and I have already pointed 40 out that the Company would only be entitled to its exemption on that basis—then it seems to me to follow logically that that determination involves all points that could have been raised, including the question of *ultra vires*, as it applied to the Company, and the matter is *res judicata*.

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183. I should notice here the argument put forward by the defendant on the strength of Broken Hill Proprietary Co. Ltd. v. Municipal Council of Broken Hill, para. 163 *supra*, and Canadian Leaf Tobacco Ltd. v. Chatham (City), para. 163 *supra*, where a principle was applied that in matters of assessment for taxation, where a new assessment is made each year, the decision of a Court on an appeal with respect to one year's assessment will not constitute *res judicata* with respect to a fresh assessment, made in a subsequent year.

184. In the Broken Hill case, para. 163 *supra*, Lord Carson, in 10 the Privy Council, said (p. 100):

“The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefore the principle of *res judicata* cannot apply.”

185. This language was held to be in point and applied by the Court of Appeal in the Canadian Leaf Tobacco Co. Ltd. case, paras. 163 and 183 *supra*. The principle seems clear and one can understand 20 the reasons for it. But it is not applicable to the present case, which is not an assessment case or a valuation case in the sense in which the words are used in the authorities last mentioned, or indeed, I think, in any sense of the words. What is involved in the instant case is not a question of assessment or valuation or liability to taxation in a particular year. Here the question is: Is the Company liable to taxation at all or is it exempt from taxation forever? The exemption claimed is the same exemption as was claimed in the School Tax case, based on the same agreement, embodied in the same by-laws and validated by the same statute.

30 186. The case at bar is a stronger case than *Hoystead v. Commissioner of Taxation*, *supra*, where the principle of *res judicata* was applied by the Privy Council in a judgment given by a different Board a little more than a month after the decision in the Broken Hill case, *supra*.

187. *Hoystead's Case* was one where a yearly assessment was involved and where the right of the taxpayers to certain deductions depended on whether or not they were joint owners. The issues and decision are clearly stated in the headnote in (1926) A.C. 155. It reads:

40 “Under a will the annual income from an estate in Australia was divisible by the trustees between the testator's daughters. The trustees objected to an assessment for the financial year 1918-1919 under the Land Tax Assessment Act, 1910-1916, of Australia; they claimed under s. 38, sub-s. 7, of the Act a deduc-

tion of 5000 l. in respect of the share of each daughter. A case was stated for the opinion of the Full Court of the High Court upon the questions: (1) Whether the shares of the joint owners, or of any and which of them, in the land were original shares within s. 38; (2) How many deductions of 5000 l. the respondent should make. The Full Court answered these questions as follows: (1) The shares of the six children surviving at the date of the assessment; (2) Six. Judgment upon the objection was entered accordingly. Upon the assessment for 1919-1920 the Commissioner allowed only one deduction of 5000 l., contending that the beneficiaries were not joint owners within the meaning of the Act. Upon a case stated the Full Court upheld that view, and held that the Commissioner was not estopped by the previous decision: Held, that the Commissioner was estopped, since although in the previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given. *Carter v. James* (1844) 13 M. & W. 137 and *Howlett v. Tarte* (1861) 10 C.B. (N.S.) 813 explained. Judgment of the High Court reversed.”

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The reasoning of Lord Shaw has already been set out: para. 166 *supra*.

188. Since the present case was argued, the report of the decision of the English Court of Appeal in *Re Koenigsberg* (1949) 1 All E.R. 804 has become available here. This case, which has been drawn to my attention by counsel for the City, distinguishes *Hoystead v. Commissioner of Taxation supra*. I do not think *Re Koenigsberg* is applicable here. It was a peculiar case and as Somervell, L. J. points out (p. 809), there does not appear to have been a case like it.

30 The headnote reads:

“By his will, made in 1936, a testator, who died on Apr. 26, 1941, having appointed the Public Trustee to be his executor and trustee, bequeathed three annuities free of income tax. Investments were directed to be appropriated to meet the annuities, and capital was to be resorted to if the income proved insufficient. In 1942, in *Re Waring* ((1942) 2 All E.R. 250), the Court of Appeal held that for the purposes of the Finance Act, 1941, s. 25(1), a provision for a payment free of income tax was made when the will in which the provision was contained was executed. In 1943 the Public Trustee took out an originating summons asking *inter alia* ‘whether the Public Trustee ought to appropriate by way of provision for each of the said annuities payable to the defendants . . . respectively investments yielding at the date of appropriation an income sufficient to meet the said annuity and the Public Trustee’s income fee in respect thereof

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10 unless commuted and ought to pay to the annuitant the amount of such annuity clear of such income fee.' An affidavit in support was filed indicating that the income from the testator's estate would be just sufficient to pay the three annuities together with the income fee thereon. The figures given were based on the decision in *Re Waring*, it being assumed in consequence of that case that the amounts payable to the annuitants must be calculated in accordance with s. 25(1). Bennett, J., ordered that 'the Public Trustee ought to appropriate by way of provision for each of the annuities payable to the defendants . . . respectively investments yielding at the date of appropriation an income sufficient to meet the said annuity and the Public Trustee's income fee in respect thereof and ought to pay to the annuitant the amount of such annuity clear of such income fee.' In 1946 the House of Lords held in *Berkeley v. Berkeley* ((1946) 2 All E.R. 154) that *Re Waring* was wrongly decided and that the date of the provision by will for the purposes of s. 25(1) was the date of the testator's death. The Public Trustee now asked whether, in view of the decision in *Berkeley v. Berkeley*, he ought to treat the annuities as not subject to s. 25(1) of the Act of 1941 (as modified by s.20 of the Finance (No. 2) Act, 1945). The parties to the present summons were the same as those to the summons in 1943 except that one of the annuitants had died since that date. The personal representatives of the deceased annuitant were parties to the present proceedings. Held: the question for decision in 1943 was not whether the Public Trustee could appropriate to meet the annuities, but simply whether he ought to appropriate further to meet his income fee; to answer that question it had not been necessary either to decide the present issue nor was a finding on the present issue necessarily involved; and, therefore, the matter was not *res judicata* and the principle in *Berkeley v. Berkeley* applied. *Hoystead v. Taxation Comr.* ((1926) A.C. 155; 134 L.T. 354), distinguished."

20

30

In my opinion the language used by Somervell, L. J., in distinguishing *Koenigsberg's* case from *Hoystead's* case is the very language to bring the case at bar within the decision of *Hoystead's* case. He said (p. 808):

40 "The case (*Hoystead's*) is a good example of what happens when a party could take a point, but fails to do so. It decides that in those circumstances he cannot in subsequent litigation get the matter . . . re-litigated by taking a point which he could have taken when the matter was previously before the courts. That decision does not cover the present case at all."

189. I refer further to the question of *res judicata* in considering

the other defences (see paras. 219, 227, 346 *infra*) and especially in dealing with the business tax which I am treating separately.

190. Certain matters alleged to work an estoppel apart from *res judicata* are dealt with later in this judgment, and especially in Section VIII.

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SECTION VI

OTHER DEFENCES RAISED

191. The defendants have set up a number of other defences which must now be dealt with. Some of these defences are set out in paragraphs 35(d) and 35(e) of the Amended Statement of Defence, reading:

20 "35. (d) In further answer to the plaintiff's Statement of Claim and amended Statement of Claim the defendant says that if the plaintiff and defendant did enter into an agreement as alleged in paragraph 4 of the plaintiff's Statement of Claim, or if the said by-law No. 148 or the said by-law No. 195 therein referred to is or are binding on the defendant, or if the plaintiff did deliver to defendant a bond and covenant as alleged, all of which is denied, or if the defendant did on or about the 5th September, 1881 agree to exempt all property then owned or that might thereafter be owned by the plaintiff within the City of Winnipeg for railway purposes or in connection therewith from all municipal taxes, rates and levies with assessments of every nature and kind, all of which is denied, that the plaintiff is not entitled to any such exemptions because the plaintiff did not fulfill and has not fulfilled the conditions and stipulations mentioned in the said by-law No. 148 or in said alleged bond and covenant or in said alleged agreement in that the plaintiff has not continued within the City of Winnipeg as then constituted 30 their principal workshops for the Manitoba lines of the Canadian Pacific Railway within the Province of Manitoba and the branches thereof radiating from Winnipeg within the limits of the said province. The defendant says as the fact is that in or about the year 1903 the plaintiff established and built their principal workshops or a substantial part thereof outside the limits of the City of Winnipeg as defined and constituted in the year 1881, namely at a place commonly known as Weston.

40 "35.(e) In further answer to the plaintiff's Statement of Claim and amended Statement of Claim the defendant says that if defendant agreed to exempt the properties of the plaintiff as alleged (which is denied), that the boundaries of the City of Winnipeg were enlarged by the Statutes of Manitoba, 1882, chapter 36, and again in the year 1906 and again in the year 1907

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and that the properties designated as Nos. . . . on the 1948 assessment roll of the City of Winnipeg are outside the original limits of the said city and are in such added territory and the same are not exempt from taxation under the terms of the alleged agreement or by-laws mentioned in the plaintiff's statement of claim."

192. The defences raised by paras. 35(d) and (e) are (1) the removal in 1903 of the workshops to the area added in 1882, so working an alleged breach of the covenant or contract; (2) the allegation that the exemption agreement applies only to property within the territorial
 10 limits of the defendant at the time it was entered into. I am satisfied that the same principles apply to each defence and that each fails. This involves a consideration of the following decisions: Toronto (City) v. Toronto Ry. Co. (1907) A.C. 315, (1906) 37 S.C.R. 430; United Gas & Fuel Co. of Hamilton Ltd. and the City of Hamilton v. Dominion Natural Gas Co. (1934) A.C. 435, (1933) O.R. 369, (1932) O.R. 559; Calgary (City) v. Canadian Western Natural Gas Co. (1918) 56 S.C.R. 117; Union Natural Gas Co. of Canada v. Chatham Gas Co. (1918) 56 S.C.R. 253; Ottawa (City) v. Canadian
 20 National Railways (1925) S.C.R. 494; In re Branch Lines of C.P.R. (1905) 36 S.C.R. 42; Toronto Electric Light Co. v. Toronto (City) (1914) 31 O.L.R. 387, (1915) 33 O.L.R. 269, and the many decisions referred to therein.

193. The defendant pressed on me particularly the decisions in the first two above mentioned cases. In the Toronto Railway case it was held that an agreement by the Railway Company to operate surface street railways in the City for the term of the agreement did not require it to operate such railways in territory added to the City after the date of the agreement and while it was in effect. In the
 30 United Gas & Fuel Co. case the facts were that the defendant in 1904 obtained under the authority of a valid by-law a franchise from the Township of B. to supply gas to the inhabitants. From time to time portions of the Township were annexed to the City of Hamilton and the defendant, without objection from the plaintiff, continued to supply gas throughout the area so annexed. In 1931, while the defendant's franchise was subsisting, the plaintiff United Gas & Fuel Co., by a franchise agreement with the City ratified by an Act of the Legislature, acquired the exclusive right to distribute and sell gas throughout the City subject "to the extent of any existing rights and
 40 privileges then held by" the defendant. The plaintiff then brought action to restrain the defendant from supplying gas through the areas in the City which formerly formed part of the township. The action failed. It was held that "having regard to the language and purpose of the by-law and agreement of 1904 between the township and the defendant company the fair inference is that the parties did not contemplate any diminution in the area of the township and that wherever the by-law or agreement spoke of the Township of B. it meant

the geographical limits of the township as they existed in 1904 as if the same were described by metes and bounds.”

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194. In *Calgary (City) v. The Canadian Western Natural Gas Co., supra*, the Court considered an agreement made in 1905 giving the Company the privilege of supplying natural gas throughout the City of Calgary. This agreement was amended in 1911 by providing that the defendant should be permitted to charge certain prices for gas supplied “to the inhabitants of the City.”

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195. It was held, distinguishing *Toronto (City) v. Toronto Ry. Co. supra*, that the privilege granted was not limited to the area of the City as it existed in 1905 but extended to the various extensions of the City's boundaries which were subsequently made.

196. The same Court, in a case argued the same year (*Union Natural Gas Co. of Canada v. Chatham Gas Co.*) para. 192, *supra*, distinguished the City of Calgary case and held that a contract by the plaintiff to supply, and by the defendant to take, all the gas required by the defendant for sale and distribution in the City of Chatham did not oblige the plaintiff to supply gas for sale and distribution in territory annexed to the City after the contract was made.

20 197. From a study of these cases I am satisfied that the decision in each case must turn first of all upon the construction of the agreement and the relevant statute, if any, there involved: see per Lord Collins in *Toronto (City) v. Toronto Ry. Co. supra* ((1907) A.C. 319). In that case the decision was upon the particular contract which the Court was asked to construe and no attempt was made to lay down any general principle: see per Fitzpatrick C.J. in *Calgary (City) v. Canadian Western Natural Gas Co. supra*, (1917) 56 S.C.R. at p. 119. “Counsel for both parties referred to many cases where the Courts have construed agreements respecting services of gas, electricity, 30 transportation, etc., to municipalities. I have studied all of those cases, and found them of doubtful use. The decision in each case must turn upon the language of the contract under review”: per Mulock C.J.O. in *United Gas & Fuel Co. & City of Hamilton v. Dominion Natural Gas Co. supra*, ((1933) O.R. at p. 383).

198. There was naturally much argument in the instant case whether By-laws 148 and 195 should be construed as exempting statutes and so strictly against the plaintiff or as documents embodying agreements between the plaintiff and defendant.

40 199. In support of the first view I was referred to Reference re Taxation of C.P.R. (1949) 1 W.W.R. 353 (see the language of Martin C.J.S. at p. 372, and the cases to which he refers) and to the cases referred to in paras. 116 to 122 *supra*.

200. In support of the second view the plaintiff cited *Halifax (City)*

v. Nova Scotia Car Works Ltd. (1914) A.C. 992; In re Nova Scotia Power Com'n & Bank of Nova Scotia (1935) 3 D.L.R. 494.

201. In my opinion the principle of construction applicable to this case is enunciated by Viscount Sumner in Halifax (City) v. Nova Scotia Car Works Ltd. (*supra*) at p. 996, where, in dealing with an exemption agreement validated by a statute, he said:

10 "So far as a simple question of interpretation is affected by pre-
sumptions at all, their Lordships are of opinion that this clause
should be construed favourably to the respondents. They have
performed the whole consideration on their side by establishing
their works, and the consideration moving to them has been
earned and ought not to be thereafter restricted. The matter
is one of bargain and of mutual advantage; it is not a case of one
citizen seeking to escape from his share of common burthens and
so increasing *pro tanto* the burthen on the others."

I am satisfied that it is an agreement I am construing, and that its meaning is clear; but if the meaning is not clear I am prepared to adopt the principle laid down by Viscount Sumner.

202. The cases already referred to in paras. 192 to 197 *supra* show
20 also that whatever interpretation might be given to the agreement at
the date it is made as to the area of its operation, the subsequent acts
of the parties may make it impossible for one to maintain successfully
that the operation of it is restricted to the territorial limits of the
municipality as it existed when the contract was made: see per
Anglin J. (later C.J.) in Calgary (City) v. Canadian Western Natural
Gas Co. *supra* ((1917) 56 S.C.R. at p. 137).

203. This, of course, is on the assumption that the original agree-
ment was a valid agreement and not *ultra vires* either party. Admit-
ting that an *ultra vires* agreement could not be validated by any
30 principle of estoppel (see para. 322 *infra*), we have not such a situation
here. I note and agree with the statement by Idington J. in Union
Natural Gas Co. v. Chatham Gas Co. (56 S.C.R. at 267) that actions
of this kind are not common law actions but essentially judicial pro-
ceedings in the nature of suits or proceedings in equity. It would in
my view be inequitable to permit the defendant to take the stand
that it is here endeavouring to take. There are many decisions I
might refer to: I content myself with referring to the language of
Mulock C.J.O. in United Gas & Fuel Co. v. Dominion Natural Gas
Co. *supra* ((1933) O.R. 369 *et seq. passim*). This is particularly so
40 in the light of the facts I refer to in paras. 205 to 208 *infra*. I discuss
the question of Estoppel in Section VIII *infra*.

204. Having these considerations in mind and in the light of these
decisions, I am satisfied that on the construction of the agreement
contained in By-laws 148 and 195 of the validating statute, and of the

bond and covenant, the words "within the said City of Winnipeg" mean the City of Winnipeg as from time to time constituted. As Sedgewick J. said in *Toronto Ry. Co. v. Toronto (City) supra* (at p. 434, 37 S.C.R.):

10 "In construing an instrument in writing, the court is to consider what the facts were in respect to which the instrument was framed, and the object as appearing from the instrument, and taking all these together it is to see what is the intention appearing from the language when used with reference to such facts and with such an object, and the function of the court is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot admit of. Its duty is to interpret, not to enact."

205. The parties contemplated and entered into an agreement in perpetuity—something the Legislature validated and confirmed by statute so far as the defendant is concerned; the principal workshops were to be "forever" continued within the City of Winnipeg and the exemption was to be "forever." In these circumstances how can it be said that the parties dealt only in respect of the area of the City
20 as it existed in 1881? In my opinion the facts show they did not.

206. The area of the City established in 1873 had been enlarged in 1875 (Ex. 7). It was again enlarged in 1882 by a statute assented to 30th May 1882 (see para. 8 *supra*). This was done after By-law 148 was passed 5th July 1881 after the Bond and Covenant was delivered 10th October 1881, after the defendant executed and delivered its deed 18th April 1882 (para. 7 *supra*), and before the amending By-law 195 was passed 30th October 1882, and before the validating Act of 1883 (para. 4 *supra*). While the parties were negotiating the agreement to amend the original agreement, as was
30 done by By-law 195, the areas of the City were being extended. It appears from Clause 3 of the admissions set out in para. 29 *supra*, that By-law 195 was submitted to the ratepayers in the whole of the City, including the portion added in 1882. I am sure the parties would have been surprised if in 1882 it had been suggested that they were making an agreement operative only within the 1875 limits of Winnipeg.

207. The area of the City was enlarged in 1902, 1906 and 1907 (see Ex. 7). Section 5 of the admissions set out in para. 29 *supra* shows that the workshops were built in the original area, that they
40 were enlarged in that area in 1887, and that in 1903 they were moved into the area added in 1882—the area added before By-law 195 was passed—where they remain.

208. There is no evidence that the defendant made any objection to the removal of the workshops to the area added in 1882, either in

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1903 when they were moved, or at any time since, until the statement of defence was filed in this action.

209. If I am wrong on the question of construction, in my opinion the second principle stated in paras. 202 and 203, *supra*, applies and both defences referred to in para. 192, *supra*, fail.

210. I now return to another ground of defence. By Condition 4 of Clause 4 of the By-laws embodied in the bond and covenant (see para. 5, *supra*), the plaintiff was to procure and erect within the City large and commodious stock or cattle yards. It is admitted that
 10 this was done (Admission 5, para. 29, *supra*); but the admission only goes to the period 1882-1911. The defendant by that admission puts the plaintiff to the proof that such yards were continued in the City after 1911.

211. The condition does not, in terms, require the plaintiff to continue these yards within the City, but the third recital of the By-law is that the plaintiffs "have agreed to establish and continue their principal workshops and stockyards for the Province of Manitoba in the City of Winnipeg aforesaid." There was some argument on
 20 whether or not the recital controlled the terms of the condition and I was referred to the statement already quoted from Corporation of Whitby v. Grand Trunk Ry. Co., para. 89 *supra*. Whatever may be the correct view, I shall deal with the matter as if the plaintiff had covenanted to continue its stock yards within the City limits forever.

212. In 1911 the Manitoba Legislature passed an Act, c. 45, to incorporate Public Markets Limited. By that statute, the various railway companies doing business in Western Canada were empowered to take shares in the capital stock of the corporation. Section 23 of the Act provides:

30 "Anything done under, in pursuance of or in connection with the provisions of this Act by the Canadian Pacific Railway Company, or by any other railway company, or the taking and holding by the said company of any share or shares or interest directly or indirectly in the corporation hereby created, or the construction, maintenance or operation of any railway facilities, terminals or of any stock yard, stock markets or the like in or near the City of St. Boniface by the said railway company, or any railway company, alone or in conjunction with others, in relation to or in connection with anything in this Act contained or by this Act
 40 authorized, shall not injure, affect, prejudice or cause any forfeiture or impairment of any benefit, right, exemption or privilege of the Canadian Pacific Railway Company under by-laws numbers 148 and 195 of the City of Winnipeg, or either of them, or of any railway company or be construed to be any breach, violation or non-observance of any provision or condition, or of

any obligation or duty under the said by-laws, or either of them, or under any contract or by-law or otherwise howsoever.”

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213. Public Markets Limited established stockyards in the City of St. Boniface and the plaintiff became a shareholder in the Corporation. Plaintiff, however, continued to maintain, and still maintains, stockyards within the territorial limits of the City of Winnipeg sufficiently commodious to handle all the business of that kind consigned to the plaintiff in the City of Winnipeg. On the argument, counsel for the defendant stated he was not pressing this point and, 10 in my opinion, no defence could be based upon these facts.

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214. The defendant next argues that the hotel and restaurant property which the plaintiff owns and operated in Winnipeg is not property owned by the plaintiff “for railway purposes or in connection therewith,” within the meaning of sec. 8 of the by-laws (see para. 5, *supra*, and secs. 4 and 26 of the defence). It relies upon the decision in Canadian Pacific Railway Company v. Attorney-General of B.C. (1948) S.C.R. 373, affirming (1947) 1 W.W.R. 927. That case, however, came before the Courts on a reference by the Lieutenant-Governor in Council to determine whether the British Columbia 20 Hours of Work Act was applicable to and binding upon the Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel in Victoria B.C. The decision was that—

“An hotel is not an integral part of a railway and therefore does not fall within the meaning of the term ‘railways’ as used in section 92 head 10(a) of the British North America Act; nor has the Parliament of Canada made a declaration as to hotels under section 92 head 10(c) of the Act. An hotel therefore does not fall with the class of subjects to which in virtue of section 91 head 29 of the Act, the exclusive Legislative Authority of the 30 Parliament of Canada extends.”

215. Counsel inform me that on July 14, 1948, leave to appeal this decision was given by the Privy Council, but I cannot see that the decision can be of any assistance in considering the words of the exemption clause, sec. 8, “property . . . owned . . . for railway purposes or in connection therewith.”

216. The evidence before me—particularly that of Mr. Manson—in my opinion makes it abundantly clear that the hotel and restaurant in question are properties owned in connection with the railway and for railway purposes. It has already appeared that in 1902 the 40 plaintiff obtained legislation which empowered it to build hotels and restaurants (see para. 59, *supra*), which I think—though it is not necessary to my decision—indicates that it was considered that hotels and restaurants were valuable adjuncts to the plaintiff and useful in the operation of its railway. This defence in my opinion

also fails. I cannot see that the decision in *Attorney-General v. Mersey Ry. Co.* (1907) A.C. 415 affects this matter one way or the other.

217. By para. 13 of the defence, the defendant says that if there were an agreement between the plaintiff and defendant the same is too vague, indefinite and uncertain in its terms to amount to a binding agreement and that it is not enforceable by either party. Para. 17 of the defence makes a similar allegation with respect to the bond and covenant. The essence of this defence is based upon the
 10 fact that the railway was to continue to do certain things forever, and that the exemption from taxation was to be an exemption from taxation forever. As I have already pointed out (see para. 95 *supra*), the defendant's argument is pointed up in the statement: "A covenant to forever continue certain railway works in a particular locality is most unusual if not unique." I can see nothing vague or indefinite in the provisions of the agreement embodied in the by-laws or in the bond and covenant. The word "forever" is neither vague nor
 20 indefinite. The Parliament of Canada used it (see para. 41 *supra*) when it authorized and approved a contract which gave an exemp-
 tion from certain taxation forever, and legally such an agreement is valid and enforceable. Even if a covenant to maintain works in a certain locality forever is "unique," there is nothing to prevent the parties making such an agreement if it is not *ultra vires*. Such an agreement was made in the *Town of Whitby* case (para. 88 *supra*) and it was only because it was held *ultra vires* that it was not enforced. The books contain many cases of perpetual franchises and agreements in perpetuity. It is not for me, sitting here, to express any opinion whether such agreements are or are not advisable.

218. But there is another, and in my opinion a conclusive, answer
 30 to the defendant's argument. The Legislature has declared By-laws 148 and 195, which contain the agreement between the parties, "legal, binding and valid" upon the defendant. As Farwell J. said in *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (para. 114 *supra*):

"When the Legislature declares an agreement valid, it is valid *in toto*, and I am not at liberty to hold it partly invalid. That disposes of the argument on the ground of perpetuity." (1900) 2 Ch. at p. 359.)

He also said, *op. cit.*, p. 360:

40 "What I have said also extends to the case of voidness for uncertainty. If the Legislature has declared the contract valid, how can I declare it void? There is, of course, a greater difficulty here, because, although the Legislature has declared the contract intelligible, that does not necessarily enable me to com-

prehend it. I adopt the view expressed by Jessel M.R. in *In re Roberts* (1881) 19 Ch.D. 520, 529, where he says "The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it." I think that applies *a fortiori* to an agreement which the Legislature has solemnly declared valid. Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning, and not to declare them void for uncertainty."

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10 219. In the case at bar there is no such difficulty. The words are perfectly plain and the meaning is not in doubt. I am further of opinion that upon the basis of the principles set out in Section V *supra* this matter is *res judicata*.

220. By paragraphs 30 and 31 of the defence, the defendant alleges that the provisions of clauses 3 and 8 of the by-law and the terms of the agreement embodied in the by-law—if there is such an agreement—are so grossly imprudent and unfair, and are so palpably unequal and so unjust in their operation, that their effect could not have been fully apprehended by the defendant, and that neither the plaintiff
20 nor defendant could have contemplated that Clause 8 could remain in effect forever. In my opinion it is only necessary to state this defence to show that it cannot prevail. I have not the slightest doubt but that both parties fully apprehended the nature of the agreement they were making and that it is one which is binding upon each and is enforceable by the Courts. The Legislature has made the agreement binding on the defendant and in my view that concludes this matter (see para. 218 *supra*).

221. By paragraph 14 of the defence, the defendant says that if there were an agreement, it was subject to an implied term that it
30 might be terminated by either party at any time; and by paragraph 30 of the defence already referred to in para. 220 *supra*, the defendant says that the covenants and agreements as set out in clause 8 of By-law 148 were subject to termination at any time by the defendant by the repeal of the said by-law or otherwise. There is of course no provision in the agreement for its termination, nor can any such provision possibly be implied upon any construction of the document. The language used is clearly to an opposite effect. The defendant does not allege that it has any statutory power to repeal By-law 148 and 195. Apart from such a power, it has no right to repeal the By-
40 laws: see *United Gas & Fuel Co. v. Dominion Natural Gas Co.* (1932) O.R. 559, affirmed (1933) O.R. 369 and (1934) A.C. 435, the cases dealt with therein, and *Montreal (City) v. College Ste. Marie* (1921) 1 A.C. 288.

222. Furthermore, the Legislature has declared the by-laws which embodied the agreement to be valid and binding on the defendant,

and so long as that legislation remains in effect the defendant may not terminate the agreement. This defence therefore fails and it follows that By-law 16306, by which the defendant purported to repeal By-laws 148 and 195 (see para. 22 *supra*), is invalid.

223. In paragraph 18 of the defence, the defendant alleges that if there were an agreement there was never any consideration for same received by the defendant for the agreement, or for enacting the by-laws, or for granting an exemption from taxation. Paragraph 18 contains the following:

10 “The defendant says that the plaintiff did not as a result of or in reliance upon said agreement or any term or terms thereof exercise any forbearance or change its plans or incur any expense or make any investment or in any way change or alter or prejudice its position or the location, construction or operation of its railway or of any works connected with its railway or give any consideration.”

224. The defendant follows this up by paragraph 19, which reads:

20 “The defendant further says that the plaintiff did not as a result of the defendant having passed said by-law No. 148 as amended by said by-law No. 195, or as a result of the defendant having been empowered by chapter 64, Statutes of Manitoba, 1883, to make such by-law, exercise any forbearance or change its plans or incur any expense or make any investment or in any way change or alter or prejudice its position or the location, construction or operation of its railway or of any works connected with its railway or give any consideration.”

225. Then by paragraph 20, the defendant pleads, *inter alia*:

30 “Defendant further says that the plaintiff had prior to the 7th day of July, 1883, when chapter 64 Statutes of Manitoba 46-47 Victoria was assented to, completed or substantially completed all works which plaintiff alleges it had agreed to complete under the terms of the agreement alleged in paragraph 5 of the plaintiff's statement of claim.”

226. The defendant's contention on this phase of the case is that the plaintiff intended to do all the things which it agreed by the by-laws to do, and would have done them whether or not the City had agreed to do the things which by the by-laws it agreed to do. To support this argument the defendant tendered in evidence a large number of exhibits, including reports of engineers and other documents which appear in the record. I admitted certain of these subject to objections of the plaintiff, and suggested that all documents so tendered should be admitted as exhibits subject to the objections and the matter dealt with on the general argument. The plaintiff then asked to be permitted to put in certain exhibits in answer on the

same basis. Several of these were put in but a stage was reached where the defendant objected to certain of the documents tendered by the plaintiff being admitted under any circumstances and accordingly the whole question of the admissibility of the documents and the relevancy of the defence of no consideration was argued, and I held that the documents were not admissible and that the question of lack of consideration was not open to the defendant. In my opinion such a defence could not succeed.

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227. While I am satisfied that there was consideration and that the
10 consideration fully appears on the face of the document, I think the
short answer to these defences is that when the Legislature declared
By-laws 148 and 195 (which includes the agreement) to be legal,
binding and valid upon the defendant, no question of consideration
can arise. I am satisfied that the principles laid down in such cases
as Manchester Ship Canal Co. v. Manchester Racecourse Co. (see
para. 114 *supra*) are applicable, and to use the language of Farwell J.
(later L.J.), (1900) 2 Ch. p. 360: "If the Legislature has declared the
contract valid, how can I declare it void?" I am also of opinion that
the matter is *res judicata* on the basis of the decisions referred to in
20 Section V *supra*. I do not think the plaintiff is driven to rely on the
principle laid down in Haigh v. Brooks (1839) 10 Ad. & El. 309
referred to in argument.

SECTION VII

THE BUSINESS TAX

228. By-laws 148 and 195 provided (sec. 8) that upon fulfilment by
the plaintiff of stated conditions

30 "all property now owned, or that hereafter may be owned by
(the plaintiff) within the limits of the City of Winnipeg, for rail-
way 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."

229. The plaintiff contends that this provision exempts it from
assessment to and payment of business tax. The defendant says that
if anything is exempt, it is property; that the business tax which it is
empowered to impose is a personal tax and not a property tax, and
that sec. 8 of the by-laws, no matter how widely construed, does not
prevent the City from assessing the plaintiff to business tax and
collecting such tax. To this the plaintiff replies that the particular
business tax sought to be imposed is a property tax and not a personal
40 tax, and that even if it is a personal tax the section properly construed
exempts the plaintiff.

230. The argument raised many difficult points and it is necessary
not only to set out the statutory provisions applicable when the 1948

assessment to business tax was made, but also the statutes from time to time in force from 1881 to 1948. I here set out the provisions of the charter in force in 1948.

231. The Charter, S.M. 1940, c. 81, as amended to 1948, provided:

“290. In this Part the expression

(a) ‘business’ includes a trade, occupation, calling, manufactory, art or profession;

(b) ‘premises’ means land or building or both or any part thereof.

10 “291. (1) Excepting as otherwise hereinafter provided every person carrying on any business in the city whether he resides therein or not shall be assessed for a sum equal to the annual rental value of the premises which he occupies in carrying on, or uses for the purpose of, such business, or uses in any way excepting solely for residential purposes. Such assessment shall be known as ‘business assessment’ and the tax levied on this assessment shall be known as ‘business tax.’

20 (2) The word ‘person’ used in this section shall have the meaning assigned to it in section 2 hereof (‘person’ includes corporation or company) notwithstanding anything to the contrary which might be otherwise referred from the use of the terms ‘resides’ and ‘residential purposes’ in the first subsection hereof.”

“292. (1) Annual rental value for the purposes of this Act, shall be deemed to include the cost of providing heat and other services necessary for comfortable use or occupancy, whether the same be provided by the occupant or owner.

30 (2) In assessing annual rental value, the assessment commissioner shall take all factors into account so that as far as possible premises similar in size, suitability, advantage of location, and the like, shall be equally assessed. The intent and purpose of this section is that all persons subject to business tax shall be assessed at a fair rental value of the premises occupied or used, based in general upon rents being actually paid for similar premises.”

“296. No person shall be exempt from assessment for business tax in respect of any premises on the ground that he is the owner of the premises and liable to taxation as such.”

40 “297. (1) For the purpose of levying the business tax hereinafter 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 per centum of said value as is applicable to the class in which such business falls, as shewn 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:

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10	"L. Proprietor or Conductor of Express Freight or Passenger Transportation Service (by rail, motor vehicle, aeroplane or other conveyance, not in- cluding taxicabs)..... Telegraph Service.....	 12½% 12½%”
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20 “306. (1) In every instance in which the assessment in respect of any property or any assessment for the purposes of business tax is in any year increased from what it was in the year immediately preceding, or is a new assessment, the assessment commissioner shall send by mail or leave with the person assessed or his agent a notice of assessment in the appropriate form contained in the schedules to this Act, or to the like effect. Except in such cases it shall not be necessary to send notice of assessment but this shall not exclude or limit the right of appeal to the board of revision in any case.

30 (2) If in any year two or more parcels of land owned by one person but previously assessed separately be consolidated and assessed at a sum equal to or less than the total of the separate assessments in respect of such parcels in the year immediately preceding, such consolidated assessment shall not be regarded as a new assessment within the meaning of this section.

(3) The assessment commissioner shall enter in the respective assessment rolls the date on which he has mailed or delivered each notice of assessment required to be sent by him.”

40 “343. The assessment commissioner shall forthwith after the completion of the business assessment roll prepare a business tax roll, in which he shall, in addition to other information, insert the names of every person assessed for business tax and a description of the premises in respect of which such person is assessed, as shown in the said business assessment roll, and shall carry out in a separate column the amount of taxes chargeable at the proper rate as fixed by this Act on each assessment, and

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the sum so shown shall be and create a debt due by the party so mentioned in the roll to the city, and that sum shall be the business tax payable by the party assessed."

"345. The business tax roll shall in all respects be a separate roll from the general tax roll."

"348. When each of the said tax rolls is completed it shall be given to and remain in the hands of the tax collector for collection and the collector shall forthwith proceed to collect the taxes as shewn on said rolls."

10 "360. (1) The city shall have a first lien or charge upon all the personal property of every person liable to the city for business tax, and the city may levy such tax with costs by distress and sale of the goods and chattels or the interest therein of the person who ought to pay the same wherever the same may be found within the city."

20 "364. Taxes, whether business or general, together with penalties for default in payment as provided for by this Act, may be recovered with costs in any court of competent jurisdiction in the Province as a debt due to the city from any person by whom the same are payable (or in whose name the same are assessed), in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person, purporting to be certified by the collector as a true copy, shall be sufficient evidence of debt."

"365. Any taxes may be recovered and may be levied on any real or personal property," (with certain irrelevant exceptions).

30 "369. (1) In case a person neglects to pay his general taxes for thirty days or his business tax forthwith, after mailing to such person or his agent of the notice required by this Act, the city shall have the right to levy the same with costs by distress and sale of the goods and chattels or the interest therein of the person who ought to pay the same; subject, however, to the exemption mentioned in section 365."

"(3) The business tax shall not be a charge upon the land or building occupied, but such tax is levied in lieu of a tax upon personal property."

232. The plaintiff says, in the first place, that on the proper inter-

pretation of these statutory provisions it is clear that the business tax imposed is a tax on property. Before deciding this point there are certain matters that should be dealt with.

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233. I accept the interpretation put upon the exemption clause by the Supreme Court in the School Tax case already set out in para. 152 *supra*. The fact that that Court preferred to rest its judgment on another ground does not invalidate the reasoning on that point and I think the literal construction is clear.

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234. But this only carries the matter part way. In my opinion the word "property" as used in the exemption clause means all property, real and personal. I have dealt with the interpretation I consider should be put on the words "owned by" the plaintiff "for railway purposes or in connection therewith" in so far as the hotel and restaurant premises of the plaintiff are concerned: paras. 214 to 216 *supra*. These are the only properties specifically dealt with on the argument or in evidence. I shall assume that all the other properties referred to in the Statement of Claim come within one or other of the categories just referred to. This applies to all real or personal property within the limits of the defendant as at present existing or as they may be at any time in the future which includes the property in question in this action: see para. 204 *supra*.

235. This property is to be "forever free and exempt from

- (1) all municipal taxes, rates and levies;
- (2) assessments of every nature and kind."

236. It seems to me clear that the business tax provided for by the charter is a municipal tax. But is it a tax on property? The plaintiff says it is, on the plain wording of the Act, and argues as follows: While sec. 291(1) (para. 231 *supra*) provides that every person shall be assessed for a sum equal to the annual rental value of the premises occupied in carrying on or used for the purpose of the business (which assessment is called the "business assessment"), and while sec. 343 (para. 231 *supra*) provides the amount of tax ascertained in the manner indicated in the Act shall create a debt due by the party assessed and that such sum shall be the business tax payable by such party,—other sections of the Charter show that actually it is the premises that are assessed.

237. The first section to which the plaintiff refers is section 292(2), and the plaintiff reads the first sentence:

40 "In assessing annual rental value, the assessment commissioner shall take all factors into account so that as far as possible premises similar in size, suitability, advantage of location, and the like, shall be equally assessed."

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238. The plaintiff then points out that the notices of business assessment served on it are all in the form set out in Schedule H to the Charter and authorized by sec. 306(1) (para. 231 *supra*). The form reads:

CITY OF WINNIPEG
NOTICE OF BUSINESS ASSESSMENT FOR 19 .

No. on Roll	Name of Party Assessed	Premises Assessed Street No., etc.	Class of Business	Annual Rental Value	Class	Rate	Ref. No.

239. Standing alone, the wording of the first sentence of s. 292(2) and Form H lend colour to the argument that it is the premises which are assessed. But the second sentence of s. 292(2) must not be overlooked. It reads:

“The intent and purpose of this section is that all persons subject to business tax shall be assessed at a fair rental value of the premises occupied or used, based in general upon rents being actually paid for similar premises.”

240. The plaintiff also calls attention to the wording of the following sections:

S. 293(3): “In assessing any premises in respect of the use or occupancy thereof for the purpose of maintaining or operating advertising signs” etc.

20 S. 293(1): “The business assessment in respect of gasoline filling stations” etc.

S. 293(2): “The business assessment in respect of any hotel” etc.

241. I must however read the provisions of the Charter relating to business assessment as a whole and I cannot come to any other conclusion than that the business assessment is not an assessment of property but is an assessment of the person carrying on the business.

242. This conclusion disposes of another argument put forward by the plaintiff. It says that its business is part of its property and 30 cites in support of that argument *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923) 54 O.L.R. 629, Re

Town of Pembroke & County of Renfrew (1929) 35 O.W.N. 364, and Regina Industries Ltd. v. Regina (City) (1947) S.C.R. 345.

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243. Whatever may be the effect of these decisions, and assuming that they decide that "business" is property, I think it beyond doubt that the Charter does not provide for assessment of the "business." It is the person that is assessed. Of course I am only dealing at this stage with "assessment." I consider the above authorities later in connection with another point.

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244. The plaintiff also contends that as an assessment is essential
10 to the imposition of the business tax and the exemption agreement covers all municipal assessments, therefore the plaintiff is exempt from the business tax. It refers me to Whitney v. Inland Revenue Commissioners (1926) A.C. 37, Re Mutual Life Assurance Co. and Halifax (City) (1935) 2 D.L.R. 267, In re J. D. Shier Lumber Co. Assessment (1907) 14 O.L.R. 210, Re Toronto Suburban Ry. Co. & Toronto (City), (1922) 52 O.L.R. 655, Norfolk Fruit Growers Association v. Quance (1947) O.R. 1007, Cooley on Taxation, 3rd Ed., vol. 1, p. 596, and the definitions of "assessment" as given in Murray's New English Dictionary.

20 245. It is quite correct that an assessment is essential to the imposition of the business tax. But the exemption agreement I am dealing with relates only to assessments on property: the business assessment provided for by the defendant's charter is clearly an assessment of the person and there is nothing in the decisions referred to permitting or compelling me to hold otherwise.

246. The plaintiff next contends that the Privy Council in Halifax (City) v. Fairbanks Estate (1928) A.C. 117, has decided that a business tax is a property tax—a tax *in rem*—and that that decision is conclusive and binding on me.

30 247. This argument carries the matter beyond the question of assessment and leads also to the interpretation of the words "municipal taxes, rates and levies" as used in the exemption clause, and their application to the provisions of the charter.

248. The defendant replies that the Privy Council did not decide that a business tax is a property tax and relies on the decision of the Saskatchewan Court of Appeal in Reference re Taxation of Canadian Pacific Railway Co. (1949) 1 W.W.R. 353, where it was held that the business tax imposed by The City Act of Saskatchewan was a personal tax—a tax *in personam*. This case, which considers all or almost all
40 of the previous decisions, is now in appeal to the Supreme Court of Canada.

249. There are many cases in which the nature of a business tax has been considered by the Courts, and they were all cited to me.

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A careful consideration of these authorities leads me to the conclusion that whether or not the particular "business tax" in question in any case is a tax *in rem* or a tax *in personam* depends upon a consideration of all of the provisions of the particular taxing statute. It is not what the tax is called but what it is, and how it is to be recovered, that is important and really decisive. In my opinion a business tax may be at one and the same time a tax *in rem* and a tax *in personam*, depending on the wording of the statute imposing it.

250. One of the earliest cases was *Re Hydro-Electric Power Commission of Ontario and City of Hamilton* (1920) 47 O.L.R. 155, where it was held that the business assessment imposed by R.S.O. 1914, c. 195, s. 10, was a personal tax. The relevant portions of the section read:

"Every person carrying on the business of . . . the transmission of . . . electricity for the purposes of light, heat or power" shall be assessed for a sum to be called "Business Assessment," to be computed by reference to the assessed value of the land so occupied or used by him, "for a sum equal to 25 percent of the assessed value of the land."

20 Meredith C.J.O. said (p. 160):

"The business assessment is imposed by sec. 10, and 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."

251. Dealing with the decision in *Re Nova Scotia Power Commission and Bank of Nova Scotia* (1935) 3 D.L.R. 494, Ross J. said at p. 502:

30 "I agree that under s. 28(2) of the Power Commission Act the Commission is exempt from the business tax in respect to its occupation or use of the premises in the Bank of Nova Scotia Bldg. It seems to me that the decision in the case of *Re Hydro-Elec. Power Com'n & Hamilton*, 52 D.L.R. 526, was based on the provisions of s. 10 of the Ontario Assessment Act, which provided that every person carrying on the business of the transmission of electricity for the purposes of light, heat or power should be assessed for a sum to be called 'Business Assessment' to be computed by reference to the assessed value of the land so occupied or used by him, 'for a sum equal to 25 per cent. of the assessed value of the land.' The Court held there that such business assessment was a personal tax and not a tax on real or personal property. We have however no similar statutory provision in Nova Scotia. In Halifax the taxation consists of different taxes, among others, a business tax and real property

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tax. The real property tax is a tax on owners of real property (s. 369); the business tax is a tax payable by every occupier of real property. In both cases the taxation is based on the value of the premises owned or occupied respectively. The business tax cannot be said to be a purely personal tax, because, as in this case, for example, if the Commission is exempt, the business tax falls on the owner. If the use or occupation of the Commission is exempt under the statute you cannot in my opinion impose liability on the Commission based on some theory that the business tax is a personal tax. The statute here imposing the business tax, is very different from the one under consideration in the Hydro case referred to above."

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252. Mr. Manning in his work "Assessment and Rating," 2nd ed., (1937) p. 95, note (a), in referring to the Hydro-Electric Power Com'n case, points out that under the Ontario Act business taxes do not constitute a lien upon lands.

253. The Winnipeg Charter provides that the business tax shall not be a charge upon the land or building occupied: s. 369(3) (para. 231 *supra*). But it also provides that the City shall have a first lien or charge upon all the personal property of every person liable to the City for business tax and the tax may be levied upon the goods and chattels of the person who ought to pay the same wherever the same may be found within the City: sec. 360(1) (Para. 231 *supra*).

254. Then sec. 365 (para. 231 *supra*) enacts that any taxes may be recovered and may be levied on any real or personal property. On the argument I drew the attention of counsel for the defendant to this section and asked him if it had ever been construed. He replied that it had not. Section 365 has been in the Charter for many years. It took its present form when the 1940 charter was granted. Prior to that it commenced: "Any school or other taxes may be recovered," etc. In this form it appeared as sec. 380 of the 1918 Charter—sec. 388 of the 1902 Charter—when it was taken from the Assessment Act, R.S.O. 1902, c. 101, s. 136. I think these words should be given their literal meaning and that the expression "any taxes" includes "business tax." Such an interpretation does not conflict with the provision of s. 369(3) referred to in para. 253 *supra*. While the business tax is not a charge on the land or building referred to it may be levied on any real or personal property under s. 365, and levied on goods or chattels under s. 369(1) (para. 231 *supra*).

40 255. In my opinion the Charter subjects the property of the taxpayer, real and personal, to a levy for business tax. This is, then, a "municipal levy" on property. But the exemption agreement provides that the property of the plaintiff is to be forever free from all municipal levies.

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256. The business tax imposed by the present Winnipeg Charter is, therefore, in this respect a tax on property, although it also partakes of the nature of a tax *in personam* in that it may be recovered as a debt: ss. 343 and 364 (para. 231 *supra*). It is however one tax and I take the view that the fact that it can be recovered in an action does not make it any the less a levy on property.

257. It seems to me that besides being a municipal levy it is also a municipal tax on property within the meaning of the term as used in the exemption agreement, but I prefer to base my judgment on the
10 ground that it is a municipal levy on property from which the plaintiff is forever exempt.

258. I can find nothing in the numerous cases cited to alter that view. It is advisable to consider some of them, which means also considering the various statutes upon which they were decided.

259. Broad statements will be found in many of the cases defining "business tax." These statements I have found of little help because they are all made with reference to particular statutes and particular facts. The question is not rendered any simpler by the use of a term—business tax—which is not descriptive of the tax really sought
20 to be imposed. As Mr. Manning in his work already referred to (para. 252 *supra*) points out at p. 96:

"The name 'business tax' has been criticized as being more appropriate to a tax in proportion to the amount of business done or the volume of profits from a business: citing Dominion Express Co. v. Brandon (Town) (1911) 20 M.R. 304 (where the term 'occupation tax' was suggested as a better description)."

260. In London County Council v. Attorney-General (1901) A.C. 26, Lord Macnaghten said (p. 35):

30 "Income tax, if I may be pardoned for saying so, is a tax on income."

I cannot say "Business tax is a tax on business." Without qualifying the statement in so many ways it would be almost, if not quite, meaningless: and see para. 275 *infra*.

261. In *Re Hertzman and Hertzman* (1931) 40 O.W.N. 561, Orde J. A. said:

"The tax upon land and business taxes are fundamentally different. The tax upon land is a tax *in rem*. Business tax is a tax *in personam*."

The remarks of Meredith C.J.O. in *In Hydro-Electric Power Commission of Ontario and City of Hamilton* have already been quoted:
40 para. 250 *supra*.

In *Pigeon v. The Recorder's Court and City of Montreal* (1890) 17 S.C.R. 495, the business tax in question was one calculated on a percentage of the annual value of the premises in which business was carried on, and Strong J. referred to the tax as

“a general tax in respect of the property upon which any trade or occupation is carried on.”

262. In a broad general sense, all taxes—even taxes on realty—are personal taxes: see the remarks of Graham J. in *Re Nova Scotia Power Commission and Bank of Nova Scotia* (para. 251 *supra*) at 10 p. 498. By the defendant's charter all lands (with stated exemptions) shall be liable to taxation; but the lands are assessed in the name of the owner and if the owner does not pay, the taxes may be recovered as a debt of the owner due to the city, as well as by distress and tax sale.

263. Each of the cases referred in argument must therefore be examined to see upon what statutory provisions it was decided, and then those provisions must be compared with the provisions of the defendant's charter. But there is a further and most important point to bear in mind: It is my duty to decide whether the business tax in 20 question is or is not within the terms of a special exemption agreement.

264. As the Saskatchewan case (see para. 248 *supra*) is the most recent I shall deal with it first. It came before the Court by way of reference from the Lieutenant-Governor in Council. One of the points to be determined was whether or not a business tax imposed by The City Act and other similar municipal Acts was a tax *in rem* or a tax *in personam*.

265. In an earlier case, *Moose Jaw (City) v. B.A. Oil Co. Ltd.* (1937) 2 W.W.R. 309, the same Court had held that a business tax levied under the provisions of The City Act was a personal tax and 30 not a tax on property. This decision had been followed in Saskatchewan.

266. The statutory provisions considered in the Saskatchewan Court of Appeal are set out in the judgment of Procter J.A. in Reference re Taxation of C.P.R. (see para. 248 *supra*) at p. 417:

“441. (1) As soon as may be in each year but not later than the thirty-first day of May the assessor shall assess:

“1. in respect of every parcel of land in the city:

“(a) the registered owner;

40 “2. every person who is engaged in mercantile, professional or any other business in the city . . .

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"3. the owner of a special franchise;

and shall prepare an assessment roll in which he shall enter the names and addresses of the persons mentioned in paragraphs 1, 2 and 3.

"443. (1) Business shall be assessed in the following manner:

10 "1. the assessor shall fix a rate per square foot of the floor space, irrespective of partitions, elevators, stairways, or other obstructions, of each building or part thereof used for business purposes, and shall as far as he deems practicable classify the various business and portions thereof;

"2. he may fix a different rate for each class or portion thereof . . .

"(2) Where it is found by the assessor that a business is being carried on, either wholly or partially outside of any building, he shall fix a rate per square foot of the yard space used for such business . . .

20 "5(a) A railway company, whether its property is liable to assessment and taxation or not, shall be liable to assessment and taxation under this section in respect of the business carried on as a railway . . .

"479. Subject to the other provisions of this Act, the municipal and school taxes of the city shall be levied upon (1) lands; (2) businesses; and (3) special franchises;

"480. The following property shall be exempt from taxation:

"(2) property specially exempted by law;

"Then follow provisions for levying taxes and the collection thereof."

267. The Court held that the business tax imposed by such legislation is not a tax on property but a personal tax. In this the Court 30 followed its previous decision in *Moose Jaw v. B.A. Oil Co. Ltd.* (para. 265 *supra*) and distinguished the Privy Council decision of *Halifax (City) v. Fairbanks Estate* (para. 246 *supra*). This last mentioned case was not cited to the Court at the time the *Moose Jaw* case was decided, and the Court came to the conclusion that in

Halifax v. Fairbanks the judicial mind was not directed to the question whether the tax was a tax *in rem* or in *personam*: see per Martin C.J.S. (1949) 1 W.W.R. at p. 383. I think it clear from the judgments, however, that the Court of Appeal was of opinion that the Halifax case did not decide that a business tax was a tax on real property, and also saw a distinction between the statute it so construed and the statute upon which the Halifax case was decided.

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268. In Halifax v. Fairbanks the facts disclosed were that the Estate owned premises which it let to the Crown for use as a ticket
10 office of Canadian National Railways. The lease provided that the lessee should pay the business taxes if any. The Halifax City Charter authorized, among other taxes, a tax called a "business tax" which was payable by every person occupying real property for the purpose of any trade, profession or calling for the purpose of gain, and the tax was assessed on 50 percent of the capital value of such property. By sec. 391 of the Charter, real property, the property of the Crown used for Imperial, Dominion or Provincial purposes, was exempt from the real property tax for which the charter also made
20 provision. By sec. 392, no business tax was to be paid by the occupiers of any of the properties declared exempt from real property tax if such occupiers were the owners or lessees thereof and occupying the same solely for the purposes of the Association or other body entitled to exemption. Sec. 394 provided that property let to the Crown or to any person, corporation or association exempt from taxation should be deemed to be in the occupation of the owner thereof for business purposes, and should be assessed and rated for business tax according to the purpose for which it was occupied.

269. The real question in Halifax v. Fairbanks was whether or not the tax in question was a direct or indirect tax; but one of the argu-
30 ments put forward by the estate was that the tax in dispute was a tax on property belonging to Canada and so void under sec. 125 of the British North America Act. This argument was disposed of in one sentence by Lord Cave when he said, at p. 122:

"It was also urged that the tax in dispute is a tax on property belonging to Canada, and so is void under s. 125 of the British North America Act; but their Lordships do not consider that a tax on the owner of premises let to the Crown in right of the Dominion can be held to be a tax on the property of Canada."

And at pp. 125-6 Lord Cave said:

40 "It may be true to say of a particular tax on property, such as that imposed on owners by s. 394 of the Halifax charter, that the tax payer would very probably seek to pass it on to others; but it may none the less be a tax on property and remain within the category of direct taxes."

From these statements it can of course be argued that the business tax being considered in *Halifax v. Fairbanks* was a property tax, and that to call it a business tax—in so far as it was sought to make the estate pay it—was to give it a fictitious name.

270. Assuming that the Privy Council did determine that in that case the tax was a property tax, it seems to me that the decisions in the Saskatchewan case are not in conflict with the decision of the Privy Council because the statutes being considered were quite different.

10 271. But I cannot see that either of these last two cases has any direct bearing on the point I am dealing with, namely, the effect of the exemption clause as applied to the business tax here in question.

272. The Saskatchewan Court was interpreting sec. 16 of the contract set out in para. 41 *supra*, and determining the extent of the exemption thereby granted. It did not have to consider the question whether the business tax was a "municipal levy" on property.

273. Nor do I find the cases referred to in para. 261 *supra* of any help. If it were necessary, I should concur in what Martin C.J.S. said at p. 382 of *In re Regina Industries Ltd. and Regina (City)*, para. 20 242 *supra*. In the *Town of Pembroke* case, para. 242 *supra*, the Court said (p. 365):

"The Assessment Act of 1904 did away with the assessment of personal property; and, as said in *Re J. D. Shier Lumber Co. Assessment (1907)* 14 O.L.R. 210, at p. 225, business and income assessments were substituted therefor. This made three classes of property—real property, business, and income—liable for rates."

274. I cannot see that general statements such as this are any help to me in considering the instant case. The plaintiff also referred me 30 to *The London County Council v. The Attorney-General (1901)* A.C. 26 (income tax); *Nova Scotia Steel & Coal Co. Ltd. v. Minister of Finance (1922)* 2 A.C. 176 (tax on profits); *Halifax (City) v. Nova Scotia Car Works Ltd. (1914)* A.C. 992, (1912) 47 S.C.R. 406, and *Pigeon v. Montreal* (para. 261 *supra*) in support of the proposition that a business tax is a property tax and therefore exempt.

275. Whatever the situation may be in Ontario (see Manning on Assessment & Rating at p. 96), the Winnipeg business tax is in no sense an income tax or a tax on profits. Indeed, a person operating at a loss must still pay the so-called business tax. I have referred 40 to the inapplicability of the term "business tax" as used in the defendant's Charter (para. 259 *supra*). The cases mentioned in para. 274 *supra*, give me no guidance on this phase of this case. I concur in the comment of Martin C.J.S. in *Reference re Taxation of C.P.R.*

(para. 248 *supra*), on Pigeon v. Montreal (para. 261 *supra*), where, discussing the statement of Strong, J., quoted in para. 261 *supra*, he said (p. 384):

“I am not prepared to agree that the statement that the business tax is a tax in respect of the property means that it is a tax on the property.”

276. I should like to be able to leave this matter of business tax here, but if I am wrong in the conclusions to which I have come there are a number of other points which must be dealt with. As this involves a consideration of past events, I am obliged to give the history of the statutory provisions which were discussed by counsel at some length.

277. The defendant was first incorporated by an Act of the Legislature of Manitoba assented to November 8th 1873 (37 Vict., ch. 7), (see para. 14 *supra*), which conferred upon it a special charter. This charter was amended from time to time and consolidated in 1882 (45 Vict., ch. 36), and again in 1884 (47 Vict., ch. 78). By sec. 112 of the original charter—

“all land and personal property in the City of Winnipeg shall be liable to taxation subject to the following exemptions.”

None of the exemptions is relevant here.

278. The provisions of sec. 112 were carried into the consolidations of 1882 and 1884. In none of these charters or the Acts amending them was any reference made to the property of railway companies.

279. In 1886 the defendant's charter was repealed by 49 Vict., ch. 52—the (new) Manitoba Municipal Act, 1886, assented to 28th May 1886 and proclaimed 15th November 1886.

280. The effect of the Act of 1886 was that the City then came under the provisions of the general Municipal Act, which provided (sec. 512):

“All lands in the rural municipalities of the Province, and all lands and personal property in the cities and towns thereof, shall be liable to taxation, subject to the following exemptions:”

281. None of the exemptions referred to the property of railway companies, but subsec (8) of sec. 512 exempted:

“All lands legally exempted from taxation by a by-law of the municipal corporation.”

It should be noted that this exemption related only to lands and did not refer to personal property.

282. In 1890 the Province passed its first general Assessment Act, 53 Vict., ch. 53. Section 3 of that Act provided:

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“All lands and personal property shall be liable to taxation, subject to the following exemptions. . . .”

The property of railway companies is not mentioned amongst the exemptions, but sec. 3 (7) exempted

“All lands legally exempted from taxation by a by-law of the municipal corporation.”

283. The Assessment Act was carried into the Revised Statutes of Manitoba, 1892, as ch. 101. Section 3 of that Act commenced with the same wording as the Act of 1890 (para. 282 *supra*), and the exemptions which are relevant were expressed in the following subsections of section 3:

“(g) All land legally exempted from taxation by a by-law of the municipal corporation.”

“(o) So much of the property of a railway company as is exempted under the forty-fifth section of this Act.”

This was the first mention of the property of railway companies in this connection.

284. Section 45 of the Act of 1892 provided that the Clerk of the Municipality was to send to the assessor certain information to be filed by railway companies, then proceeded:

“And the property so occupied by the railway roadway and in actual use and occupation in connection with the operation and working of the railway, as aforesaid, shall not be assessed at any greater value than the average value of agricultural lands in the municipality in which the lands aforesaid are situated as given in the last revised assessment roll; and the superstructure on the said above mentioned land, except station houses and freight sheds, shall not be liable to be, and shall not be, assessed or taxed by any municipality or corporation whatever in the province having power to assess or levy a tax on any property.”

285. Section 46 of the same Act reads:

“Provided, and it is hereby expressly enacted, that the last preceding section or any part thereof is not to be regarded or construed as an acknowledgment of want of authority or waiver of right by this Province to tax any or all railways or railway property in this Province, or as affecting the power of any municipality to exempt the property of a railway company from taxation.”

286. Up to the year 1893 all of the relevant statutes provided for a realty tax and a personal property tax; but in 1893, by an Act to

amend the Assessment Act (56 Vict., ch. 24), it was provided by sec. 3:

“Hereafter no personal estate or personal property of the City of Winnipeg shall be liable to taxation under ‘The Assessment Act,’ nor shall be assessed by the Assessor of the said city for taxation purposes.”

287. Section 8 of the same Act then went on to provide for a business tax in the following words:

10 “8. Every person, firm, partnership, company or corporate body that carries on business in any way in the said city as merchant, trader, manufacturer, banker, broker, money changer, lawyer, physician, dentist, photographer, auctioneer, grocer, baker, butcher, huckster, mechanic, pawnbroker, livery stable keeper, tanner, land agent, commission agent, ticket agent, ticket seller, telegraph agent, telephone agent, inspector of any kind, agent of any kind, or who carries on an insurance business of any kind, or acts as agent for any of the above mentioned businesses, or who carries on any other business, trade, occupation, manufactory, art or profession not above detailed, shall be assessed for a sum by way of capitalization of the rental value of the premises which he so occupies in carrying on any of the businesses, professions, employments or callings above mentioned, or which he uses for an office for such business, profession, employment or calling and both thereof, to the end and intent that all persons and corporations occupying premises not solely used as a residence for the person or corporation so occupying the same shall be liable to taxation for a sum equivalent to the capitalized rental value of the premises so occupied:

20

30 “(a) In arriving at the amount to which such person shall be assessed as above mentioned, the Assessor shall capitalize the annual rental value and fix the amount at such sum that the rate fixed by the said city in the year last preceding, for all the purposes of the said city, including school tax, will produce a sum which shall equal ten per centum of the yearly rental value of the premises so occupied at the time of the assessment, . . .”

Sec. 10 provided for a fixed assessment of, *inter alia*, street railways and telegraph companies. No reference is made in this Act to other railways. The Act also contained the following:

40 “18. All personal property of every nature and kind in and upon the premises for which the occupant has been assessed by way of capitalization of rental shall be liable for the taxes due by such occupant while the occupant is so in possession of the said premises, and the taxes shall be a first charge thereon and shall take priority over every other lien or claim thereto, and

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may be seized while so upon the premises distrained upon, and sold as provided by 'The Assessment Act' for the distress and sale of personal property for non-payment of arrears of taxes and the goods and personal property of the party so assessed as herein provided, wherever they may be found within the said city, shall be liable to be seized, distrained upon and sold for arrears of taxes as is provided by Section 120 and the following sections of 'The Assessment Act.'

10 "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.

20 "20. In case of non-payment of taxes levied upon any of the companies heretofore in this Act mentioned who have properties in this Act described as in, upon, under or over the streets of the said city, and machinery and plant above described, after the Collector has mailed the notice required by Section 114 of 'The Assessment Act' upon resolution of the Council authorizing the same the Collector may leave a notice at the office or chief place of business of the company in the said city notifying the company that in case the taxes so in arrears are not paid within three months after the date of the leaving of the notice at the company's office or place of business, payment will be enforced by seizure and removal of the property of the company so defaulting which may be in, under, upon or over the streets of the said city or the said plant and machinery."

The provisions of s. 18 should be compared with those of present ss. 360 (1) and 369 (1); those of s.19 with the present s.369 (3); and those of s. 20 with the present s. 364—all set out in para. 231 *supra*.

30 288. All the provisions of this Act relating to business tax, including the sections set out in the two preceding paragraphs, applied only to the City of Winnipeg: s. 26.

289. In the year 1900 the Legislature passed The Railway Taxation Act, 63 & 64 Vict., ch. 57, assented to July 5th, 1900, entitled: "An Act respecting the Taxation of the Earnings of Railroad Companies, for the Purpose of Supplementing the Revenues of the Crown in the Province of Manitoba."

40 290. This Act imposed a tax on the gross earnings of railway companies, and exempted railway companies from all other taxes, except as to certain lands, by section 18, which reads:

"Every railroad company coming within and paying taxes under the provisions of this Act or any Act or Acts amending this Act and the property of every nature and kind of every such

railroad company except the land subsidy to which such company is or may be entitled from the Dominion Government, and any land held by it for sale, shall, during the continuance of this Act or any Act or Acts amending this Act, be free and exempt from all assessments and taxation of every nature and kind within the Province of Manitoba by whomsoever made or imposed, except such as are made and imposed under the provisions of this Act or any Act or Acts amending this Act, and no person or body corporate or politic having power to make assessments or impose taxation of any kind shall during the continuance of this Act or any Act or Acts amending this Act make any assessments or impose any taxation of any kind of or upon any such railroad company or any property of such railroad company except the land subsidy to which such Company is or may be entitled from the Dominion Government and any land held by it for sale as aforesaid."

10

291. By the Act of 1900, "Railroad company" and "Railroad" were defined by sections 3 and 4, which read:

20

"3. The expression 'Railroad company' or 'Company' when used in this Act shall mean every railroad company owning or operating a railroad in the Province of Manitoba, whether the head office is situated in Manitoba or elsewhere, and which transacts business in Manitoba, and shall embrace and include every company operating a railroad in Manitoba, whether as an original enterprise or undertaking, or under a lease, contract or agreement or otherwise howsoever.

30

"4. The expression 'Railroad' when used in this Act shall include all tracks, bridges, switches, sidings, spurs, used or operated in connection with any railroad, and also the road in use by any company operating a railroad, whether owned or operated as an original enterprise or undertaking, or operated under a contract, agreement or lease or otherwise howsoever."

292. In 1902 the defendant obtained from the Legislature a new charter by S. M. 1 & 2 Edw. VII., ch. 77. By sec. 281 of that charter, all lands were declared liable to taxation subject to certain exemptions, of which the only relevant one was contained in ss. (f):

"All land legally exempted from taxation by a by-law of the City."

No reference was made to railway property but the provisions of 40 The Railway Taxation Act just set out would apply.

293. By section 303 of the same charter, assessment to business tax was provided for in terms substantially similar to that provided for in sec. 8 of The Assessment Act quoted in para. 287 *supra*.

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By sec. 313:

10 "All personal property of every nature and kind in and upon the premises for which the occupant has been assessed by way of capitalization of rental shall be liable for the taxes due by such occupant while the occupant is so in possession of the said premises, and the taxes shall be a first charge thereon and shall take priority over every other lien or claim thereto, and may be seized while so upon the premises distrained upon, and sold as provided by this Act for the distress and sale of personal property for non-payment of arrears of taxes, and the goods and personal property of the party so assessed as herein provided, wherever they may be found within the City, shall be liable to be seized, distrained upon and sold for arrears of taxes as is provided by section 369 and the following sections of this Act."

By sec. 314:

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

20 294. In 1909, by 9 Edw. VII., ch. 78, the Charter was amended to provide for an assessment to business tax for a sum equivalent to the annual rental value of the premises so occupied. The same Act, by sec. 21, for the first time added to the Charter what might be called a specific taxing section, (282(b)), which provided, in part:

30 "Each corporation, company, individual or partnership shall pay to the city a business tax to the extent of six and two-thirds per centum of the amount of the business assessment of such corporation, individual or partnership, as shown on the business assessment roll, and each individual in any such partnership shall be liable for such tax; provided that neither this section nor section 35 of the Act, being chapter 48 of the statutes of Manitoba 6 and 7 Edward VII, shall apply to a railway company or to ticket agents, ticket sellers, telegraph agents or railway agents employed by a railway company exclusively for the business of such railway company if such railway company is liable to pay taxes under 'The Railway Taxation Act,' or if the property of such company is exempt under any by-laws or by-law of the city; . . ."

This is the first reference to "The Railway Taxation Act."

40 295. The Act of 1909 repealed sec. 303 of the previous charter referred to in para. 293 *supra*. Section 313, quoted in para. 293 *supra*, was amended by striking out the words "capitalization of rental" and inserting the words "business assessment."

296. In 1918 the City was granted a new charter by 8 Geo. V., c. 120. Sec. 278 of the 1918 charter is the same as sec. 281 of the 1902 charter, except that the exemption appearing in sec. 281(f) was amended to read:

“All land legally exempted from taxation by a by-law of the city, to the extent to which the same is so exempted.”

297. The provisions of the new charter of 1918 as to business assessment are the same, in so far as this case is concerned, as those existing after the amendments of 1909 had been made—section 282 of the 10 1918 charter corresponding to section 282(b) added in 1919, and section 307 corresponding to section 313.

298. In 1926, by 16 Geo. V., ch. 105, section 282 was amended, but the amendments did not change the exemptions of companies liable to pay taxes under The Railway Taxation Act or if the property of the company was exempt under any by-laws or by-law of the city.

299. In 1935, by S.M. ch. 93, a change was made in the sections imposing business tax. While the basis of assessments to business tax remained the annual rental value of the premises occupied, the different businesses were classified and the classes were divided into 20 groups, and differing rates were imposed on various classifications and various groups within those classifications. In doing this, however, section 282 was so amended as to omit any reference to exemptions of companies liable to pay taxes under The Railway Taxation Act still in force, or of companies whose property was exempt under city by-law. The classifications and groups set out in the 1935 sec. 282 made no mention of railway companies.

300. In 1936 new classifications were provided for by sec. 6 of ch. 92, which for the first time made reference, in s. 282 to railways in the following terms:

30 “L. Proprietor or Conductor of
Express, Freight, or Passenger Transportation not
otherwise exempt (by rail, motor vehicle, aeroplane or
other conveyance operating to or from Winnipeg, not
including taxi-cabs).....10%.”

301. In 1940 the defendant obtained a new charter, S.M. c. 81, which made no substantial changes in the immediately previous provisions relating to business tax, except that the rate set out for classification “L,” now appearing in sec. 297, was increased from 10 percent to 12½ percent. Section 295(2) provided:

40 “No business assessment or business tax shall be made or levied in respect of a railway company or ticket agent, ticket seller, telegraph agent, or railway agent, employed by a railway company exclusively for the business of such company, if such com-

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pany is liable to pay taxes under 'The Railway Taxation Act' or if the property of such company is exempt under any by-law of the city."

302. The Act also contained secs. 360, 364 and 365 set out in para. 231 *supra*.

303. In 1942 the Legislature passed S.M. 1941-42, ch. 1—"An Act to authorize and implement an Agreement between the Dominion and the Province and to suspend Certain Acts imposing Taxes." By sec. 8(2) of that Act, The Railway Taxation Act (at that time 10 R.S.M. 1940, ch. 210) was suspended, except in so far as necessary in order to ensure the due collection of taxes imposed by the Act which became due and payable on or before 1st September 1941. Section 8(3) provided:

"The exemption from taxation provided for in section 17 of 'The Railway Taxation Act' shall continue during the term of the agreement set forth in Schedule A to the extent to which said exemption would have applied if the province had continued to collect from railway companies the tax imposed by the said Act."

304. The exemption referred to in this subsection was the exemption 20 first given in The Railway Taxation Act of 1900 by sec. 18 referred to in para. 290 *supra* and continued through the various revisions and consolidations of that Act.

305. By Section 8(5) of the same Act of 1942 it was provided:

"The suspension effected by subsections (1) and (2) shall not be deemed to be a repeal of the Acts therein mentioned but those Acts shall, except as herein provided, be inoperative until such time as the suspension herein enacted is repealed by an Act of the Legislature."

306. Section 11 of the same Act provided:

30 "Neither the Government of Manitoba nor any municipality shall, during the term of the agreement, do any act or exercise any power or collect any tax in contravention of the provisions of the agreement."

307. In 1947 the Legislature passed S. M. ch. 56, assented to 26th April 1947 and retroactive to 1st April 1947, entitled: "An Act to suspend The Succession Duty Act, to amend The Taxation Suspension Act, and to authorize the execution of an Agreement between the Government of Canada and the Government of Manitoba." By section 4 of that Act there were added to the words of section 8(3), 40 (see para. 303 *supra*), the following:

"but the said exemption shall be suspended on, from, and after, the termination of the said agreement."

Section 7 of the 1947 Act is identical with section 11 of the Act of 1941-42 (see para. 306 *supra*).

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308. In 1948, by S. M. c. 92, the defendant's charter was amended. By section 7 the words "not otherwise exempt" were struck out of the provisions of sec. 297 relating to Class "L" (see paras. 300 and 301 *supra*), so that subsection now reads as set out in para. 231 *supra*. By section 6, section 295(2) (set out in para. 301 *supra*) was repealed. By section 8, the words in brackets in section 364 (as set out in para. 231 *supra*) were added.

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10 309. Section 9 of the above Act provides in part:

"9. Nothing in this Act shall

(a) injure, affect, prejudice, or cause the forfeiture or impairment of, the benefit, right, exemption, or privilege, if any, of the Canadian Pacific Railway Company under

(i) by-laws numbered respectively 148 and 195 or any other by-law of the City of Winnipeg; or

(ii) a contract or contracts, if any, entered into between the City of Winnipeg and the Canadian Pacific Railway Company; or

20 (b) be or be considered to be, a repeal of any of the provisions of chapter 64 of the Statutes of Manitoba 46-47 Victoria:"

310. Section 10 of the Act of 1948 provides:

"This Act shall come into force on assent but shall be retroactive and shall be deemed to have been in force on, from, and after, the first day of January, 1948."

311. From the foregoing it appears that in 1881, when the parties entered into their agreement, there was no "business tax" in Manitoba. The only taxes then authorized were taxes on land and personal property taxes. It was not until 1893 that a "business tax" was first authorized, but only so far as the City of Winnipeg was concerned, and this business tax was stated to be in lieu of the personal property tax which was abolished: (see para. 287 *supra*).

312. The defendant says that the exemption agreement made in 1881 cannot in any event apply to a tax which had never been heard of, which could not have been in the contemplation of the parties, and which did not come into existence until 12 years later. It is very clear to me that when the parties made their agreement in 1881 the plaintiff thought it was getting a perpetual exemption from all municipal taxation (which would include all types of municipal taxation which might be imposed within the period of time measured

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by the word "forever," if that can be said to be a period of time) and the defendant thought that it was giving such an exemption.

313. I have held that the exemption agreement does exempt from business tax as a "municipal levy" on property (paras. 255 and 256 *supra*); I am satisfied that the agreement plainly bears this interpretation and I am also of opinion that the principle applicable to the point now under consideration has been declared by the House of Lords in *Associated Newspapers Ltd. v. London (City)* (1916) 2 A.C. 429.

10 314. The headnote reads:

"Sect. 51 of 7 Geo. 3, c.37, vests the land reclaimed from the river Thames under the provisions of that Act in the owners of the adjoining lands and wharves 'free from all taxes and assessments whatsoever.' The City of London Sewers Act, 1848, which provided for the levying of the sewer rate and the consolidated rate, enacts by s. 169 that every such rate shall be made upon every occupier of any house or building in the City 'whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place, or otherwise.' The occupiers of certain hereditaments situate in the city of London and forming part of the area reclaimed from the river Thames under 7 Geo. 3, c. 37, were rated to so much of the general rate levied under the City of London (Union of Parishes) Act, 1907, as represented the consolidated rate and the police rate, which was imposed by the City of London Police Act, 1839: Held—(1.) (by Viscount Haldane, Lord Parmoor, and Lord Wrenbury; Lord Sumner dissenting), that the exemption granted by 7 Geo. 3, c. 37, though limited by the context to local as distinguished from Imperial taxes, extended to all local taxes and assessments, whether present or future, except so far as any Act imposing a new tax qualified or repealed the exemption; (2.) (by all their Lordships), on the authority of *London Corporation v. Netherlands Steamboat Co.* (1906) A.C. 263, that s. 169 of the City of London Sewers Act, 1848, did not impliedly repeal the exemption so far as the consolidated rate was concerned. Held, therefore (Lord Sumner dissenting), that the occupiers of the reclaimed lands were exempt from liability to the rates in question. *Sion College v. London Corporation* (1901) 1 K.B. 617, in so far as it decided that the exemption granted by 7 Geo. 3, c. 37, applied only to taxes and assessments in existence at the date of the Act, and others substituted for them, overruled. *Williams v. Pritchard* (1790) 4 T.R. 2, *Perchard v. Heywood* (1800) 8 T.R.

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468, and *Rex v. London Gas Light and Coke Co.* (1828) 8 B. & C. 54 explained. Dictum of Bayley J. in *Rex v. London Gas Light and Coke Co.*, 8 B. & C. 54, 62, overruled. Decision of the Court of Appeal (1915) 3 K.B. 128 reversed.”

315. As the other questions affecting business tax arise on the arguments based on estoppel which are also sought to be applied to the realty tax, I shall deal with them in the next Section.

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SECTION VIII

ESTOPPEL, OTHER THAN BY *RES JUDICATA*, AND OTHER MATTERS

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316. Besides the plea of estoppel by *res judicata* already dealt with in Section V *supra*, the plaintiff by its reply pleads other matters which it relies upon by way of estoppel. These may be summarized as follows:

1. The defendant is estopped from denying the existence of the original agreement between the parties by reason of—
 - (a) the Validating Act;
 - (b) the fact that the plaintiff had fulfilled all the terms of the agreement which it was to fulfil;
 - 20 (c) the admissions in and the passing of By-law 219: (para. 9 *supra*);
 - (d) the fact that the defendant had conveyed to the plaintiff the land upon which the plaintiff built its station (depot);
 - (e) the fact that the defendant had recognized the agreement by its failure to tax the plaintiff;
 - (f) the facts that the defendant entered into the agreement of 4th August 1906 (para. 18 *supra*), and that it was approved by the resolution of the defendant's Council of 6th August 1906 (para. 18 *supra*);
 - 30 (g) the facts that the defendant entered into the agreement of 29th May 1914 (para. 19 *supra*), that findings were made pursuant to that agreement (para. 20 *supra*), and that this was ratified by defendant's By-law 8721 (para. 19 *supra*);
 - (h) the facts that the defendant entered into the agreement of 28th April 1942 (para. 21 *supra*) and ratified it by By-law 15455 (para. 21 *supra*);
 - (i) the defendant's course of conduct since the agreement was entered into.

317. The plaintiff also pleads that the defendant is estopped from

denying that the plaintiff had power to enter into the bond or covenant by reason of the matters set out in clauses (b) to (h) of the preceding paragraph.

318. The defendant pleads (para. 23 of the defence):

10 “In further answer to paragraphs 7, 8, 9 and 10 of the plaintiff's Statement of Claim the defendant says that if it did pass the by-law referred to in paragraph 7 of the plaintiff's Statement of Claim and if it did enter into the agreements referred to in paragraph 9 of the plaintiff's Statement of Claim and if it did pass the by-laws referred to in paragraph 10 of the plaintiff's Statement of Claim, all of which is denied, and if the plaintiff in by-law No. 219 recited that the plaintiff had completed and performed all the conditions mentioned in said by-law No. 195 which amended by-law No. 148, and had in all respects complied with the same, and if the defendant has recognized and acknowledged that all conditions and stipulations to be fulfilled by the plaintiff under said alleged agreement and by-law No. 148, as amended, to entitle the plaintiff to exemption from taxation as therein provided have been fulfilled, and if the defendant has recognized and
 20 granted freedom and exemption of the plaintiff's property from assessment and taxation, and if the defendant has recognized and acknowledged in the manner alleged that the plaintiff is under no legal necessity to pay taxes in respect to the property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith, all of which is denied, the defendant says that any such recital or recognition or acknowledgment was incorrect and not in accordance with the facts as the plaintiff well knew.”

319. To this the plaintiff replies with a denial and says that in any
 30 event the defendant is estopped by reason of the matters set out in clauses (b) to (i) of para. 316 *supra* from alleging that the said recital, recognition or acknowledgment was or were incorrect and not in accordance with the facts.

320. The defendant pleads by para. 24 of its defence that:

40 “the defendant had no power under its charter or otherwise to exempt or free the plaintiff's property within the City of Winnipeg from assessment or taxation by entering into any of the agreements referred to in the said paragraphs or by passing the resolution or any of the by-laws referred to in the said paragraphs.”

It also pleads by para. 25:

“ . . . that the defendant had no power under its charter or otherwise to recognize or acknowledge that the plaintiff was or is under no legal necessity to pay taxes in respect to property owned by

the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith.”

321. To these pleas the plaintiff replies that the defendant is estopped by the Validating Act (paras. 10 to 120 *supra*) and by its course of conduct from denying that it had no power to exempt or free the plaintiff's property from assessment or taxation.

322. The defendant says that if the agreement were *ultra vires* the City it cannot be made valid by estoppel, acquiescence, lapse of time, ratification or delay, and refers to British Mutual Banking Co. Ltd. 10 v. Charnwood Forest Ry. Co. (1887) 18 Q.B.D. 714, per Lord Bowen at p. 718; Maritime Electric Co. Ltd. v. General Dairies Ltd. (1937) A.C. 610, per Lord Maugham at p. 620; Wegenast, Canadian Companies pp. 1545; York Corporation v. H. Leetham & Sons Ltd. (1924) 1 Ch. 557, per Russell J. at p. 569 (distinguished in Birkdale District Electric Supply Co. Ltd. v. Southport (Corp'n) (1926) A.C. 355); Brice on *Ultra Vires* (1893) 3 Edn., p. 633, and 13 Hals. 474. See also Toronto Finance Corporation Ltd. v. Banking Service Corporation Ltd. (1926) 59 O.L.R. 278.

323. The defendant argues too that the doctrine of acquiescence is 20 not applicable to public functionaries: referring to Street on *Ultra Vires* (1930) p. 84, and Wentworth (County) v. Hamilton Radial Electric R. W. Co. & Hamilton (City) (1914) 31 O.L.R. 659, per Meredith C.J.C.P. at p. 664, and Re Ellis and Town of Renfrew (1910) 21 O.L.R. 74, per Riddell J. at p. 86.

324. The defendant also contends that there can be no acquiescence without knowledge by the acquiescing party of its legal rights: referring to Toronto Electric Light Co. v. Toronto (City) (1915) 33 O.L.R. 267, per Meredith C.J.O. at pp. 283 and 284-5, and per Hodgins J.A. at pp. 304-5; Hoare v. Kingsbury (1912) 2 Ch. 452, per 30 Neville J. at p. 465; and Vyvyan v. Vyvyan (1861) 30 Beav. 65. per Romilly M.R. at p. 74.

325. The defendant says, in effect, that the previous Councils of the defendant from 1881 to 1947 were not aware of the powers of and the disabilities attaching to the defendant municipal corporation, and its Counsel said in argument: “If Council made a mistake in judgment in not seeking advice with regard to the continuing covenant” the defendant cannot be estopped.

326. The defendant also says that by virtue of the provisions of The Railway Taxation Act (para. 289 *supra*) the defendant had no 40 power to tax the plaintiff for realty or business tax between 1900 and 1947. The defendant contends that the legislation passed in the latter year (see para. 307 *supra*) removed that disability.

327. If the agreement between the parties made as long ago as

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1881 and observed by both parties since, except when the defendant tried to evade it in its attempt to collect school taxes (referred to in Section V *supra*), was *ultra vires* the defendant, then, regardless of what has been done in the course of some sixty-seven years, the authorities would seem to compel me to hold that the agreement is not binding on the defendant. The Port Whitby and Port Perry Ry. Co. and its successors appear to have maintained its head office and machine shops in the municipality from 1868 to 1900 but, when the agreement with the municipality was found in 1901 to be *ultra vires* 10 the municipality, the company was in a position to remove them: see *Corporation of Whitby v. Grand Trunk Ry. Co.* (1901) 1 O.L.R. 480 (para. 87 *supra*).

328. But as I have come to the conclusion that there was an agreement between the parties, and that it was *intra vires* each of them and that the bond and covenant given by the plaintiff was a valid bond and covenant, I do not need to consider farther the arguments summarized in paras. 322 to 326 *supra*.

329. The defendant argues that by enlarging its workshops into the area added to the city in 1882 the plaintiff broke its agreement 20 and lost its right to exemption. I have already held that there was no breach of agreement (para. 204 *supra*). If there had been, I hold that the defendant waived the breach by its conduct since 1903 when the shops were moved. Once it is settled that the agreement was a valid agreement, the defendant in my opinion may waive a breach just as any other party to an agreement. The defendant says it had not power to waive. I think this is answered by *United Gas & Fuel Co. of Hamilton Ltd. & Hamilton (City) v. The Dominion Natural Gas Co.* (1933) O. R. 369 (affirmed (1934) A.C. 435) when it was held that if a certain condition was a condition precedent, its 30 performance had been waived by the conduct of the municipality: and see the remarks of Mulock C. J. O. (1933) O. R. at p. 388.

330. By By-law 219 (para. 9 *supra*) the defendant admitted that the plaintiff had complied with all the conditions imposed upon it by the agreement. The defendant's plea—set out in para. 318 *supra*—that the recital, recognition and acknowledgment in By-law 219 was incorrect and not in accordance with the facts, cannot be supported. The admissions set out in para. 29 *supra* (clauses 4, 5 and 6) demonstrate that. The defendant in pleading this way is of course relying on its argument going to the power of the city to pass By- 40 laws 148 and 195 and the power of the plaintiff to give the bond and covenant. Once those questions are determined against the defendant's contention the plea fails.

331. The defendant also argues with regard to By-law 219 that it was merely an authority to the trustee to deliver the debentures, that the recital of compliance was for the purpose of directing the

trustee to release the debentures—it was a matter between the trustee and the City, a matter of internal management only—and it refers to *Montreal (City) v. College Ste. Marie* (1921) 1 A.C. 288. I shall content myself with saying that in my opinion this case is no authority for the proposition put forward by the defendant. It was there argued that a resolution of a Municipal Council fixing for thirty years the amount of municipal taxes which the College should pay was a mere unilateral declaration and that the evidence failed to disclose the existence of any agreement obliging the College to
 10 observe the conditions of the resolution. It was held there was ample evidence of the agreement and the resolution was valid and irrevocable. In the case at bar the right of the plaintiff to receive the debentures from the trustee depended upon the fulfilment by the plaintiff of certain conditions. The defendant certified to the fulfilment of the conditions by By-law 219 and it was upon that certificate that the plaintiff obtained possession of and title to the debentures. Under these circumstances I hold that the defendant is estopped by the By-law and the admissions made in it. The question may not be of much importance because of the Admissions
 20 set out in para. 29 and because the facts are so clear.

332. The defendant says, too, that By-law 219 is not a suitable subject for a By-law. No authority was cited to me in support of this proposition. In any event, the defendant made certain admissions under seal and I think it had power to do so whether it was called a By-law or not.

333. The defendant did convey to the plaintiff the land upon which the plaintiff built its station. But these lands were, as they were required to be, conveyed to the plaintiff before all the conditions imposed on it by the agreement were fulfilled: see paras. 5 and
 307 *supra*. The conveyance was necessary to enable the plaintiff to carry out its agreement. It was of course a recognition that there was an agreement and to that extent, at least, the defendant would be estopped.

334. The next matter to be considered is the effect of the agreement of 4th August 1906 between the parties (see paras. 18, 316, 317, 319 and 321 *supra*). This agreement, which is executed by both parties under seal, is Exhibit 9 and contains *inter alia* the following recital:

40 “AND WHEREAS although the Company's said hotel property and any interest in the said premises which may be used by the Company for commercial telegraph purposes and all its other property in the City of Winnipeg and said commercial telegraph business is exempt from taxation, the City has claimed that said hotel property should be made subject to Municipal taxation on the grounds that an hotel was not originally in-

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10 cluded within the meaning of a railway or railway enterprise, and that it competes (if exempt) unfairly with hotels conducted by private enterprise, and to amicably adjust and settle differences the Company has agreed to pay to the City annually the sum of Eight thousand Five hundred dollars (\$8,500.00) in respect of its said hotel and hotel business in lieu of what taxation there might be thereon if the same were liable for any taxation and to assist the City in its efforts to protect against fire, the City agreeing not to seek or ask for further concessions on the part of the Company."

Here we have a definite statement that all property of the plaintiff in Winnipeg and "any interest in" the hotel property which may be used by the plaintiff for commercial telegraph purposes is exempt from taxation. The City also claimed that the hotel property should be made subject to taxation on the ground set out in the recital, not on the ground that it was not exempt. The terms of the agreement are summarized in para. 18 *supra*. There was no time limit set by the agreement, which would therefore be a perpetual agreement.

20 335. The defendant pleads (para. 320 *supra*) and argues that it had no power to enter into this agreement. I think it had. As I understood the law, a municipal corporation has power to enter into any agreement to compromise a reasonable claim such as that land was exempt from taxation: *Montreal (City) v. College Ste. Marie*: para. 331 *supra*. I am of opinion that this agreement was binding on the defendant notwithstanding that it was not authorized or ratified by By-law. However, the agreement of 28th April 1942, which approbated the agreement of 4th August 1906, was authorized and adopted by By-law: see para. 21 *supra*.

30 336. But the defendant says that in fact it had no power to tax either the Company or its property because the provisions of The Railway Taxation Act, para. 289 *supra*, forbade it. This is so, and in my opinion the provisions of the Act applied not only to realty taxes but to business tax as a tax on the defendant. The defendant then argues, as I understand it, that the above recital refers only to the exemption given by The Railway Taxation Act and not to any exemption given by the agreement of 1881. The use of the words "if exempt" would appear to be an attempt by the defendant to leave open the matters so definitely stated in the earlier part of the recital and in the concluding clause (5) of the agreement set out in
40 para. 18 *supra*.

337. I think this argument must be considered in conjunction with the arguments relating to the subsequent agreements between the parties of 29th May 1914 (paras. 19, 316, 317, 319 and 321, *supra*) and of 28th April 1942 (paras. 21, 316, 317, 319 and 321, *supra*).

338. The defendant's covenant not to ask or seek further contributions or concessions from the plaintiff in respect of matters mentioned in the agreement of 4th August 1906 did not prevent it from doing so, and such further contributions and concessions were made by the plaintiff in the next two agreements. The agreement of 29th May 1914 (Ex. 10), the terms of which are summarized in para. 19 *supra*, contained a recital that there appeared "to be a number of matters outstanding and unsettled between the City and the Company," and one of those was the taxation of the hotel because that was one
 10 of the matters dealt with and disposed of by the Committee. In the result the amount of \$8,500.00 provided for by the agreement of 4th August 1906 was increased to \$10,500.00. The terms of the earlier agreement were otherwise unchanged: (para. 20, *supra*). The agreement to submit the matter to the Committee was confirmed by By-law: (para. 19 *supra*). The agreement of 28th April 1942, which was authorized and adopted by By-law, approbated the agreement made by the submission and finding of the Committee: (para. 21 *supra*). I am of opinion, for the reason already given in para. 334 *supra*, that
 20 the agreement to vary the amount is binding on the defendant. The agreement still remained a perpetual agreement: see para. 334 *supra*.

339. The matter came up again in 1942 when the parties entered into the agreement of 28th April 1942 (Ex. 12) referred to in para. 21 *supra*. The effect of this agreement, as I read it, was to alter the earlier perpetual agreement insofar as it dealt with amounts paid in lieu of taxes on or in connection with the hotel, or the business carried on therein, to an agreement terminating at the end of 1952. This agreement is binding on the defendant (see paras. 334, 335 and 338, *supra*); it is subsisting, and I hold that in any event the defendant cannot tax the hotel property for realty tax or the plaintiff company
 30 for business tax in respect of the business carried on in the hotel property until 1952. The agreement, by Clause 1, approbated the prior agreements of 4th August 1906 and 27th November 1914, including the amount fixed by the Committee, and was authorized and adopted by the defendant's By-law: para. 21 *supra*. The variations made by the agreements of 27th November 1914 and 28th April 1942 left unchanged the provision of the agreement of 4th August 1906 fixing the sum payable as equivalent to business tax in respect of the commercial telegraph business carried on by the plaintiff in
 40 premises apart from its railway and railway station property. This portion of the agreement of 4th August 1906 is in my opinion a perpetual agreement. In effect the plaintiff will have to pay the defendant an amount equal to the business tax in respect of that particular business by virtue of the agreement.

340. By the agreement of 28th April 1942 the defendant covenanted that it would not "seek or apply for any legislation which would in any way enable the City to impose any taxation upon the Company

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or upon the said hotel property.” It was probably because of this covenant that the defendant, in 1948 when it obtained the amendments to its Charter (set out in paras. 308 *et seq. supra*), asked for or agreed to the insertion of sec. 9 of S.M. 1948, c. 92, (set out in para. 309, *supra*).

341. While the three agreements which I have considered are binding and effective as agreements, I doubt whether they also work an estoppel as the plaintiff contends. The recitals in them do not specifically refer to the exemption agreement and, as they were all
10 entered into while The Railway Taxation Act (para. 289 *supra*) was in force—which entirely exempted the plaintiff from any municipal taxation such as is under consideration in this case—there is not such an unambiguous recognition of a claim to exemption based upon the agreement between the parties as I think should exist to support a plea of estoppel. This in my opinion is all that need be said about the argument summarized in paras. 326 and 336, *supra*.

342. I now address myself to the problem of whether or not the defendant is estopped by reason of its failure to tax the plaintiff: see paras. 316, 317 and 319, *supra*. It is admitted that in the period
20 between 1882 and 1900—that is, from the year following the making of the agreement for exemption until the year The Railway Taxation Act was passed—the assessment rolls of the defendant contained such notations as “exempt, by law 148” or “exempt for school purposes” or similar statements. I think that mere failure to tax, standing alone, would not work an estoppel, and I hold—with some hesitation—that even related to the exemption agreement it would not work an estoppel. Nor do I think the notations made carry the matter any farther.

343. I have dealt in Section VI, *supra*, with the effect of the
30 defendant’s course of conduct and I do not consider it necessary to deal further with that matter.

344. The effect of the Validating Act has also been fully dealt with in paras. 123 *et seq.*, *supra*.

345. I should perhaps say that as I read the amendments made in 1947 (see para. 307 *supra*) to the “Act to authorize and implement an Agreement between the Dominion and the Province and to suspend certain Acts imposing taxes” (see para. 303 *supra*) they have deprived the plaintiff, at least temporarily, of the protection of The Railway Taxation Act.

40 346. There is one other question to which reference must be made. The plaintiff argues that sec. 741 of S.M. 1886, 49 Vict., c. 52, set out in para. 15, *supra*, also validated By-laws 148 and 195. This was the view held by Dubuc J. in the School Tax Case: see para. 148 *supra*. The defendant replies that sec. 741 was merely to maintain the *status*

quo when the defendant's charter was repealed and the defendant brought under the general Municipal Act: see *The King v. Nunn* (1905) 15 M.R. 288. I agree with Dubuc J. on this point and am inclined to think the matter is *res judicata*. But the original validating Act is so clear that I doubt that the plaintiff needs to rely upon the effect of sec. 741.

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SECTION IX CONCLUSION

347. For the reasons given above, I am therefore of opinion that
10 the plaintiff is entitled to succeed in this action.

348. The defendant argued that if the plaintiff were entitled to
succeed, this was not a proper case for an injunction and the plaintiff
should be left to its remedy in damages. I cannot agree with this
and said so during the argument. As has already been pointed out,
this action is not in the nature of a common law action but is essentially
a proceeding in the nature of suits or proceedings in equity:
(para. 203 *supra*). Damages have to be assessed once for all. The
amount involved in the 1948 taxes alone is, according to a rough
estimate made from the assessment notices filed as exhibits, a very
20 large one indeed. These yearly amounts might easily be substantially
increased in the future by an increase of assessment or of rates, or
both. The plaintiff's exemption is forever. Even if the assessment
of damages were limited to one year, the amount involved would
equal the amount of taxes and perhaps penalties. In my opinion the
remedy by way of injunction is the only reasonable remedy.

349. There will be judgment for the plaintiff for the declarations
and injunctions as prayed, with costs. Having regard to the nature
and importance of the action, the amount involved, the interest of
the parties, and all the other circumstances, I order that the costs be
30 taxed without regard to the limit imposed by Rule 630(1).

350. I should add that as it might be possible for the defendant,
with the help of the Legislature, to frame its charter powers to take
business tax out of the terms of the exemption agreement, I was in
doubt whether the injunction in respect of business tax should be
perpetual. I have come to the conclusion that I should not speculate
on or anticipate such action, and the injunction will go as prayed.
I also point out that by its agreement of 28th April 1942 the defendant
covenanted that, during the period expiring in 1952, it would not seek
or apply for any legislation which would in any way enable the
40 defendant to impose any taxation upon the Company: see para. 340
supra.

E. K. WILLIAMS, C.J.K.B.

Delivered this 7th day of October, 1949.

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No. 14

Formal Judgment

Dated the 7th day of October, 1949

This action coming on for trial on the 7th, 8th, 9th, 10th and 11th days of March, 1949, before this court in the presence of counsel for both parties, on hearing read the pleadings and hearing the evidence adduced and what was alleged by counsel aforesaid, this court was pleased to direct this action to stand over for judgment, and the same coming on this day for judgment:

10 (1) This court doth declare that:

- (a) An agreement was entered into and made between the plaintiff and the defendant on or about the 5th day of September, 1881, the terms of which are set forth in By-law of the defendant numbered 148, dated the 5th day of September, 1881, as amended by By-law of the defendant numbered 195, dated the 30th day of October, 1882, and that by the terms of the said agreement and the said by-laws all property now owned or that hereafter may be owned by the plaintiff within the limits of the City of Winnipeg, for railway purposes or in connection therewith, is
 20 forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind;
- (b) The plaintiff is not liable to the defendant for any real property tax or any business tax sought to be imposed under the present City Charter in respect of any property within the limits of the City of Winnipeg now owned by the plaintiff for railway purposes or in connection therewith;
- (c) By serving the plaintiff with notices of assessment of the said properties and premises for realty taxes and business taxes, the
 30 defendant has committed a breach of the said agreement and of the said by-laws;

(2) This court doth order and adjudge that:

- (a) The defendant, by its officers, employees, servants and agents or any of them, be and is hereby perpetually restrained from making any assessment of or in respect of any property now owned or that hereafter may be owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith, for any municipal taxes, rates and levies and from making any assessment of any nature or kind of or in respect of the said property;
- 40 (b) The defendant, by its officers, employees, servants and agents or any of them, be and is hereby perpetually restrained from levying or collecting or attempting to levy and collect any real

property taxes or any business tax sought to be imposed under the present City Charter or municipal taxes of any other nature or kind in respect of any property now owned or that hereafter may be owned by the plaintiff within the limits of the City of Winnipeg, for railway purposes or in connection therewith;

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(c) The name of the plaintiff and its properties shown on the Realty Assessment Roll as Ward 1 numbers 11044, 11288, 12883, 16799, 16799-1, 12883-1; Ward 2 numbers 273, 517-1, 518, 530, 669, 674, 675, 1180, 1183-1, 1185, 1539, 1879, 2085, 2090, 2094, 2318, 2458, 2461, 2467, 2523, 2694, 9920, 9963, 10132, 10137-1, 10854, 10857, 10865, 10869-2, 11233, 11162, 11551, 12014, 12162, 12198, 12392, 12399, 12404, 12405, 12691, 12923, 12980, 13415, 13666-1, 13709, 13846, 14352, 14439, 14450, 14452, 14471, 14488, 14491, 14554, 14555, 14562, 14586, 14610, 14617, 14641, 14708, 14727, 14730, 14746, 14747, 14849, 14850; Ward 3 numbers 3, 13, 100, 605, 1765, 1767, 2225-1, 2264-1, 2462, 2768, 3677, 4006, 4486, 5605, 5692, 5995, 7194, 7473, 9671, 10102, 10483, 11016, 12241, 12248, 12423, 13447, 13449, 14622, 15096, 15451, 15762, 16486, 17175 and 17591, be struck off the said Roll for 1948 and succeeding years;

(d) The name of the plaintiff and the premises shown on the Business Assessment Roll as Numbers 4516-1, 6654-15 and 9034 be struck off the said Business Assessment Roll for 1948 and succeeding years;

(3) And this court doth further order and adjudge that the defendant pay the plaintiff its costs herein without regard to the limit imposed by Rule 630 (1).

Signed the 21st day of November, 1949.

"A. J. Christie"
Prothonotary.

30

In the Court of Appeal for Manitoba

No. 15

Notice of Appeal

Record
Court of Appeal

No. 15
Notice of Appeal
November 30, 1949

Take notice that this Honourable Court will be moved at the next sittings thereof by way of appeal on behalf of the above named (Defendant) Appellant from the verdict order or judgment of the Honourable Chief Justice of the Court of King's Bench delivered herein on the 7th day of October, 1949 and entered in the records of the Court of King's Bench on the 19th day of November, 1949, and for an order dismissing the Respondent's claim with costs, or for a new trial and for such further or other order as to this Honourable

40

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Continued

Court may seem meet, upon the following or other grounds, namely:

1. The said judgment is against law, evidence and the weight of evidence.
2. The learned trial judge erred in drawing the inference that the Parliament of Canada intended that the Plaintiff should have the fullest possible powers and provided for a charter that would give such powers.
3. The learned trial judge erred in finding that section 2 of the Act of 1881 incorporating the Plaintiff, and sections 21 and 22 thereof 10 which made the Railway Act of 1879 applicable to the company did not cut down the effect of Letters Patent under the Great Seal.
4. The learned trial judge should have found that the powers of the Plaintiff were limited to the powers conferred on it by the Parliament of Canada in the incorporating Act and in the Railway Act of 1879 either expressly or by necessary implication and that the affixing of the Great Seal to the Letters Patent granted to the Plaintiff by the said incorporating Act did not confer additional powers on the Plaintiff and did not constitute the Plaintiff a corporation with a status resembling that of a common law corporation. Section 2 20 of the incorporating Act provides that the charter shall have force and effect as if it were an Act of Parliament of Canada and the learned trial judge should have found it had no other force or effect.
5. The learned judge erred in finding that the Plaintiff was by virtue of the affixing of the Great Seal to its charter thereby constituted a corporation resembling that of a common law corporation.
6. The learned trial judge erred in finding that the judgment delivered in the case known as the "Bonanza Creek Gold Mining Company Limited v. The King, 1916 A.C. 566" was an authority binding on him or that it was an authority applicable to the charter 30 which was granted to the Plaintiff pursuant to the said incorporating Act.
7. The learned trial judge should have found that under and by virtue of the terms of the Act incorporating the Plaintiff or providing for its constitution and incorporation it was necessarily implied that the Plaintiff was not created or constituted as a common law corporation or a corporation having the status of a common law corporation.
8. The learned trial judge erred in finding that the Plaintiff was a corporation created solely by Letters Patent and should have found that the powers of the Plaintiff were subject to the restrictions which 40 were imposed on its proceedings by the incorporating Act and schedules thereto.
9. The learned trial judge erred in holding that as the Plaintiff

was incorporated by Letters Patent under the Great Seal that it had all the powers possessed by a corporation created by the King's Charter at common law, and erred in holding that there is nothing in its incorporating Act of 1881 to preclude the Governor from exercising the right or prerogative power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person.

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10 10. The learned trial judge should have found that the Governor General of Canada had no right or power or prerogative power to enlarge the powers or capacity of the corporation a charter for which was directed to be issued under the provisions of the incorporating Act.

20 11. The learned trial judge erred in finding that there was any agreement embodied in By-laws Nos. 148 and 195 of the City of Winnipeg and the learned trial judge erred in finding that the Plaintiff had any right, power or authority to enter into, execute or deliver the bond and covenant which the Plaintiff was required to enter into, execute and deliver before the property then owned or that might thereafter be owned by the Defendant within the City of Winnipeg for railway purposes or in connection therewith should forever be free and exempt from all municipal taxes, rates and levies and assessments of every nature and kind.

12. The learned trial judge should have found that the Plaintiff did not fulfill and had no power to fulfill the conditions and stipulations which it was required to fulfill before its properties became so exempt.

30 13. The learned trial judge should have held that the power of the Plaintiff to deliver such a bond and covenant so onerous on the railway company and binding upon them for all time could not be held to be derived by reasonable implication from any powers conferred upon the Plaintiff by its incorporating Act, the schedules thereto or otherwise howsoever.

14. The learned trial judge should have found that the words in section 7 of the contract between the Dominion of Canada and the Plaintiff which was authorized by said incorporating Act, namely, "and the company shall thereafter and forever efficiently work and run the Canadian Pacific Railway" prevented either expressly or by necessary implication the railway from covenanting to forever maintain and continue certain railway works in a particular locality.

40 15. The learned trial judge should have found that by purporting to deliver the bond and covenant in question the Railway Company was acting in contravention to its statutory powers and that such a bond and covenant amounted to a negation of its statutory powers

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and a covenant not to exercise the same and was *ultra vires* of the Plaintiff, and was inconsistent with the railway being worked for the general advantage of Canada.

16. The learned trial judge should have found that there is nothing in the incorporating Act or the agreement thereby authorized or in the charter of incorporation therein set out which expressly or by necessary implication authorizes the Plaintiff to enter into a contract with a municipality agreeing to maintain any part of the railway or any station or workshops or stock yards forever in any particular
10 locality.

17. The learned trial judge should have found that the only powers possessed by the Plaintiff are those contained in the incorporating Acts and its authorized charter and in the Consolidated Railway Act of 1879, and that the absence of any express power to enter into a contract agreeing to maintain any part of the railway or any station or workshops or stock yards forever in any locality necessarily implies that the Plaintiff had no power to enter into such an unusual and onerous contract which might prevent the efficient and economical operation of the railway.

20 18. The learned trial judge should have found that it was not a necessary or useful exercise of its franchise by the Plaintiff to enter into such an onerous and unusual covenant.

19. The learned trial judge erred in finding that the Plaintiff by entering into such a contract has done or agreed to do anything incompatible with the due discharge of the Plaintiff's duties in maintaining and operating its railway.

20. The learned trial judge erred in finding that the intendment of section 16 of the statutory contract which provided for tax exemptions by the Dominion or any province thereafter established was that the
30 Plaintiff should have the right to bargain for and obtain similar tax exemptions from any province theretofore established or any municipal corporation therein, and erred in finding that the necessary or useful franchise and powers given to the Plaintiff by section 4 of its charter or by its incorporation by letters patent under the Great Seal gave the Plaintiff the right or power to enter into the alleged contract in question with the Defendant.

21. The learned trial judge should have found that it was not competent to the Legislature of the Province of Manitoba to sanction a contract the enforcement of which might involve the dismember-
40 ment of the railway or prevent the efficient and economical operation thereof.

22. The learned trial judge erred in finding that chapter 64,

Statutes of Manitoba, 1883, section 6, validated and confirmed an agreement between the Plaintiff and Defendant, and should have found that the province had no authority to authorize the Plaintiff to deliver the bond and covenant in question and should have found that there was no agreement between the Plaintiff and Defendant.

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23. The learned trial judge erred in finding that the alleged contract or the By-laws in question could have any force and effect unless and until the Plaintiff fulfilled the conditions precedent which entitled it to tax exemption, and should have held that the Plaintiff could not
10 and has not fulfilled such conditions precedent.

24. The learned trial judge erred in finding that the Plaintiff has carried out the terms of the agreement as the terms of the alleged agreement require the Plaintiff to forever maintain its works, etc., within the limits of the City of Winnipeg, and should have found that there is nothing to prevent the Plaintiff from at any time removing such works from within the limits of the City of Winnipeg if it becomes uneconomical or impracticable for the efficient operation of the railway to maintain the same within the City of Winnipeg.

25. The learned trial judge erred in finding that the alleged agree-
20 ment and the by-laws in question were made binding upon the Plaintiff by the special Act purporting to validate the same regardless of whether the Plaintiff fulfilled the conditions precedent to its right to perpetual tax exemption.

26. The learned trial judge erred in holding that the Defendant cannot now be heard to say that the by-laws in question are not binding upon it.

27. The learned trial judge erred in finding that the Defendant cannot rely upon any defence that the agreement or by-laws were *ultra vires* of the Defendant.

30 28. The learned trial judge also erred in finding that these matters are *res judicata*.

29. The learned trial judge erred in finding that the Supreme Court in the school tax case, 30 S.C.R., 558 addressed themselves to whether or not there was a contract between the parties in pursuance of which the by-law was passed and erred in finding that the Supreme Court so decided.

30. The learned trial judge erred in finding that the decision of the Supreme Court in the school tax case determined that the Company had fulfilled all the conditions set out in the By-laws. The question
40 as to whether the Plaintiff had any power or authority to covenant that it would covenant to establish and build within the limits of the City of Winnipeg their principal workshops for the main line of

railway within the Province of Manitoba and the branches thereof radiating from Winnipeg and forever continue the same within the said City of Winnipeg was not raised, discussed or argued in any issue before the court in the school tax case, nor raised in argument or considered by the court.

That the sole question before the court was whether school taxes were included in the phrase "municipal taxes, rates and levies and assessments of every nature and kind." This was the only issue raised in the case and the only point decided in the case and the only point which it was necessary for the courts to consider or decide upon.

31. The learned trial judge erred in finding that the following issues were of necessity decided in the school tax case:

1. There was an agreement between the parties.
2. The terms of the agreement were embodied in By-laws 148 and 195.
3. The terms of the agreement were varied by mutual consent.
4. The terms of the agreement as varied were embodied in By-law 195.
- 20 5. The exemption clause in the agreements and By-laws is an exemption forever, and it applies to all municipal taxes which the city might otherwise be entitled to impose upon the property of the company, including school taxes.
6. The company fulfilled all the conditions to make the exemption clause effective.
7. The By-laws and agreement were *intra vires*.

32. The learned trial judge erred in holding that the finding in the school tax case was that the Company had carried out its part of the contract or that such a finding was a necessary step in the court's judgment.

30 33. The learned judge erred in holding that the question of *ultra vires* as it applies to the Plaintiff Company could have been but was not raised in the school tax case, that the matter is now *res judicata*.

34. The learned trial judge erred in holding that the exemption claimed in the school tax case was the same as the exemption claimed in the case at Bar, and should have held that the only question raised in the school tax case was as to the interpretation of the alleged agreement as the City of Winnipeg had not then repudiated the agreement or questioned the right of the Railway Company to enter into the same.

40 There is nothing in the decision of the Supreme Court of Canada

or in the decision of the court below in the school tax case which decides that the Plaintiff is bound to forever continue its principal workshops, etc., within the limits of the City of Winnipeg.

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35. The learned trial judge erred in finding that the Plaintiff had not committed a breach of its agreement, if any, with the City of Winnipeg by removing its shops outside the original territorial limits of the City of Winnipeg, and erred in finding that the Defendant is estopped from raising any such issue.

36. The learned trial judge erred in finding that the words "within
10 the said City of Winnipeg" contained in the bond and covenant in question mean in the City of Winnipeg as from time to time constituted.

37. The learned judge erred in finding that the property known as the Royal Alexandra Hotel is a property owned by the Plaintiff in connection with the railway or for railway purposes.

38. The learned trial judge erred in finding that the Legislature of the Province of Manitoba had validated the alleged contract by declaring that By-laws Nos. 148 and 195 are legal, binding and valid,
20 of mutuality as the railway company had no power to perform its part of the agreement, namely to maintain certain works forever within the City of Winnipeg.

39. The learned trial judge should have found that the alleged agreement, being indefinite as to duration, is subject to cancellation or repudiation by either party on reasonable notice.

40. The learned trial judge should have found that tax exemption never existed because the Plaintiff was unable to fulfill the stipulations which were a condition precedent.

41. The learned trial judge erred in rejecting documents relevant
30 to the Defendant's plea that there was no consideration for the alleged agreement and to other issues.

42. The learned judge erred in holding that the business tax provided for in the charter is a municipal tax, and erred in holding that it is a tax on property and should have found and held that it was a tax which is levied *in personam* only.

43. The learned trial judge erred in holding that the tax was a tax on property because the charter of the Defendant subjects the property of the taxpayer, real and personal, to a levy for business tax.

44. The learned trial judge erred in finding that when the exemp-
40 tion agreement was made in 1881 it was in contemplation of both parties that the Defendant was to be exempt from a tax such as a business tax.

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45. The learned trial judge should have held that if the alleged agreement were *ultra vires* of the Defendant it cannot be made valid by estoppel, acquiescence, lapse of time, ratification or delay, and the learned judge erred in holding that the alleged agreement was *intra vires* of the Defendant under its statutory powers.

46. The learned trial judge erred in holding that the Defendant could waive performance of the condition precedent contained in the alleged agreement by conduct or otherwise.

47. The learned trial judge erred in holding that the Defendant is 10 estopped by By-law 219 or by the contents thereof, and erred in holding that section 219 was a by-law and that such a by-law was within the powers of the Defendant to enact.

48. The learned trial judge erred in holding that the Defendant had any power to enter into the agreement made with the Plaintiff on the 4th of August, 1906.

49. The learned trial judge erred in finding that the agreement of 1906 remains a perpetual agreement and that it is still subsisting and binding on the Defendant.

50. The learned trial judge erred in finding that this is a proper 20 case for injunction and should have held that an injunction should not have granted an injunction to restraining the Defendant from assessing the Plaintiff either for real property or business tax.

Take notice in support of such appeal will be read the pleadings and proceedings herein, the exhibits filed, the evidence adduced at the trial, and such further and other material as counsel may advise.

Dated at Winnipeg the 30th day of November, A.D. 1949.

G. F. D. Bond
Solicitor for the above named
(Defendant) Appellant

30 To Canadian Pacific Railway
Company the above named
(Plaintiff) Respondent
and
To H. A. V. Green, Esq., K.C.,
its solicitor.

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Reasons for Judgment of The Honourable Chief Justice McPherson

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This is an appeal from a judgment of Williams, C.J.K.B. in reference to a dispute between the Canadian Pacific Railway Company and the City of Winnipeg (to which I shall refer hereafter as the Company and the City) in respect to the right of the City to tax the Company.

The two major points involved are as to the power of the Company to enter into a certain agreement with the City, and the interpretation
10 of the terms of the agreement.

Counsel for both parties, during their arguments, referred to the historical background of the factors which finally led to the agreement between the parties being entered into by them. I am of opinion that in order to arrive at a proper conclusion those conditions which preceded the contract have to be considered.

The Dominion Government had entered into an agreement with the Province of British Columbia to construct a railway which would unite the Pacific Coast with Eastern Canada. The Government had constructed a portion of that railway but came to the conclusion that
20 it was in the interest of Canada that the balance should be completed, built and operated by a private company. In furtherance of this work they entered into an agreement with certain men who undertook to carry on the project. A charter under the Great Seal was issued to the new company being formed thereby and the charter and contract were authorized and approved by an Act passed by the Dominion Government.

It was realized that in constructing the proposed railway, the Company would be faced with very serious difficulties, both physical and financial, and important concessions and assistance were given it by
30 the Government.

The main line to be constructed was originally planned to cross the Red River at Selkirk and proceed westerly. If this plan had been carried out it would have meant that the City of Winnipeg, as then and now located, would have been by-passed by the main line and at best could only be situate on a branch line running south from the main line to the Border. The citizens of Winnipeg realized this situation and entered into negotiations with the Company to run their main line through the City, and the terms under which the change was made were embodied in an agreement between the Company
40 and the City and were set forth in By-law No. 148, passed by the Corporation.

Under the terms of the agreement the Company undertook to build its main line through the City; to build a branch therefrom running

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south-west a distance of 100 miles; to erect a suitable station and to maintain its workshops, stockyards, etc., within the City of Winnipeg. They entered into a bond with the City to fulfil these terms. The City agreed to deliver \$200,000.00 worth of debentures to the Company and to exempt it from taxation (the extent of which is now the main subject matter under consideration in this action). The time within which the branch line was to be constructed was subsequently extended by City By-law No. 195.

It is admitted that both parties to the agreement completed and 10 fulfilled all the terms of same.

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

Three questions remain for consideration: (a) the effect of the extension of the City limits and the erection of shops therein by the Company; (b) liability of the Company for business tax; (c) the right 20 of exemption of the Royal Alexandra Hotel.

When the agreement was entered into, the Company undertook to build its shops, etc., within the limits of the City of Winnipeg, and By-law No. 148 was duly submitted to the residents of the City as then constituted on the 24th August 1881. It was approved by the ratepayers of the City. Subsequently, in 1882, the boundaries of the City were extended. After that extension was in force By-law No. 195, which included a recital of By-law No. 148, was passed by the City on March 26th, 1882, and submitted to the ratepayers of the whole City including those in the added part, and was approved by 30 the ratepayers of the City of Winnipeg as then constituted.

A question was raised as to the powers of the City to submit said by-laws and both by-laws were validated in 1883, 46-47 Vict., ch. 64, sec. 6. If, as contended now, the Company was restricted to build its shops and works within the limits of the original city, there was no right or necessity to submit it to a vote of the citizens living outside of the original area. If the City considered that their original agreement did not apply to the extended area they could have, under the Taxation Act of 1883, ch. 4, taxed the property of the Company outside of the original area and that right of taxation remained in the 40 City until the passing of the Railway Taxation Act of 1900. During all that time no attempt was made to levy taxes on the Company's property even in the extended area. In 1903 the Company constructed large shops outside of the original boundaries of the City but inside the boundaries under the 1882 extension. The effect of this

construction was that a large residential area was developed in the added territory to the north of the new shops—a development which was a distinct advantage to the City. If the City's present contention is right, when the Company constructed the new shops the City could have brought action for breach of their agreement but such action was never taken. Numerous cases have been cited in support of counsel's arguments on this point but they did not give much assistance. In practically all of them, local statutes and contracts were involved and the effect of those contracts was such as to either
 10 increase the liabilities or extend the rights of one of the parties in the action.

I am of opinion that the City's action in submitting By-law No. 195 to the rate payers of the whole city as it then existed was a definite indication that it was the intention of the agreement to allow the Company to construct their works within the City as it was then constituted, and their further abstinence from taking any steps to enforce their rights, if they existed, was also an indication of their interpretation of the agreement up to the present time.

Of all the cases cited, the City of Calgary v. Canadian Western
 20 Natural Gas Company, 56 S.C.R. 117, is the most applicable, and I would hold the property of the Company situate within the limits of the extended boundaries of 1882 is in exactly the same position in reference to the agreement as the property of the Company within the original limits of the City.

The next question to be considered is liability of the Railway to pay the business tax on all their property situate within the present limits of the City. I am not now considering the question of liability for taxation of the Royal Alexandra Hotel as distinct from other properties. That question will have to be dealt with separately.

30 The clause in By-law No. 148, subsequently included in By-law No. 195, which is pertinent to this question is as follows:

“4(8) Upon the fulfilment by the said Company of the conditions and stipulations herein mentioned by the said Canadian Pacific Railway Company, all property now owned or that hereafter may be owned by them within the limits of the City of Winnipeg, for railway purposes or in connection therewith, shall be forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind.”

The City of Winnipeg was incorporated on November 8th 1873
 40 by 37 Vict., ch. 7, and under sec. 112 thereof there was set forth the property which was liable for taxation, namely:

“all land *and personal property* in the City of Winnipeg shall be liable to taxation subject to the following exemptions.”

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The exemptions mentioned thereafter do not affect the matters in dispute in this action.

On May 14th, 1875, ch. 7, above mentioned, was repealed by 38 Vict., ch. 50, and sec. 112 in the previous Act became sec. 66 in the new Act and there was no change in the wording of the section.

The City continued to tax land and personal property until 1886. In that year 49 Vict., ch. 52, brought into force in the province the first Municipal Act.

Section 741 of the above Act reads in part as follows:

- 10 "From and after the passing of this Act all existing by-laws heretofore passed . . . prior to the said 29th of June 1884 . . . shall in all courts of law or in any other place or at any other time, . . . be held to apply to the said City, including the limits thereof extended by the said charter of 1884."

Under sec. 742 thereof the existing Winnipeg Charter was repealed and the City became subject to the Municipal Act.

In order to make the Act applicable to both rural and urban municipalities, in dealing with the question of taxation, sec. 512 was as follows:

- 20 "All lands in rural municipalities of the province and all lands *and personal property in the cities* and towns thereof shall be liable for taxation," etc.

There were certain exemptions named therein which do not apply in this case with the exception of subsec. 8, which was as follows:

"All lands legally exempt from taxation by a by-law of the Municipal Corporation."

- In 1890 the first Assessment Act of the province, as distinct from the Municipal Act, was passed, being 53 Vict., ch. 53. In this Act sec. 3 thereof was the same as sec. 512 of the 1886 Act, and the
30 exemption under subsec. 7 thereof was the same as the exemption under subsec. 8 of sec. 512.

- In 1893 the Assessment Act, ch. 24, was passed and the Act consolidated. This Act brought in a new form of taxation called a "Business Tax." The effective clauses were: Sec. 3: "Hereafter *no personal estate or personal property* in the City of Winnipeg shall be liable to taxation." Sec. 8: "Every person . . . shall be liable to business tax," etc. Sec. 19: "Nothing in this Act contained shall be construed to make the above tax levied upon occupants a charge upon the real estate, *but such tax is levied in lieu of a tax on personal prop-*
40 *erty.*"

The City carried on their municipal business under the above

legislative powers until the year 1902 when, by ch. 77 of that year's statutes, there was enacted a new charter for the City.

Sec. 281 thereof, set forth that land only should be taxed and assessed, with certain exceptions, among which were, under subsec. (f): "all lands legally exempt from taxation by a By-law of the City."

Sec. 285 provided for the assessment of a business tax similar to the one contained in the Assessment Act of 1893, and under sec. 313, the method provided for the collection of said tax is set forth.

Sec. 19 of the Assessment Act of 1893 was carried into the Charter 10 under sec. 314 thereof, in exactly the same words as in said sec. 19.

The City, in 1918, obtained a new Charter under ch. 120 of the Manitoba Statutes for that year, and sec. 314 of the 1902 Charter was continued in sec. 308 of said ch. 120, and has never been repealed. But sec. 308 was omitted from the Charter issued to the City in 1940, under which it is now operating.

It will be noted that the City, from the year 1873 until the year 1893, only assessed land and personal property for taxation purposes; that in 1893 the first business tax was levied and that same was so levied *in lieu of a tax on personal property*; and that no attempt was 20 made to assess the property of the Company for business tax until the present time when it became the subject of this action.

In considering the true intent of the contract entered into between the parties, consideration must be given to the conditions that existed when the contract was entered into. At that time the only taxation levied was on land and personal property. No other method of collecting taxes was in existence, and under clause 4, sec. 8, above mentioned, it would appear that all property was to be free and exempt from all municipal taxes, rates, levies *and assessments* of every nature and kind.

30 When the business tax was introduced as a new method of taxation it was definitely provided by statute, and carefully continued through the subsequent statutes, that the same was levied in lieu of a tax upon personal property.

I am of opinion that the inclusion of such a term was not merely by accident but for a definite purpose, namely; to show that it was a tax substituted for the previous existing tax. It was entirely unnecessary to include such an explanation for any other purpose as the power of taxation of personal property could have been dropped out of the statute and the power to institute the collection of the business 40 tax could have been adopted without any reference to the matter. There appears to be no doubt as to what the term "in lieu of" means. The Century Dictionary states that it is equivalent to "instead of." The Oxford Dictionary defines it as "in the place of" or "instead of."

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The effect of such a term has been considered in the *Shaftsbury v. Marlborough* case, 7 Simons, 237. In that case the Earl of Shaftsbury left to his grandson annuities of £1000 and £2000, each subject to certain conditions, and his Executors were to pay the legacy dues on said annuities. In a codicil he revoked the annuities in his will and "in lieu thereof" directed that his Executors pay his grandson £3000 yearly. It was held that the £3000 annuity was in substitution of the legacy in the will and was to be taken with all its accidents, and the legacy duty on same was to be paid out of the residuary 10 estate.

In *re Boddington*, 53 L.J. Ch. 475; 25 Ch. D. 685, the testator had given a legacy of £200 to his wife and directed his trustees "in addition thereto to pay to my said wife, so long as she shall continue my widow and unmarried an annuity of £300, or otherwise in lieu and in substitution of the said annuity, at the option of my said wife if she shall prefer it, a legacy of £2000.

After the date of the will the marriage was declared null by the Divorce Court in a suit brought by the wife against the testator. It was held that she was entitled to the £200 bequest but that as she 20 had not continued to be the testator's widow the annuity of £300 was not payable and her claim to be entitled to the £2000 in lieu of the annuity was also barred because it was based upon her right to the £300.

Selbourne, L.C. at p. 689, says:

"I think without reference to any general rule of law, and from the natural meaning of the words here used, that if she could not take the annuity she could not take the legacy. . . . But if the annuity is not given her, then it does not appear possible to say that she is entitled to the capital sum."

30 The words of the Lord Chancellor are applicable to the present case, and that when the City exempted all property (which included land and personal property) from all taxation they cannot, at a later date, under a tax under another name substituted therefor, make the Company liable for such substituted tax.

Counsel for both parties submitted very strong arguments in support of their contention as to whether a business tax was a tax on property or not. In *Hydro-Electric Power Commission v. City of Hamilton* (1920) 47 O.L.R. 155; *Toronto Suburban Railway Co. v. City of Toronto*, 52 O.L.R. 655, it was held that business tax was 40 not a tax on property but a personal tax. On the other hand: in *Nova Scotia Power v. Bank of Nova Scotia* (1935) 3 D.L.R. 494; *Pigeon v. City of Montreal* (1890) 17 S.C.R. 495; and in *Dominion Express Company v. City of Brandon*, 20 M.R. 304, the opinions

expressed by members of the Court were that it was a tax on property. In all of these cases the questions before the various Courts were entirely different from those in this action and dealt with the various statutes and the effect of same in reference to taxation of Crown lands or property occupied by the Crown, or cases of double taxation in contravention of the statutes under consideration. In no case was it for the purpose of settling the point of whether it was a property or personal tax, and the comments in reference to that phase of the problem were *obiter dicta*.

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10 In Reference re Taxation of Canadian Pacific Railway Company (1949) 1 W.W.R. 353, now subject to appeal, certain questions were submitted to the Saskatchewan Court of Appeal as to the powers of a municipality to tax the Company in that Province. Various local Acts were under consideration and the effect of Clause 16 set forth in Ch. 1 of the Statutes of Canada, 44 Vict., 1881, and the Court held that in Saskatchewan the Company was liable for both property and business tax.

In the first analysis, all taxation is personal as it has to be paid by the person taxable, although there are different ways of ascertaining
20 what the amount of the tax shall be; and conversely, all property owned by the person responsible for payment of the tax is available for the purpose of realizing the amount thereof and becomes subject thereto.

I do not think that in the present case it makes any difference whether it is a personal or property tax. The rights of the parties hereto depend upon the agreement entered into by them, as contained in the by-law.

In Hedley Shaw Milling Company v. City of Medicine Hat (1918) 1 W.W.R. 754, an agreement had been entered into between the City
30 and the predecessors of the plaintiff in 1912 whereby the property of the Company was to be assessed at a fixed assessment over a period of twenty years. In 1916 the City obtained power from the Legislature, by amendment to its charter, for the purpose of making an assessment for, and levying, a tax which would be known as a "business tax." It was held that the arrangement between the Company and the City was a contract, the true meaning of which was that the entire property would only be liable for the fixed assessment. It is true that the judgment was that of a single judge; but I agree with his reasoning that the terms of a private contract should not be varied
40 unless the amending Act clearly expresses the intention that it was to be varied.

In Canadian Pacific Railway v. City of Winnipeg, 30 S.C.R. 558, where the City levied taxes for purposes of the City schools, it was held that such taxes were a municipal levy and that the Company

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was not liable for same. The case rested on exactly the same documentary foundation as the present one, and in giving the judgment of the Court, Sedgewick, J. stated (p. 563):

“The question then is: Are schools taxes exempt under this phrase ‘exempt from all municipal taxes, rates and levies and assessments of every nature and kind?’

10 “Apart from the main inquiry, the words themselves are not altogether free from ambiguity. I think, according to the rules of grammatical expression, the adjective ‘municipal’ applies only to ‘taxes, rates and levies,’ and does not qualify ‘assessments.’ If the first conjunction ‘and’ were not there, the adjective would qualify ‘assessments,’ but it is there, and according to the literal construction of the sentence the property is exempt not only from all ‘municipal taxes, rates and levies,’ but also from ‘assessments of every nature and kind.’ *If this literal construction is to be given, and I think it should be given, the case is at an end.*”

He continued and dealt with the matter further from the standpoint of the definition of “municipal taxes” as affected by the words “school tax.”

20 Under the quotation above mentioned, the Court held that the City was prohibited from making “assessments of every nature and kind”; so that regardless of whether a business tax is a personal or property tax, it cannot be levied without making an assessment of the Company’s property.

30 The ordinary municipal tax on property is levied against the assessed capital value of the property. The business tax is levied by an assessment of the annual rental value of the property. In both cases the property is to be taken into consideration. Because the basis of valuation used for the purpose is different, it does not eliminate the fact that the assessment is made in relation to the property and the City is not entitled to make an assessment of any kind.

40 Counsel for the City also submitted that the contract was one which it was impossible to fulfil, as it was to be “forever.” Under the final sentence in Clause 7 of the contract, as set forth in the charter issued under the Great Seal, it is stated: “*And the company shall thereafter forever efficiently maintain, work and run the Canadian Pacific Railway.*” It was, therefore, not only logical but advisable that wherever possible it should enter into contracts which would enable it to carry out and fulfil the contract it had entered into; and one of the methods whereby it would be assisted in so performing its contract was to make the agreement, which it did, that “all property . . . *shall be forever free and exempt* from all municipal taxes, rates and levies and assessments of every nature and kind.”

In *Mayor, etc. of London v. Netherlands Steamboat Company*, 1906 A.C. 263, the right of the municipality to assess certain property was in question. In 1812 the British Treasury Department voluntarily undertook to pay each year "for ever" a certain sum in reference to their Custom House premises, and that, in consideration of doing so, the premises should be exempt from all rates and assessments though they might become private property. In 1832, by an amending Act, it was enacted that the collectors should collect the composition amount agreed upon—and no more—from the occupiers of the
 10 property, which was about to be sold by the Treasury. Subsequently, under the City of London Sewers Act, 1848, the City endeavoured to charge the property with taxes, and it was held that under the arrangements made by the statutes referred to the exemption applied to future as well as existing rates and assessments and the property was not liable for taxation by the Act of 1848. Lord James, at p. 272, when expressing agreement with the Master of the Rolls, said:

20 "The statutes *do not refer to then existing rates, but apparently all future rates were contemplated.* The words 'for ever' appear to be employed for the purpose of shewing that this bargain was to be taken on both sides for better or worse, and that the property should in the hands of private owners be as free from rateability as if it had been occupied by the Crown."

That case was followed in *Associated Newspapers Ltd. v. Corporation of the City of London* (1916) 2 A.C. at 429.

In *United Towns Electric Co. Ltd. v. Atty.-Gen. for Newfoundland* (1939) 1 A.E.R. 423, the matter under consideration was the effect of the exemption clause in the United Towns Electric Company Act, 1902, ch. 8 sec. 30, which read as follows:

30 "The company shall be liable for water rates on all lands and buildings owned by it in the aforesaid towns, but otherwise the company shall be exempt from taxation."

At the time of the contract there was no business profit or income tax existing in Newfoundland, but in 1917 a business profits tax was imposed, followed in 1918 by a war income tax which was continued until 1925, its name being changed to 'income tax' in 1922 and subsequently included in the Income Tax Act passed in 1929. It was held that the exemption clause applied to income tax and that the company was not liable for same.

I am, therefore, of the opinion that the Company is not liable for
 40 the so-called business tax for the following three reasons:

- (1) It was a tax substituted for the personal tax from which it was exempt at the time the by-law was passed.

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- (2) That the by-law prohibited the City from making the assessment necessary before such a tax could be ascertained.
- (3) That on a true and correct interpretation of the meaning of Clause 4, ss. 8, at the time the by-law was passed and the contract entered into between the Company and the City, which was the reason for the passing of the by-law and the exemption being granted, the Company was to be exempt from any and all taxes levied by the municipality.

The third point is the question of the right to tax the Royal Alexandra Hotel, to which I have referred above.

The relationship of the Company's hotel system with the operation of its railroad is well known, and the facts are fully set forth in evidence given at the trial. It appears to me that all its hotels are not in the same position. In many instances their construction can only be accounted for from the standpoint that they were to be conducted entirely in connection with the development and operation of railroad business. I can see no other reason for the existence of the Company's hotels at Lake Louise and Banff than that they were built solely to encourage tourist traffic on its railway system.

20 In Winnipeg the Royal Alexandra Hotel is operated by the Canadian Pacific Railway. The hotel not only provides accommodation for the Company's railroad patrons, but also for numerous conventions and other functions from all over the continent which could not possibly be held in this city unless such accommodation were available. By doing this the Company's business in reference to passenger traffic must be affected. It is also quite true that in addition to service provided for railway patrons, the hotels are available for the holding of balls and banquets by city organizations. It appears to me that such additional service is not the main or a basic reason for the construction and operation of the railway hotels. The service to its passengers is more elaborate and extensive, but similar to the lesser service provided by the Company in its dining halls at divisional points (which are also available for use by the general public), and I would consider it was operated by the Company for railroad purposes within the meaning of sec. 4(8) set out above and certainly "in connection therewith."

40 In *C.P.R. v. Atty.-Gen. of British Columbia* (1950) 1 W.W.R. 220, the Privy Council interpreted the sections of the Railway Act (in reference to the Empress Hotel, owned and operated by the Company in Victoria), as not including the hotel as part of the railway system operated by the Company or connected therewith for railway purposes. If the proper interpretation of that judgment is that the same covers all hotels operated by the Company, I am bound by that decision and must hold that the Royal Alexandra is liable to taxation

by the City. If, however, I am wrong in so interpreting said decision, I would hold that it is exempt from taxation along with the other property of the Company.

I would dismiss the appeal with costs.

E. A. McPHERSON, C.J.M.

Delivered this 17th day of April 1950.

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I will discuss the various matters or issues in the order followed 10 by the learned trial judge.

THE VALIDITY OF THE MAIN AGREEMENT

I agree with my brother Dysart that the Company's powers are limited to those set forth in the Act authorizing its charter and in the Acts amending same or giving the Company additional powers. I think, however, that the agreement entered into, as evidenced by By-law 148, was not *ultra vires* of the Company. One contention of the City is, that the covenant to "establish and build within the limits of the City of Winnipeg, their principal workshops for the main line of the Canadian Pacific Railway within the Province of Mani-
20 toba . . . and forever continue the same within the said City of Winnipeg" was so onerous and restrictive that it might conflict with the duty of the Company, to "forever efficiently maintain, work and run the Canadian Pacific Railway" as required by sec. 7 of the contract dated 21st October, 1880, between George Stephen and others with the Government of Canada to build and operate the railway.

The City of Winnipeg is in a fairly central position on the main line within Manitoba, and the tying of the main workshops to that position for the Province of Manitoba was of little importance compared to an exemption from taxation and a bonus of \$200,000.00.

30 The City relies on the judgment of the Ontario Court of Appeal in *Whitby Corporation v. G.T. Ry. Co.* (1901) 1 O.L.R. 480; 1 C.R.C. 265. That case is discussed in *McMurchy & Denison's Railway Law of Canada*, 3rd ed., pp. 249 and 250. At p. 250 there is the following statement:

"As already mentioned, it has sometimes been held in the United States that contracts for the location of the line or some or one of its stations in a particular place have been declared *ultra vires*: *Pierce*, p. 513; but no such decision, other than the *Whitby Case*, has been found in England or Canada. The

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question must always largely turn on whether express or implied statutory power has been given to railways to receive benefits and give covenants imposing corresponding liabilities, and sufficient authority will now generally be found either in the Acts of Incorporation or in the general statutes, if any, incorporated with them. The Whitby Case is, however, authority for the proposition that the directors of a railway company have not, without express statutory authority, power to bind it by a contract imposing for all time a peculiarly onerous condition."

- 10 In my opinion the covenant was not a peculiarly onerous condition but, on the contrary, was a very advantageous arrangement for the Railway Company and was not *ultra vires*.

THE AREA AFFECTED BY THE AGREEMENT TO EXEMPT

The City claims that, if the provisions for exemption from taxation in the agreement set out in By-law 148 are valid and binding on the City, they apply only to property within the territorial limits of the City as existing on 21st September 1881. This issue is dealt with by the learned trial judge in paragraphs 192 to 204 of his reasons for judgment.

- 20 I agree with the reasons for judgment of my brother Adamson that the exemption does not apply to the territory subsequently added.

Section 93 of ch. 50 of the 1875 Statutes of Manitoba which amended and re-enacted the City's charter, provided that no by-law for contracting debts, such as By-law 148, shall be valid which is not in accordance with certain restrictions and provisions of which one is: "The by-law shall name a day in the financial year in which the same is passed, when the by-law shall take effect."

- By-law 148, as passed by the City Council on 5th September 1881, and as re-enacted by By-law 195 passed by the City Council on 30th 30 October, 1882, contained the following provision:

"4(9) That this by-law shall take effect from and after the twenty-first day of September, in the year of our Lord one thousand eight hundred and eighty one."

The words "take effect" must mean take effect for all purposes.

- The City's limits were enlarged 30th May 1882. By-law 195 was voted on and approved by the ratepayers of the City, including the added portion, on 26th October 1882. It must be assumed that the Railway Company, the City, and the ratepayers were aware of the by-law's implications. The fact that ratepayers of the added portion 40 voted on the by-law did not change its terms. Such ratepayers were affected financially just as much as the ratepayers within the original limits by the exemption from payment of taxes of any property in

Winnipeg within or without the boundaries existing on 21st September 1881.

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An agreement is ordinarily construed as referring to conditions existing at the time it was entered into unless otherwise provided. That is particularly so where the point is raised and brought to the notice of the parties, as in this case, by the provision for an effective date.

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It would seem, too, that the Railway Company had in contemplation, and was interested only in, property within the 1881 limits. It 10 built its stockyards, workshops, engine house, roundhouse, yards and all it required, within such limits.

The learned trial judge states in para. 202 of his reasons for judgment:

“The cases . . . show also . . . the subsequent acts of the parties may make it impossible for one to maintain successfully that the operation of it [the agreement] is restricted to the territorial limits of the municipality as it existed when the contract was made: see per Anglin J. (later C.J.C.) in *Calgary (City) v. Canadian Western Natural Gas Co.* (1917) 56 S.C.R. at p. 137.”

20 and, in para. 209, expresses the opinion that the principle applies here.

I do not know of any subsequent acts of the parties which would have any such estoppel effect. The trial judge does not state them and I am unable to find any in the evidence or admissions. The statements in the agreements as to the taxation of the Royal Alexandra Hotel refer only to the hotel and should not be considered as being general so as to affect other matters in dispute. That, too, is the view of the trial judge: see para. 341 of his reasons for judgment. See also *Beal's Cardinal Rules of Legal Interpretation*, pages 184 *et seq.*

30 The facts in the Calgary case were different. There the Gas Company's construction of its system extended into new territory from the beginning. Its plans were submitted to the City Engineer, the Mayor and the Commissioners (or two of them) and the Company was told to go ahead: see the report of the case, 10 Alta. L.R. 181. Beck, J. at p. 230 is reported as saying:

“. . . There are formal acts of the council and of the ratepayers actively joined in and acted upon by the Company, which, in my opinion, must be taken as an effective and irrevocable construction of the contract.”

40 In the case at bar the Railway Company argues that the question could have been raised, but was not raised, in the School Tax case in 1894 when, they claim, the City attempted to collect school taxes in

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the extended area, and that this is admitted by the City in para. 13 of the Admissions. Neither para. 13 nor any other paragraph of the Admissions, states that the City attempted to collect school taxes in the extended area.

My brother Adamson points out that there is no evidence that the Railway Company owned any property in the extended area in 1894. I am not able to find any statement in the reports of the School Tax case that refers to an extended area. Killam, C.J., in 12 M.R., at p. 587, says the question is:

10 “. . . whether . . . the City is entitled to recover from the Company rates assumed to be levied . . . for the support of public schools . . . upon the Company's property situate in Winnipeg and *used for railway purposes or in connection therewith.*" (The italics are mine.)

The property on which the shops were built in 1903 was not used for railway purposes in 1894.

It may be that the Railway Company owned the right-of-way over which it operated trains outside the 1881 limits, but, so far as the evidence shows, the right-of-way may have been leased, or the right
20 to run trains over it may have been by agreement with another party.

The point that the exemption did not apply to property outside the 1881 territorial limits of the City could not have been raised in the School Tax case unless; *firstly*, the Company "owned" property "for railway purposes or in connection therewith" in the added area, and, *secondly*, such property had been taxed for school purposes. There is no proof of either condition and, in my opinion, the principle of *res judicata* does not apply.

THE ROYAL ALEXANDRA HOTEL AND STATION RESTAURANT

30 The Company was authorized to build and operate hotels by the Canadian Pacific Railway Company Act, 1902, ch. 52, S.C. 1902, and a few years later built the Royal Alexandra Hotel and adjacent restaurant on its property in Winnipeg, and has operated the hotel continuously ever since.

The Railway Company denies the right of the City to tax the hotel and station restaurant, claiming they are within the provision of By-law 148, that "all property now owned, or that hereafter may be owned by them (the Company) within the limits of the City of Winnipeg, *for railway purposes, or in connection therewith* shall be
40 forever free and exempt from all municipal taxes, rates, and levies and assessments of every nature and kind." (The italics are mine.) The question peculiar to this issue is whether the hotel and restaurant are owned for Railway purposes or in connection therewith. The

judgment of the learned trial judge deals with this question in paragraphs 214 to 216 of his reasons for judgment.

Mr. Manson, Vice-President of the Company for the Prairie Region, testified that the hotel provided food for the travelling public, drew traffic to the railway, its laundries washed the linen of the dining cars, and it was used for large staff meetings. But he stated also that hotel rooms are not confined to the use of travellers, that the hotel has a public beer parlor and three main ballrooms and a number of smaller places where local functions are held, that service clubs used
10 the hotel for luncheons and other functions, that during the 1930's depression, possibly many local people had permanent rooms and, at the present time, a few local people are on a permanent basis, and that the restaurant is open to the public and is used by people who reside or are in business in the neighbourhood.

The Supreme Court of Canada, in *C.P.R. v. Atty.-Gen. of British Columbia*, 1948 S.C.R. 373, held that a hotel is not an integral part of a railway, and that "railway," defined in sec. 2(2) of the Railway Act, 1919, R.S.C. ch. 170, as meaning "any railway which the Company has authority to construct or operate, and includes all branches,
20 extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal *and works connected therewith*" does not include hotels. (The italics are mine.) Rand, J. is reported at p. 397 as saying:

"Whatever may have been the actual situation in Great Britain in 1867 of railway hotels, the history of the railways of the United States, which our own development has followed closely, has never associated hotels with railway functions."

The Judicial Committee of the Privy Council has rendered its judgment in the same case under the title "Reference re Application of
30 Hours of Work to Empress Hotel," (1950) 1 W.W.R. 220, since judgment was given in the case at bar. The activities and business of the Empress Hotel, as reported, are strikingly similar to those of the Royal Alexandra Hotel, and both carry on a general hotel business.

Lord Reid said, at p. 233:

"It may be that, if the appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be a part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on the appellant's system may be a part of its railway
40 undertaking whether that provision is made in trains or at stations, and such provision might be made in a hotel. But the Empress Hotel differs markedly from such a hotel. Indeed there is little if anything in the facts stated to distinguish it from an independently owned hotel in a similar position. No doubt the

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fact that there is a large and well managed hotel at Victoria tends to increase the traffic on the appellant's system; it may be that the appellant's railway business and hotel business help each other, but that does not prevent them from being separate businesses or undertakings."

It would seem that, when the agreement, as evidenced by By-law 148, was entered into, hotels were not in the minds of the contracting parties as being property owned "for railway purposes or in connection therewith" because it was not until 1902 that the Company applied 10 for and was given express authority to build and operate them.

It should be noted, too, that while the operative part of By-law 148 exempts property owned "for Railway purposes or in connection therewith," the recital in the By-law refers only to property owned "for Railway purposes."

Where there are words, particularly general words, in the operative part of a deed which are of doubtful meaning, the recitals may be referred to in order to discover the intention of the parties and to explain ambiguities: Beal's Cardinal Rules of Legal Interpretation, page 184.

20 To give effect to the contention of the plaintiff Company that any property owned by it on which there is carried on works or a business having in some way to do with the operation of the railway is exempt from taxation, would mean the Company could, without paying taxes, engage in many lines of business with the public in competition with citizens who are required to pay property taxes.

My view is that the Royal Alexandra Hotel is not owned for railway purposes or in connection therewith, and is not exempted from taxation by the 1881 agreement.

The restaurant is situated in the station building but it is connected 30 with the hotel and is referred to by Mr. Manson as the Royal Alexandra Coffee Shop. I am unable to distinguish the restaurant from the hotel.

THE BUSINESS TAX

The plaintiff claims it is not liable to the business tax imposed on persons carrying on business in the City because of the exemption provision of By-law No. 148, *supra*.

The learned Chief Justice of the King's Bench sets forth all the relevant facts and discusses the leading cases in regard to the business tax in paragraphs 228 to 315 of his reasons for judgment. Therefore 40 it will not be necessary for me to set forth all the relevant sections of the Winnipeg Charter but it is, I think, advisable to refer to the following sections which provided for assessing and fixing the amount of the tax.

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"291. (1) Excepting as otherwise hereinafter provided every person carrying on any business in the city whether he resides therein or not shall be assessed for a sum equal to the annual rental value of the premises which he occupies in carrying on, or uses for the purpose of, such business, or uses in any way excepting solely for residential purposes. Such assessment shall be known as 'business assessment' and the tax levied on this assessment shall be known as 'business tax.' "

- 10 "292. (2) In assessing annual rental value, the assessment commissioner shall take all factors into account so that as far as possible premises similar in size, suitability, advantage of location, and the like, shall be equally assessed. The intent and purpose of this section is that all persons subject to business tax shall be assessed at a fair rental value of the premises occupied or used, based in general upon rents being actually paid for similar premises."

Section 297(1) provides that the tax shall be at a rate per centum of the assessed annual rental value.

- 20 And to the following provisions for collection:

"REMEDIES TO ENFORCE PAYMENT OF TAXES"

"360. (1) The city shall have a first lien or charge upon all the personal property of every person liable to the city for business tax, and the city may levy such tax with costs by distress and sale of the goods and chattels or the interest therein of the person who ought to pay the same wherever the same may be found within the city."

- 30 "364. Taxes, whether business or general, together with penalties for default in payment as provided for by this Act, may be recovered with costs in any court of competent jurisdiction in the Province as a debt due to the city from any person by whom the same are payable [or in whose name the same are assessed], in which case the production of a copy of so much of the collector's roll as relates to the taxes payable by such person, purporting to be certified by the collector as a true copy, shall be sufficient evidence of debt."

- 40 "365. Any taxes may be recovered and may be levied on any real or personal property excepting therefrom that mentioned in subsections (a) (b) (d) and (h) of section 29 of 'The Executions Act.' "

"369. (1) In case a person neglects to pay his general taxes for thirty days or his business tax forthwith, after mailing to such

person or his agent of the notice required by this Act, the city shall have the right to levy the same with costs by distress and sale of the goods and chattels or the interest therein of the person who ought to pay the same; subject, however, to the exemption mentioned in section 365."

"369. (3) The business tax shall not be a charge upon the land or building occupied, but such tax is levied in lieu of a tax upon personal property."

The trial judge expressed the opinion that sec. 365 refers to the
10 business tax. The City contends it does not. See paras. 231 and
254 of his reasons for judgment. I do not think the correctness of
either view makes any difference to the decision on this phase of the
case.

The City claims the business tax is a tax *in personam* and not a tax
in rem and there is, under the sections I have quoted, and other
sections of the Charter relating to business tax, no tax or assessment
of property of the Company.

The Company claims that under the scheme of this taxation there
is an assessment of its property and, following the assessment, a tax
20 on its property.

The trial judge agrees with the Company's contention and sets out
his finding in the following words:

"255. In my opinion the Charter subjects the property of the
tax-payer, real and personal, to a levy for business tax. This is,
then, a 'municipal levy' on property. But the exemption agree-
ment provides that the property of the plaintiff is to be forever
free from all municipal levies.

30 "256. The business tax imposed by the present Winnipeg
Charter is, therefore, in this respect a tax on property, although
it also partakes of the nature of a tax *in personam* in that it may
be recovered as a debt: ss. 343 and 364 (para. 231 *supra*). It
is however one tax and I take the view that the fact that it can
be recovered in an action does not make it any the less a levy on
property."

"257. It seems to me that besides being a municipal levy it is
also a municipal tax on property within the meaning of the term
as used in the exemption agreement, but I prefer to base my
judgment on the ground that it is a municipal levy on property
from which the plaintiff is forever exempt."

40 The basis of his opinion, is his view of the use of the word "levied"
in sec. 365 of the City Charter, *supra*. Evidently he ascribes to it
the meaning "taxed" which he considers would be a breach of the

agreement to "exempt from taxes, rates and levies." Applying the *ejusdem generis* rule, the word "levies" clearly means taxes. The Oxford Dictionary gives a definition of the noun "levy" as "an assessment, duty, tax, etc." I think, however, the word "levied," used as it is in the tax collection sections, should be given the meaning ascribed to the verb "levy" in the Oxford Dictionary, namely: "To collect a debt; to raise a sum by legal execution." The tax which has been fixed and imposed *in personam* may be levied.

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It will be noted that sec. 292(2) provides the manner in which the
10 Assessment Commissioner shall arrive at the annual rental value, and
sec. 297(1) fixes the tax at a rate per centum on such value.

I am unable to find any definition of the words "annual rental value." The Oxford Dictionary gives the following meaning of the word "value":

"The material or monetary worth of a thing. The amount at which it may be estimated in terms of some medium of exchange."

There is not to be an assessment of property of any kind. In the case of an occupant of his own premises there is not even a rent. The annual rental value which is to be assessed is neither real nor personal
20 property. It is merely an amount of money, not actually in existence, but estimated by the Assessment Commissioner on the basis of rents being actually paid for similar premises and not on the basis of the value of any property.

Then as to the business tax being a tax on real or personal property. Sec. 369(3), which I have quoted, says it is not to be a charge upon the land or building occupied. Certainly it is not a tax on any particular real or personal property.

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
30 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 realized 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.

I cite as a test the following hypothetical example which illustrates the principle and scheme of the tax and shows that the result of the
40 tax is the creation of a debt owing by the occupant carrying on business in the premises, but is not a tax on any property.

Let us suppose an extra-provincial corporation rents a furnished

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office in Winnipeg for the sole purpose of giving information as to its business, all correspondence being handled by the head office of the corporation in another province, or by the Winnipeg office on stationery belonging to the landlord, for which payment is made after use, and assuming that the corporation has no property whatsoever in Winnipeg. In such case the tax could only be *in personam* and not *in rem* because there was no property of the tax-payer in Winnipeg. I think, that being the result of the test, the contention of the City is correct.

- 10 The relevant cases are fully and adequately discussed by the learned trial judge and, if I may say so, his expressions of opinion as to their purport are correct. The plaintiff Company, however, still contends the Halifax v. Fairbanks case, 1928 A.C. 117, decides that a business tax is a direct tax on real property and, therefore, conclusive against the appellant. I cannot add anything to what has been said by the trial judge in this case, but I, too, point out that the statute in the Halifax v. Fairbanks case is different from the City Charter and the real question in that case was whether the tax was direct or indirect. There is no provision in the Winnipeg Charter that imposes the busi-
20 ness tax directly or indirectly on the owner of any real or personal property, *qua* owner, although he may be required to pay it as occupant and user.

I think as the City succeeds on three of the four main questions and the Company on one, the costs should be disposed of by ordering the Company to pay one-half of the City's costs, without bars, here and below.

S. E. RICHARDS, J.A.

Delivered this 17th day of April 1950.

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30 Reasons for Judgment of The Honourable Mr. Justice Coyne

This Court has the advantage of the compendious and able judgment of Williams C.J.K.B. in the Court below: (1949) 2 W.W.R. 881. With his conclusions on all points I agree, as well as substantially with the reasons he has given. I also concur in the judgment of the Chief Justice of this Court, with the exception of the two sentences at the end of his judgment where he refers to the Reference respecting the British Columbia Labour Statute as affecting employees of the Empress Hotel: (1950) 1 W.W.R. 220 (P.C.), and where, on the basis of a supposition of interpretation of that case, he finds the Royal

Alexandra Hotel liable to taxation. In my opinion the Empress Hotel judgment is not relevant or helpful here. The judgments of the two Chief Justices make it unnecessary for me to say anything at length.

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The exemption provision must be interpreted so as to effectuate the intention of the parties, and as words mean little alone without knowledge of the circumstances in which they were used, it is plain that where, as here, the words have been used many long years before and no contemporary witnesses survive, history and the conduct of the parties is the best interpreter. The City admits that after the extension of area 68 years ago, it never endeavoured to assess or tax the Company in respect of property within the extension of 1882 or to impose a "business tax" on Company property after the Legislature in 1893 endowed the City with power to levy such a general tax. It was only in 1948 that attempt was made to do so, and to support it the new interpretation was invented—that the limits of the City of Winnipeg meant the area within its boundaries in 1881 and that the 'business tax' was outside the exempting clause of agreement and by-law. The result is the present action.

20 The City now tries to escape the natural interpretative effect of its conduct over that long period of exemption by saying that from 1900 to 1947 the Railway Taxation Act prevented assessment and taxation. But except for the attempted "school tax" in 1894, and notwithstanding the authority conferred on the City in 1893 to impose a "business tax," in the nineteen years from 1881 until 1900—the years immediately following the by-law, when the authors were still living—no assessment or tax was made or imposed, and that to my mind demonstrates the meaning of the exemption clause, particularly in view of the fact that on the establishment in 1903 of the workshops
30 in the extended area, no objection was raised to it as being a breach of the Company's Bond and Covenant; the latter using the same words as the exemption clause, "Within the limits of the City of Winnipeg." Whatever limit of area was intended, the workshops were to be continued there *forever*. The limits of the 1881 area would have been a narrow location for the workshops for eternity, and that was never intended. The limits of 1873 had been extended in 1875. When By-law 148 was passed in July 1881, much land outside the then limits had already been sub-divided into building lots, and the further extension of boundaries had already been planned and it was
40 enacted at the next session of the Legislature, May 1882. Review of the history of the time, and since then, confirms the interpretation that the limits intended were not the area within the 1881 boundaries but the area which would be within the expanding boundaries of the great city which Winnipeg was to be, as envisioned by the inhabitants of that time.

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If the conduct of the City is not interpretative as above, it is evidence of waiver and acquiescence.

The Empress Hotel case is quite different from this. Williams C.J.K.B. found no assistance in it. That was before the Privy Council judgment was delivered. But in my opinion his view still holds.

That case turns on conditions and circumstances in British Columbia as affecting employees therein. The question was a constitutional one—whether labour legislation of the Province was within its
10 competence so as to affect those employees. The language of the B.N.A. Act and Federal statutes was examined and construed. Even in the instance where a phrase there appears similar to that used in the exemption clause, it is in a different context.

But the question here is not constitutional. It is the meaning intended by parties in Manitoba in 1881 in an agreement made in circumstances here, and interpreted in the light of the conduct of the parties and of events here over a period of many years.

Another feature should be mentioned. The City asserts that the Railway Taxation Act of 1900 has prevented the City from assessing
20 and taxing in respect of the hotel. The Act at first exempted from municipal assessment and taxation all railway property except (a) land received as subsidy from the Dominion and (b) land held for sale. But in 1909 the Act was changed so that the exemption no longer applied to “lands or property held by the Company not in actual use in the operation of the railway.” If, after 1909, the Railway Taxation Act prevented taxation of the hotel, it was because the hotel was “in actual use in the operation of the railway.” If that Act did not affect it, the reason why the City did not tax the Company in respect of the hotel or its business was because the hotel came within the exemption
30 clause of the By-law as “property owned . . . for purposes of the railway or in connection therewith.” The course of conduct of the parties for some forty years shows that the hotel was such property.

In addition, when, under and by virtue of the new agreement made between the parties in 1914, the Company agreed to pay the City a larger annual sum in respect of the hotel than under the 1906 agreement, it is quite clear that the new annual amount was not to be paid as an obligation otherwise legally exactable by the City from the Company, and that provisions in the terms of the 1906 agreement,
40 other than the amount there set out, were incorporated as part of the 1914 agreement. The payments in 1915 and thereafter were, therefore, to be made on the same terms and conditions as those of the 1906 agreement, including the recital “the Company’s hotel property . . . is exempt from taxation,” and paragraph 5 of the operative part: “it is distinctly understood that what the Company has agreed to do

and give are concessions made and given by the Company without legal necessity on the part of the Company." That recital and understanding were re-asserted and applied as the basis of the 1914 concessions. In paragraph 10 of the admissions in this action, in admitting the execution of the 1914 agreement and the enactment of By-law No. 8721 "purporting to ratify and confirm said agreement," the defendant City "does not admit the power of the Council of the defendant to execute said agreement or to pass the By-law or to recognize or acknowledge that the plaintiff was and is not under any
10 legal necessity to pay taxes in respect of property owned by the plaintiff within the City of Winnipeg for railway purposes or in connection therewith."

The City admits the purport of the 1914 agreement as I have set it out in the preceding paragraph. What it does not admit is only the competence of the Council to make the agreement of that purport or to pass the By-law or to recognize or acknowledge, as is done in that agreement, that the Company is under no obligation to pay taxes in respect of the hotel. Not the slightest basis has been offered for questioning the competence of Council.

20 In the agreement of 1942 between the parties (authorized by By-law 15455) the Company's contribution in respect of the hotel was again raised, among other things. The last operative paragraph of the agreement contains the same words as those quoted above from clause 5 of the agreement of 1906.

In my opinion the exemption clause of agreement and by-law applies to the Royal Alexandra Hotel and its business.

The majority of the Court holds that the doctrine of *res judicata* does not apply. I do not think it is necessary to deal with the doctrine in this case. The "school tax" case, 30 S.C.R. 558, is how-
30 ever a binding precedent.

I would dismiss the appeal with costs.

J. B. COYNE, J.A.

Delivered this 17th day of April 1950.

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This is an appeal from a judgment of Williams, C.J.K.B., restraining the defendant from assessing and levying taxes on the plaintiff's railway property in the City of Winnipeg.

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

The agreement, as a document, is not in evidence; but its terms are fully set forth in By-law No. 148 passed by the City on September 5th 1881, and are repeated, with some amendments, in By-law No. 195 passed by the City on October 30th, 1882. Paragraph 4(8) of the agreement reads as follows:

20 "Upon the fulfilment by the said Company of the conditions and stipulations herein mentioned by the said Canadian Pacific Railway Company, all property now owned or that hereafter may be owned by them within the limits of the City of Winnipeg for railway purposes or in connection therewith, shall be forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind." (The underlining is mine.)

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

As part of the agreement, as a bonus and in addition to tax exemp-
40 tion, the City was (1) to convey to the Company land for the depot, and (2) issue its debentures for \$200,000.00, payable to the Company

in twenty years, with interest—the debentures to be held by a trustee until the Company fulfilled the three conditions.

On March 30th, 1883, the City passed By-law No. 219, which, after reciting that the Company had “completed and performed all the conditions mentioned in the said By-law [195] and in all other respects complied with same,” authorized and instructed the trustee to deliver the \$200,000.00 debentures to the Company. The trustee then delivered the debentures and the City conveyed the land for the depot.

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

The City had obtained the approval of its ratepayers before passing By-laws Nos. 148 and 195; but in order to set at rest all doubts as to its competence to pass the by-laws, it procured the Legislature of Manitoba to validate them by an Act. S.M. 1883, c. 64, sec. 6 of which reads:

- 20 “. . . By-law No. 148 to authorize the issue of debentures granting by way of bonus to the . . . Company the sum of two hundred thousand dollars in consideration of certain undertakings on the part of the said company; and By-law No. 195 amending By-law No. 148 and extending the time for the completion of the undertakings expressed in By-law No. 148, by the . . . Company . . . be and the same are hereby declared legal, binding and valid upon . . . the City of Winnipeg.”

- 30 Again, in 1886, S.M., c. 52, sec. 741 was enacted declaring, *inter alia*, that: “all existing By-laws heretofore passed by the . . . City of Winnipeg . . . shall in all courts of law or in any other place or at any other time . . . be held to be valid and binding, and the same are hereby ratified and confirmed. . . .”

- 40 These validating Acts did not—so counsel for the City argue—validate the agreement itself, but confined their operation to the by-laws alone. The grounds for this distinction are to be found in the authorities they cite: Ontario Power Co. v. Municipal Corporation of Stamford (1916) 1 A.C. 529 at 534, and Winnipeg City v. Winnipeg Electric Co. (1921) 20 M.R. 337 at 354. The Company’s power to enter into the agreement and covenant was apparently assumed by both the contracting parties to be adequate; at least, the Company never had them ratified or confirmed by the Dominion authorities.

The validity of the agreement was not further questioned by the City until 1948. For much of that long delay there were compelling reasons, as will be shown later in connection with alleged estoppel.

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True, the meaning and scope of the tax exemption clauses were more than once challenged; but the agreement, as a contract, was never questioned for validity. In 1948, however, the City assessed the property of the Company for all municipal taxes, and the Company reacted by promptly bringing this action for an injunction to restrain the assessment, and for a declaration that the exemption from taxation in the City is effective forever.

This action raises several important questions which, in their order of importance, though not of logic, may be put thus:

- 10 I. Did the Company as incorporated derive its powers from the Crown or from Parliament?
- II. Was the Company empowered to covenant to continue its workshops in the City "forever"?
- III. Is the City barred from challenging the validity of the covenant?
- IV. Does the tax-exemption clause (assuming it to be valid)
- (a) extend only to the then area of the City, or does it extend to the area added since then?
- (b) does it include business tax?
- 20 (c) does it include the Royal Alexandra Hotel?

I. *As to the first question:* the incorporation must be traced from its beginnings. The Company came into existence in 1881, by Letters Patent issued under the Great Seal of Canada by the Governor-General, in pursuance of an Act of Parliament, S.C. 1881, ch. 1. That Act, by sec. 1, "approved and ratified" a contract entered into on October 21, 1880, between the Government of Canada and a group of individuals (therein called "the Company"), for the construction of the uncompleted portions of the Canadian Pacific Railway, which the Government had years before undertaken to build in order to
30 connect the coast of British Columbia with the railway system of Central Canada, and had in parts built. Sec. 21 of that contract provided:

"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."

Said Schedule A sets out in the fullest detail the "form," that is, the terms and provisions which were to be embodied in "the act of
40 incorporation" and comprises 41 sections of more than 70 folios in all. Section 4 thereof provides:

“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.”

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10 The Act, to which the said contract and Schedule A are appended as a schedule, authorizes incorporation in these words:

20 “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* . . . 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.”

On the very day following the passing of that Act, the Governor-General granted the authorized charter incorporating the Company by Letters Patent, issued in the name of the Sovereign and sealed with the Great Seal of Canada.

30 This Charter is a voluminous document. It consists of about 135 folios. It recites (1) *all* the said contract, (2) all of section 2, and (3) other *parts* of the Act. It then incorporates the Company in the *exact* words of Schedule A. It adds nothing, it omits nothing, it alters nothing. The terms of the Charter are the terms of Schedule A and are strictly “in conformity with the said contract” as required by sec. 2 of the authorizing Act.

The first operative section of the Letters Patent contains these words: “. . . by and with the advice of our Privy Council for Canada, and under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in Us vested in this behalf,
40 We do by these our Letters Patent grant, order, declare and provide that the said George Stephen” [and others named] “shall be and they are hereby constituted a body corporate and politic, by the name of the ‘Canadian Pacific Railway Company’.”

Of the several kinds of corporations known to the law, we are con-

cerned with only two: (1) corporations created by charters granted by the Sovereign in the exercise of his prerogative powers, and known as common law corporations; and (2) corporations created by Acts of Parliament in the exercise of its legislative powers, and commonly known as statutory corporations. The chief difference between a "common law company" and a "statutory company" lies in the extent of the powers conferred upon the company.

10 "A corporation created by charter has at common law power to deal with its property and to incur liabilities in the same way as an ordinary individual. Even if the charter expressly prohibits a particular act the corporation can do the act, but if it does that which is prohibited or is not authorized by its charter, its charter may be recalled by the Crown by proceedings on a *scire facias*." 8 Hals., 2nd Ed., s. 125, and cases cited. See also *Bonanza Creek Gold Mining Co. v. Rex*, 1916 1 A.C. 566 at 584.

20 "Where a corporation is created by statute, its powers are limited and circumscribed by the statute creating it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the Legislature has authorized. What the statute does not expressly or impliedly authorize is to be taken to be prohibited." 8 Hals., 2nd Ed., s. 125; *Ashbury Railway Carriage and Iron Co. v. Riche*, 1875 L.R. 7 H.L. 653; *Whitby v. Grand Trunk Railway* (1901) 1 O.L.R. 480 (C.A.)."

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

30 My reasons for that view are:

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

(2) That although Letters Patent were not expressly called for by the Act, they were the usual, if not the only, means by which the Governor-General could grant the "charter," and so were impliedly

requested by Parliament. In 6 Hals., 2nd Ed., it is stated in sec. 549: "The principal documents by means of which the Crown carries into effect or makes known its intentions with regard to such matters as are left to its control, either by the common or statute law, are . . . letters patent under the Great Seal. . . ."

(3) That the Great Seal of itself adds nothing to the force or effect of the Letters Patent. Nothing in the Act or contract expressly suggested that the Great Seal should be affixed to the Charter, and so no significance was thereby attached to the Seal. Moreover, the
 10 Monarch is a corporation *sole* and, as such, does not need a seal: 8 Hals., 2nd Ed., secs. 15 & 29; 1 Blackstone's Comm., 15th Ed., pp. 469 and 475. The Sovereign's representative in Canada is in similar position—his signature by "sign manual" would have been sufficient of itself to authenticate the "charter." His signature in that form alone is all that is required on letters patent by which he officially appoints Lieutenant-Governors: per Lord Haldane in the Bonanza Creek Case, 1916 1 A.C. 566 at 581. The same learned jurist says, at p. 580 of that case: "Provincial Great Seals were assigned" to Lieutenant-Governors "as evidences of their authority." That language
 20 applies with equal force to the Governors-General, to whom the Dominion Great Seal is assigned for no other purpose than as evidence of their authority as Governors-General to sign state documents.

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

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

(5) That the prerogative rights of the Governor, prior to the Act of 1881, did not include the right to grant a Charter to this or any railway Company. In earlier days the Sovereign had extensive prerogative powers, but that prerogative has in modern times been

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greatly curtailed by statute: Clement's Canadian Constitution, 3rd Ed., p. 118. The Sovereign's prerogative is extended to the Dominion by delegation to the Governor-General as the personal representative of the Monarch, and its extent is such as is indicated in his Commission of Appointment, supplemented by any Instructions which accompany it, and as it is enlarged or curtailed by the statutory law of Canada: Bonanza Creek Case at p. 587. We have not before us the Commission of Appointment nor any accompanying Instructions. The onus of presenting these is upon the Company, as the asserter of
10 the prerogative, but has not been discharged. We have before us, however, the statute law of Canada of 1881, and can ascertain the limitations placed upon the prerogative by that law. Section 3 of the Canada Joint Stock Companies Act, 1877, being S.C. 1877, ch. 43, reads: "The Governor in Council may, by letters patent under the great seal, grant a charter to any number of persons . . . constituting such persons . . . a body corporate and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, except the construction and working of railways. . . ."

That section, in the plainest terms, deprives the Governor of any
20 theretofore existing prerogative right to grant Letters Patent under the Great Seal for the incorporation of railway companies. "The prerogative is the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." This language of Dicey's is adopted by Lord Dunedin in *Atty.-Gen. v. DeKeyser's Royal Hotel Ltd.*, 1920 A.C. (H.L.) 508 at 526. Section 2 of the 1881 Act in effect amends sec. 3 of the Companies Act of 1877 by lifting the prohibition against incorporation of railway companies by Letters Patent—but lifting it on definite terms for this one instance of the Canadian Pacific Railway.

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

to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been."

(7) That even if the prerogative power were revived *in toto*, that power could not enable the Governor to grant the powers granted by this Charter. Many of the powers of the Company were beyond the prerogative rights of the Crown to confer by any charter. Examination of the Charter and Contract will reveal many powers and 10 privileges which Parliament alone had the right to confer. For instance, the Company was, by the contract, entitled to get large grants of public domain, to import its materials free of tariff duties, and to have other large public aids. These could only come from Parliament—they were beyond any prerogative power to confer. True, they were to come by virtue of the contract, which the charter was intended to enable the Company to carry out; but the contract was "only to be binding" if the charter was "in the form" prescribed in the Schedule A.: (sec. 21). That means that no powers were contemplated or permitted for the Company larger or other than those 20 prescribed by Parliament. Consequently, the Company's powers, rights and privileges are those, and only those, stated in the Act of 1881 and its schedules, and are therefore derived essentially from the statute and not from the prerogative. In *Elve v. Boyton* (1891) 1 Ch. 501, an insurance company was incorporated "by a prerogative charter" under a general Act of Parliament empowering the Crown to incorporate such companies, with special privileges and limitations; and the question arose whether that company was incorporated by prerogative or by statutory authority. Lindley L.J. held that the incorporation was by Act of Parliament. At p. 507, after recounting 30 some of the privileges allowed the Company by the Act, he speaks of the Act in these terms: "It empowers the Crown to grant Charters of a particular kind—to grant Charters which the Crown could not grant apart from the provisions of this Act of Parliament." And at p. 508: "... it would have been impossible, without the Act of Parliament, to create such a corporation by that charter or any other charter. The real truth is, that, if you look at it very closely, the corporation owed its birth and creation to the joint effect of the charter and of the Act of Parliament, and you can no more neglect the Act of Parliament than you can neglect the charter." That 40 language seems very apposite in this case.

(8) That the qualifying words of sec. 2 of the authorizing Act are not to be misconstrued; they must be given their full natural meaning and effect. As Lord Haldane said in the *Bonanza Case*, p. 577: "The words employed to which such a corporation owes its legal existence must have their natural meaning, whatever that may be." And at p. 578, he adds: "The question is simply one of interpretation of the

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words used." Sec. 2 states: "Such charter . . . shall have force and effect as if it were an Act of the Parliament of Canada." In the *Institute of Patent Agents v. Lockwood*, 1894 A.C. (H.L.) 347, an Act of Parliament provided that general rules might be made which shall be of the same effect as if they were contained in this Act, and shall be judicially noticed." Dealing with that language, Herschell L.C. says, at p. 360: "I own I feel very great difficulty in giving to this provision . . . any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly

10 as if they were in the Act." And Lord Watson, at p. 365, referring to the same words, states: "Such rules are to be as effectual as if they were part of the statute itself." *The Minister of Health v. The King*, 1931 A.C. (H.L.) 494, at 502, and *Belanger v. The King* (1917) 54 S.C.R. 265, are to the same effect. This provision of sec. 2 requires that the charter be treated as a statutory one. The additional provision of the said section—that the charter "shall be held to be an Act of incorporation within the meaning of the contract," means that the charter must be *held*—i.e., by all Courts—to be an Act of Parliament incorporating the Company. These last quoted words add

20 strength and positiveness to the first-quoted words, and make this Charter for all purposes a statutory Charter. A similar clause in the Companies Act of 1864 was interpreted by Lord Haldane in the *Bonanza Case* "as an enabling one and not intended to restrict the existence of the Company to what can be found in the words of the Act as distinguished from the Letters Patent granted in accordance with its provisions." But the Act of 1864 differs from the Act of 1881, in that it contains no such restrictions or conditions as dominate the Act of 1881. His Lordship's interpretation cannot apply to the instant case.

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

40 have, from the very beginning, publicly attached to this Charter, is strong evidence that the Charter is a statutory one: Maxwell on Interpretation of Statutes, 9th ed., p. 308 *et seq.* That view of the Company and Parliament is shared by the Justices of the Supreme Court, as indicated in the recent case of the *Canadian Pacific Railway v. Atty.-Gen. of British Columbia*, 1948 S.C.R. 373, where the issue concerned the Company's powers in reference to the Empress

Hotel, which it owns and operates at Victoria, B.C. At p. 374 Kerwin J. says: "The Company, incorporated under the Statutes of Canada, owns," etc., and at p. 376: "The Company may under its special Acts engage in many activities"; and at p. 377: "... the Company has been endowed by its creator, the Dominion, with power." Estey J. (Taschereau J. concurring) says, at p. 386: "The Canadian Pacific Railway Company was incorporated by Special Act of the Parliament of Canada in 1881 (44 Vict., c. 1) and by Letters Patent under the Great Seal of Canada in the form set out in the
 10 schedule to that Act." Rand J. at p. 391 says: "The Canadian Pacific Railway Company was incorporated by Dominion charter under the authority of and with the effect declared in chap. 1 of the Statutes of Canada, 1881." Kellock J., at p. 399, says: "In fact it was not until the Act of 1902, 2 Ed. VII, cap. 52, section 8, that the appellant [Company] was authorized to operate hotels... It is noteworthy that by the following section, section 9, the appellant [Company] was also, in order to utilize its land grant... authorized to engage in general mining... And by section 11 it was authorized to exercise the powers of an irrigation company."

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

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

(10) That the foregoing reasons for my opinion that the Company's powers in 1881 were derived solely from the statute are not in conflict with the Bonanza Creek decision, which is strongly relied upon by the Company in support of its contention that the Company is a common law company. The Bonanza Creek Mining Co. Ltd. was incorporated in 1904 by Letters Patent under the Great Seal of On-
 40 tario issued by the Lieutenant-Governor of the Province under the general authority of the Ontario Companies Act of 1897, ch. 191. By sec. 9 of that Act, incorporation of such a company was authorized in that manner for purposes within the legislative jurisdiction of the Province, including mining and exploring for minerals. The Privy Council held that as the Company "purports to derive its exis-

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tence from the Act of the Sovereign [through his representative the Lieutenant-Governor] and not merely from the words of the regulating statute," it therefore possesses "a status resembling that of a corporation at common law . . . a general capacity analogous to that of a natural person." The Court treated the Ontario Companies Act as a "regulating statute" governing the incorporation of companies by prerogative power but held that the prerogative power had, by the B.N.A. Act, been continued in the King's representative from pre-Confederation days, and had not been abrogated or curtailed
10 by that statute or any other statute. In delivering the judgment of the Court, Lord Haldane, L.C., states at p. 585: "It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities."

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

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

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

In the *Atty.-Gen. v. DeKeyser's Hotel*, 1920 A.C. 508 at 539, Lord Atkinson states: "It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd." See also Maxwell on Interpret. of Stat., 9th Ed., p. 140, *et seq.*, where this view is amplified.

The principles laid down in the *Bonanza Creek Case* have limitations. In *Cobalt v. Temiskaming Telephone Co.*, (1919) 59 S.C.R. 62, the Supreme Court dealt with a Company incorporated in the same way as the *Bonanza Company* had been, and held that the Company's powers and rights did not differ "from what they would be if it had been incorporated by a private statute conferring the same rights and powers in identical language": per Anglin J. at p. 74. And after discussing the *Bonanza case*, he adds that the telephone company possessed "within the province whatever capacity, powers and rights, within its competence the legislature, having provided for the creation of the corporation by the Lieutenant-Governor in Council, as its delegate, has seen fit by the terms of the 'Companies Act' itself to bestow upon it when so created; and it derives its existence, at least in part, from that statute under and pursuant to which the Lieutenant-Governor in Council purported to act in creating it and in defining its purposes. . . ." And at p. 75 "In both cases alike—that of such a company incorporated by Letters Patent issued under the Act of 1897 and that of the like company incorporated by special Act—the source of the power . . . is the legislature, the corporate body enjoying them being brought into existence in the one case by the act of its delegate, the Lieutenant-Governor in Council, and in the other by direct legislative action."

For further comments on the limitations of the *Bonanza case*, see,

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inter alia, Canadian Bank of Commerce v. Cudworth Rural Telephone Co., 1923 S.C.R. 618 at 627-631.

For the foregoing reasons I think that the Company's charter had "force and effect" of the statute which authorized it and prescribed its terms, and that the Company's powers are therefore "limited and circumscribed" by that statute.

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

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

30 The power is not conferred impliedly. Implied powers include all those that are "necessarily and properly required for carrying out the purposes of the corporation," and such as are "incidental to, or consequential upon, the things the legislature has authorized": 8 Hals., 2nd Ed., sec. 125, *supra*; *Ashbury Carriage and Ironworks v. Riche* (1875) L.R. 7 H.L. 653; *Atty.-Gen. v. G.W. Ry. Co.* (1880) 5 A.C. 473; *Wenlock v. River Dee Corporation* (1885) 10 App. Cas. 354. While the purposes for which the Company was incorporated were many and varied, they include the all-important one that the Company, upon receiving from the Dominion transfers of the completed portions of the railway, would "thereafter and forever efficiently maintain work and run" the railway, including all its branches. To this undertaking the Company bound itself by accepting those transfers. This obligation was imposed because of its high importance to Parliament for the due performance of the Dominion's own obligations
40 to British Columbia. Therefore even if, but for this provision, the covenant could—contrary to my opinion—be regarded as necessary, or proper, or incidental to, or consequent upon, the powers and duty of the Company to construct the railway, the covenant must nevertheless be viewed in the light of that Dominion requirement of perpetually efficient operation of the road. If the covenant is in conflict

with, or even incompatible with, that permanent overriding duty, it is prohibited and *ultra vires*. This well-established principle is stated by Lord Birkenhead in *Birkdale District Elec. Supply Co. v. Southport Corporation*, 1926 A.C. 355 at 364, where he says: “. . . if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties.”

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- 10 The covenant must be appraised in the light of the circumstances existing at the time it was entered into. As was stated in *Bank of New Zealand v. Simpson*, 1900 A.C. 182 at 188: “The general rule seems to be that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used.” See also *River Wear Commissioners v. Adamson et al.* (1876-7) 2 A.C. 743 at 763. And it must be construed as at the time it was made: *North Eastern Ry. v. Hastings*, 1900 A.C. 260 (H.L.). In that case Lord Halsbury states, at p. 266: “I think the true view is that laid down by Lord Kenyon
- 20 in 1794, and I have no right to construe the covenant now in question differently from the mode in which I should have construed it if the controversy had arisen the day after the agreement had been executed.” To the same effect, see the language of Lord Dunedin in *Charrington Co. v. Wooder*, 1914 A.C. 71 at 82.

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

- 40 In order to secure a reversal of the deliberate decision and to effect the change of crossing site, the ambitious City offered large and attractive inducements. Free land for a depot, \$200,000.00 of debentures and perpetual exemption from taxation, were large and onerous considerations from the struggling young city of 8,000 inhabitants. But without these inducements the crossing site would not

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have been changed. We may fairly assume that the bargain was struck only after considerable negotiations, in which the Company laid down the terms upon which it would change the crossing site. The whole transaction is evidence of the Company's conviction that Winnipeg was not a suitable place for its main western headquarters if efficiency in the operation of the railway was to be perpetually maintained. No financial advantage could change the physical facts.

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

Although events subsequent to 1881 are not relevant on this issue, the Company points to 67 years of experience as proof of the suit-
20 ability of Winnipeg for the perpetual site of the shops. But the fact is that the experience proves the contrary and confirms the unsoundness of the choice of the original Winnipeg site for the permanent home of these shops. In 1903 the Company found it advisable in the interest of efficient operation to abandon that original site and to build new shops outside the original area of the City. The fact that the new site happened to be in the new area added to the City after 1881 is immaterial. The main fact is that the shops could no longer be "continued within the limits of the City" of 1881. If the City had
30 seriously objected to the removal, the shops would have remained where they were at the expense of efficient operation of the railway. That fact alone condemns the covenant as a violation of the Company's charter powers and duties. No assurance can be given that in the future the shops may not have to be moved again.

The advantage derivable by the Company from the agreement, while undoubtedly useful as an aid in financing the building of the railway, was not useful to the perpetually efficient working and running of the road. The means for financing the building of the railway were all set forth in detail in the charter and do not include such aids as that of tax exemptions purchased at the price which the
40 Company paid under the agreement with Winnipeg. Financial advantage alone, if it could justify this agreement, would logically justify any agreement or action by the Company—even one that was expressly prohibited. The test of validity is not the financial or other advantages, but the actual powers to make the agreement. In *York Corporation v. Leetham* (1924) 1 Ch. 557 at 569, Russell J.

states: "The question of *ultra vires* is not to be decided by the pecuniary result of the bargain which was struck. If the bargain was at its date within the powers of the Corporation the fact that it turned out a bad bargain from their point of view would not convert it into an *ultra vires* transaction. Conversely if it was at its date beyond the powers of the corporation the fact that it proved a profitable one for the Corporation would not render it *intra vires*."

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The suggestion is also made that the validity or invalidity of the covenant is immaterial, because the City could sue the Company for any breach of the covenant and so get proper redress in damages. This suggestion overlooks the fact that there can be no action for breach of a contract, unless there is first a valid contract to breach. In such an action as is suggested, the Company could set up *ultra vires* as a defence and so remove the very foundation of the suit. In my opinion no action could successfully be maintained by the City for breach of this covenant: *Canadian Bank of Commerce v. Cudworth Rural Telephone Co.*, 1923 S.C.R. 618; *Wegenast's Canadian Companies*, pp. 154-5.

The law on this point is clear. Of the many decisions supporting the City's contention, the one most nearly in point and most strongly relied upon, is *Whitby v. Grand Trunk Ry.* (1901) 1 O.L.R. 480. In that case a local railway company (which was later absorbed in the Grand Trunk Railway) was incorporated by statute, with authority to accept bonuses and benefits from municipalities. A cash bonus was received from the Town of Whitby in consideration of the Company's undertaking by covenant to keep for all time its head office in the town. In the course of time, the Company found that it was impracticable to maintain its head office at Whitby, and in an action by the town to restrain the removal, it was held that the agreement was not justified by the statutory provisions and was not enforceable. The Chief Justice stated (at p. 485): "These provisions give no express power to the railway company to enter into such an agreement, and I do not think that the power to make such an agreement, so onerous upon the railway company and binding upon them for all time, can be held to be derived by reasonable implication from these provisions, or can be fairly regarded as incidental to, or consequent upon, the things authorized by them;" He cites several authorities in support of that view, including *Wenlock v. River Dee Co.* (1885) 10 App. Cas. 354.

In the case of *Eastview v. Roman Catholic Episcopal Corporation of Ottawa*, (1919) 47 D.L.R. 47, the Chief Justice of the same Court stated, at p. 51: "The Legislature conferred on the plaintiff corporation the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality, and therefore the corporation is unable by any contract to divest itself of such powers

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or to abridge them. They were entrusted to it for the public good, and the municipality must always be in a position to exercise them when the public interest so requires."

That language is particularly applicable here, because the Canadian Pacific Railway was also a work "for the public good." The Act of 1881 in its preamble recites—and the recital is repeated in the charter—that it is necessary "for the development of the North-West Territory and for the preservation of the good faith of the Government in the performance of its obligations." And sec. 6 of the statutes of 10 1883, c. 24, declares, *inter alia*, that "the Canadian Pacific Railway . . . and each and every branch line . . . connecting therewith, is a work for the general advantage of Canada."

In the Eastview case, the Chief Justice continues, at p. 51: "If the plaintiff corporation were able to contract itself out of such powers, such a contract would be equivalent to amending the legislation which created them. Obviously the municipality, the creature of the Legislature, cannot, unless so authorized by the Legislature, vary its legislation." Mr. Justice Riddell, at p. 60, states: "The implication of powers not expressly given has been jealously watched in this 20 Province . . .," and "any fair reasonable doubt concerning the existence of power is resolved by the Courts against the corporation and the power is denied."

In *Montreal Park & Island Ry. v. Chateauquay & Nor. Ry. Co.* (1904) 35 S.C.R. 48, Killam J., at p. 62, states: "An agreement by a corporation exercising a franchise for the public convenience, that it will not exercise it where the convenience may be thereby promoted is invalid." In *York Corporation v. H. Leathem & Sons Ltd.* (1924) 1 Ch. 557, *supra*, Russell J. states, at 569: "No matter what emergency 30 may arise during the currency of the agreements the corporation have deprived themselves of the power to charge the defendants such increased tolls as might enable them to cope with the emergency. They have for so long a time as the defendants desire to that extent wiped out or fettered their statutory power. If that be, as I think it is, the effect of these agreements, they are, in my opinion, agreements which are *ultra vires* the corporation."

The doctrine of *ultra vires* has been held to apply strictly to railway companies incorporated by private Act in much the same manner as to municipal corporations: see *Shrewsbury & Birmingham Railway Co.*, 6 H.L. Cas. (10 E.R. p. 1237).

40 At p. 58 of the Montreal Park Case, it is said: "Of course if it is lawful for a company possessing special statutory powers to bind themselves for a consideration not to exercise them in part, they can do so in whole." And if such companies "can by contract . . . limit

themselves . . . not to use those powers in whole or in part . . . the chief object of Parliament . . . might be defeated.”

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The covenant to continue the shops for ever in the locality fixed by the covenant was incompatible with the Company's duty to move them to some other locality if efficiency of operation so required. That incompatibility has existed from the beginning. A conflict between the covenant and the duty was foreseeable in 1881; it actually occurred in 1903, and may occur again. The 1903 conflict was solved by obeying the charter duty and disregarding the covenant. 10 If the City had objected—as it had a right to do—the conflict might have brought the whole question to a head. Similar lassitude by the City is not to be expected in the future. The incompatibility is not a matter of opinion or speculation; it is now a proven fact of importance.

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On the facts and law, I am of opinion that by entering into the covenant to continue the shops in the City forever, the Company virtually agreed, in certain eventualities, not to exercise the powers which were conferred upon it, and not to discharge the duties imposed upon it for the public good. The covenant was therefore *ultra vires* 20 when made, and has always been void.

In reaching this conclusion, I have confined myself to the covenant for the reason that it is in the covenant (i.e., the bond and covenant) that the *ultra vires* undertaking is to be found. All other terms and conditions imposed on the Company by the agreement with the City—the undertaking to build the 100 mile branch line, the depot, the stock yards and the work shops—were well within its powers. But because the agreement is one integral and indivisible unit, the invalid covenant invalidates the whole contract.

III. *The third important question* is whether the City is estopped by 30 its conduct or by *res judicata* from now contending that the covenant was *ultra vires* the Company. The grounds for estoppel, as claimed by the Company, include acquiescence and laches; but without considering the City's reply thereto, none of them amounts to estoppel, because nothing that the City did or did not do in any way induced the Company to change its position to its disadvantage: Duchess of Kingston's case, 2 Smith's Leading Cas., 12 Ed., p. 788. In any event, such conduct could never prevent the City from attacking the covenant on grounds of *ultra vires*. The covenant being *ultra vires ab initio*, can not become *intra vires* by reason of estoppel, lapse of 40 time, acquiescence or delay: 8 Hals., 2nd Ed., sec. 125.

The ground of *res judicata* is more difficult. For this the Company relies upon the case of Winnipeg City v. C.P.Ry. (1899) 12 M.R. 581, (1900) 30 S.C.R. 558. In that action, brought by the City under the procedure then in force, for school taxes against the Company, the

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Company set up as a defence By-law 148 as amended by By-law 195. The City replied by setting forth the terms of the by-laws in full, and pleading that "save and except by the by-laws" the lands of the defendant were not in any way exempt from taxation. The Company demurred to the City's replication and the Supreme Court held that the replication was bad and dismissed the action.

During the trial the Company's plea was amended by adding the following words: "All conditions were performed and all things happened and all times elapsed necessary to entitle the defendants
10 [the Company] to the benefit of exemption in the said by-laws mentioned." The "conditions" so referred to included those imposed by the tax-exempting agreement as touching the bond and covenant, and went no further than that the Company would execute a bond and covenant under its seal and would deliver it to the City. Thus none of the "conditions" went behind the execution to look at the power to execute. That power was assumed to exist. Again, the 'happening of things' and the 'lapsing of times' did not even hint at the making of a covenant—they referred to things that followed afterwards. The amendment was nothing more than a form of pleading. At common
20 law a party had to plead particularly the performance of all conditions precedent. Under the Common Law Procedure Act, 1852, s. 57, it was sufficient to state generally the performance of conditions precedent, and it was for the defendant to set up particularly any conditions which he claimed had not been performed: Odgers on Pleading, 15th Ed., p. 79. The effect of pleading those amending words would be as though the Company had pleaded that it had constructed the hundred miles of railway, had built the station, had established large and commodious stock yards and had given the bond and covenant. These, of course, are traversable pleas. Traverse of the plea that the
30 Company had given the bond and covenant could only be construed to mean a denial that it had given the bond and covenant as a fact, but it would not raise any question as to the validity of the bond and covenant. That could only be done by a special plea: Day's C.P.L. Acts, p. 495, rule 10; Humphries v. Humphries (1910) 2 K.B. 531 at 585. The question of *ultra vires* was raised in argument by the City in respect of its own power to pass the by-laws, but was rejected for the reason that the by-laws had been ratified and confirmed by provincial legislation. *Ultra vires* was not raised expressly in respect of the Company's action in entering into the agreement. (If it were
40 raised at all it was only by implication in the concluding words of the Company's amended plea). It was not mentioned in either the replication or the demurrer and was never carried forward as an issue in the case. The real question and the only question decided was that the term "municipal taxes" includes "school taxes" within the meaning of the two by-laws. This is clearly shown in the elaborate arguments appearing at pp. 582-7 of the Manitoba Report of the case.

In the Court, *en banc*, of Manitoba, Killam C. J. states at p. 598-9: "It has seemed to me more satisfactory to determine the real meaning of the by-law, and the result renders it unnecessary to discuss the other point." And at p. 590: "The main questions then are those of the construction and the validity of the by-law set out in the replications. . . . The real point arises upon the word 'municipal.'" The "validity" there referred to turns exclusively upon the City's power to enact the by-laws. Dubuc J., at p. 600, states: "The real question to be determined is whether the exemption stated in the by-law
 10 applies to the school taxes as well as to other taxes to be levied by the City." In the Supreme Court the issues were the same. Sedgewick J., at p. 561, states: "The chief question arising upon this appeal is as to the extent of the exempting privileges created by the by-law as confirmed by the Act of 1883. In other words, is the exemption sufficiently wide to embrace the moneys raised by the City of Winnipeg for public school purposes? Are school taxes included in the phrase "municipal taxes, rates and levies and assessments of every nature and kind"?

The doctrine of *res judicata* applies as an absolute bar to the trial
 20 in subsequent action of any issue that has been tried and finally decided in a previous action between the same parties. But the application of the doctrine has clearly defined limits. In the case of *Johanesson v. C.P.Ry.* (1922) 32 M.R. 210, Dennistoun J.A., speaking for the majority of the Court of Appeal in upholding my decision in the King's Bench, states at p. 238: "the estoppel of a judgment is effective only so far as questions in issue have been actually adjudicated upon. Such estoppel does not extend so as to include additional matters unnecessary to the decision of the case, although they may come within the scope of the pleadings. . . . The true test is
 30 identity of issue."

It is contended however that if one of the parties to the earlier action had the opportunity to raise the issue but, because of neglect or misunderstanding of his rights, failed to do so, he is nevertheless bound absolutely by the earlier judgment and can not raise the issue in the subsequent suit. The contention is supported by 13 Hals., 2nd Ed., sec. 466: "In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity for recovering, and but for his own fault might have recovered in the first
 40 action that which he seeks to recover in the second." Many other authorities in support of this argument are cited—including my own decision in *Johanesson v. C.P.Ry.* *supra*, at pp. 344-5. My language there is broad and needed the narrowing effect placed upon it by Dennistoun J.A., *supra*. The limitations are well stated in the *Duchess of Kingston's* case, at p. 788, thus: "The omission by a defendant to set up a defence in an earlier action does not estop him

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from setting it up in a later action brought by the same plaintiff, provided that such defence is not inconsistent with any traversable averment made by the plaintiff in the earlier action": Smith's Leading Cas. 12th Ed., vol. II, (1915) p. 754, at p. 788. And 13 Hals., in the same section, adds: "It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."

In Johnson v. Henry (1911) 21 M.R. 347, a purchaser under 10 several agreements for the sale and purchase of lands had been sued by his vendor, and paid the judgment. He then discovered a defect in the vendor's title and sued for recovery of the money so paid. The first decision was not *res judicata* because, although the purchaser might have discovered the defect, he had not in fact done so, and title had not been put in issue nor tried.

In Harriman v. Harriman, 1909 p. 123, Vaughan Williams L.J. at p. 134, states that *res judicata* is conclusive between the parties only as to matters precisely and directly alleged on the face of the record, and also with reference to the grounds of the decision." Carroll v. 20 Erie County Natural Gas and Fuel Co. (1899) 29 S.C.R. 591, was an action to reform a deed. In an earlier action relating to the deed, the plaintiff had claimed the benefit of a reservation in a pre-existing agreement, but judgment was given against him on the ground that the agreement was superseded by the deed. In the second action he sought to reform the deed by including the reservation therein. Held, the subject matter of the second action was not *res judicata*. At pp. 593-4 the Chief Justice said: "It is not material to say that the appellants might, if they had so elected, have made an alternative 30 case for relief on the ground of mistake in their first action; it is sufficient to say that they did not in fact do so and that no such question was there in issue." So in the School Tax case, the City, if it had known of the *ultra vires*, might have put in issue the Company's incapacity to make the covenant, but it "did not in fact do so," and "no such question was there in issue."

Kennedy v. Kennedy, 1914 A.C. 215, was the second action respecting a trust which had been created by a will and which was invalid both for uncertainty and for violation of the rule against perpetuity. The first action was decided on the question of perpetuity alone; the second action was based on uncertainty, and the defence was *res* 40 *judicata*. In delivering the judgment of the Privy Council, Lord Parker, speaking of the first action, at p. 220 said: "In that action there was some suggestion that the discretionary trust was void for uncertainty, but the point, obvious though it was, as to the effect of the perpetuity rule, appears for some reason to have passed unnoticed. Moreover, the plaintiff in that action based his claim upon the interest

which he claimed under the will, and not upon his title as next of kin or otherwise against the will. Under these circumstances their Lordships are of opinion that there is no such estoppel as alleged." The present case is stronger than the Kennedy case, in that the issue before the Court in the second action had not even been suggested in the first.

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The limit to which the principle of *res judicata* goes seems to be that the party in the second action is not precluded from setting up any plea that is not inconsistent with any traversable allegation in the
10 first action, or from setting up any special plea by way of confession and avoidance: *Howlett v. Tarte* (1861) 10 C.B. (N.S.) 813; *Humphries v. Humphries* (1910) 1 K.B. 796; (1910) 2 K.B. 531 at 535-6. The limits are stated by Lord Shaw in *Hoystead v. Commissioner of Taxation*, 1926 A.C. 155 at 166, to the effect that estoppel applies where (1) a point fundamental to the earlier decision was taken or assumed by the plaintiff; (2) that the point was traversable by the defendant, and (3) was not traversed. In the present case the Company's power was not fundamental to the judgment, was not raised by pleading or argument, and so was not traversable.

20 I refer also to *Wentworth v. Hamilton Radial Elec. Ry.* (1917) 41 O.L.R. 524; *Re Koenigsberg* (1949) 1 A.E.R. 804; *Berkeley v. Berkeley*, 1946 A.C. 555 (H.L.); *Isbester v. Ray* (1897) 26 S.C.R. 79.

There is no need to pursue the matter further. I leave this question with this answer: that in my opinion the City is not estopped by *res judicata* or otherwise from now contending that the bond and covenant given by the Company were *ultra vires* when made, and that the invalidity has not been since cured by any competent confirmation or amendment.

To sum up my conclusions on the first three questions: (1) the
30 Company's powers in 1881 were those, and only those, conferred by the authorizing Act of 1881; (2) those powers did not enable the Company to enter into the covenant to continue its workshops in Winnipeg forever, and the covenant was consequently *ultra vires* and void; (3) the City is not estopped by *res judicata* or otherwise from showing that invalidity; and (4) the agreement of 1881 between the parties, being void in part is void *in toto*.

IV. *As to the fourth question:* the conclusions I have thus far reached constitute my answer to this question. The agreement of 1881, being void, did not exempt from taxation either the Company
40 itself, or any of its property situate within the City's area, whether original or extended.

But it seems necessary to express an opinion on the interpretation that should be placed upon the exempting clause of that agreement, considered apart from any question of invalidity. On this point my

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opinion, briefly stated, is (1) that those clauses confine the exemption to the area of the City as that area was defined before the extension of 1882, because that was the only area in which the work shops were to be built, in which they were actually built, and in which they were intended to be continued forever; and because the exempting clause must relate to that area as the only area involved; (2) that the business tax is not exempt because, although the *amount* of the tax annually assessed is to be computed upon the rental value of the property in which the business is conducted, the tax is not on the property but
10 on the person involved; (3) that the Royal Alexandra Hotel is not exempt from taxes because, although owned by the Company, it is not owned "for railway purposes or in connection therewith": The Empress Hotel case (1950) 1 W.W.R. 220 (P.C.). For extended reasons, I adopt those stated by my brothers Richards and Adamson.

The only remaining question that I need discuss arises from considerations of equity. Is it equitable, after all that has been done by the parties in the 67 years since 1881, to deprive the Company now of what in good faith was so long regarded and acted upon as its rights and privileges? But by removing the shops in 1903, the Company
20 has practically rendered itself incapable of continuing them forever in the prescribed original area; and even if that removal were overlooked, the perpetual continuance of the shops, even in their present site, can be performed, if at all, only in the future. The tax exempting clause likewise can be fulfilled "forever" by the City only in the future. The agreement has, except to that extent, been carried out by both the contracting parties. The agreement has been of advantage to the Company, but onerous to the City. If considerations of equity are to be invited, the City should be allowed to terminate the improvident arrangement. The termination would permit the
30 Company to retain all the immense advantages it has received from 67 years of tax exemption, and would put it to no loss for what has been done in the past; and would, without recouping the City for its losses of the past, enable it to prevent such losses for the future. The purpose is to start afresh on a footing of equality as of 1948. In these circumstances I cannot see any inequity in terminating the tax exemption.

Before closing, I desire to express my thanks to all counsel for the great assistance they have given this Court, and to acknowledge our indebtedness to the learned trial Judge for his judgment, which—
40 although I have differed from its conclusions—has proved to be an invaluable source of law and fact connected with this complicated and difficult case.

I would allow the appeal.

A. K. DYSART, J.A.

Delivered this 17th day of April, 1950.

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This is an appeal from a judgment restraining the City from assessing and taxing the property of the Company. The Company's claim for exemption from taxation is founded on a tax exemption agreement entered into in 1881. The first point for consideration is the submission of the City that the agreement is a nullity because the Company did not have the constitutional powers enabling it to enter into the agreement. The City further submits that if the agreement is valid, it has not the scope and application which the Company claims.

The Company was incorporated by Letters Patent under the Great Seal of Canada. A Company so incorporated has the powers and capacities of a common law company, which are those of a natural person. If there be restrictions or limitations in the Charter which it exceeds or violates, the only recourse is in the hands of the Crown by writ of *scire facias*. The doctrine of *ultra vires* has no real application: *Bonanza Creek Gold Mining Co. Ltd. v. Rex*, 1916 1 A.C. 566.

The submission of the City is that the words "shall have force and effect as if it were an Act of the Parliament of Canada," used in sec. 2, 44 Vict., c.1 (An Act respecting the Canadian Pacific Railway), have the effect of making the Company a statutory corporation and subject to the limitations of such a Company. Those words, however, must be read with the words immediately following them: "and shall be held to be an Act of Incorporation within the meaning of the said contract." The reason for this provision is that clause 21 of the contract (between the Syndicate and the Government) stated that the contract would "only be binding in the event of an Act of Incorporation being granted to the Company in the form appended as 'Schedule A'."

In deciding what powers were intended, sec. 4 (schedule A) of ch. 1, S.C. 1881, 44 Vict., which is recited in the Charter, is important:

"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."

In the *Bonanza Creek Case*, *supra*, there were similar supposed restrictions and "Their Lordships construe as enabling—and not

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intended to restrict the existence of the Company to what can be found in the words of the Act as distinguished from the Letters Patent." Even if these words were held to be words of limitation, the doctrine of *ultra vires* does not apply because the only remedy is in the hands of the Crown; for the Great Seal of Canada is on the document. This appears to be conclusive.

The argument advanced against such a conclusion is that it is in conflict with the intention of Parliament and that the affixing of the Great Seal was "accidental, unnecessary and unauthorized." There
10 is nothing to support such a view. The facts are entirely the other way. Section 2 of (1881) 44 Vict., c.1, says: "for the purpose of incorporating . . . the Governor may grant to them . . . a charter conferring upon them the franchises, privileges. . . ." The only way in which the Governor could grant a charter was under the Great Seal. It cannot be held that the use of the Great Seal was either "accidental, unnecessary or unauthorized," or contrary to the intention of Parliament. The use of the Great Seal not being unauthorized, "the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment:" per Viscount Sankey
20 in *British Coal Corp. v. The King*, 1935 A.C. 500 at 519. There are no qualifications, either expressed or implied, and there is nothing to indicate that the Company was not to have unrestricted powers.

Apart from whether the Company is a statutory company or a common law company, the expressly enumerated powers give the Company authority to make the agreement and execute a binding bond. I refer again to sec. 4, cap. 1, S.C. 1881, already quoted, and emphasize the significance of the last sentence of that section. It is an historic fact that financing the building of the Canadian Pacific Railway and, in the early days, making it pay, were matters of great
30 difficulty and public concern. The statutes of those years show that provincial and municipal agreements with railroads were not uncommon. See Gordon J. A. in Reference re Taxation of C.P.R. (1949) 1 W.W.R. 353 at pp. 387-8. It is apparent that to locate the main line and shops where they were free from taxation was important in carrying out the enterprise. Power to make this agreement is given by sec. 4, cap. 1, S.C. 1881, 44 Vict., (already quoted), as certainly and as clearly as is possible without specific reference to the agreement. Power to make the contract was one of the "sufficient powers to enable them to carry out the foregoing contract":
40 sec. 21 (1881) 44 Vict., c.1. It could not be held that, because such a special transaction as this agreement is not specifically mentioned, power to enter into the agreement and give a binding bond thereunder was not "reasonably incidental" to such powers: Lord McNaughton in *Atty.-Gen. v. Mersey Railway* (1907) A.C. 415 at 417. "This doctrine [*ultra vires*] ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as

incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*": Lord Selbourne in *Atty.-Gen. v. Great Eastern Railway Co.* (1880) 5 App. Cas. 473.

This finding makes *Whitby v. G.T.P. Co.*, 1 O.L.R. 48, on which the City greatly relied, inapplicable. That decision turned on the interpretation of the statutory powers of the Company.

It follows that the Company did have the constitutional authority to make the agreement with the City set forth in By-law 148. The
10 Company did have powers enabling it to give a valid and binding bond as required under that agreement.

It was submitted that the Company, being a public utility, chartered and subsidized as a national enterprise and for the public good, did not have powers enabling it to either deal with its property or to enter into an agreement which fettered or incapacitated it from carrying out its objects and discharging its public duty. The principle is well stated in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation* (1926) A.C. 355, by Lord Birkenhead at p. 364:

20 " . . . if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties."

In *Town of Eastview v. The Roman Catholic Episcopal Corp. of Ottawa*, 47 D.L.R. 47 at 51, Mulock, C.J.O., stated the proposition as follows:

30 "By this section, the Legislature conferred on the plaintiff corporation the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality, and therefore the corporation is unable by any contract to divest itself of such powers or to abridge them. They were entrusted to it for the public good, and the municipality must always be in a position to exercise them when the public interest so requires."

Montreal Park & Island Ry. Co. v. Chateauguay & Northern Railway, 35 S.C.R. 48; *York Corporation v. H. Leetham & Sons Ltd.* (1924) 1 Ch. 557, and other cases are to the same effect.

I am unable to find that this principle has ever been applied to a corporation with a Royal Charter. It is a phase of the doctrine of
40 *ultra vires*. In principle, it is difficult to see how it could apply to a company with a Royal Charter. Even if the principle of these cases does apply to the plaintiff Company, the facts do not support the contention.

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The terms of the agreement which are said to denude the Company of powers essential to forever efficiently operate the railway are (1) to forever run its main line through the City, and (2) to forever maintain its main workshops with the city limits. At that time (prior to the agreement) the terminals of the divisions of the railroad and the main line were provisionally located. According to those preliminary plans, the terminal point in Manitoba was at Selkirk and the main line was located some miles north of Winnipeg. The citizens of Winnipeg offered the Company substantial inducements to
10 come to Winnipeg, as is shown by the agreement. By sec. 13 of the agreement between the Syndicate and the Government—which is recited in the charter—the Company had the “right subject to the approval of the Governor in Council to lay out and locate the line of the railway.” The main line had to be located and the shops and cattle yards would naturally be located on the main line. The main line of a railroad, when once located, is not likely to be moved. Railroad shops are not usually moved from place to place. The main line, the shops and the yards, have been in Winnipeg for 67 years. It is significant that it is not suggested that the Company has not
20 efficiently and effectively operated the railroad these many years. So far as the evidence in this case shows, so far as the experience of the years indicates, the main line and the shops are most advantageously located. It is not submitted that either the main line or the shops could be better or more usefully located elsewhere. As the years go by these works seem permanently and solidly established in their present locations. We are asked to assume some imaginary and unforeseen catastrophe, some emergent circumstance or condition which would require that the main line and shops be moved away from Winnipeg. The argument is that because the main line and shops
30 cannot, under the agreement, be moved in such a contingency, the Company has denuded itself of powers necessary to efficiently and effectively run the railroad. There are two answers to this argument. In the first place, it cannot be assumed that there will be such changes that the railroad cannot be efficiently and effectively operated with its main line and shops in their present locations. The second answer is that the Company agreed to do something which under its charter it was required to do, not something “incompatible with the due exercise” of its powers. In the cases cited, the companies agreed not to do something which under their charters they possibly might,
40 in the public interest, be required to do. The important thing is that the Company did what it was required to do. This is the distinction between what was agreed to by the Company in the agreement under consideration and the facts in the cases relied on by the City.

I am not overlooking the fact that in 1903 the Company established its enlarged shops three or four city blocks west of the old city limits, in the added area. From that it cannot be concluded that in order

to operate the railroad they were obliged to move the shops; nor does it mean that it was impossible for them to continue within the old city limits. It was clearly a matter of convenience and economy. Should circumstances arise which require the main line or the shops to be moved away from Winnipeg, the only recourse the City would have would be an action for damages on the bond and covenant. The legal consequence would be that the Company would be liable for what damages the City could prove, but the Company would not have denuded itself of essential powers to operate the railroad.

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- 10 The argument that the Company has denuded itself of essential powers fails on the facts. The agreement set forth in By-law 148 is binding and the bond given by the Company in pursuance of the agreement is valid.

It remains to interpret the provision of the operative clause of the agreement evidenced by By-law 148, that "all property now owned or that hereafter may be owned by them (the Company) 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 The agreement is to be interpreted as a contract. It is not to be strictly construed as a tax exemption under a statute. The principle to be applied is that effect is to be given to the intention of the parties collected from their expression of it as a whole. "All facts are admissible (to proof) which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used": per Lord Davey in *Bank of New Zealand v. Simpson* (1900) A.C. at 188. But where a contract is plain and unambiguous, the subsequent conduct of the parties cannot be admitted to vary or contradict its terms. In *N.E.Ry. v. Hastings* 30 (Lord), 1900 A.C. 260, Lord Halsbury is reported at p. 263 as follows:

- 40 "The chief argument used to give an unnatural construction of the words is that the parties have so acted during a period of forty years that the only reasonable inference to be derived from their conduct is that they have understood and acted on their bargain in a sense different from that which the words themselves convey. I am of opinion that if this could be truly asserted it is nothing to the purpose. The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.

"So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed

according to the plain and unambiguous language of the instrument itself."

Three questions arise:

- (1) Is the business tax of the City within the exemption?
- (2) Is the Royal Alexandra Hotel—which is owned by the Company—property for "railway purposes or in connection therewith"?
- (3) What area is covered by the agreement?

I. Does the City business tax constitute an "assessment" of the property of the Company of any nature or kind or impose a tax or levy on the property of the Company? On this point I agree with my brother Richards.

It has frequently been held that a business tax is a personal tax and not a tax on property: Reference re Taxation of C.P.Ry. (1949) 1 W.W.R. 353 at 381, et seq., and cases there cited. The fact that it is called a business tax and that business is property, does not determine the matter. The nature of the tax is the determining factor. Whether or not a business tax is a tax on or assessment of property depends on the statute in each case.

20 Sec. 291(1) of the Winnipeg Charter, S.M. 1940, c.81, as amended, says: ". . . every person carrying on any business in the city . . . shall be assessed for a sum equal to the annual rental value of the premises which he occupies. . . ." The business tax imposed by this enactment is an assessment of the person. It is not an assessment of property, nor is it a tax upon property. "The annual rental value" is not property. It is an abstract term used as a measure or standard for the personal tax imposed.

The Company is not exempt from assessment or taxation. All the Company's property is not exempt; only that property owned by the
30 Company for a certain specific purpose, or in connection with that purpose, is exempt. In United Towns Electric Co. Ltd. v. Atty.-Gen. for Newfoundland (1939) 1 A.E.R. 423, the Company was exempt.

There is a fundamental difference between exempting an individual or a company from taxation or assessment and exempting only the property, or part of the property, of such individual or company. Had it been intended to exempt the company, as was done in the Newfoundland case, it would have been so stated in the agreement. This exemption clause appears to have been most carefully worded to
40 express precisely what the parties intended. It bears all the marks of negotiation and compromise.

The only sense in which this can be said to be an assessment or tax

on property is that it must be paid with property. To hold that this makes it a tax on property would be to enlarge the scope of the agreement. It would do away with the distinction between exempting the individual or company and exempting only part of the property of such individual or company. An illustration of that distinction occurs in this case. By clause 16 of the contract quoted in the charter, the Canadian Pacific Railway is exempt from taxation by the Government of Canada. By the Railway Taxation Act, S.M. 1900, c. 57, s.18, the Company was exempt from taxation by all municipal corporations within the Province. Under the contract we are considering, only part of the property of the Company is exempt. It cannot be supposed that those who agreed upon this clause did not know and understand the wide difference between exempting the Company from taxation and exempting some particular property owned by the Company.

It may be that if the City had been alert and well advised, it might have collected the business tax from 1894 to 1899. The Company has not been injured or prejudiced by this inadvertence on the part of the City. The argument on the Company's behalf is that because for those years it received greater advantages under the agreement than it was entitled to, it should continue for all time to benefit to a greater extent than was intended by the agreement. The statement of Lord Halsbury in *N.E.Ry. v. Hastings* (Lord) 1900 A.C. 260, which is quoted above, gives the answer to this contention: "No amount of acting by the parties can alter or qualify words which are plain and unambiguous."

II. The second question refers to taxation of the Royal Alexandra Hotel and turns upon the meaning of the words "railway purposes or in connection therewith."

In *Charrington & Co. Ltd. v. Wooder* (1914) A.C. 71, Lord Dunedin said (p. 82): "Now, in order to construe a contract the Court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were placed, in fact, when they made it—or, as it is sometimes phrased, to be informed as to the surrounding circumstances."

When the agreement was entered into, the Company did not own or operate hotels. Indeed, the officials of the Company did not know that they had powers to own and operate hotels and restaurants, for in 1902—before going into the hotel business—An Act Respecting the Canadian Pacific Railway Company, 2 Edw. VII, c. 52, was passed, giving the Company authority to do so. This indicates that neither the officials of the City nor the Company intended to exempt a hotel from taxation. It cannot be held that the parties to the agreement intended to exempt from taxation a business which was believed to be beyond the powers of the Company. It was the rail-

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road and works which at that time went with railroading, or were related or essential to the railroad, that were exempted. Operating a hotel is a separate business; hotels are not used in operating the railroad. The fact that the Company successfully and efficiently operated the railroad for over 25 years without hotels indicates that the hotels are not connected with the railroad.

The Royal Alexandra Hotel was not built until 1906. The Company owns and operates a number of hotels, and Mr. Manson, Vice-President of the Company for the Prairie Region, gave evidence
10 respecting them. The size and extent of the Company's hotel business is shown by figures from the 1946 statement of the Company's affairs. It shows that the Company had an investment of \$97,780,-479.00 in "hotel, communication and miscellaneous properties," and in that year had a profit of \$2,550,862.00 from that investment. He said that "the hotels provide two main functions": "primarily they are for the purpose of providing food and lodging for the travelling public"; "secondly, hotels are established for the traffic that they would draw to the railway." The Royal Alexandra is attached to the railway station. It has a coffee shop used by the public and employees.
20 A patron of the railroad may or may not get accommodation at the hotel—such a traveller receives the same treatment and accommodation as a person who has not used the railroad. The hotel operates a public beer parlour and restaurant. There are three main ball-rooms and a number of smaller rooms available for the accommodation of the public. The hotel accommodates local people and a number reside at the hotel. It has 445 rooms—most of them available for guests.

The Royal Alexandra Hotel is in precisely the same relationship and connection with the railway as the Empress Hotel in Victoria,
30 B.C., except that the Empress, instead of being attached to a railway station, is near a dock which is connected with the railway by Company steamships. "Connection therewith" does not mean physical connection. It may well be that the Company's down-town ticket offices in Winnipeg, a mile away from the station, are connected with the railroad; whereas the hotel is not so connected. The relationship with and connection of the Empress Hotel with the railway was discussed and determined in Reference re Application of Hours of Work Act (B.C.) to the Employees of the C.P.Ry. Co. (1950) 1 W.W.R. 220. In that case the question for decision was whether the Pro-
40 vincial Act regulating hours of work applied to the employees of the Company in the Empress Hotel. Particulars of the hotel and its connection with the railroad are stated and discussed by Lord Reid at p. 223. Its connection with and use to the railroad is substantially the same as the Royal Alexandra. In the judgment of the Judicial Committee of the Privy Council, Lord Reid said (p. 232):

“The question for decision, therefore, is, in their Lordships’ view, whether the Empress Hotel is a part of the appellant’s railway works and undertaking connecting the province of British Columbia with other provinces or is a separate undertaking. A company may be authorized to carry on and may in fact carry on more than one undertaking. Because a company is a railway company it does not follow that all its work must be railway works or that all its activities must relate to its railway undertaking.”

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10 And at pp. 232-3:

“Sec. 8 of the appellant’s Act of 1902 is in the following terms:

20 “ ‘The company may for the purposes of its railway and steamships and in connection with its business build purchase acquire or lease for hotels and restaurants such buildings as it deems advisable and at such points or places along any of its lines of railway and lines operated by it or at points or places of call of any of its steamships and may purchase lease and hold the land necessary for such purposes and may carry on business in connection therewith for the comfort and convenience of the travelling public and may lay out and manage parks and pleasure grounds upon the property of the company and lease the same from or give a lease thereof to any person or contract with any person for their use on such terms as the company deems expedient.’

30 “This section limits the places where the appellant may build or operate hotels but it does not limit the classes of hotel business which may be carried on therein. Their Lordships do not read the authority to carry on business ‘for the comfort and convenience of the travelling public’ as requiring the appellant to cater exclusively or specially for those who are travelling on its system. The appellant is free to enter into competition with other hotel keepers for general hotel business. It appears from the facts stated in the order of reference that the appellant has so interpreted its powers and that in the Empress Hotel it does carry on general hotel business. It may be that, if the appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be a part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on the appellant’s system may be a part of its railway undertaking whether that provision is made in trains or at stations, and such provision might be made in a hotel. But the Empress Hotel differs markedly from such a hotel. Indeed there is little if anything in the facts stated to distinguish it from an independently owned hotel in a similar position. No doubt the fact that there is a large and well

40

managed hotel at Victoria tends to increase the traffic on the appellant's system; it may be that the appellant's railway business and hotel business help each other, but that does not prevent them from being separate businesses or undertakings."

It was decided that the hotel was a separate undertaking and not a part of the Company's railway works.

At pp. 234, 235:

10 "Third argument submitted for the appellant sought to bring the Empress Hotel within the scope of head 10(c) of sec. 92" (of the B.N.A. Act). "If this argument is to succeed it is necessary to find that the hotel or something which includes the hotel has been declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of its provinces. There is no declaration by the Parliament of Canada which specifically mentions either this hotel or the appellant's hotels generally; but it is contended for the appellant that the declaration contained in sec. 6 (1) (c) of the *Railway Act*, R.S.C. 1927, ch. 170, is wide enough to embrace the appellant's hotels including the Empress Hotel."

20 At pp. 235-237:

"In both *The Railway Act*, 1919, ch. 68, and the *Railway Act*, 1927, sec. 6 (1) (c) is in the following terms:

"The provisions of this Act shall, without limiting the effect of the last preceding section, extend and apply to . . .

"(c) every railway or portion thereof . . . shall be deemed and is hereby declared to be a work for the general advantage of Canada.'

"In both *The Railway Act*, 1919, and the *Railway Act*, 1927, sec. 2(21) provides that unless the context otherwise requires

30 "'railway' means any railway which the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway.'

40 "It was argued that the Empress Hotel falls within the scope of this definition of railway and therefore within the scope of the declaration in sec. 6(c). In their Lordships' judgment that is not so. The fact that it was thought necessary to specify such things as sidings, stations, railway bridges and tunnels as being

10 included in the definition of 'railway' indicates that the word 'railway' by itself cannot have been intended to have a very wide signification; and in their Lordships' view there is nothing in the definition to indicate that it was intended to include anything which is not a part of or used in connection with the operation of a railway system. The appellant founded on two general phrases which occur in the definition—'property real or personal and works connected therewith' and 'other structure which the company is authorized to construct.' With regard to the first

20 of these phrases their Lordships are of opinion that the words 'connected therewith' qualify the whole phrase and refer back to the preceding words and therefore property which is not connected with the railway system is not included; with regard to the second phrase the context shows that these words were not intended to bring in structures which have no connection with a railway system merely because a railway company was authorized to construct them. The appellant is authorized by the *Canadian Pacific Railway Act, 1902*, to carry on a variety of undertakings including mining, electricity supply and irrigation; it cannot have been intended that structures erected solely for the purposes of these undertakings and having no connection with the railway system should be included within this definition of 'railway'. Accordingly the Empress Hotel could only come within the scope of the definition if it could be regarded as connected with the appellant's railway system or railway undertaking. Their Lordships have already held that that hotel is not part of the appellant's railway or railway works and undertaking within the meaning of sec. 92(10) of the *B.N.A. Act, 1867*; for similar reasons they hold that it does not come within the scope

30 of the declaration enacted by the Parliament of Canada in sec. 6(c) of the *Railway Act, 1927*."

This decision of the Judicial Committee affirmed a unanimous decision of the Spureme Court of Canada which upheld a four to one decision of the Court of Appeal of British Columbia. The reasoning and the findings *In re the Empress Hotel* apply in this case. The Royal Alexandra Hotel is not connected with railway purposes any more than the Empress is connected with the railway system. A precedent more in point or of more authority is hardly possible. It is conclusive and is binding on this Court.

40 The question of the exemption of the hotel under the agreement has been a matter of dispute between the Company and the City for years. The Company, without admitting its liability for taxes, and the City, without admitting the exemption, have from time to time entered into compromise agreements which provided that in settlement of their differences the Company would pay a fixed amount in lieu of taxes on the hotel. If the hotel is not within the exemption,

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Continued

the City Council did not have power to tax it by a system or at a rate other than that by which all other property is taxed. Such action would be contrary to the provisions of the City Charter for equitable and equal taxation. However, the current agreement expires in 1952 and counsel for the City have stated that they intend to carry it out. It would be wrong to hold that these compromise agreements either enlarged the scope of the agreement or estopped the City from insisting on their true interpretation and meaning.

III. The third point deals with the area covered by the agreement. 10 This turns upon the meaning of the words "within the limits of the City of Winnipeg" used in the operative clause of the agreement. Had the agreement said "within the city" it would have meant the City as it then was. The use of the word "limits" emphasizes that intention. The word "limits" must be given a meaning. At the time the agreement was made there was only one thing to which that word could refer and that was the limits of the City of Winnipeg at that time. It could not possibly refer to anything else. It would be making a new agreement to interpret the clause "within the limits of the City of Winnipeg" as meaning "within the limits of the City as 20 they may be from time to time."

By-law 148 was passed 5th Sept. 1881. The City limits were extended on 30th May 1882. By-law 195 amending By-law 148 was passed 30th October 1882. A change in the City limits was pending and probably under consideration when the agreement was made. The last clause of By-law 148 is: "this by-law shall take effect from and after the twenty-first day of September in the present year of our Lord one thousand eight hundred and eighty-one." This clause, with the same date, is in By-law 195. Had it been intended that the agreement was to apply to the added territory, that date would 30 have been changed by By-law 195.

In the bond and covenant which the Company gave to the City, as provided in By-laws 148 and 195, the Company did "covenant and agree and bind and oblige themselves . . . that the said Company will . . . establish and build within the limits of the City of Winnipeg their principal workshops . . . and that they will forever continue the same within the City of Winnipeg." In performance of that covenant they built the workshops within the old limits. Can it be supposed that if, at that time, the Company had built the shops outside such limits—say, where they are now—that they would have been considered to 40 have complied with the covenant? The words are perfectly clear and must be taken to mean exactly what they say. It is the intention of the parties when the agreement was made which governs.

The law required that these by-laws be submitted to the ratepayers and some point has been made of the fact that By-law 195 was submitted to all the ratepayers, including the ratepayers in the enlarged

limits. As there was no provision for submitting the by-law to some of the ratepayers, it is difficult to see how that indicates that the agreement made the year before meant something other than what it expressed: City Charter 1882, S.M. 45-6 Vict., c. XXXVI, secs. LXXIII and LXXV. The fact that the effective date clause of By-law 148 (already quoted) was repeated in By-law 195, after the extension of the City Limits, makes the intention clear. Moreover, the property owners in the added area had an interest in exemptions from taxation of property within the old limits.

- 10 The only argument against the simple and plain meaning of the words of the agreement is that up to the time of the assessments which gave rise to this action, the City made no assessments or claim for taxes on the Company's property outside the old city limits. As the City made no assessments of and imposed no taxes on the Company either inside or outside the old City limits, that does not affect the question of limits in any way.

It is submitted that the City, by its conduct, has shown that the clause "limits of the city" means "limits of the city as they may be from time to time." This submission must be examined.

- 20 In 1883 The Assessment Act 46-7 Vict., cap. 4 was passed. Sec. 2 of that Act reads in part as follows:

- 30 "And the property so occupied by the railway roadway and in actual use and occupation in connection with the operation and working of the railway, as aforesaid, shall not be assessed at any greater value than the average value of agricultural lands in the municipality in which the lands aforesaid are situated as given in the last revised assessment roll; and the superstructure on the said above mentioned land, except station houses and freight sheds, shall not be liable to be, and shall not be, assessed or taxed by any municipality or corporation whatever in the province having power to assess or levy a tax on any property."

- This provision became sec. 45 in The Assessment Act, R.S.M. 1892, cap. 101. It remained in force until the Railway Taxation Act, S.M. 1900, c. 57, which prohibited the City and all other municipal corporations from taxing railroads. The Company did not move its shops outside the old City limits until 1903. There is no allegation in the pleadings and no evidence that the Company owned property outside the old but within the new city limits prior to 1900. There is no allegation and there is no evidence as to when, if ever, they 40 acquired their right-of-way. That it did own property in the added area which the City deliberately refrained from assessing and taxing cannot be assumed. If the Company owned the right-of-way of the main line and the Pembina Branch within the added area, it would amount to five or six acres at most. This could be assessed under the

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above quoted statute only as agricultural land. In those days the taxes on such acreage would be so little as to be *de minimis*. It would be so trivial that nothing can be deduced from it. In any event, there is no evidence of ownership of the right-of-way.

The only tax which the City could have collected from the Company during all these years is the business tax already referred to. As no attempt was made to collect that tax, either within or without the original limits, that oversight on the part of the City does not affect the question of "limits." Apart from attempting to collect the
10 business tax between 1894 and 1899, there is only one thing in all these years the City could have done, and which it did not do. When the Company moved its shops outside the old City limits, it might have brought an action against the Company for breach of the agreement on the bond and covenant. Such an action would have been for damages, and perhaps for specific performance. It is difficult to see how the City could prove damages. Specific performance in such a case would be ordered only if damages were not an adequate remedy. Such an action would have been futile and abortive. At that time it could not tax the shops, no matter where located. The moving of the
20 shops did not give rise to more than a technical cause of action. The shops were and are of as much advantage to the City in the new as in the old location.

In para. 159 of his judgment the learned trial judge says:

"The City says that in 1882 the company moved its shops into an area newly added to the City but not part of the City in 1881, and has thereby broken its agreement. This fact was known to the City when the earlier case was decided and was not raised."

This is an error, and reasoning and deductions based on it are wrong. The fact is that the shops were not moved outside the old limits until
30 1903: Para. 35(8) of defence. At p. 75 of his evidence, Mr. Manson says the shops were moved in 1903. Also see Facts Admitted, No. 5. The School Tax case was commenced in November 1894.

The learned trial Judge says (para. 208):

"There is no evidence that the defendant made any objection to the removal of the workshops to the area added in 1882, either in 1903 when they were moved, or at any time since, until the statement of defence was filed in this action."

Mr. Manson says that he knows of no complaint—and the records showed no complaint—of that move. On the other hand there is no
40 allegation and no evidence that the City was consulted or given notice of the move. When, if ever, the proper city officials received official notice of the move is not shown. To extend the original meaning of the contract on a negative assumption of this kind is

wrong. The words of Lord Chelmsford, L.C., in *Midland Great Western Railway v. Johnson*, (1858) 6 H.L.C. at p. 812, are applicable:

10 “But suppose that it could be successfully established that there was a new course of dealing which was such a departure from the original contract, as to amount to a variation of the contract by mutual consent, the case of the respondents would still not be much advanced as the appellants are an incorporated company, having contracted under seal, and a mere verbal variation of the contract would not be binding upon them. The directors, no doubt, would have a control over the contract, and the Company might vary the contract by the acts of its agents authorized for that purpose, but then the variation must be effected in the proper manner. The case of *Kirk v. The Guardians of Bromley Union*, 2 Phill. 640, seems a strong authority against the respondents on this point.”

This applies with more force to the acts of a municipal corporation.

The Company submits that sec. 741 of The Municipal Act, S.M. 1886, 49 Vict., c. 52, has some bearing on the question of the meaning 20 of “within the limits of the City of Winnipeg.” At that time the City Charter was being changed and that section was put in merely for the purpose of preserving the *status quo* and validating the general assessments. There was no intention to change the agreement between the Company and the City or to interpret it.

Cases have been cited in which the boundaries of municipalities were changed, to show how contracts are affected by such changes. In *City of Toronto v. Toronto Street Ry. Co.*, 1907 A.C. 315, 1906 S.C.R. 430, it was held that provision for establishment of new lines of railway in an agreement applied only to streets in the City at the 30 date of the agreement, and not to streets in an added area. In *United Gas & Fuel Co. of Hamilton Ltd. v. The Dominion Natural Gas Co.*, 1934 A.C. 446, defendant acquired a franchise to supply gas. *Held*, that it continued to hold that right when part of territory was joined to Hamilton; the limits as they existed in 1904 remained as if described by metes and bounds.

In *City of Calgary v. Can. Natural Gas Co.* 56 S.C.R. 115, the case turned upon the fact that “on at least two occasions the municipal corporation formally and deliberately dealt with the franchise granted to it by A.W. Dingman in 1905 as covering territory subsequently 40 annexed to the City.” The course of dealing between the City and the Company does not bring this case within the principle applied by the majority of the Court. The reasoning of Davies J. in a dissenting judgment applies in this case, especially as other members of the

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Court did not differ with him as to the original meaning of the contract. Davies J. said, at p. 124.

10 “It does seem to me that if the parties seek for and obtain from a city corporation an exclusive franchise, right and privilege for many years over the streets of the city, and the granting of which franchise depends upon a majority vote of the municipal voters being first obtained, such franchise will not be construed as extending to territorial additions to the city made during the term of the franchise, even assuming the power of the city to make any such agreement with such possible extensions unless there are either express words shewing an intention that the franchise granted shall be so extended or other language used from which such an intention must fairly and reasonably be drawn.”

At p. 125:

“The ‘said city’ there referred to is no doubt the Calgary of that day covering an area of 1800 acres with a population of about 12,500, as compared with its subsequent extension and enlargement to approximately 25,000 acres with a population of some 80,000 or 90,000.”

20 At p. 126:

30 “The words in question, ‘the City of Calgary’, were not ambiguous at the time the Dingman agreement was entered into. On the contrary, they at that time had a clear, definite, well understood meaning and only one. Subsequently changes in the territorial area by the addition of new territory may have created conditions which, if they were to control in the construction of the agreement, might make the words ambiguous. But, in my judgment, these words must be construed and interpreted as they would have been the day after the agreement was entered into had any dispute as to their meaning then arisen. *Wallis v. Pratt* (1911) A.C. 394, *North Eastern Railway Co. v. Hastings* (1900) A.C. 260.

“If I am right in my construction of the agreement when made, then the question arises whether any subsequent action of the city or its officials operated to create such extension.”

And at p. 130:

“Nothing less than an act done by the corporation itself acting within its powers, under the authority of its municipal council, could extend the franchise of 1905 to the added territory.”

40 See also *Idington J.* to the same effect.

In the *Union Natural Gas Co. of Canada v. The Chatham Gas Co.* 56 S.C.R. 253, which is concurrent with the *Calgary* case, *supra*, it

was held that the Union Company was not obliged to supply gas for distribution and sale by the Chatham Company in territory annexed to the City after the contract was made.

While each of these cases turns upon a particular contract and special circumstances, they all support the interpretation that "within the limits of the City" means "within the limits of the City" at the time the agreement was made.

This question was not in issue in the School Tax case; nor is there evidence that there was ground upon which it might have been put in
10 issue. There is no evidence that prior to the commencement of the School Tax case the Company owned property in the added area. There is no evidence that the first action was for taxes for assessments on property in the added area. The question of limits of the City was not considered in that case. This issue therefore is not *res judicata*.

There is no evidence that the City, by its conduct or by its laches admitted or acquiesced in an interpretation of the agreement other than that which it has set out in its defence in this action. There is no reason why the operative words of the agreement should not be
20 given their plain and natural meaning.

My conclusions are:

- (1) that the Company had powers enabling it to enter into the agreement and powers to carry out the condition of the agreement requiring it to execute and deliver a bond and covenant;
- (2) that the business tax is not an assessment of or a tax upon property, and the Company is not exempt from it under the agreement;
- 30 (3) That the Royal Alexandra Hotel is not property "owned by the Company for railway purposes or in connection therewith," and is not exempt under the agreement; and
- (4) that "within the limits of the City of Winnipeg" means within the limits on the effective date of By-laws 148 and 195, namely, 21st September 1881, and that property owned by the Company outside those limits is not exempt under the agreement.

The appeal should be allowed to the extent I have indicated. The City should have half its costs here and in the King's Bench. This being a case of special difficulty and importance, the statutory bar
40 limiting costs should be raised here and below.

J. E. ADAMSON, J.A.

Delivered this 17th day of April, 1950.

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Court of Appeal

No. 20
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April 17, 1950
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Court of Appeal

No. 21
Certificate of
Decision
April 17, 1950

No. 21**Certificate of Decision**

Dated the 17th day of April 1950

The Appeal of the above named Defendant from and against the Judgment of the Court of King's Bench bearing date the 7th day of October, 1949, having come on for hearing on the 14th, 15th, 16th, 17th and 20th days of February, 1950, in the presence of Counsel for both parties, this Court having heard such Counsel was pleased to direct that the same should stand over for Judgment, and the same
10 coming on now for Judgment

1. This Court Did Order and Adjudge that the said Appeal be and the same was allowed in part; that the injunction granted by His Lordship the Chief Justice of the King's Bench be dissolved insofar as it restrains the Defendant, by its officers, employees, servants or agents or any of them from—

(a) Making any assessment, levying or collecting or attempting to levy and collect any business tax sought to be imposed under the present City Charter upon any property of the Plaintiff Company;

(b) Making any assessment of, levying or collecting or attempting
20 to levy and collect any real property taxes on any property of the Plaintiff Company outside the boundaries of the City of Winnipeg as they existed on the 21st day of September, 1881;

(c) Making any assessment of, levying or collecting or attempting to levy and collect any real property or business tax on the property of the Plaintiff Company commonly known as the Royal Alexandra Hotel;

And That the said Judgment be and the same was varied accordingly.

And the Court Did Further Order and Adjudge that the Defendant
30 recover from the Plaintiff one half of its costs of the said Appeal and of the Trial in the Court of King's Bench, and that such costs be taxed without regard to the limit imposed by Rule 630 (1).

Dated at Winnipeg, Manitoba, this 8th day of June, A.D. 1950.

(SEAL)

"S. Hardymont"
Deputy Registrar.

No. 22

Notice of Appeal of Canadian Pacific Railway Company

Record
Court of Appeal

No. 22
Notice of Appeal of
Canadian Pacific
Railway Company
May 6, 1950

Take Notice that the Canadian Pacific Railway Company hereby appeals to the Supreme Court of Canada from that part of the decision of the Court of Appeal for Manitoba delivered on the 17th day of April 1950 whereby the said Court decided that the terms of a certain agreement between the (Plaintiff) Appellant and the (Defendant) Respondent, the terms of which are contained in By-law No. 148 of the (Defendant) Respondent, dated the 5th day of September, 1881, as amended by By-law No. 195 of the (Defendant) Respondent, dated the 30th day of October, 1882, both of which By-laws were declared legal, binding and valid by Statutes of Manitoba (1883) 46-47 Vic. Chap. 64, and which were again ratified and confirmed and declared to be applicable to the whole City of Winnipeg as it then existed by Statutes of Manitoba (1886) 49 Vict., Chap. 52, by which agreement it was agreed that all property of the (Plaintiff) Appellant then or thereafter owned by the (Plaintiff) Appellant within the limits of the City of Winnipeg for railway purposes or in connection therewith should be forever free and exempt from all municipal taxes, rates and levies and assessments of every nature and kind, do not exempt the (Plaintiff) Appellant from all municipal taxes, rates and levies and assessments of every nature and kind on

(1) property owned by the (Plaintiff) Appellant for railway purposes or in connection therewith and situated outside the limits of the City of Winnipeg as they existed on the 21st day of September, 1881, and

(2) the property of the (Plaintiff) Appellant in the City of Winnipeg known as the Royal Alexandra Hotel;

and from business tax imposed by the (Defendant) Respondent under the provisions of its Charter, being Statutes of Manitoba (1940) 4, George VI, Chap. 81.

And Take Notice that at the next sittings of the Supreme Court of Canada, the said Court will be moved to reverse the decision of the Court of Appeal of Manitoba as above set forth and to restore the judgment of the Court of King's Bench of Manitoba and to hold that the said freedom and exemption from all municipal taxes, rates and levies and assessments of every nature and kind contained in the said agreement between the (Plaintiff) Appellant and the (Defendant) Respondent extends to, covers and includes:

(1) all property owned by the (Plaintiff) Appellant for railway purposes or in connection therewith, situated within the limits of the City of Winnipeg as they now exist, and

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Court of Appeal

No. 22
Notice of Appeal of
Canadian Pacific
Railway Company
May 6, 1950

Continued

(2) the property of the (Plaintiff) Appellant in the City of Winnipeg known as the Royal Alexandra Hotel;

and to hold further that the said freedom and exemption from all municipal taxes, rates and levies and assessments of every nature and kind contained in the said agreement includes freedom and exemption from business tax imposed by the (Defendant) Respondent under the provisions of its said Charter, being Statutes of Manitoba (1940) 4, George VI, Chap. 81.

Dated at the City of Winnipeg, in the Province of Manitoba, this 106th day of May, 1950.

“H. A. V. Green”
Solicitor for Canadian Pacific
Railway Company.

To:
The City of Winnipeg
And to:
G. F. D. Bond, its Solicitor.

No. 23

Notice of Appeal of City of Winnipeg

No. 23
Notice of Appeal of
City of Winnipeg
May 19, 1950

20 Take Notice that the City of Winnipeg hereby appeals to the Supreme Court of Canada from the decision of the Court of Appeal for Manitoba delivered on the 17th day of April, 1950, insofar as the said Court affirmed the judgment entered in favour of the plaintiff Canadian Pacific Railway Company against the defendant the City of Winnipeg in the Court of King's Bench for the Province of Manitoba on the 21st day of November, 1949.

30 Take Notice that at the next sittings of the Supreme Court of Canada the said Court will be moved to reverse the decision of the Court of Appeal for Manitoba insofar as it affirmed the judgment entered against the City of Winnipeg in the Court of King's Bench and to hold that property now or hereafter owned by the Canadian Pacific Railway Company for railway purposes or in connection therewith and situate within the limits of the City of Winnipeg as they existed on the 21st day of September 1881, is not free and exempt from all municipal taxes, rates and levies and assessments of every nature and kind;

And to Dissolve in its entirety the injunction granted against the defendant the City of Winnipeg and to dismiss the plaintiff's action.

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Court of Appeal

Dated at the City of Winnipeg, in the Province of Manitoba, the 19th day of May, 1950.

No. 23
Notice of Appeal of
City of Winnipeg
May 19, 1950

"G. F. D. Bond"

Continued

Solicitor for the City of Winnipeg.

To: The Canadian Pacific Railway Company
and to H. A. V. Green, K.C., its solicitor.

No. 24

10

**Order allowing security of
Canadian Pacific Railway Company**

No. 24
Order allowing
security of
Canadian Pacific
Railway Company
June 8, 1950.

Before The Honourable Mr. Justice Richards, The Hon. Mr. Justice Dysart, The Hon. Mr. Justice Adamson in Court.

The 8th day of June, 1950

Upon the application of the (Plaintiff) Respondent and upon hearing Counsel for the (Plaintiff) Respondent as well as for the (Defendant) Appellant.

20 It Is Ordered that the sum of Five hundred (\$500.00) Dollars paid into Court, which sum was duly paid in as security that the said (Plaintiff) Respondent will effectually prosecute its appeal to the Supreme Court of Canada from the judgment of this Court, dated the 17th day of April, 1950, and will pay such costs and damages, if any, as may be awarded against it by the said Supreme Court of Canada, be and the same is hereby allowed as good and sufficient security.

30 It Is Further Ordered that the (Defendant) Appellant be prohibited from collecting or attempting to collect any realty or business taxes from the (Plaintiff) Respondent in respect of its property within the present limits of the City of Winnipeg owned for railway purposes or in connection therewith or in respect of the property of the (Plaintiff) Respondent known as the Royal Alexandra Hotel, until the appeal from the said judgment of this Court to the Supreme Court of Canada has been heard and judgment given by the said Supreme Court of Canada.

Dated at the City of Winnipeg, in the Province of Manitoba, this 8th day of June, 1950.

"A. J. Christie"
Registrar.

Record
Court of Appeal

No. 25
Order allowing
security of City
of Winnipeg
June 8, 1950.

No. 25**Order allowing security of
City of Winnipeg**

Before The Honourable Mr. Justice Richards, The Hon. Mr. Justice
Dysart, The Hon. Mr. Justice Adamson in Court.

The 8th day of June, 1950

Upon the application of The City of Winnipeg, the (Defendant)
Appellant, and upon hearing read the accountant's certificate shewing
that the sum of Five hundred (\$500.00) dollars has been paid into
10 Court in this cause, and it appearing that the matter in controversy
exceeds the sum of Two thousand (\$2,000.00) dollars, and upon the
(Plaintiff) Respondent assenting to short notice of this motion;

It Is Ordered that the sum of Five hundred (\$500.00) dollars paid
into Court to the credit of this cause by the above named (Defendant)
Appellant The City of Winnipeg, as security that the said (Defendant)
Appellant will effectually prosecute its appeal to the Supreme Court
of Canada from the judgment, order and decision of this honourable
Court, rendered and pronounced herein on the 17th day of April,
A.D. 1950, and will pay such costs and damages as may be awarded
20 against it by the Supreme Court of Canada, be and the same is hereby
allowed as good and sufficient security.

And It Is Further Ordered that pending the final determination
of this appeal the Defendant (Appellant) be allowed to assess the
property of the Plaintiff (Respondent) but take no steps to collect
taxes thereon.

"S. Hardymont"
Deputy Registrar.

No. 26**Order admitting Exhibits 40, 41 and 42 in evidence**

30 Before The Honourable The Chief Justice of Manitoba, The Hon.
Mr. Justice Richards, The Hon. Mr. Justice Coyne, The Hon.
Mr. Justice Dysart, The Hon. Mr. Justice Adamson in Court.

The 8th day of June, 1950

Upon the application of the Defendant for a ruling of this Court
on the admissibility of certified copies of certain exhibits tendered
at the trial hereof and rejected as inadmissible, and upon hearing
counsel for the Plaintiff as well as for the Defendant,

This Court Rules that certified copies of Orders-in-Council P.C.
1165, P.C. 1227 and P.C. 1458 (marked as Exhibits numbered 40,
40 41 and 42 respectively) be and the same are admitted in evidence for
all purposes of this action.

Dated at Winnipeg, Manitoba, this 8th day of June, A.D. 1950.

"S. Hardymont"
Deputy Registrar.

No. 26
Order admitting
Exhibits 40, 41 and
42 in evidence
June 8, 1950.

In the Supreme Court of Canada**No. 27****Order of the Supreme Court of Canada
Consolidating the Appeals**

Before The Honourable Mr. Justice Kerwin in Chambers

The 27th day of June, 1950

ORDER

Upon the application of Counsel for the Appellant, Canadian Pacific Railway Company, upon hearing read the Notice of Motion, 10 the Affidavit of Ian D. Sinclair and other material filed in support thereof, and the consent of Agents for the City of Winnipeg and upon hearing what was alleged by Counsel aforesaid,

It Is Ordered that the above-mentioned appeals be consolidated and proceeded with as one appeal;

And It Is Further Ordered that the Appellants shall file one Case;

And It Is Further Ordered that the costs incidental to this application be costs in the cause.

“Paul Leduc”
Registrar.

Record
Supreme Court
of Canada

No. 27
Order of the
Supreme Court
of Canada
consolidating
the appeals
June 27, 1950.

20

No. 28**Letter From Solicitor for Canadian Pacific Railway Company
to Solicitor for City of Winnipeg**

11th July, 1950.

G. F. D. Bond, Esq., K.C.,
City Solicitor,
City Hall,
Winnipeg, Man.

Dear Sir:

Re: Canadian Pacific Railway Company
vs. City of Winnipeg

30

Mr. Justice Richards, in his Reasons for Judgment in the Court of Appeal, said:

“The point that the exemption did not apply to property outside the 1881 territorial limits of the City could not have been raised in the School Tax case unless; firstly, the Company ‘owned’ property ‘for railway purposes or in connection therewith’ in the added area, and, secondly, such property had been taxed for school purposes. There is no proof of either condition and, in my opinion, the principle of *res judicata* does not apply.”

Record

No. 28
Letter from
solicitor for
Canadian Pacific
Railway Company
to solicitor for
City of Winnipeg
July 11, 1950.

Record

No. 28
Letter from
solicitor for
Canadian Pacific
Railway Company
to solicitor for
City of Winnipeg
July 11, 1950.

Continued

Mr. Justice Adamson, in his Reasons for Judgment, said:

“There is no allegation in the pleadings and no evidence that the Company owned property outside the old but within the new city limits prior to 1900. There is no allegation and there is no evidence as to when, if ever, they acquired their right of way. That it did own property in the added area which the City deliberately refrained from assessing and taxing cannot be assumed.”

These statements, as you know, are erroneous. The admissions of
10 fact cover property owned by the Company for railway purposes or
in connection therewith in the areas added to the City in 1882 and
subsequently. Such property is shown in the assessment rolls from
1882 onwards with a notation opposite each entry to the effect that
the property is exempt under By-law 148, or some similar wording.
This was made clear at the trial, but apparently two, at least, of the
Court of Appeal Judges did not so read the Appeal Case and the
transcript.

When the appeals were before the Court of Appeal, on application
to approve of security for costs, Counsel for the City stated that the
20 City was prepared to give the Company a letter making the above
admission in specific terms so that there might be no doubt as to what
the admission is when the appeals come before the Supreme Court of
Canada. Will you be so good as to write me a letter accordingly.

Yours truly,

“H. A. V. Green”

Solicitor.

G.-M.

Record**No. 29**

No. 29
Letter from
Solicitor for City of 30
Winnipeg to
Solicitor for
Canadian Pacific
Railway Company
August 14, 1950.

**Letter from Solicitor for City of Winnipeg to Solicitor for Canadian
Pacific Railway Company**

August 14th, 1950.

Mr. H. A. V. Green, K.C.,
Solicitor,
Canadian Pacific Railway Company,
Winnipeg, Manitoba.

Dear Sir:

Re: Canadian Pacific Railway Company vs. City of Winnipeg.

The City of Winnipeg admits, for the purposes of this action, that
the Canadian Pacific Railway Company has owned since 1881, and
40 still owns, property used for railway purposes or in connection there-
with in the area added to the City in 1882 by Statutes of Manitoba

45 Vict. Ch. 36, and likewise has owned and still owns property in the areas added to the City in subsequent years, and the City of Winnipeg further admits that, on the assessment rolls of the said City for the years from 1882 to 1900, opposite the entries of the property owned by the Canadian Pacific Railway Company, situated both within the limits of the original City of Winnipeg and in the areas added to the said City in 1882 and in subsequent years, for railway purposes or in connection therewith, there are notations on some rolls to the effect that the said properties were exempt from taxation under 10 By-law 148; on others under By-law 195 and on others; exempt from municipal taxes without showing the authority therefor.

Yours truly,

"G. F. D. Bond"
City Solicitor.

GFDB:GO

Record

No. 29
Letter from
Solicitor for City of
Winnipeg to
Solicitor for
Canadian Pacific
Railway Company
August 14, 1950.

Continued

No. 30

Agreement as to Contents of Appeal Case

It is hereby agreed by and between the parties hereto that the Case in appeal to the Supreme Court of Canada shall be composed of 20 and comprise the following documents and papers, to wit:

1. Amended Statement of Claim.
2. Amended Statement of Defence to Amended Statement of Claim.
3. Reply to Amended Statement of Defence.
4. Transcript of evidence and proceedings at the trial, but not including the argument on the admissibility of documents.
5. Exhibits filed at the trial numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 9A, 10, 11, 12, 13, 14, 15, 16 (only one of a bundle of assessment notices to be printed), 17 (only one of a bundle of assessment notices to be 30 printed), 18, 19, 22, 40, 41, 42, 43 and 44.
6. Order of Court of Appeal for Manitoba admitting in evidence Exhibits numbered 40, 41 and 42.
7. Letter from Solicitor for Canadian Pacific Railway Company to Solicitor for City of Winnipeg dated 11th July, 1950, *re* admissions.
8. Letter from Solicitor for City of Winnipeg to Solicitor for Canadian Pacific Railway Company dated 14th August, 1950, *re* admissions.

Record

Supreme Court
of Canada

No. 30
Agreement as to
contents of Appeal
Case
August 24, 1950.

Record
Supreme Court
of Canada

No. 30
 Agreement as to
 contents of Appeal
 Case
 August 24, 1950.

Continued

9. Reasons for Judgment of the learned trial Judge, The Honourable Chief Justice E. K. Williams.
10. Formal Judgment of the Court of King's Bench for Manitoba.
11. Notice of Appeal to the Court of Appeal for Manitoba.
12. Reasons for Judgment of:
 - (a) The Honourable The Chief Justice of Manitoba.
 - (b) The Honourable Mr. Justice Richards.
 - (c) The Honourable Mr. Justice Coyne.
 - (d) The Honourable Mr. Justice Dysart.
 - 10 (e) The Honourable Mr. Justice Adamson.
13. Formal Judgment of the Court of Appeal for Manitoba.
14. Notice of Appeal to the Supreme Court of Canada of Canadian Pacific Railway Company.
15. Notice of Appeal to the Supreme Court of Canada of the City of Winnipeg.
16. Order Approving Security of Canadian Pacific Railway Company on appeal to the Supreme Court of Canada and prohibiting the City of Winnipeg from collecting realty or business taxes.
17. Order Approving Security of City of Winnipeg on appeal to
 20 the Supreme Court of Canada and permitting City of Winnipeg to assess the property of Canadian Pacific Railway Company only.
18. Order of Supreme Court of Canada consolidating the appeals and providing for the filing of one Case.
19. Agreement as to Contents of Appeal Case.
20. Certificate of the Registrar of the Court of King's Bench of Manitoba.
21. Solicitor's Certificate of Comparison.
22. Certificate of the Acting Registrar of the Court of Appeal for Manitoba.
- 30 Dated at the City of Winnipeg, in the Province of Manitoba, this 24th day of August, 1950.

CANADIAN PACIFIC RAILWAY COMPANY

By "H. A. V. Green"
 its Solicitor.

THE CITY OF WINNIPEG

By "G. F. D. Bond"
 its Solicitor.

No. 31**Certificate of the Registrar of the Court of King's Bench
for Manitoba**

I, Augustus James Christie, Registrar of the Court of King's Bench for the Province of Manitoba, hereby certify to the Registrar of the Court of Appeal for Manitoba that I have applied to the Judges of the said Court of King's Bench for their opinions or Reasons for Judgment in this case and the only Reasons delivered to me were those of The Honourable The Chief Justice of this Court.

10 Dated at the City of Winnipeg, in the Province of Manitoba, this 24th day of August, 1950.

"A. J. Christie"
Registrar of the Court of King's Bench
for Manitoba.

(Seal)

Record
Court of
King's Bench

No. 31
Certificate of the
Registrar of the
Court of King's
Bench for Manitoba
August 24, 1950.

No. 32**Certificate of the Acting Registrar of the Court
of Appeal for Manitoba**

I, the undersigned Acting Registrar of the Court of Appeal for Manitoba, do hereby certify that the annexed case on pages 1 to 373, 20 inclusive, is the Case stated and agreed upon between the parties hereto pursuant to Section 68 of The Supreme Court Act and the Rules of the Supreme Court of Canada in the appeals herein to the Supreme Court of Canada.

I do further certify that both the said Canadian Pacific Railway Company and the said City of Winnipeg have given proper security to the satisfaction of the said Court of Appeal for Manitoba, as required by Section 70 of The Supreme Court Act, being in each case the sum of Five hundred (\$500.00) Dollars of lawful money of Canada deposited with me as Acting Registrar of the said Court of Appeal, 30 a copy of each of the Orders of the said Court of Appeal allowing the said security being found at pages 249 and 250 of the said Case.

And I do further certify that the said Case contains the Reasons for Judgment of all Judges of the Court of Appeal for Manitoba.

And I do further certify that I have received a certificate from the Registrar of the Court of King's Bench to the effect that he had applied to the Judges of the said Court for their opinions or reasons for judgment and that the only reasons delivered to him were those of the Honourable The Chief Justice of the said Court.

Record
Supreme Court
of Canada

No. 32
Certificate of the
Acting Registrar
of the Court of
Appeal for
Manitoba
October 16, 1950.

Record
Supreme Court
of Canada

No. 32
 Certificate of the
 Acting Registrar
 of the Court of
 Appeal for
 Manitoba
 October 16, 1950.

Continued

In testimony whereof I have hereunto subscribed my name and affixed the seal of the Court of Appeal for Manitoba, this 16th day of October, 1950.

(SEAL)

“L. J. C. Elliott”
 Acting Registrar

No. 33

Solicitors' Certificate of Comparison

No. 33
 Solicitors'
 Certificate of
 Comparison
 October 16, 1950.

I, Henry Archibald Vaughan Green, of the City of Winnipeg, in the Province of Manitoba, and I, George Frederick Daniels Bond, of the same place, hereby certify that we have personally compared the annexed print of the case in appeal to the Supreme Court with the originals and that the same is a true and correct reproduction of such originals.

Dated at Winnipeg in Manitoba, this 16th day of October, 1950.

“H. A. V. Green”
 Solicitor for the Canadian Pacific
 Railway Company

“G. F. D. Bond”
 Solicitor for the City of Winnipeg

PART II—EXHIBITS**Exhibit No. 5****PLAINTIFF'S AND DEFENDANT'S DOCUMENT****Admission of Facts**

Record
Exhibits

No. 5
Admission
of Facts

The parties to this action, for the purposes of this action only, Hereby Admit each and every one of the facts hereunder specified.

Facts Admitted

1. That Letters Patent under the Great Seal of Canada were issued by His Excellency the Governor General of Canada to Canadian Pacific Railway Company on February 16, 1881, and that a photostatic copy thereof will be admitted in evidence in lieu of the original Letters Patent.

2. That on August 24, 1881, By-Law 148 of the City of Winnipeg was submitted to and approved by the ratepayers of the City of Winnipeg as then constituted.

3. That on October 26, 1882, By-Law No. 195 of the City of Winnipeg was submitted to and approved by the ratepayers of the City of Winnipeg as then constituted.

4. That the plaintiff

20 (a) constructed, completed and fully equipped before February 1, 1883, one hundred miles of railway running south-westerly from the City of Winnipeg to the westerly limits of the Province of Manitoba, on the prescribed route as set forth in paragraph 4 (1) of By-Law No. 148, as amended and re-enacted by By-Law No. 195 but the defendant does not admit the power of the city to pass said by-laws.

30 (b) built, constructed and completed before November 1, 1883, a substantial and commodious general passenger railway depot with all the modern improvements, in the City of Winnipeg, on the lots described in paragraph 4 (2) of By-Law No. 148, as amended and re-enacted by By-Law No. 195, and has maintained a substantial and commodious general passenger railway depot in the City of Winnipeg to this date.

(c) executed and delivered to the Mayor and Council of the City of Winnipeg a bond and covenant under its corporate seal which is produced by the city in its affidavit of documents No. 17.

but the defendant does not admit the power of the plaintiff to give the said bond and covenant.

5. The plaintiff established and built, as shown on a plan to be 40 filed as an exhibit, in the City of Winnipeg its principal workshops

Record
Exhibits

No. 5
Admission
of Facts.
(Continued)

for its main line in Manitoba and the branches thereof radiating from the City of Winnipeg and has continued to this date the said workshops in the locations in the City of Winnipeg shown on the said plan. In the year 1882 the plaintiff established and built its principal workshops for its main line within the Province of Manitoba and the branches thereof radiating from Winnipeg at the location shown and numbered 1 on the said plan, and in the year 1887 the plaintiff enlarged the said workshops to the location shown and numbered 2 on the said plan. The said workshops were moved to the location 10 shown and numbered 4 on the said plan in the year 1903 and have been continued in this location to the present date. An engine house has been maintained by the plaintiff at the location numbered 3 on the said plan from 1903 to the present date.

6. That in 1882 the plaintiff procured and erected in the City of Winnipeg large and commodious stock and cattle yards and the defendant admits that such stock and cattle yards were continued in the City of Winnipeg, at the locations shown and numbered 5, 6 and 7 on the said plan, until 1911; but the defendant puts the plaintiff to the proof that such stock or cattle yards were continued in the 20 City of Winnipeg after 1911.

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

8. That the lands upon which the said passenger station was to be built were conveyed by the defendant to the plaintiff by a deed dated April 18, 1882, which deed was registered in the Winnipeg Registry Office on July 24, 1882, as No. 31520.

9. That the Memorandum of Agreement dated August 4, 1906, referred to in paragraph 9 of the amended statement of claim, was 30 executed by the plaintiff and the defendant on the said date and a resolution purporting to approve said agreement was passed by the council of the defendant on the 6th day of August 1906, but the defendant does not admit the power of the council of the defendant to execute said agreement or to pass said resolution or to recognize or acknowledge that the plaintiff was or is not under any legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith.

10. That the Memorandum of Agreement dated May 29, 1914, 40 referred to in paragraph 9 of the amended statement of claim, was executed by the plaintiff and the defendant on the said date and a by-law numbered 8721 and dated 15th June 1914 purporting to ratify and confirm said agreement was passed by defendant but the defendant does not admit the power of the council of the defendant to

execute said agreement or to pass said by-law or to recognize or acknowledge that the plaintiff was or is not under any legal necessity to pay taxes in respect of property owned by the plaintiff within the limits of the City of Winnipeg for railway purposes or in connection therewith.

Record
Exhibits
No. 5
Admission
of Facts.
(Continued)

11. That one of the findings made pursuant to the said agreement dated May 29, 1914, by the committee thereby established was as follows:

“18. Taxes on Royal Alexandra Hotel.

10 The City contended that in as much as the railway company had increased the size of the hotel, the present arrangement as to payment of taxes should be revised and that the company should pay on a larger assessment. The company agrees to pay on the hotel as enlarged annually the sum of \$10,500.00. The terms of the agreement already in existence respecting the taxes on the hotel is amended only as to the amount. This understanding is to apply to taxes for 1915 and thereafter.”

but defendant does not admit that this finding is relevant to any
20 issue.

12. That the Memorandum of Agreement dated April 28, 1942, referred to in paragraph 9 of the amended statement of claim was executed by the plaintiff and the defendant on the said date and a by-law numbered 15455 and dated 27th April 1942 purporting to authorize and adopt said agreement was passed by defendant but defendant does not admit the power of the council of the defendant to execute said agreement or to pass the said by-law or to recognize or acknowledge that the plaintiff was or is not under any legal necessity to pay taxes in respect of property owned by the plaintiff
30 within the limits of the city of Winnipeg for railway purposes or in connection therewith.

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

Record
Exhibits

No. 5
Admission
of Facts.
(Continued)

14. It is also agreed that copies of all maps, plans, letters, memoranda, minutes and all other papers and documents produced by the parties hereto in their respective affidavits as to documents and also Sessional Papers (Dominion) and a certified copy of the plan referred to in letter dated 2nd June 1881 from C. Drinkwater, secretary of the plaintiff to the Honorable Secretary of State, shall be admitted on behalf of either party without formal proof, subject to the right of either party to object to the relevancy of any or all of the said maps, plans, letters, memoranda, minutes, Sessional Papers and other 10 papers and documents.

"H. A. V. Green,"
Solicitor for the Plaintiff.

"G. F. D. Bond,"
Solicitor for the Defendant.

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Exhibit No. 7

PLAINTIFF'S AND DEFENDANT'S DOCUMENT

Plan of the City of Winnipeg

Record
Exhibits

No. 7
Plan of the
City of Winnipeg

Record
Exhibits

No. 1
Letters Patent
of Incorporation
of Canadian
Pacific Railway
Company.
February 16, 1881

Exhibit No. 1

PLAINTIFF'S DOCUMENT

**Letters Patent of Incorporation of Canadian Pacific Railway
Company**

"Lorne"
Great Seal of Canada

(Coat of Arms)
CANADA

"Jas. McDonald,"
10 Attorney-General of Canada.

Victoria, by the Grace of God, of the United Kingdom of Great
Britain and Ireland, Queen, Defender of the Faith, &c., &c., &c.

To all to whom these presents shall come, or whom the same may in
anywise concern, Greeting:

Whereas, George Stephen, of the City of Montreal, in the Province
of Quebec and Dominion of Canada, Esquire; Duncan McIntyre, of
the same place, Merchant; John S. Kennedy, of the City of New York,
in the State of New York, one of the United States of America;
Richard B. Angus, of the City of St. Paul, in the State of Minnesota,
20 one of the United States of America; and James J. Hill, of the same
place; the firm of Morton, Rose and Company, of the City of London,
in England, Merchants, and the firm of Kohn, Reinach and Company,
of the City of Paris, in France, Bankers, on or about the twenty-first
day of October, in the year of Our Lord one thousand eight hundred
and eighty, duly entered into a contract and agreement with Us
represented and acting by the Honorable Sir Charles Tupper, K.C.
M.G., our Minister of Railways and Canals of Canada, which contract
and agreement is in the words and figures following, viz.:

This Contract and Agreement made between Her Majesty the
30 Queen, acting in respect of the Dominion of Canada, and herein
represented and acting by the Honorable Sir Charles Tupper, K.C.
M.G., Minister of Railways and Canals, and George Stephen and
Duncan McIntyre, of Montreal, in Canada, John S. Kennedy of
New York, in the State of New York, Richard B. Angus and James
J. Hill, of St. Paul, in the State of Minnesota, Morton, Rose & Co.,
of London, England, and Kohn, Reinach & Co., of Paris, France,

Witnesses: That the parties hereto have contracted and agreed
with each other as follows, namely:—

1. For the better interpretation of this contract, it is hereby
40 declared that the portion of Railway hereinafter called the Eastern
section, shall comprise that part of the Canadian Pacific Railway to
be constructed, extending from the Western terminus of the Canada

Central Railway, near the East end of Lake Nipissing, known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in course of construction extending from Lake Superior to Selkirk on the East side of Red River; which latter portion is hereinafter called the Lake Superior section. That the portion of said Railway, now partially in course of construction, extending from Selkirk to Kamloops, is hereinafter called the Central section; and the portion of said Railway now in course of construction, extending from Kamloops to Port Moody, is hereinafter called the
 10 Western section. And that the words "the Canadian Pacific Railway," are intended to mean the entire Railway, as described in the Act 37th Victoria, cap. 14. The individual parties hereto, are hereinafter described as the Company; and the Government of Canada is hereinafter called the Government.

2. The contractors immediately after the organization of the said Company, shall deposit with the Government \$1,000,000 in cash or approved securities, as a security for the construction of the Railway hereby contracted for. The Government shall pay to the Company interest on the cash deposited at the rate of four per cent. per annum,
 20 half-yearly, and shall pay over to the Company the interest received upon securities deposited, the whole until default in the performance of the conditions hereof, or until the repayment of the deposit, and shall return the deposit to the Company on the completion of the railway, according to the terms hereof, with any interest accrued thereon.

3. The Company shall lay out, construct and equip the said Eastern section, and the said Central section, of a uniform gauge of 4 feet 8½ inches; and in order to establish an approximate standard whereby the quality and the character of the Railway and of the
 30 materials used in the construction thereof, and of the equipment thereof may be regulated, the Union Pacific Railway of the United States as the same was when first constructed, is hereby selected and fixed as such standard. And if the Government and the Company should be unable to agree as to whether or not any work done or materials furnished under this contract are in fair conformity with such standard, or as to any other question of fact, excluding questions of law, the subject of disagreement shall be from time to time referred to the determination of three referees; one of whom shall be chosen by the Government, one by the Company, and one by the two
 40 referees so chosen, and such referees shall decide as to the party by whom the expense of such reference shall be defrayed. And if such two referees should be unable to agree upon a third referee, he shall be appointed at the instance of either party hereto, after notice to the other, by the Chief Justice of the Supreme Court of Canada. And the decision of such referees, or of the majority of them, shall be final.

Record
Exhibits

No. 1
 Letters Patent
 of Incorporation
 of Canadian
 Pacific Railway
 Company.
 February 16, 1881.
 (Continued)

RecordExhibits

No. 1
 Letters Patent
 of Incorporation
 of Canadian
 Pacific Railway
 Company.
 February 16, 1881.
 (Continued)

4. The work of construction shall be commenced at the eastern extremity of the Eastern section not later than the first day of July next, and the work upon the Central section shall be commenced by the Company at such point towards the eastern end thereof on the portion of the line now under construction as shall be found convenient and as shall be approved by the Government, at a date not later than the 1st May next. And the work upon the Eastern and Central sections, shall be vigorously and continuously carried on at such rate of annual progress on each section as shall enable the
 10 Company to complete and equip the same and each of them, in running order, on or before the first day of May, 1891, by which date the Company hereby agree to complete and equip the said sections in conformity with this contract, unless prevented by the act of God, the Queen's enemies, intestine disturbances, epidemics, floods, or other causes beyond the control of the Company. And in case of the interruption or obstruction of the work of construction from any of the said causes, the time fixed for the completion of the railway shall be extended for a corresponding period.

5. The Company shall pay to the Government the cost, according
 20 to the contract, of the portion of railway, 100 miles in length, extending from the city of Winnipeg westward, up to the time at which the work was taken out of the hands of the contractor and the expenses since incurred by the Government in the work of construction, but shall have the right to assume the said work at any time and complete the same, paying the cost of construction as aforesaid so far as the same shall then have been incurred by the Government.

6. Unless prevented by the act of God, the Queen's enemies, intestine disturbances, epidemics, floods or other causes beyond the control of the Government, the Government shall cause to be com-
 30 pleted the said Lake Superior section, by the dates fixed by the existing contracts for the construction thereof; and shall also cause to be completed the portion of the said Western section now under contract, namely, from Kamloops to Yale, within the period fixed by the contracts therefor, namely, by the thirtieth day of June, 1885; and shall also cause to be completed, on or before the first day of May, 1891, the remaining portion of the said Western section, lying between Yale and Port Moody, which shall be constructed of equally good quality in every respect with the standard hereby created for the portion hereby contracted for. And the said Lake Superior
 40 section, and the portions of the said Western section now under contract, shall completely be completed as nearly as practicable according to the specifications and conditions of the contracts therefor, except in so far as the same have been modified by the Government prior to this contract.

7. The Railway constructed under the terms hereof shall be the

property of the Company: and pending the completion of the Eastern and Central sections, the Government shall transfer to the Company the possession and right to work and run the several portions of the Canadian Pacific Railway already constructed or as the same shall be completed. And upon the completion of the Eastern and Central sections, the Government shall convey to the Company, with a suitable number of station buildings and with water service (but without equipment), those portions of the Canadian Pacific Railway constructed or to be constructed by the Government which shall then be 10 completed; and upon completion of the remainder of the portion of railway to be constructed by the Government, that portion shall also be conveyed to the Company, and the Canadian Pacific Railway shall become and be thereafter the absolute property of the Company. And the Company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway.

8. Upon the reception from the Government of the possession of each of the respective portions of the Canadian Pacific Railway, the Company shall equip the same in conformity with the standard herein established for the equipment of the sections hereby contracted for, 20 and shall thereafter maintain and efficiently operate the same.

9. In consideration of the premises, the Government agree to grant to the Company a subsidy in money of \$25,000,000, and in land of 25,000,000 acres, for which subsidies the construction of the Canadian Pacific Railway shall be completed and the same shall be equipped, maintained and operated, the said subsidies respectively to be paid and granted as the work of construction shall proceed, in manner and upon the conditions following, that is to say:

a. The said subsidy in money is hereby divided and appropriated as follows, namely:—

30	<i>Central Section</i>	
	Assumed at 1,350 miles—	
	1st.—900 miles, at \$10,000 per mile.....	\$9,000,000
	2nd.—450 “ “ 13,333 “ “	6,000,000
		—————\$15,000,000
	<i>Eastern Section</i>	
	Assumed at 650 miles, subsidy equal to \$15,384.61 per mile	10,000,000
		—————\$25,000,000

And the said subsidy in land is hereby divided and appropriated as follows, subject to the reserve hereinafter provided for:—

40	<i>Central Section</i>	
	1st.—900 miles, at 12,500 acres per mile	11,250,000
	2nd.—450 “ “ 16,666.66 “ “ “	7,500,000
		————— 18,750,000

Record
Exhibits

No. 1
Letters Patent
of Incorporation
of Canadian
Pacific Railway
Company.
February 16, 1881.
(Continued)

Eastern Section

Record Exhibits

No. 1
Letters Patent
of Incorporation
of Canadian
Pacific Railway
Company.
February 16, 1881
(Continued)

Assumed at 650 miles, subsidy equal to 9,615.35 acres per	
mile.....	6,250,000
	25,000,000

b. Upon the construction of any portion of the railway hereby contracted for, not less than 20 miles in length, and the completion thereof so as to admit of the running of regular trains thereon, together with such equipment thereof as shall be required for the traffic thereon, the Government shall pay and grant to the Company the money and land subsidies applicable thereto, according to the divisions
10 and appropriation thereof made as hereinbefore provided; the Company having the option of receiving in lieu of cash, terminable bonds of the Government, bearing such rate of interest, for such period and nominal amount as may be arranged, and which may be equivalent according to actuarial calculation to the corresponding cash payment, the Government allowing four per cent, interest on moneys deposited with them.

c. If at any time the Company shall cause to be delivered on or near the line of the said railway, at a place satisfactory to the Government, steel rails and fastenings to be used in the construction of the
20 railway, but in advance of the requirements for such construction, the Government, on the requisition of the Company, shall, upon such terms and conditions as shall be determined by the Government, advance thereon three-fourths of the value thereof at the place of delivery. And a proportion of the amount so advanced shall be deducted according to such terms and conditions from the subsidy to be thereafter paid, upon the settlement for each section of 20 miles of railway, which proportion shall correspond with the proportion of such rails and fastenings which have been used in the construction of such sections.

30 d. Until the first day of January, 1882, the Company shall have the option, instead of issuing land grant bonds as hereinafter provided, of substituting the payment by the Government of the interest (or part of the interest) on bonds of the Company mortgaging the railway and the lands to be granted by the Government, running over such term of years as may be approved by the Governor in Council, in lieu of the cash subsidy hereby agreed to be granted to the Company or any part thereof; such payments of interest to be equivalent according to actuarial calculation to the corresponding cash payment, the
40 Government allowing four per cent. interest on moneys deposited with them; and the coupons representing the interest on such bonds shall be guaranteed by the Government to the extent of such equivalent. And the proceeds of the sale of such bonds to the extent of not more than \$25,000,000, shall be deposited with the Government, and the balance of such proceeds shall be placed elsewhere by the Com-

pany, to the satisfaction and under the exclusive control of the Government; failing which last condition the bonds in excess of those sold shall remain in the hands of the Government. And from time to time as the work proceeds, the Government shall pay over to the Company: firstly, out of the amount so to be placed by the Company, —and, after the expenditure of that amount, or of the amount deposited with the Government,—sums of money bearing the same proportion to the mileage cash subsidy hereby agreed upon, which the net proceeds of such sale (if the whole of such bonds are sold upon
 10 the issue thereof) or, if such bonds be not all then sold, the net proceeds of the issue, calculated at the rate at which the sale of part of them shall have been made, shall bear to the sum of \$25,000,000. But if only a portion of the bond issue be sold, the amount earned by the Company according to the proportion aforesaid, shall be paid to the Company, partly out of the bonds in the hands of the Government, and partly out of the cash deposited with the Government, in similar proportions to the amount of such bonds sold and remaining unsold respectively; and the Company shall receive the bonds so paid as cash at the rate at which the said partial sale thereof shall have been
 20 made. And the Government will receive and hold such sum of money towards the creation of a sinking fund for the redemption of such bonds, and upon such terms and conditions, as shall be agreed upon between the Government and the Company.

e. If the Company avail themselves of the option granted by clause *d*, the sum of \$2,000 per mile for the first eight hundred miles of the Central section shall be deducted *pro rata* from the amount payable to the Company in respect of the said eight hundred miles, and shall be appropriated to increase the mileage cash subsidy appropriated to the remainder of the said Central section.

30 10. In further consideration of the premises, the Government shall also grant to the Company the lands required for the road bed of the railway, and for its stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards, and other appurtenances required for the convenient and effectual construction and working of the railway, in so far as such land shall be vested in the Government. And the Government shall also permit the admission free of duty, of all steel rails, fish plates and other fastenings, spikes, bolts and nuts, wire, timber and all material for bridges, to be used in the original construction of the rail-
 40 way, and of a telegraph line in connection therewith, and all telegraphic apparatus required for the first equipment of such telegraph line; and will convey to the Company, at cost price, with interest, all rails and fastenings bought in or since the year 1879, and other materials for construction in the possession of or purchased by the Government, at a valuation; such rails, fastenings and materials not being required

Record
 Exhibits

No. 1
 Letters Patent
 of Incorporation
 of Canadian
 Pacific Railway
 Company.
 February 16, 1881.
 (Continued)

Record
Exhibits

No. 1
Letters Patent
of Incorporation
of Canadian
Pacific Railway
Company.
February 16, 1881.
(Continued)

by it for the construction of the said Lake Superior and Western sections.

11. The grant of land hereby agreed to be made to the Company, shall be so made in alternate sections of 640 acres each, extending back 24 miles deep, in each side of the railway, from Winnipeg to Jasper House, in so far as such lands shall be vested in the Government, the Company receiving the sections bearing uneven numbers. But should any of such sections consist in a material degree of land not fairly fit for settlement, the Company shall not be obliged to
10 receive them as part of such grant, and the deficiency thereby caused and any further deficiency which may arise from the insufficient quantity of land along the said portion of railway, to complete the said 25,000,000 acres, or from the prevalence of lakes and water stretches in the sections granted (which lakes and water stretches shall not be computed in the acreage of such sections), shall be made up from other portions in the tract known as the fertile belt, that is to say, the land lying between parallels 49 and 57 degrees of north latitude, or elsewhere at the option of the Company, by the grant therein of similar alternate sections extending back 24 miles deep on
20 each side of any branch line or lines of railway to be located by the Company, and to be shown on a map or plan thereof deposited with the Minister of Railways; or of any common front line or lines agreed upon between the Government and the Company, the conditions hereinbefore stated as to lands not fairly fit for settlement to be applicable to such additional grants. And the Company may with the consent of the Government, select in the North-West Territories any tract or tracts of land not taken up as a means of supplying or partially supplying such deficiency. But such grants shall be made only from lands remaining vested in the Government.

30 12. The Government shall extinguish the Indian title affecting the lands herein appropriated, and to be hereafter granted in aid of the railway.

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.

40 14. The Company shall have the right, from time to time, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway, to any point or points within the territory of the Dominion. Provided always, that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the

Government shall grant to the Company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.

Record
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No. 1
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15. For 20 years from the date hereof, no line of railway shall be authorised by the Dominion Parliament to be constructed South of the Canadian Pacific Railway, from any point at or near the Canadian Pacific Railway except such line as shall run South West, or to
10 the Westward of South West: nor to within fifteen miles of Latitude 49. And in the establishment of any new Province in the North West Territories, provision shall be made for continuing such prohibition after such establishment until the expiration of the said period.

16. 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;
20 and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

17. The Company shall be authorized by their Act of incorporation to issue bonds, secured upon the land granted and to be granted to the Company, containing provisions for the use of such bonds in the acquisition of lands, and such other conditions as the Company shall see fit, such issue to be for \$25,000,000. And should the Company make such issue of land grant bonds, then they shall deposit them in the hands of the Government; and the Government
30 shall retain and hold one-fifth of such bonds as security for the due performance of the present contract in respect of the maintenance and continuous working of the railway by the Company, as herein agreed, for ten years after the completion thereof, and the remaining \$20,000,000 of such bonds shall be dealt with as hereinafter provided. And as the said one-fifth of the said bonds, so long as no default shall occur in the maintenance and working of the said Canadian Pacific Railway, the Government shall not present or demand payment of the coupons of such bonds, nor require payment of any interest thereon. And if any of such bonds so to be retained by the
40 Government shall be paid off in the manner to be provided for the extinction of the whole issue thereof, the Government shall hold the amount received in payment thereof as security for the same purposes as the bonds so paid off, paying interest thereon at four per cent, per annum so long as default is not made by the Company in the performance of the conditions hereof. And at the end of the said period

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of ten years from the completion of the said railway, if no default shall then have occurred in such maintenance and working thereof, the said bonds, or if any of them shall then have been paid off, the remainder of said bonds and the money received for those paid off, with accrued interest, shall be delivered back by the Government to the Company with all the coupons attached to such bonds. But if such default should occur, the Government may thereafter require payment of interest on the bonds so held, and shall not be obliged to continue to pay interest on the money representing bonds paid off; 10 and while the Government shall retain the right to hold the said portion of the said land grant bonds, other securities satisfactory to the Government may be substituted for them by the Company by agreement with the Government.

18. If the Company shall find it necessary or expedient to sell the remaining \$20,000,000 of the land grant bonds or a larger portion thereof than in the proportion of one dollar for each acre of land then earned by the Company, they shall be allowed to do so, but the proceeds thereof, over and above the amount to which the Company shall be entitled as herein provided, shall be deposited with the 20 Government. And the Government shall pay interest upon such deposit half-yearly, at the rate of four per cent. per annum and shall pay over the amount of such deposit to the Company from time to time as the work proceeds, in the same proportions, and at the same times and upon the same conditions as the land grant—that is to say: the Company shall be entitled to receive from the Government out of the proceeds of the said land grant bonds, the same number of dollars as the number of acres of the land subsidy which shall then have been earned by them, less one fifth thereof, that is to say, if the 30 bonds are sold at par, but if they are sold at less than par, then a deduction shall be made therefrom corresponding to the discount at which such bonds are sold. And such land grant shall be conveyed to them by the Government, subject to the charge created as security for the said land grant bonds, and shall remain subject to such charge till relieved thereof in such manner as shall be provided for at the time of the issue of such bonds.

19. The company shall pay any expenses which shall be incurred by the Government in carrying out the provisions of the two last preceding clauses of the contract.

20. If the Company should not issue such land grant bonds, then 40 the Government shall retain from out of each grant to be made from time to time, every fifth section of the lands hereby agreed to be granted, such lands to be so retained as security for the purposes, and for the length of time, mentioned in section eighteen hereof. And such lands may be sold in such manner and at such prices as shall be agreed upon between the Government and the Company, and in that

case the price thereof shall be paid to, and held by the Government for the same period, and for the same purposes as the land itself, the Government paying four per cent. per annum interest thereon. And other securities satisfactory to the Government may be substituted for such lands or money by agreement with the Government.

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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.

10 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.

In witness whereof the parties hereto have executed these presents at the City of Ottawa, this twenty-first day of October, 1880

(Signed) CHARLES TUPPER,
Minister of Railways and Canals.
" GEO. STEPHEN,
20 " DUNCAN McINTYRE,
" J. S. KENNEDY,
" R. B. ANGUS,
" J. J. HILL,
Per pro. Geo. Stephen.
" MORTON, ROSE & COMPANY
" KOHN, REINACH & Co.,
By P. DuP. Grenfell.

Signed in presence of F. Braun, and Seal of the Department hereto affixed by Sir Charles Tupper, in presence of (Signed) F. Braun.

30 And whereas the Schedule A to the said contract, is set out in an Act of Parliament of Canada, passed on the fifteenth day of February, in the year of Our Lord one thousand eight hundred and eighty-one, and in the forty-fourth year of our reign, intituled: "An Act respecting the Canadian Pacific Railway;" and whereas by the said Act after reciting as follows, viz.:

"Whereas by the terms and conditions of the admission of British Columbia into Union with the Dominion of Canada, the Government

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of the Dominion has assumed the obligation of causing a Railway to be constructed, connecting the seaboard of British Columbia with the Railway system of Canada;

“And whereas the Parliament of Canada has repeatedly declared a preference for the construction and operation of such Railway by means of an incorporated Company aided by grants of money and land, rather than by the Government, and certain Statutes have been passed to enable that course to be followed, but the enactments therein contained have not been effectual for that purpose;

10 “And whereas certain sections of the said Railway have be constructed by the Government and others are in course of construction, but the greater portion of the main line thereof has not yet been commenced or placed under contract, and it is necessary for the development of the North West Territory, and for the preservation of the good faith of the Government in the performance of its obligations, that immediate steps should be taken to complete and operate the whole of the said Railway;

“And whereas, in conformity with the expressed desire of Parliament, a contract has been entered into for the construction of the
20 said portion of the main line of the said Railway, and for the permanent working of the whole line thereof, which contract with the schedule annexed has been laid before Parliament for its approval, and a copy thereof is appended hereto, and it is expedient to approve and ratify the said contract, and to make provision for the carrying out of the same;” the said contract and agreement with the said Schedule A thereto was approved and ratified, and We were authorized to perform and carry out the conditions thereof according to their purport; and for the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with
30 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, it was enacted that our Governor-General of Canada might 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 said schedule to the said contract; and that such charter being published in the *Canada Gazette* with any Order or Orders in Council relating to it should have force and effect as if it were an Act of our Parliament of Canada, and should be and be held to be an Act of
40 incorporation within the meaning of the said contract;

And whereas the said persons have prayed for a charter for the purpose aforesaid;

1. Now know ye, that, by and with the advice of our Privy Council for Canada, and under the authority of the hereinbefore in part

recited Act, and of any other power and authority whatsoever in Us vested in this behalf, We Do, by these our Letters Patent, grant, order, declare and provide that the said George Stephen, Duncan McIntyre, John S. Kennedy, Richard B. Angus, James J. Hill, the firm of Morton, Rose and Company, and the firm of Kohn, Reinach and Company; 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 Company."

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10 2. The capital stock of the Company shall be twenty-five million dollars, divided into shares of one hundred dollars each, which shares shall be transferable in such manner and upon such conditions as shall be provided by the by-laws of the Company; and such shares, or any part thereof, may be granted and issued as paid-up shares for value *bona fide* received by the Company, either in money at par or at such price and upon such conditions as the board of directors may fix, or as part of the consideration of any contract made by the Company.

20 3. As soon as five million dollars of the stock of the Company have been subscribed, and thirty per centum thereof paid up, and upon the deposit with our Minister of Finance of Canada of one million dollars in money or in securities approved by our Governor-General in Council, for the purpose and upon the conditions in the said contract provided, the said contract shall become and be transferred to the Company, without the execution of any deed or instrument in that behalf; and the Company shall, thereupon, become and be vested with all the rights of the contractors named in the said contract, and shall be subject to, and liable for, all their duties and obligations to the same extent and in the same manner as if the said
30 contract had been executed by the said Company instead of by the said contractors; and thereupon the said contractors, as individuals, shall cease to have any right or interest in the said contract, and shall not be subject to any liability or responsibility under the terms thereof otherwise than as members of the corporation hereby created. And upon the performance of the said conditions respecting the subscription of stock, the partial payment thereof, and the deposit of one million dollars to the satisfaction of our Governor-General in Council, the publication by our Secretary of State of Canada in the
40 *Canada Gazette*, of a notice that the transfer of the contract to the Company has been effected and completed shall be conclusive proof of the fact. And the Company shall cause to be paid up, on or before the first day of May next, a further instalment of twenty per centum upon the said first subscription of five million dollars, of which call thirty days notice by circular mailed to each shareholder shall be sufficient. And the Company shall call in, and cause to be paid up,

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on or before the 31st day of December, 1882, the remainder of the said first subscription of five million dollars.

4. 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
10 franchises and powers so hereby conferred upon them.

DIRECTORS

5. The said George Stephen, Duncan McIntyre, John S. Kennedy, Richard B. Angus, James J. Hill, Henry Stafford Northcote, of London, aforesaid, Esquires, Pascoe du P. Grenfell, of London, aforesaid, Merchant, Charles Day Rose, of London, aforesaid, Merchant, and Baron J. de Reinach, of Paris, aforesaid, Banker, are hereby constituted the first directors of the Company, with power to add to their number, but so that the directors shall not in all exceed fifteen in number; and the majority of the directors, of whom the
20 President shall be one, shall be British subjects. And the Board of Directors so constituted shall have all the powers hereby conferred upon the directors of the Company, and they shall hold office until the first annual meeting of the shareholders of the Company.

6. Each of the directors of the Company, hereby appointed, or hereafter appointed or elected, shall hold at least two hundred and fifty shares of the stock of the Company. But the number of directors to be hereafter elected by the shareholders shall be such, not exceeding fifteen, as shall be fixed by by-law, and subject to the same conditions as the directors appointed by, or under the authority of,
30 the last preceding section; the number thereof may be hereafter altered from time to time in like manner. The votes for their election shall be by ballot.

7. A majority of the directors shall form a quorum of the board; and until otherwise provided by by-law, directors may vote and act by proxy, such proxy to be held by a director only; but no director shall hold more than two proxies, and no meeting of directors shall be competent to transact business unless at least three directors are present thereat in person, the remaining number of directors required to form a quorum being represented by proxies.

40 8. The board of directors may appoint from out of their number an Executive Committee, composed of at least three directors, for the transaction of the ordinary business of the Company, with such

powers and duties as shall be fixed by the by-laws; and the President shall be *ex officio* a member of such committee.

9. The chief place of business of the Company shall be at the City of Montreal, but the Company may from time to time, by by-law, appoint and fix other places within or beyond the limits of Canada at which the business of the Company may be transacted, and at which the directors or shareholders may meet, when called as shall be determined by the by-laws. And the Company shall appoint and fix by by-law, at least one place in each Province or Territory
 10 through which the Railway shall pass, where service of process may be made upon the Company, in respect of any cause of action arising within such Province or Territory, and may afterwards, from time to time, change such place by by-law. And a copy of any by-law fixing or changing any such place, duly authenticated as herein provided, shall be deposited by the Company in the office, at the seat of Government of the Province or Territory to which such by-law shall apply, of the Clerk or Prothonotary of the highest, or one of the highest, courts of civil jurisdiction of such Province or Territory. And if any cause of action shall arise against the Company within
 20 any Province or Territory, and any writ or process be issued against the Company thereon out of any court in such Province or Territory, service of such process may be validly made upon the Company at the place within such Province or Territory so appointed and fixed; but if the Company fail to appoint and fix such place, or to deposit, as hereinbefore provided, the by-law made in that behalf, any such process may be validly served upon the Company, at any of the stations of the said Railway within such Province or Territory.

SHAREHOLDERS

10. The first annual meeting of the shareholders of the Company,
 30 for the appointment of directors, shall be held on the second Wednesday in May, 1882, at the principal office of the Company, in Montreal; and the annual general meeting of shareholders, for the election of directors and the transaction of business generally, shall be held on the same day in each year thereafter at the same place unless otherwise provided by the by-laws. And notice of each of such meetings shall be given by the publication thereof in the *Canada Gazette* for four weeks, and by such further means as shall from time to time be directed by the by-laws.

11. Special general meetings of the shareholders may be convened
 40 in such manner as shall be provided by the by-laws. And except as hereinafter provided, notice of such meetings shall be given in the same manner as notices of annual general meetings, the purpose for which such meeting is called being mentioned in the notices thereof;

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and, except as hereinafter provided, all such meetings shall be held at the chief place of business of the Company.

12. If at any time before the first annual meeting of the shareholders of the Company, it should become expedient that a meeting of the directors of the Company, or a special general meeting of the shareholders of the Company, should be held, before such meeting can conveniently be called, and notice thereof given in the manner provided by this Act, or by the by-laws, or before by-laws in that behalf have been passed, and at a place other than at the chief place of
10 business of the Company in Montreal before the enactment of a by-law authorising the holding of such meeting elsewhere; it shall be lawful for the President or for any three of the directors of the Company to call special meetings either of directors or of shareholders, or of both, to be held at the city of London in England, at times and places respectively, to be stated in the notices to be given of such meetings respectively. And notices of such meetings may be validly given by a circular mailed to the ordinary address of each director or shareholder as the case may be, in time to enable him to attend such meeting, stating in general terms the purpose of the intended meeting.
20 And in the case of a meeting of shareholders, the proceedings of such meeting shall be held to be valid and sufficient, and to be binding on the Company in all respects, if every shareholder of the Company be present thereat in person or by proxy, notwithstanding that notice of such meeting shall not have been given in the manner required by this Act.

13. No shareholder holding shares upon which any call is overdue and unpaid shall vote at any meeting of shareholders. And unless otherwise provided by the by-laws, the person holding the proxy of a shareholder shall be himself a shareholder.

30 14. No call upon unpaid shares shall be made for more than twenty per centum upon the amount thereof.

RAILWAY AND TELEGRAPH LINE

15. The Company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches; which railway shall extend from the terminus of the Canada Central Railway near Lake Nipissing, known as Callander Station, to Port Moody in the Province of British Columbia; and also, a branch line of railway from some point on the main line of railway to Fort William on Thunder Bay; and also the existing
40 branch line of railway from Selkirk in the Province of Manitoba to Pembina in the said Province; and also other branches to be located by the Company from time to time as provided by the said contract; the said branches to be of the gauge aforesaid; and the said main line of railway and the said branch lines of railway, shall be commenced

and completed as provided by the said contract; and together with such other branch lines as shall be hereafter constructed by the said Company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the Company, shall, constitute the line of railway hereinafter called The Canadian Pacific Railway.

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16. The Company may construct, maintain and work a continuous telegraph line and telephone lines throughout and along the whole line of the Canadian Pacific Railway, or any part thereof, and may
10 also construct or acquire by purchase, lease or otherwise, any other line or lines of telegraph connecting with the line so to be constructed along the line of the said railway, and may undertake the transmission of messages for the public by any such line or lines of telegraph or telephone, and collect tolls for so doing; or may lease such line or lines of telegraph or telephone, or any portion thereof; and, if they think proper to undertake the transmission of messages for hire, they shall be subject to the provisions of the fourteenth, fifteenth and sixteenth sections of chapter sixty-seven of the Consolidated Statutes of Canada. And they may use any improvement that may hereafter be
20 invented (subject to the rights of patentees) for telegraphing or telephoning, and any other means of communication that may be deemed expedient by the Company at any time hereafter.

POWERS

17. "*The Consolidated Railway Act, 1879*," in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof and save and except as hereinafter provided, is hereby incorporated herewith.

18. As respects the said railway, the seventh section of "*The*
30 *Consolidated Railway Act, 1879*," relating to Powers and the eighth section thereof relating to Plans and Surveys shall be subject to the following provisions:—

a. The Company shall have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in Us and shall not be required by Us, to such extent as shall be required by the Company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways. But the provisions of this sub-section shall not apply to any beach or
40 land lying East of Lake Nipissing except with the approval of our Governor-General in Council.

b. It shall be sufficient that the map or plan and book of reference for any portion of the line of the railway not being within any district

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or county for which there is a Clerk of the Peace, be deposited in the office of our Minister of Railways and Canals of Canada; and any omission, mis-statement or erroneous description of any lands therein may be corrected by the Company, with the consent of the Minister and certified by him; and the Company may then make the railway in accordance with such certified correction.

c. The eleventh sub-section of the said eighth section of the Railway Act shall not apply to any portion of the railway passing over ungranted lands of Us, or lands not within any surveyed township 10 in any Province; and in such places, deviations not exceeding five miles from the line shown on the map or plan as aforesaid, deposited by the Company, shall be allowed, without any formal correction or certificate; and any further deviation that may be found expedient may be authorized by order of our Governor-General in Council, and the Company may then make their railway in accordance with such authorized deviation.

d. The map or plan and book of reference of any part of the main line of the Canadian Pacific Railway made and deposited in accordance with this section, after approval by our Governor-General in 20 Council, and of any branch of such railway hereafter to be located by the said Company in respect of which the approval of our Governor-General in Council shall not be necessary, shall avail as if made and deposited as required by the said "*Consolidated Railway Act, 1879*," for all the purposes of the said Act, and of this Act; and any copy of, or extract therefrom, certified by our said Minister or his deputy, shall be received as evidence in any court of law in Canada.

e. It shall be sufficient that a map or profile of any part of the completed railway, which shall not lie within any county or district having a registry office, be filed in the office of our Minister of Rail- 30 ways and Canals of Canada.

19. It shall be lawful for the Company to take from any public lands adjacent to or near the line of the said railway, all stone, timber, gravel and other materials which may be necessary or useful for the construction of the railway; and also to lay out and appropriate to the use of the Company, a greater extent of lands, whether public or private, for stations, depots, workshops, buildings, side-tracks, wharves harbors and roadway, and for establishing screens against snow, that the breadth and quantity mentioned in "*The Consolidated Railway Act, 1879*," such greater extent taken, in any case, being 40 allowed by our Governor-General in Council, and shown on the maps or plans deposited with our Minister of Railways and Canals of Canada.

20. The limit to the reduction of tolls by our Parliament of Canada provided for by the eleventh sub-section of the 17th section of "*The*

Consolidated Railway Act, 1879,” respecting tolls, is hereby extended, so that such reduction may be to such an extent that such tolls when reduced shall not produce less than ten per cent. per annum profit on the capital actually expended in the construction of the Railway, as such capital may be defined by an Act of our Parliament of Canada to be passed during the present session thereof, instead of not less than fifteen per cent. per annum profit, as provided by the said sub-section; and so also that such reduction shall not be made unless the net income of the Company, ascertained as described in said sub-section, 10 shall have exceeded ten per cent. per annum instead of fifteen per cent. per annum as provided by the said sub-section. And the exercise by our Governor-General in Council of the power of reducing the tolls of the Company as provided by the tenth sub-section of said section seventeen is hereby limited to the same extent with relation to the profit of the Company, and to its net revenue, as that to which the power of Parliament to reduce tolls is limited by said sub-section eleven as hereby amended.

21. The first and second sub-sections of section 22, of “*The Consolidated Railway Act, 1879,*” shall not apply to the Canadian Pacific 20 Railway Company; the transfer of shares in the undertaking shall be made only upon the books of the Company in person or by attorney, and shall not be valid unless so made; and the form and mode of transfer shall be such as shall be from time to time regulated by the by-laws of the Company. And the funds of the Company shall not be used in any advance upon the security of any of the shares or stock of the Company.

22. The third and fourth sub-sections of said section 22 of “*The Consolidated Railway Act, 1879,*” shall be subject to the following provisions, namely, that if before the completion of the Railway and 30 works under the said contract, any transfer should purport to be made of any stock or share in the Company, or any transmission of any share should be effected under the provisions of said sub-section four, to a person not already a shareholder in the Company, and if in the opinion of the Board it should not be expedient that the person (not being already a shareholder) to whom such transfer or transmission shall be made or effected should be accepted as a shareholder, the Directors may by resolution veto such transfer or transmission; and thereafter, and until after the completion of the said Railway and works under the said contract, such person shall not be, or be recog- 40 nized as a shareholder in the Company; and the original shareholder, or his estate, as the case may be, shall remain subject to all the obligations of a shareholder in the Company, with all the rights conferred upon a shareholder under this Charter. But any firm holding paid-up shares in the Company may transfer the whole or any of such shares to any partner in such firm having already an interest as such partner in such shares, without being subject to such veto. And in

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the event of such veto being exercised, a note shall be taken of the transfer or transmission so vetoed in order that it may be recorded in the books of the Company after the completion of the Railway and works as aforesaid; but until such completion, the transfer or transmission so vetoed shall not confer any rights, nor have any effect of any nature or kind whatever as respects the Company.

23. Sub-section sixteen of section nineteen, relating to President and Directors, their election and duties; sub-section two of section twenty-four, relating to By-laws, Notices, &c., sub-sections five and 10 six of section twenty-eight, relating to General provisions, and section ninety-seven, relating to Railway Fund, of "*The Consolidated Railway Act, 1879*," shall not, nor shall any of them apply to the Canadian Pacific Railway or to the Company hereby incorporated.

24. The said Company shall afford all reasonable facilities to the Ontario Pacific Junction Railway Company, when their railway shall be completed to a point of junction with the Canadian Pacific Railway; and to the Canada Central Railway Company, for the receiving, forwarding and delivering of traffic upon and from the railways of the said Companies, respectively, and for the return of carriages, trucks 20 and other vehicles; and no one of the said Companies shall give or continue any preference or advantage to, or in favor of either of the others, or of any particular description of traffic, in any respect whatsoever; nor shall any one of the said Companies subject any other thereof, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever; and any one of the said Companies which shall have any terminus or station near any terminus or station of either of the others, shall afford all reasonable facilities for receiving and forwarding all the traffic arriving by either of the others, without any unreasonable delay, and without any preference or advantage, or 30 prejudice or disadvantage, and so that no obstruction may be offered in the using of such railway as a continuous line of communication, and so that all reasonable accommodation may at all times, by the means aforesaid, be mutually afforded by and to the said several railway companies; and the said Canadian Pacific Railway Company shall receive and carry all freight and passenger traffic shipped to or from any point on the railway of either of the said above named railway companies passing over the Canadian Pacific Railway or any part thereof, at the same mileage rate and subject to the same charges for similar services, without granting or allowing any preference or 40 advantage to the traffic coming from or going upon one of such railways over such traffic coming from or going upon the other of them, reserving, however, to the said Canadian Pacific Railway Company the right of making special rates for purchasers of land, or for emigrants or intending emigrants, which special rates shall not govern or affect the rates of passenger traffic as between the said Company and the said two above named Companies or either of them. And

any agreement made between any two of the said companies contrary to the foregoing provisions, shall be unlawful, null and void.

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25. The Company, under the authority of a special general meeting of the shareholders thereof, and as an extension of the railway hereby authorized to be constructed, may purchase or acquire by lease or otherwise, and hold and operate, the Canada Central Railway, or may amalgamate therewith, and may purchase or acquire by lease or otherwise and hold and operate a line or lines of railway from the city of Ottawa to any point at navigable water on the Atlantic sea-board or to any intermediate point, or may acquire running powers over any railway now constructed between Ottawa and any such point or intermediate point. And the Company may purchase or acquire any such railway subject to such existing mortgages, charges or liens thereon as shall be agreed upon, and shall possess with regard to any lines of railway so purchased, or acquired, and becoming the property of the Company, the same powers as to the issue of bonds thereon, or on any of them, to an amount not exceeding twenty thousand dollars per mile, and as to the security for such bonds, as are conferred upon the Company by the twenty-eighth section hereof, in respect of bonds to be issued upon the Canadian Pacific Railway. But such issue of bonds shall not affect the right of any holder of mortgages or other charges already existing upon any line of railway so purchased or acquired; and the amount of bonds hereby authorized to be issued upon such line of railway shall be diminished by the amount of such existing mortgages or charges thereon.

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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 vessels for cargo and passengers upon any navigable water, which the Canadian Pacific Railway may reach or connect with.

BY-LAWS

27. The by-laws of the Company may provide for the remuneration of the president and directors of the Company, and of any executive committee of such directors; and for the transfer of stock and shares; the registration and inscription of stock, shares, and bonds, and the transfer of registered bonds; and the payment of dividends and interest at any place or places within or beyond the limits of Canada; and for all other matters required by the said contract or by this Act to be regulated by by-laws: but the by-laws of the Company made as provided by law shall in no case have any force or effect after the next general meeting of shareholders, which shall be held after

the passage of such by-laws, unless they are approved by such meeting.

BONDS

28. The Company, under the authority of a special general meeting of the shareholders called for the purpose, may issue mortgage bonds to the extent of ten thousand dollars per mile of the Canadian Pacific Railway for the purposes of the undertaking authorized by the present Charter; which issue shall constitute a first mortgage and privilege upon the said railway, constructed or acquired, and to be
10 thereafter constructed, or acquired, and upon its property, real and personal, acquired and to be thereafter acquired including rolling stock, and plant, and upon its tolls and revenues (after deduction from such tolls and revenues of working expenses), and upon the franchises of the Company; the whole as shall be declared and described as so mortgaged in any deed of mortgage as hereinafter provided. Provided always, however, that if the Company shall have issued, or shall intend to issue land grant bonds under the provisions of the thirtieth section hereof, the lands granted and to be granted by Us to the Company may be excluded from the operation of such
20 mortgage and privilege: and provided also that such mortgage and privilege shall not attach upon any property which the Company are hereby, or by the said contract, authorized to acquire or receive from Us until the same shall have been conveyed by Us to the Company, attach upon such property, if so declared in such deed, but shall as soon as the same shall be conveyed to the Company. And such mortgage and privilege may be evidenced by a deed or deeds of mortgage executed by the Company, with the authority of its shareholders expressed by a resolution passed at such special general meeting; and any such deed may contain such description of the property
30 mortgaged by such deed, and such conditions respecting the payment of the bonds secured thereby and of the interest thereon, and the remedies which shall be enjoyed by the holders of such bonds or by any trustee or trustees for them in default of such payment, and the enforcement of such remedies, and may provide for such forfeitures and penalties, in default of such payment, as may be approved by such meeting; and may also contain, with the approval aforesaid, authority to the trustee or trustees, upon such default, as one of such remedies, to take possession of the railway and property mortgaged, and to hold and run the same for the benefit of the bondholders thereof
40 for a time to be limited by such deed, or to sell the said railway and property, after such delay, and upon such terms and conditions as may be stated in such deed; and with like approval any such deed may contain provisions to the effect that upon such default and upon such other conditions as shall be described in such deed, the right of voting possessed by the shareholders of the Company, and by the holders of preferred stock therein, or by either of them, shall cease

and determine, and shall thereafter appertain to the bondholders, or to them and to the holders of the whole or of any part of the preferred stock of the Company, as shall be declared by such deed; and such deed may also provide for the conditional or absolute cancellation after such sale of any or all of the shares so deprived of voting power, or of any or all of the preferred stock of the company, or both; and may also, either directly by its terms, or indirectly by reference to the by-laws of the Company, provide for the mode of enforcing and exercising the powers and authority to be conferred and defined by

10 such deed, under the provisions hereof. And such deed, and the provisions thereof made under the authority hereof, and such other provisions thereof as shall purport (with like approval) to grant such further and other powers and privileges to such trustee or trustees and to such bondholders, as are not contrary to law or to the provisions of this Charter, shall be valid and binding. But if any change in the ownership or possession of the said Railway and property shall at any time take place under the provisions hereof, or of any such deed, or in any other manner, the said Railway and property shall continue to be held and operated under the provisions hereof, and of

20 "*The Consolidated Railway Act, 1879*," as hereby modified. And if the Company does not avail itself of the power of issuing bonds secured upon the land grant alone as hereinafter provided, the issue of bonds hereby authorized may be increased to any amount not exceeding twenty thousand dollars per mile of the said Canadian Pacific Railway.

29. If any bond issue be made by the Company under the last preceding section before the said railway is completed according to the said Contract, a proportion of the proceeds of such bonds, or a proportion of such bonds if they be not sold, corresponding to the proportion of the work contracted for then remaining incomplete,

30 shall be received by Us, and shall be held, dealt with and, from time to time, paid over by Us to the Company upon the same conditions, in the same manner and according to the same proportions as the proceeds of the bonds, the issue of which is contemplated by sub-section *d.* of Clause 9 of the said Contract, and by the thirty-first section hereof.

30. The Company may also issue mortgage bonds to the extent of twenty-five million dollars on the lands granted in aid of the said railway and of the undertaking authorized by this Charter; such

40 issue to be made only upon similar authority to that required by this Charter for the issue of bonds upon the railway; and when so made such bonds shall constitute a first mortgage upon such lands, and shall attach upon them when they shall be granted, if they are not actually granted at the time of the issue of such bonds. And such mortgage may be evidenced by a deed or deeds of mortgage to be executed under like authority to the deed securing the issue of bonds on the

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Exhibits

No. 1
Letters Patent
of Incorporation
of Canadian
Pacific Railway
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February 16, 1881.
(Continued)

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Exhibits

No. 1
Letters Patent
of Incorporation
of Canadian
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February 16, 1881.
(Continued)

railway; and such deed or deeds under like authority may contain similar conditions and may confer upon the trustee or trustees named thereunder and upon the holders of the bonds secured thereby, remedies, authority, power and privileges and may provide for forfeitures and penalties, similar to those which may be inserted and provided for under the provisions of this Charter in any deed securing the issue of bonds on the railway, together with such other provisions and conditions not inconsistent with law or with this Charter as shall be so authorized. And such bonds may be styled Land Grant Bonds,
10 and they and the proceeds thereof shall be dealt with in the manner provided in the said Contract.

31. The Company may in the place and stead of the said land grant bonds, issue bonds under the twenty-eighth section hereof, to such amount as they shall agree with Us to issue, with the interest guaranteed by Us as provided for in the said contract; such bonds to constitute a mortgage upon the property of the Company and its franchises acquired and to be thereafter acquired—including the main line of the Canadian Pacific Railway, and the branches thereof hereinbefore described, with the plant and rolling stock thereof ac-
20 quired and to be thereafter acquired, but exclusive of such other branches thereof and of such personal property as shall be excluded by the deed of mortgage to be executed as security for such issue. And the provisions of the said twenty-eighth section shall apply to such issue of bonds, and to the security which may be given for the payment thereof, and they and the proceeds thereof shall be dealt with as hereby and by the said contract provided.

32. It shall not be necessary to affix the seal of the Company to any mortgage bond issued under the authority of this Act; and every such bond issued without such seal shall have the same force and
30 effect, and be held, treated and dealt with by all courts of law and of equity as if it were sealed with the seal of the company. And if it is provided by the mortgage deed executed to secure the issue of any bonds, that any of the signatures to such bonds or to the coupons thereto appended may be engraved, stamped or lithographed thereon, such engraved, stamped or lithographed signatures shall be valid and binding on the Company.

33. The phrase "working expenses" shall mean and include all expenses of maintenance of the railway, and of the stations, buildings, works and conveniences belonging thereto, and of the rolling and other
40 stock and moveable plant used in the working thereof, and also all such tolls, rents or annual sums as may be paid in respect of the hire of engines, carriages or waggons let to the Company; also, all rent, charges, or interest on the purchase money of lands belonging to the Company, purchased but not paid for, or not fully paid for; and also all expenses of and incidental to working the railway and the traffic

thereon, including stores and consumable articles; also rates, taxes, insurance and compensation for accidents or losses; also all salaries and wages of persons employed in and about the working of the railway and traffic, and all office and management expenses, including directors' fees, agency, legal and other like expenses.

34. The bonds authorized by this Charter to be issued upon the railway or upon the lands to be granted to the Company, or both, may be so issued in whole or in part of the denomination of dollars, pounds sterling, or francs, or in any or all of them, and the coupons
 10 may be for payment in denominations similar to those of the bond to which they are attached. And the whole or any of such bonds, may be pledged, negotiated or sold upon such conditions and at such price as the Board of Directors shall from time to time determine. And provision may be made by the by-laws of the Company, that after the issue of any bond, the same may be surrendered to the Company by the holder thereof, and the Company may, in exchange therefor, issue to such holder inscribed stock of the Company, which inscribed stock may be registered or inscribed at the chief place of business of the Company or elsewhere, in such manner, with such rights, liens,
 20 privileges and preferences, at such place, and upon such conditions, as shall be provided by the by-laws of the Company.

35. It shall not be necessary, in order to preserve the priority, lien, charge, mortgage or privilege, purporting to appertain to or be created by any bond issued or mortgage deed executed under the provisions of this Charter, that such bond or deed should be en-registered in any manner, or in any place whatever. But every such mortgage deed shall be deposited in the office of our Secretary of State of Canada, of which deposit notice shall be given in the *Canada Gazette*. And in like manner any agreement entered into by the Com-
 30 pany, under section thirty-six of this Charter, shall also be deposited in the said office. And a copy of any such mortgage deed or agreement, certified to be a true copy by our said Secretary of State or his Under-Secretary or Deputy, shall be received as *prima facie* evidence of the original in all courts of justice, without proof of the signatures or seal upon such original.

36. If, at any time, any agreement be made by the Company with any persons intending to become bondholders of the Company, or be contained in any mortgage deed executed under the authority of this Charter, restricting the issue of bonds by the Company, under the
 40 powers conferred by this Charter, or defining or limiting the mode of exercising such powers, the Company, after the deposit thereof with our said Secretary of State as hereinbefore provided, shall not act upon such powers otherwise than as defined, restricted and limited by such agreement. And no bond thereafter issued by the Company, and no order, resolution, or proceeding thereafter made, passed or had

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No. 1
 Letters Patent
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 February 16, 1881.
 (Continued)

by the Company, or by the Board of Directors, contrary to the terms of such agreement, shall be valid or effectual.

37. The Company may, from time to time, issue guaranteed or preferred stock, at such price, to such amount, not exceeding ten thousand dollars per mile, and upon such conditions as to the preferences and privileges appertaining thereto, or to different issues or classes thereof, and otherwise, as shall be authorized by the majority in value of the shareholders present in person or represented by proxy at any annual meeting or at any special general meeting thereof called 10 for the purpose,—notice of the intention to propose such issue at such meeting being given in the notice calling such meeting. But the guarantee or preference accorded to such stock shall not interfere with the lien, mortgage and privilege attaching to bonds issued under the authority of this Act. And the holders of such preferred stock shall have such power of voting at meetings of shareholders, as shall be conferred upon them by the by-laws of the Company.

EXECUTION OF AGREEMENTS

38. Every contract, agreement, engagement, scrip certificate or bargain made, and every bill of exchange drawn, accepted or endorsed, 20 and every promissory note and cheque made, drawn or endorsed on behalf of the Company, by any agent, officer or servant of the Company, in general accordance with his powers as such under the by-laws of the Company, shall be binding upon the Company; and in no case shall it be necessary to have the seal of the Company affixed to any such bill, note, cheque, contract, agreement, engagement, bargain, or scrip certificate, or to prove that the same was made, drawn, accepted or endorsed, as the case may be, in pursuance of any by-law or special vote or order; nor shall the party so acting as agent, officer or servant of the Company be subjected individually to any 30 liability, whatsoever, to any third party therefor; Provided always, that nothing in this Charter shall be construed to authorize the Company to issue any note payable to the bearer thereof, or any promissory note intended to be circulated as money, or as the note of a bank, or to engage in the business of banking or insurance.

GENERAL PROVISIONS

39. The Company shall, from time to time, furnish such reports of the progress of the work, with such details and plans of the work, as our Governor-General in Council may require.

40. As respects places not within any Province, any notice required 40 by "*The Consolidated Railway Act, 1879*," to be given in the "Official Gazette" of a Province, may be given in the *Canada Gazette*.

41. Deeds and conveyances of lands to the Company for the purposes of this Charter, (not being letters patent from Us) may, in so

far as circumstances will admit, be in the form following, that is to say:—

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“Know all men by these presents, that I, A. B., in consideration of paid to me by the Canadian Pacific Railway Company, the receipt whereof is hereby acknowledged, grant, bargain, sell and convey unto the said The Canadian Pacific Railway Company, their successors and assigns, all that tract or parcel of land (*describe the land*) to have and to hold the said land and premises unto the said Company, their successors and assigns for ever.

No. 1
Letters Patent
of Incorporation
of Canadian
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February 16, 1881.
(Continued)

10 “Witness my hand and seal, this day of one
thousand eight hundred and

“Signed, sealed and delivered } A.B. [L.S.]
in presence of

“C.D.”
“E.F.”

or in any other form to the like effect. And every deed made in accordance herewith shall be held and construed to impose upon the vendor executing the same the obligation of guaranteeing the Company and its assigns against all dower and claim for dower and against all
20 hypothecs and mortgages and against all liens and charges whatsoever and also that he has a good, valid and transferable title thereto.

In testimony whereof we have caused these our letters to be made patent and the great seal of Canada to be hereunto affixed.

Witness: Our Right Trusty and Well Beloved Councillor, Sir John Douglas Sutherland Campbell, (commonly called the Marquis of Lorne), Knight of Our Most Ancient and Most Noble Order of the Thistle, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Governor General of Canada, and Vice-Admiral of the same, at Our Government House, in our city of
30 Ottawa, this sixteenth day of February in the year of our Lord one thousand eight hundred and eighty-one and in the forty-fourth year of our reign.

By Command,

“John O’Connor,”

Secretary of State.

Exhibit No. 40

DEFENDANT'S DOCUMENT

Order-in-Council P.C. 1165

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 6th August, 1881.

P.C. 1165

On a memorandum dated 2nd August, 1881, from the Honourable the Minister of Railways and Canals representing that the line of the
10 Canadian Pacific Railway between Winnipeg and Portage la Prairie as constructed by the Government extends from the City of Winnipeg in a northerly direction to near Stonewall, thence westwards to Ossawa thence Southward to Portage la Prairie a distance of about 70 miles.

That the Canadian Pacific Railway Company have by a letter dated the 2nd of June last applied for assent to a proposed relocation of this portion of the line, submitting a plan showing the location as desired, according to which plan the line commences at a point on the present line about one mile west of Winnipeg and takes a generally
20 westerly course running nearly parallel with the Assiniboine River and at a distance from it of from 3 to 4 miles, it then gradually approaches the river, and is close to it for the greater portion of the remaining distance to Portage la Prairie, the total length being about 53½ miles a considerable saving in distance being gained in comparison of the present line.

That by the 13th Section of the contract made with the Company dated the 21st day of October, 1880, confirmed by Act of Parliament on the 15th of February, 1881, they have the right, subject to the approval of the Governor General in Council, to lay out and con-
30 struct the line as they may see fit between certain terminal points, of which Selkirk, Yellow-Head Pass and Kamloops are named, the intermediate distance being undefined.

The Minister while deferring for future consideration the question of the adoption of the entire relocation asked for, advises that the approval of His Excellency the Governor General as required by the contract be given to the relocation of the portion of the line between Portage la Prairie and a certain point in Range 4 Township 13, Sections 13 or 14 shown on the plan submitted by the Company and attached to the Ministers Memorandum, the report of the Chief
40 Engineer showing no objections to exist to such location the alignment being direct and the grades light.

The Committee recommend that the above proposed relocation be approved accordingly.

"A. M. HILL,"
Asst. Clerk of the Privy Council

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No. 40
Order-in-Council
P.C. 1165.
August 6, 1881.
(Continued)

Exhibit No. 41

DEFENDANT'S DOCUMENT

Order-in-Council P.C. 1227

No. 41
Order-in-Council
P.C. 1227.
August 25, 1881.

10 Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 25th August, 1881.

P.C. 1227

On a memorandum dated 18th August 1881, from the Honorable the Acting Minister of Railways and Canals, stating that, whereas by an Order-in-Council passed on the 6th instant authority was given, in accordance with the provisions of the contract held by the Canadian Pacific Railway Company, for the location of a portion of that line extending Eastwards from Portage la Prairie to a point in Range IV, Township 13, Section 13 or 14, he recommends that the approval of His Excellency the Governor General in Council be now given to
20 a further direct extension of the line from the point named in Range IV, Township 13, Section 13 or 14, to a point of junction with the existing line of railway.

The Committee submit the foregoing recommendation for approval.

"A. M. HILL,"
Asst. Clerk of the Privy Council

Exhibit No. 2

PLAINTIFF'S DOCUMENT

City of Winnipeg By-law No. 148

No. 2
City of Winnipeg
By-law No. 148.
September 5, 1881.

30 A By-law to aid and assist the Canadian Pacific Railway Company in consideration of certain undertakings on the part of the said Company.

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

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No. 2
City of Winnipeg
By-law No. 148.
September 5, 1881.
(Continued)

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

And Whereas it is also desirable to secure the location of the Workshops and Stockyards of the said Company for the Province of Manitoba in the City of Winnipeg as a central point on the Main line of the Canadian Pacific Railway, and the several branches thereof, and the said Company have agreed to construct a railway South, and Southwesterly as aforesaid at the time and in manner as 10 in this By-Law hereinafter mentioned, and have agreed to establish and continue their principal Workshops and Stockyards for the province of Manitoba in the City of Winnipeg aforesaid.

And Whereas it is expedient for the City of Winnipeg to lend their aid to the said Company in consideration of the premises, upon the terms hereinafter mentioned, by granting them by way of bonus, debentures of the City of Winnipeg to the amount of two hundred thousand dollars payable in twenty years from the day this by-law takes effect, with interest at six per centum per annum payable half 20 yearly, and by exempting the property now owned or hereafter to be owned by the said Railway Company for Railway purposes within the City of Winnipeg from taxation forever, and by conveying to the said Company lands sufficient and suitable for a passenger Station within the said City of Winnipeg.

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

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

And Whereas, it will require an annual special rate of Four and 30 four tenths Mills in the dollar, over and above all other rates and assessments for paying the interest, and providing an equal yearly sinking fund for redeeming and paying off the principal of the debt thereby to be created.

Now Therefore The Mayor and Council, of the City of Winnipeg enacts as follows:

(1) For the purposes aforesaid it shall be lawful for the mayor and Council of the City of Winnipeg, to issue debentures of the Mayor and Council of the City of Winnipeg, for the sum of Two hundred thousand dollars of lawful money of Canada, in denominations of not 40 less than One hundred dollars each, payable to the Canadian Pacific Railway Company or bearer, on the Twentieth day of September, one thousand, nine hundred and one, bearing interest in the meantime at six per centum per annum, payable half-yearly, on the Twentieth

day of March and September in each and every year, with coupons attached to each debenture to represent the respective half yearly payments of interest.

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No. 2
City of Winnipeg
By-law No. 148.
September 5, 1881.
(Continued)

(2) For paying the interest as aforesaid and creating an equal yearly sinking fund for redeeming and paying off the principal of the said debentures so to be issued as aforesaid, at the maturity thereof a special rate of Four and four tenths Mills in the dollar on the whole rateable property in the said City of Winnipeg, shall be rated and levied in each year during the currency of the said debentures, in 10 addition to all other rates and Assessments whatsoever.

(3) The said debentures shall be issued forthwith upon the ratification of this By-Law in accordance with the provisions of the Statutes of this Province in that behalf, and after issued shall be, by the Mayor and council of the City of Winnipeg, within one Month thereafter delivered to—The Manager for the time being of the Winnipeg Branch of the Merchants Bank of Canada, upon the following trusts, that is to say, upon trust that the said The Manager for the time being of the Winnipeg Branch of the Merchants Bank of Canada, shall hold the said debentures, and every of them until the 20 said Canadian Pacific Railway Company shall have performed the conditions and each and every of them hereinafter specified and stipulated to be performed by them, and to collect and to hold the half yearly interest maturing on the said debentures (retaining thereout as Commission One half of one per cent upon the amount so collected) and to deposit the balance so collected in some Chartered Bank doing business in the City of Winnipeg to his credit as such trustee at interest if possible, and upon the completion of the conditions by the Canadian Pacific Railway Company hereinafter mentioned, upon the further trust to pay over the monies so deposited, 30 and any accumulations of interest thereon, and also deliver over the said debentures with coupons attached (except such as may have been paid) to the Canadian Pacific Railway Company.

(4) The conditions herein before referred to, are as follows:

1. The said Canadian Pacific Railway Company, shall on or before the first day of November, one thousand, eight hundred and Eighty-two, commencing within the City of Winnipeg, construct and complete and fully equip one hundred miles of the railway running South Westerly towards the Westerly Limit of the Province, upon a course starting within the said City of Winnipeg, crossing the Assini- 40 boine River, running within the limits of Townships, Nine, eight, seven, six and five in Range One East of the Principal Meridian; Townships five and four in Range One West of the Principal Meridian; Township four in Range two west of the Principal Meridian; Townships four and three in Range three West of the Principal Meridian; and Townships three in Ranges four, five, six, seven and eight, west

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No. 2
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By-law No. 148.
September 5, 1881.
(Continued)

of the Principal Meridian, (all according to the Dominion Government Survey of the Province of Manitoba) or within a distance of six miles upon either side of a line which may be drawn through the said townships to the extent of the said One hundred miles in the direction above described.

2. The Canadian Pacific Railway Company, shall on or before the first day of November, one thousand eight hundred and eighty two, build, construct and complete, within the City of Winnipeg on lots four and five in Block One; Eleven and twelve on the east side of
10 Austin Street; and forty four and forty five on the west side of Maple Street—east of the Main Street, on the Point Douglas common property, as laid down on a Map or Plan of said City, registered in the Registry Office in and for the County of Selkirk (which are to be conveyed to the said Company on or immediately after the ratification of this by-law, as aforesaid, by the Mayor and Council of the City of Winnipeg, for that purpose) a substantial and commodious general passenger railway depot, with all the modern improvements for the accommodation and convenience of the public at large and the business of the said Company.
- 20 3. The said Canadian Pacific Railway Company, shall immediately after the ratification of this By-Law as aforesaid, make, execute and deliver to the Mayor and Council of the City of Winnipeg a Bond and Covenant under their Corporate Seal, that the said Company shall with all convenient and reasonable dispatch establish and build within the limits of the City of Winnipeg, their principal workshops for the Mainline of the Canadian Pacific Railway within the Province of Manitoba, and the branches thereof radiating from Winnipeg, within the limits of the said Province, and for ever continue the same within the said City of Winnipeg.
- 30 4. And by such bond and covenant the said Company shall bind themselves as soon as they conveniently can to procure and erect within the City of Winnipeg, large and commodious stock or Cattle Yards, suitable and appropriate for the central business of their Main line of railway and the several branches thereof.
5. If the said Company shall make default in any of the conditions herein mentioned to be by them performed the said Trustee shall thereupon, and in any such case deliver all the said Bonds with the Coupons attached, not paid, and all the monies in his hands, by virtue of the trust hereby created, to the Mayor and Council of the
40 City of Winnipeg.
6. The Mayor and Council of the City of Winnipeg, are hereby authorized and empowered upon the said Company making, executing and delivering, to the Mayor and Council of the City of Winnipeg, the bond and covenant in the third Subsection of the fourth Section

of these presents, mentioned, to make, seal and deliver to the said Company a deed of the lands, upon which the passenger Station in the Second Sub-section of the Fourth Section of these presents mentioned, is to be erected.

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No. 2
City of Winnipeg
By-law No. 148.
September 5, 1881.
(Continued)

7. Should any differences or disputes arise between the Mayor and Council of the City of Winnipeg, and the Canadian Pacific Railway Company, in respect of any matter or thing, concerning the terms of this By-Law, or the terms, or conditions thereof, the same shall from time to time be submitted to the arbitrament of three
10 persons, one to be chosen by the Mayor and Council of the City of Winnipeg, one to be chosen by the said Canadian Pacific Railway Company, and one to be appointed on application of either party, and on reasonable notice to the other party, by the Chief Justice of Manitoba, and the award of a Majority of such Arbitrators of and concerning the premises submitted to them, shall be final and binding upon both parties, and the same may be made a rule of court.

8. Upon the fulfilment by the said Company of the conditions and stipulations herein-mentioned, by the said Canadian Pacific Railway Company all property now owned, or that hereafter may be
20 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.

9. That this By-Law shall take effect from and after the twenty first day of September in the present year of our Lord, one thousand eight hundred and eighty one.

Done and Passed in Council at the City of Winnipeg this Fifth day of September in the year of our Lord, one thousand eight hundred and eighty one.

30

(City of Winnipeg Seal)

(Sgd.) E. G. Conklin,
Mayor

(Sgd.) A. M. Brown
City Clerk

City Clerk's Office,
Winnipeg Sept. 2/48

Certified True Copy

"G. L. Gardner"
Acting City Clerk

Exhibit No. 6

PLAINTIFF'S DOCUMENT

Bond and Covenant of the Plaintiff

THIS INDENTURE made and executed at Montreal in the province of Quebec, by the CANADIAN PACIFIC RAILWAY COMPANY

WITNESSES:

- That Whereas by a by-law numbered One hundred and forty-eight of the by-laws of the Corporation of the City of Winnipeg duly
10 made and passed by the Mayor and Council of the said City, on the fifth day of September last past, after having been submitted to, and approved by the Electors of the City of Winnipeg, on Wednesday, the twenty-fourth day of August last past, the Corporation of the said City of Winnipeg agreed to grant aid to the said Canadian Pacific Railway Company to the extent of Two hundred thousand Dollars upon the terms mentioned in the said By-law, and, authorised the Mayor and Council of the said City of Winnipeg to issue the Debentures of the said Mayor and Council for the sum of Two
20 hundred thousand Dollars payable to the said Company or Bearer, on the twentieth day of September, Nineteen hundred and one, with interest at Six per centum per annum payable half-yearly; the whole in the manner more particularly set forth in the said By-law; and it was also thereby enacted and provided, that upon the fulfilment by the said Company of the Conditions and stipulations contained in the said By-law, all property then owned by the said Company, or that thereafter should be owned by them within the limits of the said City of Winnipeg for Railway purposes or in connection therewith, should be for ever free and exempt from all municipal taxes, rates and levies and assessments of every nature and kind.
- 30 . And Whereas it was in and by the said By-Law further stipulated that the said Canadian Pacific Railway Company should immediately after the ratification of the said By-Law make, execute and deliver to the Mayor and Council of the said City of Winnipeg a bond and covenant under their Corporate seal, that the said Company would, 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
40 within the said City of Winnipeg: And that by such bond and covenant the said Company should bind themselves, as soon, as they conveniently could, to procure and erect within the City of Winnipeg, large and commodious stock or cattle yards, suitable and appropriate

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No. 42
Order-in-Council
P.C. 1458.
November 19, 1881.

Exhibit No. 42

DEFENDANT'S DOCUMENT

Order-in-Council P.C. 1458

P.C. 1458

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 19th November, 1881.

On a Report dated 27th October, 1881 from the Minister of Railways and Canals, representing that by two Orders-in-Council of the 10 6th and 25th of August last, authority was given for the location of the Canadian Pacific Railway from Portage la Prairie eastwards to a point of junction with the existing line of Railway. That the application of the Company dated the 2nd of June which resulted in the two Orders mentioned had been for approval of a line of location shown on a plan then submitted, by which the main line of the railway from Winnipeg west to Portage la Prairie was relocated bringing it nearer the River Assiniboine.

That by a letter dated the 27th instant the Company have applied for approval of the line westwards from Winnipeg shown on the plan 20 submitted on the 2nd of June, the course of such line extending to a point of junction with the line authorized by the Orders-in-Council above cited, about twelve (12) miles east of Portage la Prairie, the Company in such letter offering to continue to operate the present line to Stonewall as a branch of the Railway.

That under date the 27th instant the Chief Engineer has reported that as the City of Winnipeg is likely to be a great centre of trade, and it being also designed to establish the general workshops of the railway at that point and assuming that the City is intended to be on the main line of the railway, it would be greatly to the advantage of 30 the traffic both through and local to have the location as direct as possible.

That the line now proposed not only passes over a comparatively dry country with old settlements all the way but is also about 15 miles shorter than the existing line.

The Chief Engineer advises, therefore, that the location, approval of which is now sought, between Winnipeg and the point shown on the plan and described as south of Meadow Lea be adopted as part of the main line—it being provided that the Company continue to operate the line between Winnipeg and Stonewall as a branch.

40 The Minister concurs in the view of the Chief Engineer and recommends that the necessary approval be granted.

The Committee submit the above recommendation for Your Excellency's approval, the Minister of Justice having reported that in his opinion there is no legal objection to the approval of the Governor in Council being given to the location of the line as recommended by the Minister of Railways and Canals. The Committee recommend, however, upon the report of the Minister of Justice that it be made a condition of the approval that the Company enter into an agreement with the Crown binding themselves to operate the line between Winnipeg and Stonewall as a branch, the draft of such agreement to be 10 approved of by the Governor in Council before execution.

The Committee further recommend upon the same report that as claims may be made against the Government by those persons who may have purchased land along the line of Railway as at first located by reason of the change in the line, it be made a condition of the approval that all such claims be dealt with by the Company and settled upon equitable principles, and be referred to the Government for decision in case the Company and the parties fail to agree with respect to the settlement, and that the draft of the agreement embodying this condition be also approved of by the Governor in Council before 20 execution.

"A. M. HILL,"
Asst. Clerk to the Privy Council.

Exhibit No. 8

PLAINTIFF'S DOCUMENT

**Deed of Lands for Station Ground from the Defendant
to the Plaintiff**

THIS INDENTURE made in duplicate this Eighteenth day of April in the year of Our Lord one thousand eight hundred and eighty-two. In Pursuance of the Act respecting Short Forms of 30 Indentures:

BETWEEN:

THE MAYOR AND COUNCIL of the City of Winnipeg
of the FIRST PART,
and

THE CANADIAN PACIFIC RAILWAY COMPANY,
of the SECOND PART,

Whereas by a By-law of the City of Winnipeg numbered One hundred and forty-eight and passed on the fifth day of September one

Record
Exhibits

No. 42
Order-in-Council
P.C. 1458.
November 19, 1881.
(Continued)

No. 8
Deed of Lands
for Station Ground
from the Defendant
to the Plaintiff.
April 18, 1882.

Record
Exhibits

No. 8
Deed of Lands
for Station Ground
from the Defendant
to the Plaintiff.
April 18, 1882.
(Continued)

thousand eight hundred and eighty-one it was among other things enacted that "The Mayor and Council" of the City of Winnipeg are hereby authorized and empowered upon the said Company making execution and delivering to the Mayor and Council of the City of Winnipeg the Bond and Covenant in the Third Subsection of the Fourth Section of These Presents mentioned to make Seal and deliver to the said Company a deed of the lands upon which the passenger station in the second Sub-section of the Fourth Section of these presents mentioned is to be erected.

10 And Whereas the said Bond has been by the said Company made executed and delivered as required in the said By-law mentioned.

And Whereas by a By-law duly passed in Council at the City of Winnipeg and dated the fifth day of September, A.D. 1881 it was enacted that, that part of Austin Street hereinafter more particularly described should be granted to the said parties of the second part and the Mayor and City Clerk were thereby and therein instructed to execute a Conveyance for further assuring the said lands and premises to the said parties of the second part.

Now Therefore this Indenture Witnesseth that in consideration of
20 the premises and of the sum of One Dollar of lawful money of Canada now paid by the said Parties of the Second Part to the said Parties of the first part (the receipt whereof is hereby by them acknowledged) they the said parties of the first part do grant unto the said parties of the second part their successors and assigns forever.

All and Singular those certain Parcels or Tracts of Land and Premises situate, lying and being in the City of Winnipeg in the County of Selkirk and Province of Manitoba being composed of all that portion of Austin Street lying between Lots numbered Four and Five in Block One and Eleven and Twelve on the East side of
30 Austin Street and also the whole of said Lots Four and Five in Block One and Eleven and Twelve on the East side of Austin Street and Forty-Four and Forty-Five on the West side of Maple Street all on the East side of Main Street on the Point Douglas Common property according to a subdivision of part of Lot number Thirty-Five in the Parish of St. John as laid down on the map or Plan of said City registered in the Registry Office in and for the County of Selkirk.

To Have And To Hold unto the said parties of the second part their successors and assigns to and for their sole and only use forever
40 Subject Nevertheless to the reservations, limitations, provisoes and conditions expressed in the Original Grant thereof from the Crown.

The said parties of the first part Covenant with the said parties of the second part that they have the right to convey the said lands

to the said parties of the second part notwithstanding any act of the said parties of the first part.

Record
Exhibits

And the said parties of the second part shall have quiet possession of the said lands free from all incumbrances.

No. 8
Deed of Lands
for Station Ground
from the Defendant
to the Plaintiff.
April 18, 1882.
(Continued)

And the said parties of the first part Covenant with the said parties of the second part That they will execute such further assurances of the said lands as may be requisite.

And the said parties of the first part Covenant with the said parties of the second part that they have done no act to incumber the said 10 lands.

And the said parties of the first part Release to the said parties of the second part All Their Claims upon the said lands.

In Witness Whereof the Mayor and Clerk of the City of Winnipeg have hereunto set their hands and affixed the Corporate Seal of the said City of Winnipeg.

Signed, Sealed and Delivered
in Presence of

“Alexander Logan,”
Mayor

“E. M. Wood”
(City of Winnipeg Seal)

“C. J. Brown,”
City Clerk (pro tem)

20

Exhibit No. 4

PLAINTIFF'S DOCUMENT

City of Winnipeg By-law No. 198

No. 4
City of Winnipeg
By-law No. 198.
September 20, 1882.

A By-law to fix the polling places, the time, and to appoint Returning Officers for taking the votes of the Electors Freeholders of the City of Winnipeg on the proposed By-Law Number 195 amending By-Law Number 148 Granting a Bonus of Two Hundred Thousand Dollars to the Canadian Pacific Railway Company.

30 Whereas the Mayor and Council of the City of Winnipeg on the fifth day of September A.D. 1881 did by By-Law Number one hundred and forty eight grant to the Canadian Pacific Railway Company a bonus of Two hundred thousand dollars in debentures of the said City payable in twenty years after the passing of said By-Law, in consideration of certain premises and undertakings which were to be performed by the said Canadian Pacific Railway Company.

And Whereas the said By-Law number one hundred and forty

Record
Exhibits

No. 4
City of Winnipeg
By-law No. 198.
September 20, 1882.
(Continued)

eight was submitted to the Electors Freeholders of the said City of Winnipeg for their approval and was voted on by the said electors on the 24th day of August A.D. 1881 and the result of said submission was a vote of one hundred and twenty nine in favor of said grant and of one against the same.

And Whereas the said Canadian Pacific Railway Company have, through their Solicitor made application to the said The Mayor and Council of the City of Winnipeg for an amendment to the said By-Law number one hundred and forty eight extending the time fixed 10 by said By-Law for the completion of certain works and miles of railway as set forth in said By-Law.

And Whereas it is deemed expedient by the said Mayor and Council to grant to the said Canadian Pacific Railway Company the said application.

And Whereas it is necessary to submit the amendment to said By-Law Number 148 to the Electors Freeholders of the said City of Winnipeg for their approval and consent. And it is further necessary for the said The Mayor and Council of the City of Winnipeg by By-Law to fix the polling places, the time and to appoint Returning 20 Officers for taking the votes of the said Electors Freeholders of said City on the said By-Law Number one hundred and ninety five amending said By-Law number one hundred and forty eight as aforesaid.

Therefore the Mayor and Council of the City of Winnipeg in Council assembled enacts as follows:

1. That Thursday the twenty sixth day of October next, ensuing at the hour of nine o'clock in the forenoon shall be the day and hour fixed by this By-Law for taking the votes of the Electors Freeholders of the City of Winnipeg on the proposed By-Law number one hundred and ninety five amending By-Law number one hundred and 30 forty eight of the City of Winnipeg submitted to the vote and approval of the said Electors Freeholders on the twenty fourth day of August, A.D. 1881 and by them voted on and approved of and passed by the said the Mayor and Council on the fifth day of September A.D. 1881.

2. The following shall be the polling places in the City of Winnipeg at which the said votes of said electors Freeholders shall be taken on the proposed By-Law number one hundred and ninety five namely

- Ward Number One: At the building in Fort Rouge known as the Town Hall or Council Chamber.
- 40 Ward Number Two: At the building known as the South Ward Schoolhouse.
- Ward Number Three: At the building known as the City Engineer's Office, Bannatyne Street.

- Ward Number Four: At the building known as the Council Chamber, City Hall.
- Ward Number Five: At the building known as the Dufferin School, Patrick Street.
- Ward Number Six: At the small building on Lot 32, East side of Main, North of Burrows Avenue.

Record
Exhibits

No. 4
City of Winnipeg
By-law No. 198.
September 20, 1882.
(Continued)

And the persons herein named shall be and they are hereby appointed Returning Officers to take the votes of the said Electors thereon, namely

- 10 In the Ward Number One — Thos. Waddell
- In the Ward Number Two — John Fay
- In the Ward Number Three — Colin F. Strang
- In the Ward Number Four — Harry Newell
- In the Ward Number Five — John Paik
- In the Ward Number Six — G. F. Munroe

Done and Passed in Council at the City of Winnipeg this twentieth day of September in the year of our Lord one thousand eight hundred and eighty two.

20 (City of Winnipeg Seal)

“Alex Logan,”
Mayor

“A. M. Brown,”
City Clerk

City Clerk's Office,
Winnipeg Feb. 24, 1949

Certified True Copy

“G. L. Gardner,”
City Clerk.

Exhibit No. 3

PLAINTIFF'S DOCUMENT

City of Winnipeg By-law No. 195

A By-Law to Amend By-Law No. 148

30

No. 3
City of Winnipeg
By-law No. 195.
October 30, 1882.

Whereas the Canadian Pacific Railway Company have asked to have the time fixed in By-Law No. 148 for the completion of certain works therein specified extended, and it is expedient to grant such request.

Therefore the Mayor and Council of the City of Winnipeg in Council assembled enacts as follows:

Record
Exhibits

No. 3
City of Winnipeg
By-law No. 195.
October 30, 1882.
(Continued)

That the said By-Law No. 148 is hereby amended by striking out the words "November one thousand eight hundred and eighty-two" in subsection one of section four of said By-Law, and substituting in lieu thereof the words "February, one thousand eight hundred and eighty-three" and by striking out the words "eighty-two" in subsection two of said section four, and substituting therefor the words "eighty-three," and also by adding to said By-Law No. 148, the following section, which shall be numbered as Section 10, of said By-Law, viz.:

- 10 "10. That notwithstanding anything in this By-Law contained, the coupons on each of the Debentures issued under this By-Law representing the first two half-yearly payments of interest be detached from said debentures and be delivered up to the Mayor and Council of the City of Winnipeg, and be cancelled."

And the said By-Law when so amended, shall read as follows:

By-Law No. 148

"A by-law to aid and assist the Canadian Pacific Railway Company in consideration of certain undertakings on the party of the said Company.

- 20 "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 advancing and developing the traffic and trade between the City of Winnipeg and the southern and south-western portions of the province.

- 30 "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 the 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.'

- 40 "And whereas it is expedient for the City of Winnipeg to lend their aid to the said Company in consideration of the premises upon the terms hereinafter mentioned by granting them by way of bonus debentures of the City of Winnipeg to the amount of two hundred thousand dollars, payable in twenty years from the day this by-law takes effect with interest at 6 per centum per annum, payable half-yearly, and by exempting the property now owned or hereafter to be

owned by the said Railway Company for railway purposes within the City of Winnipeg from taxation forever, and by conveying to the said Company lands sufficient and suitable for a passenger station within the said City of Winnipeg.

Record
Exhibits

No. 3
City of Winnipeg
By-law No. 195.
October 30, 1882.
(Continued)

“And whereas the amount of the whole rateable property of the City of Winnipeg according to the last revised assessment roll is four million, eight thousand, two hundred and ninety dollars.

“And whereas the total amount required to be raised annually for the paying of the said debentures and interest is seventeen thousand 10 dollars.

“And whereas it will require an annual special rate of four mills and four tenths of a mill in the dollar over and above all other rates and assessments for paying the interest and providing an equal yearly sinking fund for redeeming and paying off the principal of the debt thereby to be created.

“Now, therefore, the Mayor and Council of the City of Winnipeg enacts as follows:

“1. For the purposes aforesaid it shall be lawful for the Mayor and Council of the City of Winnipeg to issue debentures for the sum 20 of two hundred thousand dollars of lawful money of Canada in denominations of not less than one hundred dollars each payable to the Canadian Pacific Railway Company or bearer on the twentieth day of September, one thousand nine hundred and one, bearing interest in the meantime at six per centum per annum, payable half-yearly on the twentieth day of March and September in each and every year, with coupons attached to each debenture to represent the respective half-yearly payments of interest.

“2. For paying the interest as aforesaid and creating an equal yearly sinking fund for redeeming and paying off the principal of 30 the said debentures so to be issued as aforesaid at the maturity thereof, a special rate of four mills and four tenths of a mill in the dollar on the whole rateable property in the said City of Winnipeg shall be rated and levied in each year during the currency of the said debentures in addition to all other rates and assessments whatsoever.

“3. The said debentures shall be issued forthwith upon the ratification of this by-law in accordance with the provisions of the statutes of this Province in that behalf, and after issued shall be by the Mayor and Council, of the City of Winnipeg, within one month thereafter 40 delivered to the Manager, for the time being, of the Winnipeg branch of the Merchants Bank of Canada, upon the following trusts, that is to say: upon trust that the said The Manager, for the time being, of the Winnipeg branch of the Merchants Bank of Canada, shall

Record
Exhibits

No. 3
City of Winnipeg
By-law No. 195.
October 30, 1882.
(Continued)

hold the said debentures and every of them until the said Canadian Pacific Railway Company shall have performed the conditions and each and every of them hereinafter specified and stipulated to be performed by them, and to collect and to hold the half-yearly interest maturing on the said debentures (retaining thereout as commission one half of one per cent upon the amount so collected) and to deposit the balance so collected in some chartered bank doing business in the City of Winnipeg to his credit as such Trustee, at interest, if possible, and upon the completion of the conditions by the Canadian Pacific
10 Railway Company hereinafter mentioned upon the further trust to pay over the monies so deposited and any accumulation of interest thereon, and also deliver over the said debentures with coupons attached (except such as may have been paid) to the Canadian Pacific Railway Company.

“4. The conditions hereinbefore referred to are as follows:

“(1) The said Canadian Pacific Railway Company shall on or before the first day of February one thousand eight hundred and eighty-three, commencing with the City of Winnipeg, construct and complete and fully equip one hundred miles of the railway running south-
20 westerly towards the westerly limits of the Province upon a course starting within the said City of Winnipeg, crossing the Assiniboine River, running within the limits of townships nine, eight, seven, six and five, in range one east of the principal meridian; townships five and four in range one west of the principal meridian; township four, in range two west of the principal meridian; townships four and three in range three west of the principal meridian, and township three in range four, five, six, seven and eight west of the principal meridian (all according to the Dominion Government survey of the Province of Manitoba) or within a distance of six miles upon either
30 side of a line which may be drawn through the said townships to the extent of the said one hundred miles in the direction above described south.

“(2) The Canadian Pacific Railway Company shall on or before the first day of November one thousand eight hundred and eighty-three, build, construct, and complete, within the City of Winnipeg, on lots four and five in block one: eleven and twelve on the east side of Austin Street, and forty-four and forty-five on the west side of Maple Street, east of the Main Street, on the Point Douglas Common property, as laid down on the map or plan of said City, registered
40 in the registry office in and for the County of Selkirk (which are to be conveyed to the said Company on or immediately after the ratification of this by-law as aforesaid, by the Mayor and Council of the City of Winnipeg for that purpose) a substantial and commodious general passenger railway depot, with all the modern improvements

for the accommodation and convenience of the public at large, and the business of the said Company.

Record
Exhibits

“(3) 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
10 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.

No. 3
City of Winnipeg
By-law No. 195.
October 30, 1882.
(Continued)

“(4) And by such bond and covenant the said Company shall bind themselves as soon as they conveniently can to procure and erect within the City of Winnipeg large and commodious stock or cattle yards, suitable and appropriate for the central business of their main line of railway and the several branches thereof.

“(5) If the said Company shall make default in any of the conditions herein mentioned to be by them performed, the said trustee
20 shall thereupon and in any such case deliver all the said bonds with the coupons attached, not paid, and all the moneys in his hands by virtue of the trust hereby created, to the Mayor and Council of the City of Winnipeg.

“(6) The Mayor and Council of the City of Winnipeg are hereby authorized and empowered upon the said Company making, executing and delivering to the Mayor and Council of the City of Winnipeg the bond and covenant in the third subsection of the fourth section of these presents mentioned to make, seal and deliver to the said Company a deed of the lands upon which the passenger station in
30 the second subsection of the fourth section of these presents mentioned is to be erected.

“(7) Should any difference or dispute arise between the Mayor and Council of the City of Winnipeg and the Canadian Pacific Railway Company in respect of any matter or thing concerning the terms of this by-law or the terms or conditions thereof, the same shall from time to time be submitted to the arbitrament of three persons, one to be chosen by the Mayor and Council of the City of Winnipeg, one to be chosen by the said Canadian Pacific Railway Company, and one to be appointed on application of either party, and on reasonable
40 notice to the other party by the Chief Justice of Manitoba and the award of a majority of such arbitrators of and concerning the premises submitted to them shall be final and binding upon both parties, and the same may be made a rule of court.

Record
Exhibits

No. 3
City of Winnipeg
By-law No. 195.
October 30, 1882.
(Continued)

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

“(9) That this by-law shall take effect from and after the twenty-first day of September, in the present year of our Lord one thousand 10 eight hundred and eighty-one.

“(10) That notwithstanding anything in this by-law contained the coupons on each of the debentures issued under this by-law representing the first two half-yearly payments of interest be detached from said debentures and delivered up to the Mayor and Council of the City of Winnipeg and be cancelled.

“Done and passed in Council at the City of Winnipeg this fifth day of September, in the year of our Lord one thousand eight hundred and eighty-one.”

Done and passed in Council at the City of Winnipeg this Thirtieth 20 day of October, in the year of our Lord one thousand eight hundred and eighty-two.

(City of Winnipeg Seal)

(Sgd.) Alexander Logan,
Mayor.

(Sgd.) A. M. Brown,
City Clerk.

City Clerk's Office,
Winnipeg Sept. 2/48

Certified True Copy

“G. L. Gardner,”
Acting City Clerk.

Exhibit No. 14
PLAINTIFF'S DOCUMENT
City of Winnipeg By-law No. 219

Record
Exhibits

No. 14
City of Winnipeg
By-law No. 219.
March 30, 1883.

A By-law to authorize the delivery over of Debentures referred to in By-law No. 195.

Whereas pursuant to said By-law No. 195 the debentures mentioned therein were delivered to the Manager of the Winnipeg Branch of the Merchants Bank of Canada as trustee;

And Whereas, The Canadian Pacific Railway Company mentioned 10 in said By-law No. 195 have completed and performed all the conditions mentioned in the said by-law, and in all other respects complied with the same; and it is desirable that the said Trustee should be instructed to deliver the bonds mentioned therein, with the coupons still unmaturred, to the said Canadian Pacific Railway Company, or their proper officer in that behalf.

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

That the said Trustee, being the manager for the time being of the Winnipeg Branch of the Merchants Bank of Canada, be and he is 20 hereby authorized and instructed, by and on behalf of the Mayor and Council of the City of Winnipeg to deliver over to the said The Canadian Pacific Railway Company the said bonds and coupons aforesaid in the said By-law No. 195 mentioned.

Done and Passed in Council assembled, this thirtieth (30) day of March A.D. 1883.

(City of Winnipeg Seal)

“A. McMicken”
Mayor.

“A. M. Brown”
City Clerk.

30

City Clerk's Office.
Winnipeg, Sept. 2, 48.

Certified True Copy

“G. L. Gardner,”
Acting City Clerk

revision and the same became the absolute and binding assessment roll for the City of Winnipeg for the year 1890, and for a long time previous to the year 1890 and during the year 1890 the defendants owned in fee simple and used and occupied a large quantity of **land upon which there were certain buildings and superstructures** situated within the City of Winnipeg, **which land was** known as part of lot number 35 according to the Dominion Government Survey of the parish of St. John **which said land was properly and sufficiently described in the assessment roll** and during the same time the defendants

10 carried on and had their principal place of business in the City of Winnipeg and upon the land above mentioned, and the said land, **without the buildings and superstructures**, was duly assessed by the said assessor for the said year 1890, and were duly entered upon the assessment roll of the said City of Winnipeg for that year as the property of the defendants owned and occupied by them, which roll containing the said assessment of the defendants' said lands was duly confirmed and made the assessment roll of the plaintiffs for the year as aforesaid, and within the plaintiffs' territorial limits there has

20 The School District of Winnipeg number one (1) and the boundaries of the said School District are co-terminus with the boundaries of the Municipality of the City of Winnipeg, the plaintiffs herein and the board of School Trustees of the said last mentioned school district in the year 1890 and before the first day of August thereof prepared and laid before the Municipal Council of the plaintiffs an estimate of the sums which the said School District thought requisite for all necessary expenses of the schools under their charge for the said year, which estimate amounted to the sum of \$77,550.00 and the plaintiffs for the purpose of collecting the said sum for the use of the said school board

30 passed a bylaw levying a rate of four and two-tenths mills on the dollar upon all the real and personal property in the said corporation as shown on the assessment roll for the said year 1890, and the plaintiffs duly and properly appointed a collector for the said year 1890, and the proper officers in that behalf duly and properly prepared a collector's roll for that year, and the said lands of the defendants were properly entered in the said collector's roll and were therein entered as the property of the defendants and were therein charged amongst other things with the said school taxes for the said year 1890 which amounted to the sum of \$4200 and the defendants were

40 duly notified of the said assessment and of the taxes due by them as aforesaid, and the said taxes were duly demanded from the defendants by the plaintiffs, and all proper and necessary steps were taken and all proper and necessary resolutions and bylaws were passed in order to charge the defendants with the said taxes, and all conditions were fulfilled and all things happened and all times elapsed necessary to charge the defendants with the payment of the said taxes, and the said taxes thereby became and were a debt due to the

Record
Exhibits

No. 18
Proceedings in
City of Winnipeg
v. Canadian Pacific
Railway Company.

Declaration
September 16, 1896.
(Continued)

Record
Exhibits

No. 18
Proceedings in
City of Winnipeg
v. Canadian Pacific
Railway Company.

Declaration
September 16, 1896.
(Continued)

plaintiffs by the defendants, yet the defendants have not paid the same.

(2) And for that the plaintiffs are a municipal corporation according to the provisions of chapters 100 and 102 of the Revised Statutes of Manitoba and have continued to be a municipal corporation for more than twenty years next, previous to the issue of the writ in this action, and the plaintiffs for the year 1891 duly appointed an assessor and he duly assessed all the real and personal property in the City of Winnipeg liable to assessment and liable to taxation, and an
10 assessment roll was duly prepared by the said assessor and completed and was duly returned and the same was duly confirmed by a court of revision, and the same became the absolute and binding assessment roll for the City of Winnipeg for the year 1891 and for a long time previous to the year 1891 and during the year 1891 the defendants owned in fee simple and used and occupied a large quantity of **land upon which there were certain buildings and superstructures** situated within the City of Winnipeg, **which land was known as part of lot No. 35 according to the Dominion Government Survey of the parish of St. John which said land was properly and sufficiently**
20 **described in the Assessment Roll** and during the same time the defendants carried on business and had their principal place of business in the City of Winnipeg and upon the land above mentioned and the said land **without the buildings and superstructures was** duly assessed by the said assessor for the said year 1891 and were duly entered upon the assessment roll of the said City of Winnipeg for that year as the property of the defendants owned and occupied by them, which roll containing the said assessment of the defendants' said lands was duly confirmed and made the assessment roll of the
30 plaintiffs for the year as aforesaid, and within the plaintiffs territorial limits there has existed for the same length of time a Public School District known as The School District of Winnipeg number one (1), and the boundaries of the said School District are co-terminus with the boundaries of the Municipality of the City of Winnipeg, the plaintiffs herein, and the Board of School Trustees of the said last mentioned School District in the year 1891, and before the first day of August thereof, prepared and laid before the Municipal Council of the plaintiffs an estimate of the sums which the said School District thought requisite for all necessary expenses of the schools under their charge for the said year, which estimate amounted to the sum of \$83,200, and the plaintiffs for the purpose of collecting the said sum
40 for the use of the said School Board passed a bylaw levying a rate of four and two-tenths mills on the dollar upon all the real and personal property in the said corporation as shown on the assessment roll for the said year 1891, and the plaintiffs duly and properly appointed a collector for the said year 1891 and the proper officers in that behalf duly and properly prepared a collector's roll for that year, and the

said lands of the defendants were properly entered in the said collector's roll and were therein entered as the property of the defendants, and were therein charged amongst other things with the said school taxes for the said year 1891 which amounted to the sum of \$4,200, and the defendants were duly notified of the said assessment and of the taxes due by them as aforesaid, and the said taxes were duly demanded from the defendants by the plaintiffs and all proper and necessary steps were taken and all proper and necessary resolutions and bylaws were passed in order to charge the defendants with the
 10 said taxes, and all conditions were fulfilled and all things happened and all times elapsed necessary to charge the defendants with the payment of the said taxes, and the said taxes thereby became and were a debt due to the plaintiffs by the defendants, yet the defendants have not paid the same.

(3) And for that the plaintiffs are a municipal corporation according to the provisions of chapters 100 and 102 of the Revised Statutes of Manitoba, and have continued to be a municipal corporation for more than twenty years next previous to the issue of the writ in this action, and the plaintiffs for the year 1892 duly appointed an assessor
 20 and he duly assessed all the real and personal property in the City of Winnipeg liable to assessment and liable to taxation, and an assessment roll was duly prepared by the said assessor and completed and was duly returned and the same was duly confirmed by a court of revision, and the same became the absolute and binding assessment roll for the City of Winnipeg for the year 1892, and for a long time previous to the year 1892 and during the year 1892 the defendants owned in fee simple and used and occupied a large quantity of **land upon which there were certain buildings and superstructures** situated within the City of Winnipeg **which land was** known as
 30 part of lot number 35 according to the Dominion Government Survey of the parish of St. John **which said land was properly and sufficiently described in the Assessment Roll** and during the same time the defendants carried on business and had their principal place of business in the City of Winnipeg and upon the land above mentioned and the said lands were duly assessed by the said assessor for the said year 1892, and were duly entered upon the assessment roll of the said City of Winnipeg for that year as the property of the defendants owned and occupied by them, which roll containing the
 40 said assessment of the defendants' said lands was duly confirmed and made the assessment roll of the plaintiffs for the year as aforesaid, and within the plaintiffs' territorial limits there has existed for the same length of time a Public School District known as the School District of Winnipeg number one (1) and the boundaries of the said school district are co-terminus with the boundaries of the Municipality of the City of Winnipeg, the plaintiffs herein, and the Board of School Trustees of the said last mentioned school district in the

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year 1892 and before the first day of August thereof prepared and laid before the Municipal Council of the plaintiffs an estimate of the sums which the said school district thought requisite for all necessary expenses of the schools under their charge for the said year, which estimate amounted to the sum of \$83,000 and the plaintiffs for the purpose of collecting the said sum for the use of the said School Board passed a bylaw levying a rate of four and one-tenth mills on the dollar upon all the real and personal property in the said corporation as shown on the assessment roll for the said year 1892 and the
10 plaintiffs duly and properly appointed a collector for the said year 1892 and the proper officers in that behalf duly and properly prepared a collector's roll for that year and the said lands of the defendants were properly entered in the said collector's roll and were therein entered as the property of the defendants, and were therein charged amongst other things with the said school taxes for the said year 1892 which amounted to the sum of \$4,100, and the defendants were duly notified of the said assessment and of the taxes due by them as aforesaid, and the said taxes were duly demanded from the defendants by the plaintiffs, and all proper and necessary steps were taken and
20 all proper and necessary resolutions and bylaws were passed in order to charge the defendants with the said taxes, and all conditions were fulfilled and all things happened and all times elapsed necessary to charge the defendants with the payment of the said taxes, and the said taxes thereby became and were a debt due to the plaintiffs by the defendants, yet the defendants have not paid the same.

(4) And for that the plaintiffs are a municipal corporation according to the provisions of chapters 100 and 102 of the Revised Statutes of Manitoba and have continued to be a municipal corporation for more than twenty years next, previous to the issue of the writ in this
30 action, and the plaintiffs for the year 1893 duly appointed an assessor and he duly assessed all the real and personal property in the City of Winnipeg liable to assessment and liable to taxation, and an assessment roll was duly prepared by the said assessor and completed and was duly returned and the same was duly confirmed by a court of revision and the same became the absolute and binding assessment roll for the City of Winnipeg for the year 1893 and for a long time previous to the year 1893, and during the year 1893 the defendants owned in fee simple and used and occupied a large quantity of **land upon which there were certain buildings and super-**
40 **structures** situated within the City of Winnipeg **which land was** known as part of lot number 35 according to the Dominion Government Survey of the parish of St. John, **which said land was properly and sufficiently described in the Assessment Roll** and during the same time the defendants carried on business and had their principal place of business in the City of Winnipeg and upon the land above mentioned, and the said land **without the buildings and superstruc-**

tures was duly assessed by the said assessor for the said year 1893 and were duly entered upon the assessment roll of the said City of Winnipeg for that year as the property of the defendants owned and occupied by them, which roll containing the said assessment of the defendants' said lands was duly confirmed and made the assessment roll of the plaintiffs for the year as aforesaid, and within the plaintiff's territorial limits there has existed for the same length of time a public school district known as The School District of Winnipeg number one (1) and the boundaries of the said School

 10 District are co-terminus with the boundaries of the Municipality of the City of Winnipeg, the plaintiffs herein, and the Board of School Trustees of the said last mentioned School District in the year 1893 and before the first day of August thereof prepared and laid before the Municipal Council of the plaintiffs an estimate of the sums which the said School District thought requisite for all necessary expenses of the schools under their charge for the said year, which estimate amounted to the sum of \$85,000, and the plaintiffs for the purpose of collecting the said sum for the use of the said School Board passed a bylaw levying a rate of four mills on the

 20 dollar upon all the real and personal property in the said corporation as shown on the assessment roll for the said year 1893, and the plaintiffs duly and properly appointed a collector for the said year 1893 and the proper officers in that behalf duly and properly prepared a collector's roll for that year, and the said lands of the defendants were properly entered in the said collector's roll and were therein entered as the property of the defendants, and were therein charged amongst other things with the said school taxes for the said year 1893 which amounted to the sum of \$3,000 and the defendants were duly notified of the said assessment and of the taxes due by them as

 30 aforesaid, and the said taxes were duly demanded from the defendants by the plaintiffs, and all proper and necessary steps were taken and all proper and necessary resolutions and bylaws were passed in order to charge the defendants with the said taxes, and all conditions were fulfilled and all things happened and all times elapsed necessary to charge the defendants with the payment of the said taxes, and the said taxes thereby became and were a debt due to the plaintiffs by the defendants, yet the defendants have not paid the same.

(5) And for that the plaintiffs are a municipal corporation according to the provisions of chapters 100 and 102 of the Revised

 40 Statutes of Manitoba, and have continued to be a municipal corporation for more than twenty years next, previous to the issue of the writ in this action, and the plaintiffs for the year 1894 duly appointed an assessor and he duly assessed all the real and personal property in the City of Winnipeg liable to assessment and liable to taxation, and an assessment roll was duly prepared by the said assessor and completed and was duly returned and the same was

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duly confirmed by a court of revision and the same became the absolute and binding assessment roll for the City of Winnipeg for the year 1894 and for a long time previous to the year 1894 and during the year 1894 the defendants owned in fee simple and used and occupied a large quantity of **land upon which there were certain buildings and superstructures** situated within the City of Winnipeg, **which land was known as part of lot number 35 according to the Dominion Government Survey of the parish of St. John, which said land was properly and sufficiently described in the Assessment**

10 **Roll** and during the same time the defendants carried on business and had their principal place of business in the City of Winnipeg and upon the land above mentioned and the said land **without the buildings and superstructures was** duly assessed by the said assessor for the said year 1894, and were duly entered upon the assessment roll of the said City of Winnipeg for that year as the property of the defendants owned and occupied by them, which roll containing the said assessment of the defendants' said lands was duly confirmed and made the assessment roll of the plaintiffs for the year as aforesaid, and within the plaintiffs territorial limits

20 there has existed for the same length of time a public school district known as The School District of Winnipeg number one (1) and the boundaries of the said school district are co-terminus with the boundaries of the Municipality of the City of Winnipeg, the plaintiffs herein, and the Board of School Trustees of the said last-mentioned School District in the year 1894 and before the first day of August thereof prepared and laid before the Municipal Council of the plaintiffs an estimate of the sums which the said School District thought requisite for all necessary expenses of the schools under their charge for the said year, which estimate amounted to the sum

30 of \$90,000, and the plaintiffs for the purpose of collecting the said sum for the use of the said School Board passed a by-law levying a rate of four and one-tenth mills on the dollar upon all the real and personal property in the said corporation as shown on the assessment roll for the said year 1894, and the plaintiffs duly and properly appointed a collector for the said year 1894 and the proper officers in that behalf duly and properly prepared a collector's roll for that year, and the said lands of the defendants were properly entered in the said collectors' roll and were therein entered as the property of the defendants, and were therein charged amongst other things

40 with said school taxes for the said year 1894 which amounted to the sum of \$3,075, and the defendants were duly notified of the said assessment and of the taxes due by them as aforesaid, and the said taxes were duly demanded from the defendants by the plaintiffs, and all proper and necessary steps were taken and all proper and necessary resolutions and by-laws were passed in order to charge the defendants with the said taxes, and all conditions were fulfilled and all things happened and all times elapsed necessary to charge the

defendants with the payment of the said taxes, and the said taxes thereby became and were a debt due to the plaintiffs by the defendants, yet the defendants have not paid the same.

(6) And for money payable by the defendants to the plaintiffs for goods sold and delivered by the plaintiffs to the defendants and for goods bargained and sold by the plaintiffs to the defendants and for work done and material provided by the plaintiffs for the defendants at their request, and for money lent by the plaintiffs to the defendants and for money paid by the plaintiffs for the defendants at their
10 request, and for money received by the defendants for the use of the plaintiffs and for interest upon money due from the defendants to the plaintiffs and forborne at interest by the plaintiffs to the defendants at their request, and for money found to be due from the defendants to the plaintiffs on accounts stated between them.

And the plaintiffs claim—Twenty-six Thousand - - Dollars.

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Order of Referee

Upon the application of the defendants and upon reading the summons granted on the first day of October A.D. 1896 and the
20 papers therein referred to and the three enlargements thereof and upon hearing Counsel for plaintiffs and defendants I do order that the plaintiffs be at liberty forthwith to amend the first, second, third, fourth and fifth counts of their declaration as they may be advised.

Order of Referee
January 30, 1897.

And I do further order that the defendants within ten days after the amendment of the said counts in the declaration as aforesaid have leave to plead and demur at the same time to the said first, second, third, fourth and fifth counts as they may be advised.

And I do further order that there be no costs of this application to either parties.

Dated at Chambers this 30th day of January 1897.

30

(Sgd.) P. A. Macdonald,
Referee

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Amended by order
of Mr. Justice Bain
dated 14th October
A.D. 1898, this
27 Oct. 1898.
"Augustus Mills,"
Dep. Prothonotary.

Pleas

Saturday the sixth day of March A.D. 1897.

1. The defendants by James Albert Manning Aikins their attorney say for a plea to the first count of the Declaration that the plaintiffs are not nor were a Municipal Corporation as alleged.
2. And for a second plea to the first count that the plaintiffs did not duly appoint an assessor as alleged.
3. And for a third plea to the first count that the assessor did not duly assess all the real and personal property in the City of
10 Winnipeg liable to assessment and liable to taxation as alleged.
4. And for a fourth plea to the first count that an assessment roll was not duly prepared by the said assessor, or completed or returned as alleged.
5. And for a fifth plea to the first count that the assessment roll in the said count mentioned was not duly confirmed by a Court of Revision, nor did the same become the absolute and binding assessment roll of the plaintiffs for the year 1890 as alleged.
6. And for a sixth plea to the first count that the defendants did not own, use or occupy a large quantity of land known as part of Lot
20 35 according to the Dominion Government Survey of the Parish of St. John as alleged.
7. And for a seventh plea to the first count that the said land without the buildings and superstructures was not duly assessed or entered on the assessment roll as alleged.
8. And for an eighth plea to the first count that there did not exist within the plaintiffs territorial limits a public school District known as the School District of Winnipeg number one (1) of which the boundaries were co-terminus with the boundaries of the plaintiffs as alleged.
- 30 9. And for a ninth plea to the first count that the said Board of School Trustees of the said School District did not lay before the Municipal Council of the plaintiffs an estimate of the sum which the said School District thought requisite for all necessary expenses of the school under their charge as alleged.
10. And for a tenth plea to the first count that the plaintiffs did not pass a by-law for levying a rate of four and two tenths ($4 \frac{2}{10}$) mills on the dollar on all real and personal property in said corporation as shown on the assessment roll as alleged.
- 40 11. And for an eleventh plea to the first count that the plaintiffs did not duly and properly appoint a Collector as alleged.
12. And for a twelfth plea to the first count that a collectors roll was not prepared as alleged.

13. And for a thirteenth plea to the first count that the land of the defendants was not properly entered on the collectors roll, nor entered as the property of the defendants, or charged with the said school taxes as alleged.

14. And for a fourteenth plea to the first count that the defendants were not duly notified of the said assessment, or of the said taxes, nor were they demanded of them as alleged.

15. And for fifteenth plea to the first count that the said sum of forty two hundred dollars was not at the time of the commencement 10 of this action, or was any part thereof required for the purpose in the said count alleged.

16. And for a sixteenth plea to the first count that the said sum of forty two hundred dollars claimed as taxes in the first count was not, nor was any portion thereof levied.

17. And for a seventeenth plea to the first count that the assessor did not enter the said land of, belonging to, owned, used or occupied by the defendants in respect of which the alleged taxes are claimed, upon the assessment roll by a true and accurate description, or by the best description that could be by him obtained, **nor was the said land** 20 **properly and sufficiently described in the assessment roll as alleged.**

18. And for an eighteenth plea to the first count that there does not appear on the said assessment roll any land of, belonging to, or occupied by the plaintiffs, which can be known or ascertained by or from any description thereof in or upon the said assessment roll.

19. And for a nineteenth plea to the first count that the said assessor did not certify to the said roll or sign the same as required by the assessment Act in that behalf.

20. And for a twentieth plea to the first count that the said land mentioned therein was exempted from taxation within the meaning 30 of the Assessment Act, and the assessor did not assess or enter it in the assessment roll separately from the non-exempted property and did not make return of the same to the Council.

21. And for a twenty first plea to the said count that the said alleged assessment of land is one and a single assessment and the said land consisted of land occupied by the road way of the defendants railway and in actual use and occupation in connection with the operation of the said railway and of superstructures thereon other than Station houses and freight sheds, which said superstructures are not excepted from the said assessment of said land nor were they 40 assessed or entered on the said assessment roll separately from the non-exempted property or returned as exempted to the Council.

22. And for a twenty second plea to the first count that the said land was not liable to be assessed, rated or taxed as in the said count mentioned **being legally exempt therefrom by by-law numbered 148**

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of the plaintiffs as amended by by-law numbered 195 of the plaintiffs and all conditions were performed and all things happened and all times elapsed necessary to entitle the defendants to the benefit of the exemption in the said by-laws mentioned.

23. And for a first plea to the second count of the Declaration that the plaintiffs are not nor were a Municipal Corporation as alleged.

24. And for a second plea to the second count that the plaintiffs did not duly appoint an assessor as alleged.

25. And for a third plea to the second count that the assessor did not duly assess all the real and personal property in the City of Winnipeg liable to assessment and liable to taxation as alleged.

26. And for a fourth plea to the second count that an assessment roll was not duly prepared by the said assessor, or completed or returned as alleged.

27. And for a fifth plea to the second count that the assessment roll in the said count mentioned was not duly confirmed by a Court of Revision, nor did the same become the absolute and binding assessment roll of the plaintiffs for the year 1891 as alleged.

28. And for a sixth plea to the second count that the defendants did not own, use or occupy a large quantity of land known as part of Lot 35 according to the Dominion Government Survey of the Parish of St. John as alleged.

29. And for a seventh plea to the second count that the said land without the buildings and superstructures was not duly assessed or entered on the assessment roll as alleged.

30. And for an eighth plea to the second count that there did not exist within the plaintiffs territorial limits a public school district known as the School District of Winnipeg number one (1) of which the boundaries were co-terminus with the boundaries of the plaintiffs as alleged.

31. And for a ninth plea to the second count that the said Board of School Trustees of the said School District did not lay before the Municipal Council of the plaintiffs an estimate of the sum which the said School District thought requisite for all necessary expenses of the school under their charge as alleged.

32. And for a tenth plea to the second count that the plaintiffs did not pass a by-law for levying a rate of four and two tenths ($4 \frac{2}{10}$) mills on the dollar on all real and personal property in said corporation as shown on the assessment roll as alleged.

40 33. And for an eleventh plea to the second count that the plaintiffs did not duly and properly appoint a Collector as alleged.

34. And for a twelfth plea to the second count that a collectors roll was not prepared as alleged.

35. And for a thirteenth plea to the second count that the land of the defendants was not properly entered on the collectors roll, nor entered as the property of the defendants, or charged with the said school taxes as alleged.

36. And for a fourteenth plea to the second count that the defendants were not duly notified of the said assessment, or of the said taxes, nor were they demanded of them as alleged.

37. And for a fifteenth plea to the second count that the said sum of forty two hundred dollars was not at the time of the commencement 10 of this action, or was any part thereof required for the purpose in the said count alleged.

38. And for a sixteenth plea to the second count that the said sum of forty two hundred dollars claimed as taxes in the said first count was not, nor was any portion thereof levied.

39. And for a seventeenth plea to the second count that the assessor did not enter the said land of, belonging to, owned, used or occupied by the defendants in respect of which the alleged taxes are claimed, upon the assessment roll by a true and accurate description, or by the best description that could be by him obtained **nor was the** 20 **said land properly and sufficiently described in the assessment roll as alleged.**

40. And for an eighteenth plea to the second count that there does not appear on the said assessment roll any land of, belonging to or occupied by the plaintiffs, which can be known or ascertained by or from any description thereof in or upon the said assessment roll.

41. And for a nineteenth plea to the second count that the said assessor did not certify to the said roll or sign the same as required by the Assessment Act in that behalf.

42. And for a twentieth plea to the second count that the said land 30 mentioned therein was exempted from taxation within the meaning of the Assessment Act, and the assessor did not assess or enter it in the assessment roll separately from the non-exempted property and did not make return of the same to the Council.

43. And for a twenty first plea to the second count that the said alleged assessment of land is one and a single assessment and the said land consisted of land occupied by the road way of the defendants railway and in actual use and occupation in connection with the operation of the said railway and of superstructures thereon other than Station houses and freight sheds, which said superstructures are 40 not excepted from the said assessment of said land nor were they assessed or entered on the said assessment roll separately from the non-exempted property or returned as exempted to the Council.

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44. And for a twenty second plea to the second count that the said land was not liable to be assessed, rated or taxed as in the said count mentioned **being legally exempt therefrom by by-law numbered 148 of the plaintiffs as amended by by-law numbered 195 of the plaintiffs and all conditions were performed and all things happened and all times elapsed necessary to entitle the defendants to the benefit of the exemption in the said by-laws mentioned.**

45. And for a first plea to the third count of the Declaration, that the plaintiffs are not nor were a municipal Corporation as alleged.

10 46. And for a second plea to the third count that the plaintiffs did not duly appoint an assessor as alleged.

47. And for a third plea to the third count that the assessor did not duly assess all the real and personal property in the City of Winnipeg liable to assessment and liable to taxation as alleged.

48. And for a fourth plea to the third count that an assessment roll was not duly prepared by the said assessor, or completed or returned as alleged.

49. And for a fifth plea to the third count that the assessment roll in the said count mentioned was not duly confirmed by a Court of
20 Revision nor did the same become the absolute and binding assessment roll of the plaintiffs for the year 1892 as alleged.

50. And for a sixth plea to the third count that the defendants did not own, use or occupy a large quantity of land known as part of Lot 35 according to the Dominion Government Survey of the Parish of St. John as alleged.

51. And for a seventh plea to the third count that the said land without the buildings and superstructures was not duly assessed or entered on the assessment roll as alleged.

52. And for an eighth plea to the third count that there did not
30 exist within the plaintiffs territorial limits a public school district known as the School District of Winnipeg number one (1) of which the boundaries were co-terminus with the boundaries of the plaintiffs as alleged.

53. And for a ninth plea to the third count that the said Board of School Trustees of the said School District did not lay before the Municipal Council of the plaintiffs an estimate of the sum which the said School District thought requisite for all necessary expenses of the school under their charge as alleged.

54. And for a tenth plea to the third count that the plaintiffs did
40 not pass a by-law for levying a rate of four and one tenth (4 1/10) mills on the dollar on all real and personal property in said corporation as shown on the assessment roll as alleged.

55. And for an eleventh plea to the third count that the plaintiffs did not duly and properly appoint a Collector as alleged.

56. And for a twelfth plea to the third count that a collectors roll was not prepared as alleged.

57. And for a thirteenth plea to the third count that the land of the defendants was not properly entered on the collectors roll, nor entered as the property of the defendants, or charged with the said school taxes as alleged.

58. And for a fourteenth plea to the third count that the defendants 10 were not duly notified of the said assessment, or of the said taxes, nor were they demanded of them as alleged.

59. And for a fifteenth plea to the third count that the said sum of forty one hundred dollars was not at the time of the commencement of this action, or was any part thereof required for the purpose in the said count alleged.

60. And for a sixteenth plea to the third count that the said sum of forty one hundred dollars claimed as taxes in the said first count was not, nor was any portion thereof levied.

61. And for a seventeenth plea to the third count that the assessor 20 did not enter the said land of, belonging to, owned used or occupied by the defendants in respect of which the alleged taxes are claimed, upon the assessment roll by a true and accurate description, or by the best description that could be by him obtained **nor was the said land properly and sufficiently described in the assessment roll as alleged.**

62. And for an eighteenth plea to the third count that there does not appear on the said assessment roll any land of, belonging to or occupied by the plaintiff, which can be known or ascertained by or from any description thereof in or upon the said assessment roll.

63. And for a nineteenth plea to the third count that the said 30 assessor did not certify to the said roll or sign the same as required by the Assessment Act in that behalf.

64. And for a twentieth plea to the third count that the said land mentioned therein was exempted from taxation within the meaning of the Assessment Act, and the assessor did not assess or enter it in the assessment roll separately from the non-exempted property and did not make return of the same to the Council.

65. And for a twenty first plea to the third count that the said 40 alleged assessment of land is one and a single assessment and the said land consisted of land occupied by the road way of the defendants railway and in actual use and occupation in connection with the operation of the said railway and of superstructures thereon other than Station houses and freight sheds, which said superstructures are

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not excepted from the said assessment of said land nor were they assessed or entered on the said assessment roll separately from the non-exempted property or returned as exempted to the Council.

66. And for a twenty second plea to the third count that the said land was not liable to be assessed, rated or taxed as in the said count mentioned **being legally exempt therefrom by by-law numbered 148 of the plaintiffs as amended by by-law numbered 195 of the plaintiffs and all conditions were performed and all things happened and all times elapsed necessary to entitle the defendants to the benefit of**
10 **the exemption in the said by-laws mentioned.**

67. And for a first plea to the fourth count of the Declaration, that the plaintiffs are not nor were a Municipal Corporation as alleged.

68. And for a second plea to the fourth count that the plaintiffs did not duly appoint an assessor as alleged.

69. And for a third plea to the fourth count that the assessor did not duly assess all the real and personal property in the City of Winnipeg liable to assessment and liable to taxation as alleged.

70. And for a fourth plea to the fourth count that an assessment roll was not duly prepared by the said assessor, or completed or
20 returned as alleged.

71. And for a fifth plea to the fourth count that the assessment roll in the said count mentioned was not duly confirmed by a Court of Revision, nor did the same become the absolute and binding assessment roll of the plaintiffs for the year 1893 as alleged.

72. And for a sixth plea to the fourth count that the defendants did not own, use or occupy a large quantity of land known as part of Lot 35 according to the Dominion Government Survey of the Parish of St. John as alleged.

73. And for a seventh plea to the fourth count that the said land
30 without the buildings and superstructure was not duly assessed or entered on the assessment roll as alleged.

74. And for an eighth plea to the fourth count that there did not exist within the plaintiffs territorial limits a public school district known as the School District of Winnipeg number one (1) of which the boundaries were co-terminus with the boundaries of the plaintiffs as alleged.

75. And for a ninth plea to the fourth count that the said Board of School Trustees of the said School District did not lay before the Municipal Corporation of the plaintiffs an estimate of the sum which
40 the said School District thought requisite for all necessary expenses of the school under their charge as alleged.

76. And for a tenth plea to the fourth count that the plaintiffs did not pass a by-law for levying a rate of four (4) mills on the dollar on all real and personal property in said corporation as shown on the assessment roll as alleged.

77. And for an eleventh plea to the fourth count that the plaintiffs did not duly and properly appoint a Collector as alleged.

78. And for a twelfth plea to the fourth count that a Collectors roll was not prepared as alleged.

79. And for a thirteenth plea to the fourth count that the land of
10 the defendants was not properly entered on the collectors roll nor entered as the property of the defendants, or charged with the said school taxes as alleged.

80. And for a fourteenth plea to the fourth count that the defendants were not duly notified of the said assessment or of the said taxes, nor were they demanded of them as alleged.

81. And for a fifteenth plea to the fourth count that the said sum of three thousand dollars was not at the time of the commencement of this action, nor was any part thereof required for the purpose in the said count alleged.

20 82. And for a sixteenth plea to the fourth count that the said sum of three thousand dollars claimed as taxes in the said first count was not, nor was any portion thereof levied.

83. And for a seventeenth plea to the fourth count that the assessor did not enter the said land of, belonging to, owned, used or occupied by the defendants in respect of which the alleged taxes are claimed, upon the assessment roll by a true and accurate description, or by the best description that could be by him obtained **nor was the said land properly and sufficiently described in the assessment roll as alleged.**

30 84. And for an eighteenth plea to the fourth count that there does not appear on the said assessment roll any land of, belonging to or occupied by the plaintiffs, which can be known or ascertained by or from any description thereof in or upon the said assessment roll.

85. And for a nineteenth plea to the fourth count that the said assessor did not certify to the said roll or sign the same as required by the Assessment Act in that behalf.

86. And for a twentieth plea to the fourth count that the said land mentioned therein was exempted from taxation within the meaning of the Assessment Act, and the assessor did not assess or enter it in the assessment roll separately from the non-exempted
40 property and did not make return of the same to the Council.

87. And for a twenty first plea to the fourth count that the said

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alleged assessment of land is one and a single assessment and the said land consisted of land occupied by the road way of the defendants railway and in actual use and occupation in connection with the operation of the said railway and of superstructures thereon other than Station houses and freight shed, which said superstructures are not excepted from the said assessment of said land nor were they assessed or entered on the said assessment roll separately from the non-exempted property or returned as exempted to the Council.

10 88. And for a twenty second plea to the fourth count that the said land was not liable to be assessed, rated or taxed as in the said count mentioned **being legally exempt therefrom by by-law numbered 148 of the plaintiffs as amended by by-law numbered 195 of the plaintiffs and all conditions were performed and all things happened and all times elapsed necessary to entitle the defendants to the benefit of the exemption in the said by-laws mentioned.**

89. And for a first plea to the fifth count of the Declaration that the plaintiffs are not nor were a Municipal Corporation as alleged.

90. And for a second plea to the fifth count that the plaintiffs did not duly appoint an assessor as alleged.

20 91. And for a third plea to the fifth count that the assessor did not duly assess all the real and personal property in the City of Winnipeg liable to assessment and liable to taxation as alleged.

92. And for a fourth plea to the fifth count that an assessment roll was not duly prepared by the said assessor or completed or returned as alleged.

93. And for a fifth plea to the fifth count that the assessment roll in the said count mentioned was not duly confirmed by a Court of Revision, nor did the same become the absolute and binding assessment roll of the plaintiffs for the year 1894 as alleged.

30 94. And for a sixth plea to the fifth count that the defendants did not own, use or occupy a large quantity of land known as part of Lot 35 according to the Dominion Government Survey of the Parish of St. John as alleged.

95. And for a seventh plea to the fifth count that the said land without the buildings and superstructures was not duly assessed or entered on the assessment roll as alleged.

40 96. And for an eighth plea to the fifth count that there did not exist within the plaintiffs territorial limits a public school district known as the School District of Winnipeg number one (1) of which the boundaries were co-terminus with the boundaries of the plaintiffs as alleged.

97. And for a ninth plea to the fifth count that the said Board of

School Trustees of the said School District did not lay before the Municipal Council of the plaintiffs an estimate of the sum which the said School District thought requisite for all necessary expenses of the school under their charge as alleged.

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March 6, 1897.
(Continued)

98. And for a tenth plea to the fifth count that the plaintiffs did not pass a by-law for levying a rate of four and one tenth (4 1/10) mills on the dollar on all real and personal property in said corporation as shown on the assessment roll as alleged.

99. And for an eleventh plea to the fifth count that the plaintiffs did not duly and properly appoint a Collector as alleged.

100. And for a twelfth plea to the fifth count that a collectors roll was not prepared as alleged.

101. And for a thirteenth plea to the fifth count that the land of the defendants was not properly entered on the collectors roll, nor entered as the property of the defendants or charged with the said school taxes as alleged.

102. And for a fourteenth plea to the fifth count that the defendants were not duly notified of the said assessment, or of the said taxes, nor were they demanded of them as alleged.

20 103. And for a fifteenth plea to the fifth count that the said sum of three thousand and seventy five dollars was not at the time of the commencement of this action, or was any part thereof required for the purpose in the said count alleged.

104. And for a sixteenth plea to the fifth count that the said sum of three thousand and seventy five dollars claimed as taxes in the said first count was not, nor was any portion thereof levied.

30 105. And for a seventeenth plea to the fifth count that the assessor did not enter the said land of, belonging to, owned, used or occupied by the defendants in respect of which the alleged taxes are claimed, upon the assessment roll by a true and accurate description, or by the best description that could be by him obtained **nor was the said land properly and sufficiently described in the assessment roll as alleged.**

106. And for an eighteenth plea to the fifth count that there does not appear on the said assessment roll any land of, belonging to or occupied by the plaintiffs, which can be known or ascertained by or from any description thereof in or upon the said assessment roll.

107. And for a nineteenth plea to the fifth count that the said assessor did not certify to the said roll or sign the same as required by the Assessment Act in that behalf.

40 108. And for a twentieth plea to the fifth count that the said land mentioned therein was exempted from taxation within the meaning

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(Continued)

of the Assessment Act, and the assessor did not assess or enter it in the assessment roll separately from the non-exempted property and did not make return of the same to the Council.

109. And for a twenty first plea to the fifth count that the said alleged assessment of land is one and a single assessment and the said land consisted of land occupied by the road way of the defendants railway and in actual use and occupation in connection with the operation of the said railway and of superstructures thereon other than Station houses and freight sheds, which said superstructures are not excepted from the said assessment of said land nor were they assessed or entered on the said assessment roll separately from the non-exempted property or returned as exempted to the Council.

110. And for a twenty second plea to the fifth count that the said land was not liable to be assessed, rated or taxed as in the said count mentioned **being legally exempt therefrom by by-law numbered 148 of the plaintiffs as amended by by-law numbered 195 of the plaintiffs and all conditions were performed and all things happened and all times elapsed necessary to entitle the defendants to the benefit of the exemption in the said by-laws mentioned.**

20 111. And for a plea to the sixth count that they were never indebted as alleged.

112. And for a second plea to the sixth count that before action they satisfied and discharged the plaintiffs claim by payment.

Demurrer

Saturday the sixth day of March A.D. 1897.

The defendants by their attorney James Albert Manning Aikins, as to the first, second, third, fourth and fifth counts of the Declaration, say that they are respectively bad in substance.

Some matters of law intended to be argued.

30 That the counts do not show a right to sue in the Plaintiffs.

That they do not show the taxes referred to in them were levied, or that the steps necessary to a levy were taken.

That they show the land was not properly described and therefore the alleged assessment is invalid.

The counts do not show that the land with superstructures mentioned in them, being that of a railway company was assessed or returned as required by law

“J. A. M. Aikins,”
Defendants Attorney.

Demurrer
March 6, 1897.

Joinder in Demurrer

Saturday the 3rd day of April A.D. 1897.

The plaintiffs say that the first, second, third, fourth and fifth counts of said Declaration are respectively good in substance.

“John Stanley Hough,”
Plaintiff’s Attorney.

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No. 18
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(Continued)

Joinder in
Demurrer.
April 3, 1897.

Replication

Saturday the third day of
April A.D. 1897

10 (1) The plaintiffs by John Stanley Hough their attorney join issue upon the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first; the twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty-first, forty-second and forty-third; the forty-fifth, forty-sixth, forty-seventh, forty-eighth, forty-ninth, fiftieth, fifty-first, fifty-second, fifty-third, 20 fifty-fourth, fifty-fifth, fifty-sixth, fifty-seventh, fifty-eighth, fifty-ninth, sixtieth, sixty-first, sixty-second, sixty-third, sixty-fourth and sixty-fifth; the sixty-seventh, sixty-eighth, sixty-ninth, seventieth, seventy-first, seventy-second, seventy-third, seventy-fourth, seventy-fifth, seventy-sixth, seventy-seventh, seventy-eighth, seventy-ninth, eightieth, eighty-first, eighty-second, eighty-third, eighty-fourth, eighty-fifth, eighty-sixth and eighty-seventh; the eighty-ninth, ninetieth, ninety-first, ninety-second, ninety-third, ninety-fourth, ninety-fifth, ninety-sixth, ninety-seventh, ninety-eighth, ninety-ninth, hundredth, hundred and first, hundred and second, hundred 30 and third, hundred and fourth, hundred and fifth, hundred and sixth, hundred and seventh, hundred and eighth and hundred and ninth; the hundred and eleventh and hundred and twelfth, pleas of the defendants.

(2) And for a replication to the twenty-second plea of the defendants, the plaintiffs say that the by-law **numbered 148** therein referred to **and as amended by By-law numbered 195** is in writing and is in the words and figures following:

BY-LAW NO. 148

40 “A By-law to aid and assist the Canadian Pacific Railway Company in consideration of certain undertakings on the part of the said Company.

Replication
April 3, 1897.

Amended by order
of the Referee
dated November
11th 1897.
Augustus Mills,
Dep. Prothonotary.

Amended by Order
of Mr. Justice Bain
dated October 14th
A.D. 1898, this 27th
October A.D. 1898.
Augustus Mills,
Dep. Prothonotary.

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No. 18
Proceedings in
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Railway Company.

Replication
April 3, 1897.
(Continued)

“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 advancing and developing the traffic and trade between the City of Winnipeg and the southern and south-western portions of the Province.

“And whereas it is also desirable to secure the location of the workshops and stockyards of the said Company for the Province of Manitoba in the City of Winnipeg as a central point on the main line of
10 The Canadian Pacific 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 the manner as in this by-law hereinafter mentioned, and have agreed to establish and continue their ‘principal workshops and stockyards for the Province of Manitoba in the City of Winnipeg aforesaid.’

“And whereas it is expedient for the City of Winnipeg to lend their aid to the said Company in consideration of the premises upon the terms hereinafter mentioned by granting them by way of bonus debentures of the City of Winnipeg to the amount of two hundred
20 thousand dollars, payable in twenty years from the day this by-law takes effect with interest at 6 per centum per annum payable half-yearly and by exempting the property now owned or hereafter to be owned by the said Railway Company for railway purposes within the City of Winnipeg from taxation forever, *and* by conveying to the said Company lands sufficient and suitable for a passenger station within the said City of Winnipeg.

“And whereas the amount of the whole rateable property of the City of Winnipeg according to the last revised assessment roll is four million eight thousand two hundred and ninety dollars;

30 “And whereas the total amount required to be raised annually for the paying of the said debentures and interest is seventeen thousand dollars;

“And whereas it will require an annual special rate of four mills and four tenths of a mill in the dollar over and above all other rates and assessments for paying the interest and providing an equal yearly sinking fund for redeeming and paying off the principal of the debt thereby to be created;

“Now therefore the Mayor and Council of the City of Winnipeg enacts as follows;

40 “(1) For the purposes aforesaid it shall be lawful for the Mayor and Council of the City of Winnipeg to issue debentures of the Mayor and Council of the City of Winnipeg for the sum of two hundred thousand dollars of lawful money of Canada in denominations of not less than

one hundred dollars each payable to the Canadian Pacific Railway Company or bearer on the twentieth day of September, one thousand nine hundred and one, bearing interest in the meantime at six per centum per annum, payable half-yearly on the twentieth day of March and September in each and every year, with coupons attached to each debenture to represent the respective half-yearly payments of interest.

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(Continued)

“(2) For paying the interest as aforesaid and creating an equal yearly sinking fund for redeeming and paying off the principal of the
10 said debentures so to be issued as aforesaid at the maturity thereof, a special rate of four mills and four-tenths of a mill in the dollar on the whole rateable property in the said City of Winnipeg shall be rated and levied in each year during the currency of the said debentures in addition to all other rates and assessments whatsoever.

“(3) The said debentures shall be issued forthwith upon the ratification of this by-law in accordance with the provisions of the statutes of this Province in that behalf, and after issued shall be by the Mayor and Council of the City of Winnipeg, within one month
20 thereafter delivered to the manager for the time being of the Winnipeg branch of the Merchants Bank of Canada, upon the following trusts, that is to say: upon trust that the said The Manager for the time being of the Winnipeg Branch of the Merchants Bank of Canada, shall hold the said debentures and every of them until the said Canadian Pacific Railway Company shall have performed the conditions and each and every of them hereinafter specified and stipulated to be performed by them, and to collect and to hold the half-yearly interest maturing on the said debentures (retaining thereout as commission one half of one per cent upon the amount so collected) and to deposit
30 the balance so collected in some chartered bank doing business in the City of Winnipeg to his credit as such Trustee at interest, if possible, and upon the completion of the conditions by the Canadian Pacific Railway Company hereinafter mentioned upon the further trust to pay over the monies so deposited and any accumulation of interest thereon, and also deliver over the said debentures with coupons attached (except such as may have been paid) to the Canadian Pacific Railway Company.

“(4) The conditions hereinbefore referred to are as follows:

“(1) The said Canadian Pacific Railway Company shall on or before the first day of February one thousand eight hundred and
40 eighty-three, commencing within the City of Winnipeg, construct and complete and fully equip one hundred miles of the railway running southwesterly towards the westerly limits of the Province upon a course starting within the said City of Winnipeg, crossing the Assiniboine River, running within the limits of townships nine, eight, seven, six and five, in range one east of the principal meridian; town-

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Exhibits

No. 18
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(Continued)

ships five and four in range one west of the principal meridian; township four in range two west of the principal meridian; townships four and three in range three west of the principal meridian and township three in range four, five, six, seven and eight west of the principal meridian (all according to the Dominion Government Survey of the Province of Manitoba) or within a distance of six miles upon either side of a line which may be drawn through the said townships to the extent of the said one hundred miles in the direction above described south.

- 10 “(2) The Canadian Pacific Railway Company shall on or before the first day of November one thousand eight hundred and eighty-three, build, construct and complete, within the City of Winnipeg, on lots four and five in block one; eleven and twelve on the east side of Austin Street, and forty four and forty-five on the west side of Maple Street, east of the Main Street, on the Point Douglas Common property; as laid down on the map or plan of said City, registered in the Registry Office in and for the County of Selkirk (which are to be conveyed to the said Company on or immediately after the ratification of this By-law as aforesaid, by the Mayor and Council
20 of the City of Winnipeg for that purpose) a substantial and commodious general passenger railway depot, with all the modern improvements for the accommodation and convenience of the public at large, and the business of the said Company.

- “(3) 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
30 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.

“(4) And by such bond and covenant the said Company shall bind themselves as soon as they conveniently can to procure and erect within the City of Winnipeg large and commodious stock or cattle yards, suitable and appropriate for the central business of their main line of railway and the several branches thereof.

- “(5) If the said Company shall make default in any of the condi-
40 tions herein mentioned to be by them performed, the said trustee shall thereupon and in any **such** case deliver all the said bonds with the coupons attached, not paid, and all the monies in his hands by virtue of the trust hereby created, to the Mayor and Council of the City of Winnipeg.

“(6) The Mayor and Council of the City of Winnipeg are hereby authorized and empowered upon the said Company making, executing and delivering to the Mayor and Council of the City of Winnipeg the bond and covenant in the third subsection of the fourth-section of these presents mentioned to make, seal and deliver to the said Company a deed of the lands upon which the passenger station in the second subsection of the fourth section of these Presents mentioned is to be erected.

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April 3, 1897.
(Continued)

“(7) Should any difference or dispute arise between the Mayor
10 and Council of the City of Winnipeg and the Canadian Pacific Rail-
way Company in respect of any matter or thing concerning the
terms of this by-law or the terms and conditions thereof, the same
shall from time to time be submitted to the arbitrament of three
persons, one to be chosen by the Mayor and Council of the City of
Winnipeg, one to be chosen by the said Canadian Pacific Railway
Company, and one to be appointed on application of either party,
and on reasonable notice to the other party by the Chief Justice of
Manitoba, and the award of a majority of such arbitrators of and
concerning the premises submitted to them, shall be final and bind-
20 ing upon both parties, and the same may be made a rule of court.

“(8) Upon the fulfilment by the said Company of the conditions
and stipulations herein mentioned by the said Canadian Pacific
Railway Company, all property now owned or that hereafter may
be owned by them within the limits of the City of Winnipeg, for
railway purposes or in connection therewith, shall be forever free
and exempt from all municipal taxes, rates and levies and assess-
ments of every nature and kind.

“(9) That this by-law shall take effect from and after the twenty-
first day of September in the present year of our Lord one thousand
30 eight hundred and eighty-one.

“(10) That notwithstanding anything in this By-law contained,
the coupons on each of the debentures issued under this by-law
representing the first two-half-yearly payments of interest be de-
tached from said debentures and delivered up to the Mayor and
Council of the City of Winnipeg and be cancelled.

“Done and Passed in Council at the City of Winnipeg this fifth
day of September, in the year of our Lord one thousand eight hundred
and eighty-one.

40

“Alexander Logan,”
Mayor.

“A. M. Brown,”
City Clerk.

“and save and except by the **by-laws** above mentioned the said lands

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No. 18
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City of Winnipeg
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Railway Company.

Replication
April 3, 1897.
(Continued)

of the defendants are not in any way exempt from any taxation whatever."

(3) And for a replication to the forty-fourth plea of the defendants, the plaintiffs say that the by-law **numbered 148** therein referred to **and as amended by by-law numbered 195** is in the words and figures following:

(Here follows By-Law No. 148 as amended.)

And save and except by the **by-laws** above mentioned the said lands of the defendants are not in any way exempt from any taxation
10 whatever.

(4) And for a replication to the sixty-sixth plea of the defendants, the plaintiffs say that the by-law **numbered 148** therein referred to **and as amended by By-Law numbered 195** is in the words and figures following:

(Here follows By-law No. 148 as amended.)

And save and except by the **by-laws** above mentioned the said lands of the defendants are not in any way exempt from any taxation
whatever.

(5) And for a replication to the eighty-eighth plea of the defend-
20 ants, the plaintiffs say that the by-law **numbered 148** therein referred to **and as amended by By-law numbered 195** is in writing and is in the words and figures following:

(Here follows By-Law No. 148 as amended.)

And save and except by the **by-laws** above mentioned the said lands of the defendants are not in any way exempt from any taxation
whatever.

(6) And for a replication to the one hundred and tenth plea of the
30 defendants, the plaintiffs say that the by-law **numbered 148** therein referred to **and as amended by By-Law numbered 195** is in writing and is in the words and figures following:

(Here follows By-Law No. 148 as amended.)

And save and except by the by-laws above mentioned the said lands of the defendants are not in any way exempt from any taxation
whatever.

Demurrer

Monday, the 15th day of November, A.D. 1897

The defendants by their attorney James Albert Manning Aikins say that the plaintiff's replications to the twenty-second, forty-fourth,

sixty-sixth, eighty-eighth, and one hundred and tenth pleas of the defendants are bad in substance.

Some matters of law intended to be argued:

That the said Replications confess the truth of the facts alleged in the pleas to which they are respectively replications but do not state any new facts in avoidance.

That the said Replications are no answer to the pleas to which they are Replications.

10

“J. A. M. Aikins”
Defendants’ Attorney

Joinder in Demurrer

Tuesday the 16th day of November, A.D. 1897.

The Plaintiffs by John Stanley Hough their Attorney say that the Plaintiffs’ replications to the twenty-second, forty-fourth, sixty-sixth, eighty-eighth and the hundred and tenth pleas of the defendants are good in substance.

“J. Stanley Hough”
Plaintiffs’ Attorney

Order of Bain, J.

20

Friday the 14th day of October A.D. 1898.

Upon the application of Counsel for the plaintiffs and Counsel for the defendants consenting thereto—

It is ordered that the plaintiffs be at liberty to amend the first five counts of the Declaration herein by inserting in each of such counts after the words “Parish of Saint John” where they appear therein, the following—“Which said land was properly and sufficiently described in the assessment roll,” and that the plaintiffs be at liberty to amend the respective replications to the 22nd, 44th, 66th, 88th and 110th pleas of the defendants by inserting after the word “by-law” where the same first appears therein the words “numbered 148,” and by inserting after the words “referred to” immediately following, the words “and as amended by by-law numbered 195,” and by inserting between the words “any” and “case” in paragraph 4 of the said by-law sub-paragraph 5 the word “such,” and by striking out the words “Alexander Logan, Mayor, A. M. Brown, City Clerk,” and by substituting for the word “by-law” where it appears last in the said replications the word “by-laws.”

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No. 18
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Demurrer
November 15, 1897.
(Continued)

Joinder in
Demurrer
November 16, 1897.

Order of Bain, J.
October 14, 1898.

Record
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No. 18
Proceedings in
City of Winnipeg
v. Canadian Pacific
Railway Company.

Order of Bain, J.
October 14, 1898.
(Continued)

And upon application of Counsel for the defendants, Counsel for the plaintiffs consenting thereto—

It is ordered that the defendants be at liberty to amend their 17th, 39th, 61st, 83rd and 105th pleas by adding thereto "nor was the said land properly and sufficiently described in the assessment roll as alleged" and to amend their 22nd, 44th, 66th, 88th and 110th pleas by striking out all the words thereof after the word "mentioned" and substituting in lieu thereof "being legally exempt therefrom by by-law numbered 148 of the plaintiffs as amended by by-law 10 numbered 195 of the plaintiffs and all conditions were performed and all things happened and all times elapsed necessary to entitle the defendants to the benefit of the exemption in the said by-laws mentioned."

And it is further ordered that the demurrer book or record for the demurrer to the replication be hereby amended accordingly.

"Jno. H. Bain"
J.

Exhibit No. 19

PLAINTIFF'S DOCUMENT

No. 19
Formal Judgment
of Supreme Court
of Canada in City
of Winnipeg v.
Canadian Pacific
Railway Company.
October 8, 1900.

20 **Formal Judgment of Supreme Court of Canada in City of Winnipeg v. Canadian Pacific Railway Company**

In the Supreme Court of Canada

BETWEEN

THE CANADIAN PACIFIC RAILWAY COMPANY
(Defendants) APPELLANTS
and

THE CITY OF WINNIPEG
(Plaintiffs) RESPONDENT.

I, Paul Leduc, Registrar of the Supreme Court of Canada, hereby 30 certify that the paper-writing annexed hereto, marked "A", is a true copy of the formal Judgment of this Court in the above appeal.

All of which I hereby certify under the Official Seal of the Supreme Court of Canada.

"Paul Leduc"
Registrar.

Dated at Ottawa, this 8th day of March, A.D. 1949.

"A"

IN THE SUPREME COURT OF CANADA
MONDAY, the 8th day of October, A.D. 1900.

PRESENT

The Honourable Mr. Justice Taschereau
 “ “ Mr. Justice Gwynne
 “ “ Mr. Justice Sedgwick
 “ “ Mr. Justice Girouard

Record
Exhibits

No. 19
 Formal Judgment
 of Supreme Court
 of Canada in City
 of Winnipeg v.
 Canadian Pacific
 Railway Company.
 October 8, 1900.
 (Continued)

The Right Honourable the Chief Justice, Sir Henry Strong being absent, his judgment was announced by the Honourable Mr. Justice Taschereau pursuant to the Statute in that behalf.

BETWEEN

10 THE CANADIAN PACIFIC RAILWAY COMPANY
 (Defendants) APPELLANTS
 and

THE CITY OF WINNIPEG
 (Plaintiffs) RESPONDENT

The appeal of the above named appellants from the judgment of the Court of Queen's Bench for Manitoba, pronounced in the above cause on the 30th day of June in the year of our Lord, one thousand eight hundred and ninety nine, affirming the judgment of the Honourable Mr. Justice Bain one of the Justices of the said Court of Queen's
 20 Bench rendered in this cause on the 15th day of October in the year of our Lord one thousand eight hundred and ninety eight, having come on to be heard before this Court on the 22nd and 23rd days of May in the year of our Lord nineteen hundred in the presence of counsel as well for the appellant as the respondent, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment and the same coming on this day for judgment this Court did order and adjudge that the said judgment of the Court of Queen's Bench for Manitoba, and the said judgment of the Honourable Mr. Justice
 30 Bain should be and the same were reversed and set aside, and that the plaintiffs' Replications to the defendants' 22nd, 44th, 66th, 88th, 110th pleas are bad in substance and that the plaintiffs take nothing by their said writ and that the defendants do go thereof without day, and that the action be dismissed.

And this court did further order and adjudge that the said respondents should and do pay to the said appellants the costs incurred by the said appellants as well of the trial before the Hon. Mr. Justice Bain and in the said Court of Queen's Bench for Manitoba as in this Court.

40

(Signed) E. R. Cameron
 Registrar.

Record**Exhibits**

No. 15
 City of Winnipeg
 By-law No. 2790.
 January 15, 1904.

Exhibit No. 15**PLAINTIFF'S DOCUMENT****City of Winnipeg By-law No. 2790**

A By-law of the City of Winnipeg relating to the C.P.R. Main Street subway and the closing of certain streets.

Whereas negotiations have been for a long time pending between the City and the Canadian Pacific Railway Company respecting the construction of a subway under the Company's tracks at the crossing of Main Street and the erection of a modern and more commodious station and office building and an hotel.

And Whereas some of the matters in question, namely as to the character of the subway and the contribution to its cost have been submitted to the Railway Committee of the Privy Council under the Provisions of "The Railway Act."

And Whereas pending the settlement of the terms of an order pronounced by the said Committee apportioning the cost, said negotiations have been resumed.

And Whereas to secure an easy gradient in the approaches of said subway it is necessary to raise the Company's tracks and the Company has agreed to raise its tracks five feet above the present normal level at Main Street;

And Whereas the Railway Company has agreed to construct said subway and its approaches at its expense and to indemnify the City against all claims for damages and compensation on account of the injury to real estate as hereinafter mentioned:

And Whereas the City and Company have entered into an agreement, which is in the words and figures following:

THIS AGREEMENT MADE in duplicate this fifth day of December, A.D. 1903.

30 BETWEEN:

THE CITY OF WINNIPEG, hereinafter called "the City"
 Of the First Part,

and

THE CANADIAN PACIFIC RAILWAY COMPANY,
 hereinafter called "the Company"
 Of the Second Part.

WITNESSETH:

That in consideration of the covenants and agreements on the part of the Company hereinafter set forth, the City for itself, its successors

and assigns, covenants, promises and agrees with the Company its successors and assigns;

Record
Exhibits

No. 15
City of Winnipeg
By-law No. 2790.
January 15, 1904.
(Continued)

1. That the City gives and grants the right and privilege to the Company to in any manner and at any time the Company thinks proper, re-arrange the location of its tracks upon Point Douglas Avenue in the City of Winnipeg, and re-construct the same and construct any additional track or tracks of railway along, upon or over any part of the said Point Douglas Avenue west of the westerly limit of McArthur Street produced northerly and use and operate
10 the same and for that purpose should the Company think proper to at any time raise the grade and surface of Point Douglas Avenue or of any part thereof and tracks thereon to such height and at such points as the Company may deem advisable, but not to exceed ten feet above the present grade of its main track on the said Point Douglas Avenue. Provided however as to the northerly twenty-one feet in width of said Avenue east of Main Street and west of the line between Lots Fifteen (15) and Sixteen (16) referred to in paragraph 3, so long as and to the extent that it remains an unclosed street, the right of the Company to lay tracks and raise the grade shall be
20 subject to the condition that there shall be no obstruction thereof, unless by consent of the City, without turning the street so as to leave an open and good passage for carriages, and on completion of the works placing the street in good passable condition; and the rail itself, if it does not, when the works are completed, rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction; and subject also to the condition that the Company shall properly grade up the approaches into said twenty-one feet of the streets running thereto from the north which the Company hereby agrees to do.
- 30 2. That the City will duly stop and close up that part of Fonseca Street lying between the southern limit of Point Douglas Avenue extended across the same on the north and the production westerly across said Fonseca Street of the southern limit of Lots "B" and "C" according to Plan 12, subdivision of Lot 12, D.G.S. St. John, produced across the same on the south and the production northerly to the southerly limit of Point Douglas Avenue of the easterly limit of Lots "B" and "A" according to Plan 12 subdivision of said Lot 12 east St. John, on the east, and also all those parts of Austin and Meade Streets, which lie between the southern limit of the said
40 Point Douglas Avenue, extended across the same on the north and the northern limit of Higgins Avenue, extended across the same on the south and also that part of Maple Street lying northward of the production westerly across Maple Street of a line parallel to and twenty-six feet north of the north limit of Lot 57, Plan 63, subdivision of Lot 35 East St. John, and South of Point Douglas Avenue, and will convey to the Company those portions of the streets so closed which

Record
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No. 15
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lie between lands or lots now owned or which may hereafter be owned by the Company, and that in the event of the Company becoming the owner of the Lots fronting on that part of Maple Street lying between said line produced across Maple Street and Higgins Avenue, it will close up said part of Maple Street and convey the same to the Company.

3. So that the same may be used by the Company for the purpose of railway tracks and sidings the City will duly stop and close up

10 (a) All that portion of Point Douglas Avenue which lies west of Main Street, and all crossings thereof and will also duly stop and close up;

(b) the most southerly forty-five feet in width of Point Douglas Avenue extending easterly from Main Street to the West line of Argyle Street and the production thereof northerly, and all crossings thereof, and will stop and close up; (c) the most southerly forty-five feet of said Point Douglas Avenue from the production northerly of the said westerly line of Argyle Street, to the boundary line between Lot Fifteen (15) and Lot Sixteen (16) according to the Dominion Government Survey of the Parish of St. John, produced northerly

20 five feet in width of said Point Douglas Avenue and all crossings of the said forty-five feet in width of said Point Douglas Avenue except a crossing from Annabel to Rachel Street, hereinafter mentioned, and will duly stop and close up; (d) that portion of Point Douglas Avenue upon which the two main railway tracks of the Company are at present constructed, and lying between the said line between Lots Fifteen and Sixteen produced northerly on the West and the production northerly across said Point Douglas Avenue of the western limit of McArthur Street and all crossings thereof.

3a. That if the Company at any time desires to divert to the north that part of the northerly twenty-one feet of Point Douglas Avenue

30 between Main Street and Argyle Street, the City will upon the Company's request and the Company's providing the lands required for such diversion, and acquiring the ownership of the lands between such proposed diversion and Point Douglas Avenue, take the necessary steps to carry out such diversion, and will stop and close up the street now forming that part of the said twenty-one feet which will, when the diversion is made, be between the twenty-one feet as diverted and the present southerly forty-five feet of Point Douglas Avenue, and will also then duly stop and close up the easterly thirty-two feet in width of Main Street, which will lie between a line

40 parallel to and twenty-one feet perpendicularly distant south from the present north line of Point Douglas Avenue produced across the same, and a line produced across the said thirty-two feet, twenty feet perpendicularly north from the most northerly track of the Company to cross Main Street at the subway hereinafter mentioned, such diversion shall not be made so as to carry the point of intersection of the present northerly boundary of Point Douglas Avenue with the

east boundary of Main Street more than fifty feet north of its present location. And that part of the land lying between the said northerly twenty-one feet as diverted and the present Point Douglas Avenue shall be used only for Railway track purposes and the continuation of any track therefrom shall cross Main Street only on the super-structure over the subway hereinafter mentioned. And the Company shall have in respect of the said twenty-one feet as diverted the same rights, subject to the same conditions as are hereby given in respect of the said northerly twenty-one feet of Point Douglas
 10 Avenue before the diversion of the same. But the east thirty-two feet of Main Street opposite the said twenty-one feet of Point Douglas Avenue as diverted shall always remain open as a street, and there shall be no obstruction thereof by the Company preventing traffic entering thereon from the north or leaving the same going north.

3b. That the Company shall have the right to construct a train shed over any part of Point Douglas Avenue to be closed up hereunder, lying between Main Street and Maple Street.

4. That the City will stop, and close up that part of King Street on the north side of Point Douglas Avenue and adjoining the same
 20 and south of a line drawn across said King Street from the north-west corner of Lot 2 part of Block 11, West of Main Street, according to a Plan filed in the Winnipeg Land Titles Office, Winnipeg Division as No. 148; and the north-east corner of Lot One (1) in Block "C" between King and Princess Streets according to Plan 63.

5. That the City will duly stop and close up that part of Princess Street lying between a line parallel to and twenty feet distant perpendicularly south from the southern limit of Sutherland Avenue extended across the said street and the northern limit of said Point Douglas Avenue extended across said street and will convey the same
 30 to the Company.

6. That the City will duly stop and close up and convey to the Company that part of the lane in block 12, West of Main Street, part of Lot 35 of the Parish of St. John, and lying between Main Street and King Street and shown on Plans Nos. 133 and 184, registered in the Winnipeg Land Titles Office, Winnipeg Division, which lies between the southern limit of Point Douglas Avenue, extended across said lane on the north and the southern limit of Lot 5 on said Plan No. 133 extended westerly across the said lane, and the Company will convey to the City as an addition to said lane, and for a lane,
 40 that part of Lot 5, Block 12, according to Plan 184, subdivision of 35 West St. John, described as follows: Lying to the south of a line drawn from the south-west corner of said Lot 5 to a point on the east boundary of said Lot distant southerly from the north-east corner of said lot, one hundred feet, and for the purpose of reducing the sharp turn in Sutherland Avenue at the intersection of King Street, the

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Company will also convey to the City the most northerly twenty feet in depth fronting on Sutherland Avenue of Lot 5 in Block "C" Part of 35 St. John, according to Plan 63.

7. That the City will and doth hereby grant to the Company, leave, license and authority for and on behalf of the City, and the Company is hereby empowered for and on behalf of the City to enter upon the most westerly one hundred feet in width of Main Street extending from the northerly limit of the proposed subway herein mentioned to the most southerly limit thereof, and therein
10 and thereon for and on behalf of the City and under its authority, to construct such subway. The Company is to furnish the materials and do the work required for the construction of such subway at its own expense. And the City will duly stop and close up the remaining 32 feet in width of Main Street from a line parallel to and two hundred feet south perpendicularly from the south line of said Point Douglas Avenue produced across Main Street to a line parallel to and twenty-one feet south perpendicularly from the north line of Point Douglas Avenue produced westerly across Main Street. And the Company shall have the right thereafter in perpetuity to construct,
20 maintain and operate its railway and tracks over such subway, and upon the superstructure thereof, and over the said thirty-two feet so closed up, or to be closed up, and to erect suitable fences on the north and south ends thereof, subject to paragraph twenty-six of this agreement.

8. That the City will convey to the Company free from encumbrances those properties in the City of Winnipeg, which may be more particularly known and described as follows: Block Eleven (11) as shown on a Plan of survey of part of Lot 35, according to the Dominion Government Survey of the Parish of St. John, filed in the
30 Winnipeg Land Titles Office, Winnipeg Division as Plan No. 63, Also Lot 58, east of Main Street shown on a plan of survey of part of Lot 35 St. John, and filed as aforesaid as Plan No. 63, except the southerly twenty-six feet in width of same.

9. That the City will lay out and dedicate as a public highway the most northerly thirty-two feet in width adjoining Higgins Avenue east of Main Street of Lots 7 and 49, which Lots are shown on a Plan of Survey of said Lot 35 St. John, which Plan is said Plan No. 63, aforesaid, except that portion of said Lot 49, which is not at present owned by the City.

40 10. That the City will without delay, pass all such by-laws, and take all such steps and proceedings as may be necessary or requisite for the closing of those portions of the said streets agreed to be closed, and for conveying to the Company those portions of the streets which the City has hereby agreed to convey, and that the closed portions of

streets that are to be conveyed shall be so conveyed under the authority of a By-law or By-laws in that behalf hereinafter mentioned.

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11. That the By-law or By-laws as to closing those portions of Princess, King, Main and Austin Streets and Point Douglas Avenue west of the west limit of Argyle Street produced across said Point Douglas Avenue as aforesaid (except in respect of a strip of land, part of said Point Douglas Avenue, of a uniform width of twenty-four feet in front and contiguous to Lots One (1), Two (2) and Three (3) in Block Twelve (12), Plan 184, aforesaid, and the continuation of
10 such strip of twenty-four feet in width to the west side of King Street) and as to the closing of the crossings of said Point Douglas Avenue, as in this agreement mentioned; and as to closing the lane hereinbefore mentioned in paragraph 6 hereof shall take effect immediately upon the passing thereof and the Company shall have the right to enter upon and use the same for Railway purposes, and that the By-law or By-laws as to the closing of those portions of Fonseca, Meade and Maple Streets shall take effect immediately upon the passing thereof as to those portions thereof which lie between the lands then owned by the Company and in respect of the other portions thereof from time
20 to time as the Company may acquire or have the ownership of the lands on each side thereof and upon the said By-law or By-laws becoming effective, as aforesaid, the Company shall have the right to enter upon and use those portions of the said streets so closed for railway purposes. But it is understood and agreed that the By-law or By-laws and that part of this agreement so far as such By-law or By-laws and that part of this agreement relate to the closing of those portions of Point Douglas Avenue which lie east of the West limit of Argyle Street produced as aforesaid, and the said strip of Point Douglas Avenue of a uniform width of twenty-four feet adjoining
30 and in front of the said Lots One (1), Two (2) and Three (3) in Block Twelve (12) aforesaid, and the continuation of such strip, to the west side of King Street as aforesaid are to be conditional upon, and are only to take effect upon the ratification and confirmation of this agreement and of such By-law or By-laws by the Legislature of Manitoba, nor is any entry upon or use of any of the streets or portions thereof by the Company to prejudice the right of the Company to have the terms of this agreement carried out, and ratified and confirmed as herein mentioned.

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12. That the City will use all effort and diligence in procuring from
40 the Legislature of Manitoba ratification and confirmation of all the City's promises and agreements herein contained and of all By-laws which may be requisite or necessary on the part of the City for carrying out the same.

In consideration of the foregoing covenants and agreements by

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and on the part of the City, and of the observance and performance thereof, and subject to the said ratification and confirmation thereof as aforesaid, the Company for itself, its successors and assigns, covenants, promises and agrees with the City, its successors and assigns as follows:

13. That the Company will, at its own expense, for and on behalf of, and under the authority of the City, construct a subway on the west side of Main Street, between Higgins Avenue on the south and Sutherland Avenue on the North, of a width of one hundred feet, and 10 of which the grade is not to exceed one in twenty and so arranged that there is to be under the tracks of the railway a place for two street railway tracks, for two teamways, and for two foot pathways, and the places for the tracks and teamways shall be on the same level if desired by the City, and that there is to be the height of fourteen feet between the surface of the subway at the place for street railway tracks in the middle part thereof and the centre of the arch over the same and not less than twelve feet at the centre of the arch over the teamways and that the railway rail level on the superstructure of said subway is to be at least five feet above the present normal 20 level of Main Street, the Company to construct and complete the pavement of the roadway (save in so far as the Winnipeg Electric Street Railway Company may be under obligation under its contract with the City or otherwise to construct and complete the same) and sidewalks in subway and approaches. The construction of said Main Street subway shall be commenced not later than three months from the ratification and confirmation by the Legislature of the terms of this agreement and the By-laws as hereinbefore mentioned, and shall be completed within twenty-seven months after such ratification and confirmation. The Company will build and thereafter repair and 30 maintain a sufficient and perpendicular retaining wall along the east side of the subway, and will restore and make good the roadway on that part of the east thirty-two feet of Main Street not closed up under the provisions hereof. The subway including the pavements and footways, the retaining wall, and the superstructure and supports thereof, are to be constructed and completed by the Company in accordance with plans and with the character of material for pavements and footways, to be submitted to and approved by the City Council. If the Council and Company cannot agree as to the Plans the questions in difference shall be submitted to the Railway Com- 40 mittee of the Privy Council of Canada. There after the City will maintain and keep in repair the pavements and footways as a part of its street.

14. That the Company will make and maintain approaches with wooden block pavement not less than twenty-six feet in width on King Street on the north and south sides of the Company's line of

railway, with a crossing over its tracks on Point Douglas Avenue so that the same may be used as an emergency crossing in the event of the said Main Street subway so to be constructed, becoming at any time impassable or necessarily obstructed, but during such time only as will necessarily be required to make it again passable and that the Company will during the time the said emergency crossing is used as aforesaid, protect the same by gates and watchmen, and during such time said portion of King Street shall be treated as a public highway.

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10 15. That the Company will make and maintain a level crossing from Annabel to Rachel Street across the Company's tracks on Point Douglas Avenue, and will provide gates and a watchman therefor. Provided however that when the Company desires to exercise its right to raise its tracks or the grade of the said Point Douglas Avenue as hereinbefore mentioned, at such point the Company will then construct for and on behalf, and under the authority of the City, a subway crossing in lieu of such level crossing, the Company doing the work and procuring the materials therefor at its own expense. Such subway shall be forty-nine feet in width and the character and plans
20 thereof shall be submitted to and approved by the Council. Said subway from Annabel to Rachel Street shall be constructed and completed within four years and six months after the said ratification and confirmation aforesaid. If the Council and Company cannot agree as to the character and plans the question in difference shall be submitted to the Railway committee of the Privy Council of Canada.

16. That the Company will build a suitable station and office building fronting towards Higgins Avenue and at a place between Main and Meade Streets and that the Company will build an hotel
30 near the north-east corner of Main Street and Higgins Avenue and in case of its destruction by fire within ten years from the first day of March 1903 will rebuild the same. The work on said station, office building, and also on the hotel shall be commenced not later than three months after the ratification and confirmation by the Legislature of the terms on the part of the City of this agreement, and the By-laws as hereinbefore mentioned, and shall be completed within twenty-seven months after such ratification and confirmation. It is agreed that delay beyond said time caused by strikes, fires, accidents, or other causes beyond the Company's control shall not be deemed to
40 constitute a breach of the agreement in this section contained.

17. That during the construction of the said Main Street subway, the Company will allow the crossings to be used by the public over the said Point Douglas Avenue except the crossings at Austin and Maple Streets, and during the time of construction will keep such

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crossings, except as aforesaid in a serviceable condition as far as practicable. The Company will proceed with the work of making and completing the subway, roadways on Main Street for tracks, teams, and foot passengers, expeditiously and diligently so as to allow same to be used for ordinary traffic at the earliest possible date, and the balance of Main Street (32 feet) not occupied by the subway will be kept open for traffic, as far as practicable, and at no time less than twenty-four feet shall be open and watchmen will be provided by the Company during the construction, until traffic can pass through the 10 subway.

18. That the Company will indemnify and save harmless the City from all damages and compensation, if any, to or in respect of the real estate hereinafter more particularly mentioned, including damages, if any, to trade or business carried on thereon, by reason of or resulting from anything done hereunder, which the City may be obliged to pay. The real estate hereinbefore in this paragraph referred to may be more particularly known as the real estate fronting upon that part of Main Street occupied by or opposite the subway, and its inclined approaches; the real estate fronting upon that part 20 of Annabel and Rachel Streets or occupied by or opposite to the subway and its inclined approaches; the real estate fronting upon Point Douglas Avenue west of McArthur Street, and those portions of Lots One (1), Two (2), Three (3), Four (4), Five (5), Thirty (30), Thirty-one (31), Thirty-two (32), Thirty-three (33), and Thirty-four (34) of subdivision of Lot Twelve (12) in the Parish of St. John, according to a plan filed in the Winnipeg Land Titles Office, Winnipeg Division as Plan No. Twelve (12) adjoining Point Douglas Avenue; and a strip 132 feet in width of Parish Lot Thirteen (13) according to the Dominion Government survey, lying to the south of and adjoining 30 Point Douglas Avenue, and those portions of Lot 14 of the Parish of St. John, according to the Dominion Government Survey which lie to the West of Lots 1 and 3, according to Plan 41 hereinafter mentioned, and between Point Douglas Avenue on the north and a line parallel thereto at a distance of one hundred and thirty-two feet south therefrom, and Lots One (1), Two (2), Twenty-nine (29), Thirty (30), Thirty-one (31), and Thirty-two (32) adjoining Point Douglas Avenue, part of the subdivision of Lot Fourteen according to the Dominion Government survey of the Parish of St. John as shown on the Plan filed in the Winnipeg Land Titles Office, Winnipeg 40 Division as Plan No. Forty-one (41). But the Company is not to be liable or responsible for any damages or compensation to or in respect of any property real or personal or any trade or business except as above specified by reason of or resulting from the closing of the said streets and street crossings or any of them, or the conveyance thereof or of any part thereof to the Company or the substitution of the said

subways or either of them for level crossings. And the Company will indemnify and save harmless the City, from and against all loss and damage occasioned by any neglect, default or omission or any wrongful act or acts, by the Company or its employees in the work of constructing said subways or either of them, and the Company will indemnify and save harmless the City from and against all costs, charges and expenses that the City may incur or be put to in connection with any actions, suits, arbitrations, or other proceedings in respect of or incidental to all and any of such damages and compensation. Provided however, that should the Company at any time require, the City will allow the Company to appoint agents or counsel to represent the City's interest in any claim, action, suit or proceeding brought against the City to compel the City to pay such damages or compensation, and if the Company so desires the City will hand to it any claims, in respect of matters arising under this section for settlement or contestation by the Company.

19. That the Company shall during the whole of the time that the tracks of the Company shall cross the said subway, and the subway remain in approximately the same position as immediately after construction, at all times keep said subway pumped free and clear of surface and soakage water, so that the same may be freely used for the traffic passing along the said street.

20. That while the tracks of the Company shall cross said subway during sleighing on Main Street, if on the teamways in the subway or in the approaches thereto the snow has melted or is blown away the Company will free of charge, provide and bring in snow, and distribute the same over the surface of such teamways so as to make the traffic through the subway convenient and practicable.

21. That the Company will construct for the City, free of charge a railway siding to the latter's new works and material yard and within the land owned by the Company furnish the right of way therefor, the City furnishing the remainder. The route of said siding may be described as follows—along Ross Avenue and across Brant Street as shown on the tracing hereto annexed marked "A". (Note: Tracing referred to not printed.)

22. That nothing in this agreement shall effect or interfere with the rights present or future of either party hereto in respect of the question of taxation or exemption from taxation of the Company's property by the City, and nothing herein contained shall take away or extinguish any rights or privileges which the Company now has in respect of Point Douglas Avenue.

23. That for the purpose at any time or times of constructing conduits and sewers, and laying gas pipes and water mains and of con-

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structing any other municipal under-surface work or re-constructing or repairing the same, the City by its officers and servants, and for the purpose of repairing gas pipes in Main Street, the proprietor thereof, their officers and agents may enter upon any of the lands now occupied by the parts of the streets which by this agreement are to be closed up and may make, excavations and other works therein, doing no damage to the Company's property and entering upon same only at convenient times. Such excavations and other works shall be done subject to any orders or regulations made or required to be
10 made pursuant to law.

24. That if there be any sewer or any water or gas pipes in the line of or in the way of the said Main Street subway or its approaches the Company may and shall at its own expense and for the City, divert same to a new position on the east thirty-two feet of Main Street and re-construct them there, so as not to injure or interrupt (further than permitted by the City Engineer) the use and efficiency thereof, and will restore and make good all house or other building connections, under the directions of the City Engineer; The Company will for the City and in so far as the City is obliged to do so, replace or place and
20 lay in positions provided for street railways in said Main Street subway to the length to which they now extend such of the tracks, wires and works of the Winnipeg Electric Street Railway Company as may be necessarily removed in connection with the construction of the said subway and its approaches and if the City shall be entitled to receive from the said Street Railway Company any moneys for such works, the City shall pay the amount thereof to the Company.

25. It is agreed between the parties hereto that the parties hereto will apply for an order of the Railway Committee approving and authorizing so far as in it lies, the provisions hereof, and any order of
30 the Railway Committee may be made subject to this agreement.

26. Whereas in Clause 7 the City has agreed to stop and close up the Thirty-two feet in width of Main Street from a line parallel to and two hundred feet south perpendicularly from the south line of Point Douglas Avenue to a line parallel to and twenty-one feet south perpendicularly from the north line of Point Douglas Avenue; and whereas the said two hundred feet is an estimate in the meantime merely of what length of said thirty-two feet will be required by the Company; it is agreed that if, when the Company's works are completed across the said thirty-two feet it shall appear that the said
40 line drawn two hundred feet south as aforesaid is a greater distance than twenty feet south of the most southerly track of the railway Company across said 32 feet, then and in such case the City shall have the right to re-open so much of said two hundred feet as shall lie to the south of said Twenty feet.

Witness the Corporate Seal of each of the parties hereto and the signature of its officials.

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(Sgd) John Arbuthnot
Mayor

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Signed, Sealed and Delivered
in the presence of

(Sgd) W. G. Scott
Treasurer

(SEAL—Canadian Pacific
Railway Company)

(Sgd) Wm. T. Rutherford
Acting Comptroller

10

THE CANADIAN PACIFIC
RAILWAY COMPANY

(SEAL—City of Winnipeg)

(Sgd) T. G. Shaughnessy
President

(Sgd) C. Drinkwater
Secretary.

NOW THEREFORE the Municipal Council of the City of Winnipeg in Council assembled enacts as follows:

(1) The agreement hereinbefore set out is hereby ratified and confirmed.

20 (2) The City doth hereby give and grant the right and privilege to the Canadian Pacific Railway Company, mentioned in the first paragraph of said agreement.

30 (3) There is hereby stopped and closed up those parts of Fonseca, Austin, Meade and Maple Streets, Point Douglas Avenue, King, Princess and Main Streets agreed to be stopped and closed up by said agreement and particularly mentioned and described in sections 2, 3, 4, 5 and 7 of the said agreement, and also that part of the lane in Block 12, west of Main Street, shown on plans 133 and 184, as mentioned and described in paragraph 6 of said agreement, and in the manner and at the times provided for in paragraph 11 of said agreement. Provided that the part of Point Douglas Avenue between Argyle Street and MacArthur Street mentioned in said section 3 shall be stopped and closed up from and after the ratification of this by-law and said agreement by the Legislature of the Province of Manitoba.

40 (4) The City, by deed executed by its proper officers, shall convey to the Canadian Pacific Railway Company the respective parcels of land occupied by the parts of streets and lane herein directed to be closed up, and which the City by said agreement, agreed to convey to the Company under paragraphs 2, 5 and 6 as and at the time agreed upon.

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(5) The City by its proper officers, shall execute a conveyance to the Canadian Pacific Railway Company of the lands by said agreement agreed to be conveyed to the Company and which are particularly described in paragraph 8 hereof as and at the time agreed upon.

(6) There is hereby appropriated from the property known as the City Hay Market, and dedicated as a public highway, and to be a part of Higgins Avenue, the land particularly described in paragraph 9 of said agreement.

(7) It is hereby determined that the persons who are or may be 10 injuriously affected by the exercise of the powers contained in this By-law and in the said agreement and who are entitled to compensation for damages by reason thereof under the provisions of The Winnipeg Charter are all persons having any estate or interest to the extent of such estate or interest in the real estate hereinafter described or any part thereof, and all persons having any trade or business carried on at the date of this by-law upon such real estate or any part thereof, the said lands being as follows: Real estate fronting upon that part of Main Street occupied by or opposite the subway and its approaches, and also real estate fronting upon Point Douglas 20 Avenue west of MacArthur Street, and real estate fronting upon the Annabel and Rachel Street subway and its approaches.

DONE AND PASSED in Council assembled this 15th day of January, A.D. 1904.

(Sgd) Thos. Sharpe
Mayor

(SEAL)

(Sgd) C. J. Brown
City Clerk.

Certified correct,
30 HOUGH & CAMPBELL
City Solicitors.

City Clerk's Office,
Winnipeg, Feb. 25/49.
Certified True Copy
"G. L. Gardner,"
City Clerk.

Exhibit No. 9**Agreement between the Plaintiff and the Defendant**

MEMORANDUM OF AGREEMENT made this Fourth day of August A.D. 1906.

BETWEEN:

THE CANADIAN PACIFIC RAILWAY COMPANY
hereinafter called "the Company"

Of the First Part,

and

10 THE CITY OF WINNIPEG hereinafter called "the City"
Of the Second Part

Whereas the Company has built and constructed in the City of Winnipeg (in connection with its railway and the operation thereof) an hotel building on the corner of Main and Higgins Streets on part of lots One, Two, Three and Four in Block 1 East of Main Street, Plan 63;

And Whereas under its Act of Incorporation the Company does a commercial telegraph business and required for that purpose to use and occupy in the City of Winnipeg and apart from its railway station
20 therein certain premises;

And Whereas that portion of Higgins Avenue lying between Main and Maple Streets will be principally used by traffic to and from the railway station of the Company and required to be paved with asphalt or creosote block pavement;

And Whereas although the Company's said hotel property and any interest in the said premises which may be used by the Company for commercial telegraph purposes and all its other property in the City of Winnipeg and said commercial telegraph business is exempt from taxation, the City has claimed that said hotel property should be
30 made subject to Municipal taxation on the grounds that an hotel was not originally included within the meaning of a railway or railway enterprise, and that it competes (if exempt) unfairly with hotels conducted by private enterprise, and to amicably adjust and settle differences the Company has agreed to pay to the City annually the sum of Eight thousand Five hundred dollars (\$8500.00) in respect of its said hotel and hotel business in lieu of what taxation there might be thereon if the same were liable for any taxation and to assist the City in its efforts to protect against fire, the City agreeing not to seek or ask for further concessions on the part of the Company.

40 Now Therefore in Consideration of the premises the Company agrees with the City:

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Defendant.
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1. In lieu of all taxation of the said hotel property its contents and business if the same were anyway liable to taxation and for the purpose of assisting the City in the protection of property in the City against fire to pay the City annually on or before the First day of December including this year the sum of Eight thousand Five hundred dollars (\$8500.00) during the time the Company may occupy and operate the said hotel and hotel property as a licensed hotel.
2. To pay annually to the City a sum which would be equivalent to the business tax in respect of the commercial telegraph business 10 carried on by the Company on any premises in Winnipeg occupied and used by the Company for commercial telegraph purposes distinct and apart and away from its railway and railway station property if the Company were liable to be assessed for such business tax in respect of said up-town premises so occupied and used for commercial telegraph purposes and such business tax to be based on the principle of an assessment made in the manner provided by the City Charter by way of capitalization of the rental value of the said up-town premises so used and occupied as aforesaid apart and away from its 20 railway and railway station property in the same manner as if the Company were liable for a business tax in respect of said commercial telegraph business carried on on the said up-town premises.
3. To pay to the City the cost of paving with asphalt or creosote block Higgins Avenue, as widened under By-law 2790 of the City of Winnipeg, between Main and Maple Streets, excepting such portion thereof as the Winnipeg Electric Railway and other owners than the City, of property abutting on said street on the South side thereof (which the City will assess therefor) may be liable to pay under the City's Charter, or any agreement with the City.
4. To pay to the City all taxes on lands within the limits of the 30 City not actually used by the Company for railway purposes but which are being held for sale or leased.
5. And the City covenants and agrees with the Company that the City will not ask or seek for any further contributions or concessions from, by or on the part of the Company in respect of any of the matters hereinbefore mentioned, and it is distinctly understood that what the Company has herein agreed to do and give are concessions made and given by the Company without legal necessity on the part of the Company.

In Witness Whereof the parties hereto have caused their respective

Corporate Seals to be affixed and the hands of their proper officers to be set—

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The Canadian Pacific Railway Company,

“T. G. Shaughnessy,”
President

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(Canadian Pacific Railway
Company Seal)

“C. Drinkwater,”
Secretary

(City of Winnipeg Seal)

“Thos. Sharpe,”
Mayor

10

“H. C. Thompson,”
Treasurer

“Wm. T. Rutherford,”
Acting Comptroller.

Certified correct,
Theo A. Hunt,
City Solicitor.

Exhibit No. 9A

PLAINTIFF'S DOCUMENT

Resolution of the Council of the City of Winnipeg

20 Extract from Minutes of Council, being Clause 4 of the report of the Finance Committee, dated August 3rd, 1906 as adopted by Council on August 6th, 1906.

No. 9A
Resolution of the
Council of the
City of Winnipeg.
August 6, 1906.

“4. Your Committee submit herewith form of agreement between the City and the Canadian Pacific Railway Company, re taxes on the Company's Hotel, and would recommend that the same be approved and executed by the proper officers.”

City Clerk's Office,
Winnipeg, Feb. 28/49.

Certified True Copy

30

“G. L. Gardner,”
City Clerk.

Record
Exhibits

No. 10
Agreement between
the Plaintiff and
the Defendant.
May 29, 1914.

Exhibit No. 10

PLAINTIFF'S DOCUMENT

Agreement between the Plaintiff and the Defendant

THIS AGREEMENT made in duplicate this 29th day of May, A.D. 1914;

BETWEEN:

THE CORPORATION OF THE CITY OF WINNIPEG,
hereinafter called "the City,"

Of the First Part,

10

and

THE CANADIAN PACIFIC RAILWAY COMPANY,
hereinafter called "the Company,"

Of the Second Part.

Whereas there appears to be a number of matters outstanding and unsettled between the City and the Company;

And whereas it has been agreed by the parties hereto that the said outstandings and unsettled matters shall be referred to a Joint Committee consisting of representatives appointed by the City and by the Company respectively, and in default of said Committee being able
20 to agree or arrive at a settlement as to any item or items which may be up for consideration that said item or items be referred to H. A. Robson Esquire, Public Utility Commissioner for his decision and award.

Now therefore the parties hereto agree each with the other as follows:

That all claims, demands, outstandings or unsettled matters which either party may have against the other shall be, and they are hereby, referred to a committee consisting of His Worship the Mayor of the City of Winnipeg and the members of the Board of Control and the
30 City Solicitor on behalf of the City, and of J. Manson Esquire and L. J. Reycraft Esquire on behalf of the Company, for their consideration, settlement and disposal; and in default of the said Joint Committee being able to agree as to a settlement in reference to any of the said claims, demands, outstandings and unsettled matters upon which said Joint Committee cannot agree be referred to H. A. Robson Esquire, Public Utility Commissioner, for his decision and award. It is further agreed that the findings of the said Committee or of H. A. Robson Esquire, Public Utility Commissioner, as the case may be, shall be final and conclusive between the parties hereto, and that
40 either party will do all things and perform all acts which may be necessary to effectually and completely carry out the findings of the

said Committee or of the said arbitrator, according to the true intent and meaning thereof.

Record
Exhibits

It is further agreed that within ten days from the signing of this Agreement by the parties hereto, or at such other time as may be agreed upon, the Company will furnish the City and the City will furnish the Company with a full statement of all claims, demands, outstandings and unsettled matters which either party has against the other, and that these statements be exchanged simultaneously, it being understood that these statements shall contain in good faith all 10 matters that are unsettled between the parties, but that if any matter or matters should be inadvertently omitted from the said statements that either party will not be estopped from making a claim thereon at any later date.

No. 10
Agreement between
the Plaintiff and
the Defendant.
May 29, 1914.
(Continued)

It is further agreed that within ten days after the exchange of the statements above referred to, or on such other date or dates as may be agreed upon, the said Joint Committee shall meet to proceed with negotiations for the settlement of the various items contained in said statements, the time and place of said meeting to be fixed by His Worship the Mayor, or the Acting Mayor.

20 It is further agreed between the parties that the fee to be paid to H. A. Robson Esquire, Public Utility Commissioner, for his services as Arbitrator as above provided shall be borne one half each by either party hereto.

In witness whereof the parties hereto have hereunto affixed their Corporate Seals attested by the hands of their proper officers in that behalf.

Signed, Sealed and Delivered
In the presence of

The Canadian Pacific
Railway Company,

30

"George Bury,"
Vice-President.

"H. C. Oswald,"
Asst. Secy.

"Thos. R. Deacon,"
Mayor.

"H. O. Thompson,"
Treasurer.

"W. H. Evanson,"
Comptroller.

Record
Exhibits

No. 11
City of Winnipeg
By-law No. 8721.
June 15, 1914.

Exhibit No. 11

PLAINTIFF'S DOCUMENT

City of Winnipeg By-law No. 8721

A By-law of the City of Winnipeg ratifying an agreement with the Canadian Pacific Railway Company to settle disputes.

The Municipal Council of the City of Winnipeg in Council assembled, enacts as follows:

1. The draft agreement hereto annexed and marked as "Schedule A" to this By-law is hereby ratified and confirmed, and the same is 10 to be read and construed as part of this By-law.

2. Said agreement shall be executed by having affixed thereto the seal of the City and by being signed by the Mayor, Treasurer and Comptroller of the said City, upon receipt of the duly executed agreement by the Canadian Pacific Railway Company.

Done and Passed in Council assembled, this 15th day of June, A.D. 1914.

(SEAL)

(Sgd.) D. McLean,
Acting Mayor.

(Sgd.) C. J. Brown,
City Clerk.

20

Certified as to form
(Sgd) Theo. A. Hunt
City Solicitor.

"Schedule A"

THIS AGREEMENT made in duplicate this day of May
A.D. 1914;

BETWEEN:

THE CORPORATION OF THE CITY OF WINNIPEG,
hereinafter called "the City,"

30

Of the First Part,

and

THE CANADIAN PACIFIC RAILWAY COMPANY,
hereinafter called "the Company,"

Of the Second Part.

Whereas there appears to be a number of matters outstanding and unsettled between the City and the Company;

And Whereas it has been agreed by the parties hereto that the said outstanding and unsettled matters shall be referred to a Joint Committee consisting of representatives appointed by the City and

by the Company respectively, and in default of said Committee being able to agree or arrive at a settlement as to any item or items which may be up for consideration that said item or items be referred to H. A. Robson, Esquire, Public Utility Commissioner, for his decision and award;

Record
Exhibits

No. 11
City of Winnipeg
By-law No. 8721.
June 15, 1914.
(Continued)

Now Therefore the parties hereto agree each with the other as follows:

That all claims, demands, outstandings or unsettled matters which either party may have against the other shall be, and they are
10 hereby, referred to a committee consisting of His Worship the Mayor of the City of Winnipeg and the members of the Board of Control and the City Solicitor, on behalf of the City, and of J. Manson Esquire and L. J. Reycraft Esquire, on behalf of the Company, for their consideration, settlement and disposal; and in default of the said Joint Committee being able to agree as to a settlement in refer-
20 ence to any of the said claims, demands, outstandings or unsettled matters, that all said claims, demands, outstandings and unsettled matters upon which said Joint Committee cannot agree be referred to H. A. Robson Esquire, Public Utility Commissioner, for his deci-
20 sion and award. It is further agreed that the findings of the said Committee or of H. A. Robson Esquire, Public Utility Commis- sioner, as the case may be, shall be final and conclusive between the parties hereto, and that either party will do all things and perform all acts which may be necessary to effectually and completely carry out the findings of the said Committee or of the said Arbitrator, according to the true intent and meaning thereof.

It Is Further Agreed That within ten days from the signing of this Agreement by the parties hereto, or at such other time as may be agreed upon, the Company will furnish the City and the City will
30 furnish the Company, with a full statement of all claims, demands, outstandings and unsettled matters which either party has against the other, and that these statements be exchanged simultaneously, it being understood that these statements shall contain in good faith all matters that are unsettled between the parties, but that if any matter or matters should be inadvertently omitted from the said statements, that either party will not be estopped from making a claim thereon at any later date.

It Is Further Agreed that within ten days after the exchange of the statements above referred to, or on such other date or dates as
40 may be agreed upon, the said Joint Committee shall meet to proceed with negotiations for the settlement of the various items contained in said statements, the time and place of said meeting to be fixed by His Worship the Mayor, or the Acting Mayor.

It Is Further Agreed between the parties that the fee to be paid

Record
Exhibits

No. 11
City of Winnipeg
By-law No. 8721.
June 15, 1914.
(Continued)

to H. A. Robson, Esquire, Public Utility Commissioner, for his services as Arbitrator as above provided shall be borne one half by either party hereto.

In Witness Whereof the parties hereto have hereunto affixed their Corporate Seals attested by the hands of their proper officers in that behalf.

Signed, Sealed And Delivered
in the presence of

Mayor

10

Treasurer

Certified as to form

Comptroller

City Solicitor

Company.

City Clerk's Office,
Winnipeg, Sept. 2/48.

Certified True Copy

"G. L. Gardner,"
Acting City Clerk.

20

Exhibit No. 13

PLAINTIFF'S DOCUMENT

City of Winnipeg By-law No. 15455

No. 13
City of Winnipeg
By-law No. 15455.
April 27, 1942.

A By-law of the City of Winnipeg to authorize an agreement between the Canadian Pacific Railway Company and the City of Winnipeg relating to taxation of hotel property.

The Municipal Council of the City of Winnipeg, in Council assembled, enacts as follows:

1. The agreement in Schedule "A" hereto between the Canadian Pacific Railway Company and the City of Winnipeg relating to ³⁰taxation of hotel property known as the "Royal Alexandra Hotel," and for mutual leases of certain premises, is hereby authorized and adopted and the proper officers of the City of Winnipeg are hereby

authorized and required to execute the same on behalf of the City of Winnipeg and to do all things necessary to give effect thereto.

Record
Exhibits

No. 13
City of Winnipeg
By-law No. 15455,
April 27, 1942.
(Continued)

Done and passed in Council assembled this 27th day of April A.D. 1942.

(SEAL)

(Sgd.) J. Queen,
Mayor.

(Sgd.) G. F. Bentley,
City Clerk.

Certified as to form:

10 (Sgd.) J. Preudhomme,
City Solicitor.

Schedule "A" to By-law No. 15455 of the City of Winnipeg.

(Sgd.) G. F. Bentley,
City Clerk.

MEMORANDUM OF AGREEMENT made this day of A.D. 1942.

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY,
hereinafter called "the Company"

Of the First Part,

20 and

THE CITY OF WINNIPEG, hereinafter called "the City"

Of the Second Part.

Whereas by certain agreements hereinafter referred to made between the Company and the City, the Company agreed to pay to the City in lieu of all taxation of certain property owned by the Company situate on Higgins Avenue, in the City of Winnipeg, known as the "Royal Alexandra Hotel," its contents and business, if the same were in any way liable to taxation, the sum of Ten Thousand Five Hundred Dollars (\$10,500.00) annually;

30 And whereas the Company, in consideration of these presents, and subject to the terms and conditions herein contained, has agreed to pay to the City in each of the ten years hereinafter specified an additional sum in respect of the said hotel property of Ten Thousand Dollars (\$10,000.00) per annum:

Now therefore this agreement witnesseth that, subject to the terms and conditions herein contained and in consideration of the covenants on the part of the City hereinafter set forth, the Company agrees with the City—

Record
Exhibits

No. 13
City of Winnipeg
By-law No. 15455.
April 27, 1942.
(Continued)

1. To pay to the City in each of the years 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951 and 1952, the sum of Ten Thousand Dollars (\$10,000.00) in addition to the sum of Ten Thousand Five Hundred Dollars (\$10,500.00) payable to the City annually under the provisions of the agreements with the City hereinbefore referred to and dated 4th August, 1906, and 27th November, 1914.
2. To lease to the City for a term of Eleven years at a rental of One Dollar per annum commencing as from the 1st day of January, 1942, all that Lot, piece or parcel of land situate in the City of Winnipeg, 10 at the corner of Austin Street and Henry Avenue described as follows:

Lots 1, 2, 3 and the most Southerly 10 feet in perpendicular width of Lot 4, Plan 63, D.G.S. 35 St. John,

said property to be used for playground purposes and under the management and control of the Playground Commission of the City of Winnipeg.
3. At its own cost and expense, to construct to the satisfaction of the Playground Commission a board fence seven feet high along the Northerly limit of the said parcel of land hereinbefore described in paragraph 2; and to pay the sum of Five hundred dollars (\$500.00) 20 towards the cost of fencing the rest of the said parcel of land; and further to pay the full cost of and to turf or grass the said parcel of land and plant hedges thereon to the satisfaction of the Playground Commission of the City so that the same will be suitable for the purposes of a playground.
4. To transfer from the present site on the property known as "William Whyte Park," the locomotive known as the "Countess of Dufferin" and to place the same upon a proper foundation and to erect the same to the satisfaction of the City on the property of the Company situate on the North side of said Higgins Avenue appurtenant to the Company's railway station and hotel property. 30
5. To maintain to the satisfaction of the City during the said term of eleven years the grass plot on the property described as follows:

Those portions of Lots forty-nine and fifty, Plan 63, D.G.S. 35 St. John, on the West side of Maple Street, as shown on said plan, described as follows: Commencing on the southerly line of Higgins Avenue as said Avenue is defined by a special survey of the City of Winnipeg at the North West angle of the said lot forty-nine; thence Easterly on the Southerly line of said Avenue eighty-two feet (82'); thence Southerly parallel with the Westerly line of Maple Street ninety feet (90'); thence Westerly parallel with the Southerly line of Higgins Avenue aforesaid eighty-two feet (82') more or less to the Westerly line of said lot 40 fifty on the West side of Maple Street; thence Northerly on the

Westerly line of said lots fifty and forty-nine to the place of beginning, excepting and reserving thereout a portion 8'x8' leased to National Parks Branch, Department of the Interior, Dominion of Canada, for an Historic Site Monument as more fully set out in By-law 11677 of the City of Winnipeg.

Record
Exhibits

No. 13
City of Winnipeg
By-law No. 15455.
April 27, 1942.
(Continued)

6. To pay to the City the rent hereinafter mentioned of said property described in paragraph (b) hereof during the said term of eleven years.

This agreement also witnesseth that, subject to the terms and conditions herein contained and in consideration of the covenants on the part of the Company hereinbefore set forth, the City covenants and agrees with the Company,

(a) To pay the Company the rent hereinbefore mentioned of said property described in paragraph 2 hereof during the said term of eleven years, and, acting through the said Playground Commission, to maintain said property as a public playground.

(b) To lease to the Company for a term of eleven years at a rental of One Dollar per annum, commencing as from the 1st day of January, 1942, all that lot, piece or parcel of land situate in the City of Winnipeg, described as follows:

Lots 5, 6 and 7, Plan 63, D.G.S. 35 St. John, and to permit same to be used during the said period of eleven years as a parking lot in connection with the Company's said hotel and railway business, and further to permit the Company to construct such crossing or crossings over the City's sidewalks as are necessary to give ingress and egress to and from such parking lot on the terms usually applied to such crossings in the City.

(c) To permit the installation of a gasoline and oil service station upon Lot 7 of the parcel of land hereinbefore described in paragraph (b) hereof, and not to withhold a license therefor or any permission required in connection therewith from any person or company designated by the Company without due and proper reason.

(d) To pay and discharge whatever taxes may from time to time during said period of eleven years from the 1st day of January, 1942, be levied upon and in respect of said property described in paragraph 2 hereof to be used for playground purposes as aforesaid.

(e) That no taxes will be assessed or levied by the City against the Company in respect of said property described in paragraph (b) hereof and the Northerly 56 feet of Lot 4, Plan 63, D.G.S. 35 St. John, or in respect of said gasoline and oil service station during the period of eleven years from the 1st day of January, A.D. 1942. Provided, however, that the City will be entitled to assess and tax any person or company designated by the Company as aforesaid in respect of the

Record
Exhibits

No. 13
City of Winnipeg
By-law No. 15455.
April 27, 1942.
(Continued)

leasehold interest in that portion thereof used and occupied as a gasoline and oil service station, and to collect from such person or company both realty and business taxes payable in connection with said leasehold interest and business conducted on said Lot 7, which said realty tax payable by said person or company so designated afore-said the Company hereby guarantees, and the Company covenants and agrees that should default be made by such designated person or company in payment of any such realty tax, the Company will forthwith upon demand pay the same to the City.

10 And the City hereby further covenants and agrees that during the period from the date hereof until the expiry of ten years from the 1st day of January, A.D. 1943, it will not ask the Company for any further payment in respect of taxes or in lieu thereof on or in connection with the said Royal Alexandra Hotel or the business carried on therein and will not seek or apply for any legislation which would in any way enable the City to impose any taxation upon the Company or upon the said Hotel property.

It is distinctly understood and agreed that what the Company has herein agreed to do and to give are concessions made and given by
20 the Company without legal necessity on the part of the Company and that the same are made and given without prejudice to the rights of either party under any pre-existing Agreement or Agreements whatsoever made between the City and the Company.

In witness whereof the parties hereto have hereunto caused their corporate seals to be affixed, attested by the hands of their respective proper officers in that behalf.

CANADIAN PACIFIC RAILWAY COMPANY

THE CITY OF WINNIPEG

30

City Clerk's Office,
Winnipeg, Sept. 2/48.

Certified True Copy

"G. L. Gardner,"
Acting City Clerk.

Exhibit No. 12

PLAINTIFF'S DOCUMENT

Agreement Between the Plaintiff and the Defendant

MEMORANDUM OF AGREEMENT made this 28th day of April,
A.D. 1942.

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY,
hereinafter called "the Company"

Of the First Part,

10

and

THE CITY OF WINNIPEG, hereinafter called "the City"

Of the Second Part.

Whereas by certain agreements hereinafter referred to made between the Company and the City, the Company agreed to pay to the City in lieu of all taxation of certain property owned by the Company situate on Higgins Avenue, in the City of Winnipeg, known as the "Royal Alexandra Hotel," its contents and business, if the same were in any way liable to taxation, the sum of Ten Thousand, Five Hundred Dollars (\$10,500.00) annually;

20 And whereas the Company, in consideration of these presents, and subject to the terms and conditions herein contained, has agreed to pay to the City in each of the ten years hereinafter specified an additional sum in respect of the said hotel property of Ten Thousand Dollars (\$10,000.00) per annum:

Now therefore this agreement witnesseth that, subject to the terms and conditions herein contained and in consideration of the covenants on the part of the City hereinafter set forth, the Company agrees with the City—

1. To pay to the City in each of the years 1943, 1944, 1945, 1946,
30 1947, 1948, 1949, 1950, 1951 and 1952, the sum of Ten Thousand dollars (\$10,000.00) in addition to the sum of Ten Thousand Five Hundred Dollars (\$10,500.00) payable to the City annually under the provisions of the Agreements with the City hereinbefore referred to and dated 4th August, 1906, and 27th November, 1914.

2. To lease to the City for a term of Eleven years at a rental of One dollar per annum commencing as from the 1st day of January, 1942, all that Lot, piece or parcel of land situate in the City of Winnipeg, at the corner of Austin Street and Henry Avenue described as follows:

40 Lots 1, 2, 3 and the most Southerly 10 feet in perpendicular width of Lot 4, Plan 63, D.G.S. 35 St. John,

Record
Exhibits

No. 12
Agreement between
the Plaintiff and the
Defendant.
April 28, 1942.

Record
Exhibits

No. 12
Agreement between
the Plaintiff and the
Defendant.
April 28, 1942.
(Continued)

said property to be used for playground purposes and under the management and control of the Playground Commission of the City of Winnipeg.

3. At its own cost and expense, to construct to the satisfaction of the Playground Commission a board fence seven feet high along the Northerly limit of the said parcel of land hereinbefore described in paragraph 2; and to pay the sum of Five hundred dollars (\$500.00) towards the cost of fencing the rest of the said parcel of land; and further to pay the full cost of and to turf or grass the said parcel
10 of land and plant hedges thereon to the satisfaction of the Playground Commission of the City so that the same will be suitable for the purposes of a playground.

4. To transfer from the present site on the property known as "William Whyte Park," the locomotive known as the "Countess of Dufferin" and to place the same upon a proper foundation and to erect the same to the satisfaction of the City on the property of the Company situate on the North side of said Higgins Avenue appurtenant to the Company's railway station and hotel property.

5. To maintain to the satisfaction of the City during the said term
20 of eleven years the grass plot on the property described as follows:

Those portions of Lots forty-nine and fifty, Plan 63, D.G.S. 35 St. John, on the West side of Maple Street, as shewn on said plan, described as follows: Commencing on the Southerly line of Higgins Avenue as said Avenue is defined by a special survey of the City of Winnipeg at the North West angle of the said lot forty-nine; thence Easterly on the Southerly line of said Avenue eighty-two feet (82') thence Southerly parallel with the Westerly line of Maple Street ninety feet (90'); thence Westerly parallel with the Southerly line of Higgins Avenue aforesaid eighty-two
30 feet (82') more or less to the Westerly line of said lot fifty on the West side of Maple Street; thence Northerly on the Westerly line of said lots fifty and forty-nine to the place of beginning, excepting and reserving thereout a portion 8'x8' leased to National Parks Branch, Department of the Interior, Dominion of Canada, for an Historic Site Monument as more fully set out in By-law 11677 of the City of Winnipeg.

6. To pay to the City the rent hereinafter mentioned of said property described in paragraph (b) hereof during the said term of eleven years.

40 This agreement also witnesseth that, subject to the terms and conditions herein contained and in consideration of the covenants on the part of the Company hereinbefore set forth, the City covenants and agrees with the Company,

(a) To pay the Company the rent hereinbefore mentioned of said property described in paragraph 2 hereof during the said term of eleven years, and, acting through the said Playground Commission, to maintain said property as a public playground.

(b) To lease to the Company for a term of eleven years at a rental of One dollar per annum, commencing as from the 1st day of January, 1942, all that lot, piece or parcel of land situate in the City of Winnipeg, described as follows—

10 Lots 5, 6 and 7, Plan 63, D.G.S. 35 St. John, and to permit same to be used during the said period of eleven years as a parking lot in connection with the Company's said hotel and railway business, and further to permit the Company to construct such crossing or crossings over the City's sidewalks as are necessary to give ingress and egress to and from such parking lot on the terms usually applied to such crossings in the City.

(c) To permit the installation of a gasoline and oil service station upon Lot 7 of the parcel of land hereinbefore described in paragraph (b) hereof, and not to withhold a license therefor or any permission required in connection therewith from any person or company 20 designated by the Company without due and proper reason.

(d) To pay and discharge whatever taxes may from time to time during said period of eleven years from the 1st day of January, 1942, be levied upon and in respect of said property described in paragraph 2 hereof to be used for playground purposes as aforesaid.

(e) That no taxes will be assessed or levied by the City against the Company in respect of said property described in paragraph (b) hereof and the Northerly 56 feet of Lot 4, Plan 63, D.G.S. 35 St. John, or in respect of said gasoline and oil service station during the period of eleven years from the 1st day of January, A.D. 1942. Provided, 30 however, that the City will be entitled to assess and tax any person or company designated by the Company as aforesaid in respect of the leasehold interest in that portion thereof used and occupied as a gasoline and oil service station, and to collect from such person or company both realty and business taxes payable in connection with said leasehold interest and business conducted on said Lot 7, which said realty tax payable by said person or company so designated aforesaid the Company hereby guarantees, and the Company covenants and agrees that should default be made by such designated person or company in payment of any such realty tax, the Company 40 will forthwith upon demand pay the same to the City.

And the City hereby further covenants and agrees that during the period from the date hereof until the expiry of ten years from the 1st day of January, A.D. 1943, it will not ask the Company for any further payment in respect of taxes or in lieu thereof on or in connec-

Record
Exhibits

No. 12
Agreement between
the Plaintiff and the
Defendant.
April 28, 1942.
(Continued)

Record
Exhibits

No. 12
Agreement between
the Plaintiff and the
Defendant.
April 28, 1942.
(Continued)

tion with the said Royal Alexandra Hotel or the business carried on therein and will not seek or apply for any legislation which would in any way enable the City to impose any taxation upon the Company or upon the said hotel property.

It is distinctly understood and agreed that what the Company has herein agreed to do and to give are concessions made and given by the Company without legal necessity on the part of the Company and that the same are made and given without prejudice to the rights of either party under any pre-existing Agreement or Agree-
10 ments whatsoever made between the City and the Company.

In witness whereof the parties hereto have hereunto caused their corporate seals to be affixed, attested by the hands of their respective proper officers in that behalf.

Seal of the Canadian Pacific
Railway Company

CANADIAN PACIFIC RAILWAY
COMPANY

"W. A. Mather"
Vice-President.

"F. Bramley"
Secretary.

20 Seal of the City of Winnipeg.

CERTIFIED AS TO FORM

THE CITY OF WINNIPEG

"J. Preudhomme"
City Solicitor.

"J. Queen"
Mayor.

Approved

The Playground Commission
and The Public Parks Board.

"H. C. Thompson"
Commissioner of Finance.

"F. G. White"
Superintendent.

30

Finance Dept.
Accounting Branch
Recorded
"G. H. M."

Exhibit No. 43

DEFENDANT'S DOCUMENT

Extracts from 1946 Annual Report of Canadian Pacific Railway Company

OTHER INCOME

(Page 10)

**Record
Exhibits**No. 43
Extracts from 1946
Annual Report of
Canadian Pacific
Railway Company.
March 10, 1947.

Other Income amounted to \$22,779,794, an increase of \$7,672,837.

The net earnings of ocean and coastal steamships increased by \$2,139,299, due principally to the additional earnings derived from 10 the five new Beaver ships which came into service during the year.

While net earnings of your hotels in 1945 were the highest up to that time, net earnings in 1946 were \$383,800 higher. The summer resort hotels, which had remained closed during the war years, were all reopened and enjoyed the largest trade in their history. A record volume of business was done at your city hotels and the larger proportion of civilian business resulted in improved earnings. There was a decline of \$214,671 in the net earnings of the communications department, due wholly to increased wage rates.

Dividend income increased by \$3,795,097. Dividends received 20 from The Consolidated Mining and Smelting Company of Canada, Limited amounted to \$7,150,625, and were at the rate of \$4.25 per share, compared with \$2.50 in 1945. An initial dividend of \$2.50 per share was declared on the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company Voting Trust Certificates from which your Company received \$897,855.

Net income from interest, exchange, separately operated properties and miscellaneous sources increased \$1,521,456. There was an increase of \$373,237 in interest received on Dominion of Canada Bonds, and a decrease of \$304,930 in interest received on farm land contracts. 30 Exchange account showed an improvement of \$882,475 as a result of the revaluation of the Canadian dollar in relation to the currencies of the United Kingdom and the United States.

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ASSETS

(Page 24)

Record
ExhibitsNo. 43
Extracts from 1946
Annual Report of
Canadian Pacific
Railway Company.
March 10, 1947.
(Continued)

<i>Property Investment—</i>		
Railway Rolling Stock and Inland Steam-		
ships.....	\$855,594,043	
Improvements on Leased Property.....	105,533,177	
Stocks and Bonds—Leased Railway Com-		
panies.....	134,170,939	
Ocean and Coastal Steamships.....	49,950,819	
10 Hotel, Communication and Miscellaneous		
Properties.....	97,780,479	
		<u>\$1,243,029,457</u>
<i>Other Investments—</i>		
Stocks and Bonds—Controlled Companies \$	70,379,542	
Miscellaneous Investments.....	46,805,482	
Advances to Controlled and Other Com-		
panies.....	6,013,140	
Mortgages Collectible and Advances to		
Settlers.....	1,346,430	
20 Deferred Payments on Lands and Town-		
sites.....	13,501,905	
Unsold Lands and Other Properties.....	14,041,912	
Unexpended Equipment Trust Deposit.....	5,614,623	
Maintenance Fund.....	25,200,000	
Insurance Fund.....	11,789,329	
Steamship Replacement Fund.....	39,275,550	
		<u>233,967,913</u>
<i>Current Assets—</i>		
Material and Supplies.....	\$ 34,987,234	
30 Agents' and Conductors' Balances.....	12,800,272	
Miscellaneous Accounts Receivable.....	14,023,405	
Dominion of Canada Securities.....	31,861,000	
Cash.....	46,009,174	
		<u>139,681,085</u>
<i>Unadjusted Debits—</i>		
Insurance Prepaid.....	\$ 247,983	
Unamortized Discount on Bonds.....	4,556,321	
Other Unadjusted Debits.....	962,909	
		<u>5,767,213</u>
40		<u>\$1,622,445,668</u>

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Gross Earnings

(Page 36)

		<u>Record</u> <u>Exhibits</u>
Freight.....	\$218,550,608	No. 43 Extracts from 1946 Annual Report of Canadian Pacific Railway Company. March 10, 1947. (Continued)
Passenger.....	45,380,645	
Mail.....	4,173,769	
Express.....	7,103,863	
Sleeping, Parlor and Dining Car and Miscellaneous.....	17,286,943	
Total.....	<u>\$292,495,828</u>	

Working Expenses

10 Maintenance of Way and Structures.....	\$ 50,492,658
Maintenance of Equipment.....	59,198,942
Traffic.....	6,405,678
Transportation.....	117,897,963
Miscellaneous Operations.....	7,879,733
General.....	12,900,540
Railway Tax Accruals.....	16,877,264
Total.....	<u>\$271,652,778</u>

Other Income

Net earnings from ocean and coastal steamships.....	\$ 4,202,264
20 Net earnings from hotel, communication and miscellaneous properties.....	2,550,862
Dividends.....	8,563,152
Net income from interest, exchange, separately operated properties and miscellaneous sources.....	7,463,516
Total.....	<u>\$ 22,779,794</u>

Record
Exhibits

No. 22
City of Winnipeg
By-law No. 16306.
February 23, 1948.

Exhibit No. 22

DEFENDANT'S DOCUMENT
City of Winnipeg By-law No. 16306.

BY-LAW No. 16306

A By-law of the City of Winnipeg
to repeal By-law No. 148 as amended.

The Municipal Council of the City of Winnipeg, in Council assembled, enacts as follows:

- 10 1. By-law No. 148 of the City of Winnipeg as amended by By-law No. 195 of the said City is hereby repealed.
2. This by-law shall take effect as of the first day of January, A.D. 1948.

Done And Passed in Council assembled this 23rd day of February, A.D. 1948.

"Garnet Coulter"
Mayor.

(SEAL)

"G. L. Gardner"
Acting City Clerk.

20 Certified as to form:
"G. F. D. Bond"
City Solicitor.

City Clerk's Office,
Winnipeg, Feb. 26th, 1948
Certified True Copy
"G. L. Gardner"
Acting City Clerk

Exhibit No. 44

DEFENDANT'S DOCUMENT

**Extracts from 1947 Annual Report of Canadian Pacific Railway
Company**

OTHER INCOME

(Page 10)

Other Income, at \$24,788,927, was the highest in your Company's history. It was \$2,009,133 more than in the previous record year of 1946.

- 10 The net earnings from ocean and coastal steamship operations decreased \$401,917. Ocean steamship earnings were greater, due principally to the addition of the sixth Beaver ship to your Company's North Atlantic fleet and the return to passenger service in July of the Empress of Canada. The decline in net earnings of coastal steamships, chiefly due to increased costs of operation, more than offset the improvement in ocean steamship earnings. Higher freight and passenger charges were put into effect on the British Columbia service on the removal of price control but were not effective early enough to affect greatly the year's results.
- 20 Net earnings of your hotels were better than in any previous year; they exceeded, by \$545,870, those of 1946 which had been the highest up to that time. Labour and material costs have been advancing rapidly over the past few years and in order to catch up with these costs it became necessary in the early summer to increase charges for meals and rooms in all your hotels. This, together with the larger volume of business enjoyed by your resort hotels, was responsible for the more favourable results.

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ASSETS

(Page 22)

30 Property Investment—

Railway, Rolling Stock and Inland Steamships.....	\$880,747,256
Improvements on Leased Property	107,956,776
Stocks and Bonds—Leased Railway Companies.....	134,169,779
Ocean and Coastal Steamships.....	54,545,167
Hotel, Communication and Miscellaneous Properties.....	97,644,309
	<hr/>
	\$1,275,063,287

Record
ExhibitsNo. 44
Extracts from 1947
Annual Report of
Canadian Pacific
Railway Company.
March 8, 1948.

Record
Exhibits

No. 44
Extracts from 1947
Annual Report of
Canadian Pacific
Railway Company.
March 8, 1948.
(Continued)

Other Investments—

	Stocks and Bonds—Controlled Companies	\$ 69,939,167	
	Miscellaneous Investments.....	47,039,979	
	Advances to Controlled and Other Com- panies.....	7,236,035	
	Mortgages Collectible and Advances to Settlers.....	1,293,295	
	Deferred Payments on Lands and Town- sites.....	10,782,049	
10	Unsold Lands and Other Properties.....	13,423,071	
	Maintenance Fund.....	27,600,000	
	Insurance Fund.....	12,460,156	
	Steamship Replacement Fund.....	34,645,823	
			224,419,575
	<i>Current Assets—</i>		
	Material and Supplies.....	\$ 36,712,903	
	Agents' and Conductors' Balances.....	14,741,396	
	Miscellaneous Accounts Receivable.....	17,968,071	
	Dominion of Canada Securities.....	31,667,000	
20	Cash.....	42,644,686	
			143,734,056
	<i>Unadjusted Debits—</i>		
	Insurance Prepaid.....	\$ 238,296	
	Unamortized Discount on Bonds.....	3,781,185	
	Other Unadjusted Debits.....	1,217,424	
			5,236,905
			<u>\$1,648,453,823</u>

Gross Earnings

(Page 33)

30	Freight.....	\$250,893,574
	Passenger.....	40,322,874
	Mail.....	4,175,758
	Express.....	7,309,759
	Sleeping, Parlor and Dining Car and Miscellaneous.....	15,883,954
	Total.....	<u>\$318,585,919</u>

Working Expenses

		<u>Record</u> <u>Exhibits</u>
Maintenance of Way and Structures.....	\$ 54,776,657	
Maintenance of Equipment.....	62,285,265	No. 44
Traffic.....	7,073,114	Extracts from 1947.
Transportation.....	133,952,979	Annual Report of
Miscellaneous Operations.....	7,224,984	Canadian Pacific
General.....	14,207,796	Railway Company.
Railway Tax Accruals.....	16,172,935	March 8, 1948.
		(Continued)
Total.....	<u>\$295,693,730</u>	

10

Other Income

Net earnings from ocean and coastal steamships.....	\$ 3,800,347
Net earnings from hotel, communication and miscellaneous properties.....	2,414,124
Dividends.....	14,547,415
Net income from interest, exchange, separately operated properties and miscellaneous sources.....	4,027,041
Total.....	<u>\$ 24,788,927</u>

Record
Exhibits

No. 16
City of Winnipeg
Realty Assessment
Notice.
March 29, 1948.

Exhibit No. 16
PLAINTIFF'S DOCUMENT
City of Winnipeg Realty Assessment Notice

City of Winnipeg

Ward No. 1 REALTY ASSESSMENT NOTICE FOR 1948

No. on Roll	Name of Party Assessed	Occupation and Address	DESCRIPTION OF LAND						ASSESSABLE VALUE	
			Parish Lot			Plan No.	Block	Lot	Land	Building
			St. Boniface	St. James	St. John					
11044	Canadian Pacific Rly. Co., c/o H. L. Pratt, Tax Agent, C.P.R. Depot.	54-6							\$	\$
							Part-12.9Ac.± R/W Pl. 374		13,090

{ The Board of Revision will fix a date, notice of which will be given by publication in a newspaper of the City of Winnipeg, for hearing of appeals from this assessment. Notice of appeal in writing must be given to the Secretary, seven clear days, including Sundays, before the sitting of the Board. }
WINNIPEG, MARCH 29, 1948, L. F. BORROWMAN, Assessment Commissioner

Exhibit No. 17

PLAINTIFF'S DOCUMENT

City of Winnipeg Business Assessment Notice

CITY OF WINNIPEG

BUSINESS ASSESSMENT NOTICE FOR 1948

373

NO. ON ROLL	NAME OF PARTY ASSESSED	PREMISES ASSESSED STREET NO. ETC.	CLASS OF BUSINESS	ANNUAL RENTAL VALUE	CLASS	% RATE
9034	Canadian Pacific Railway Co. c/o H. L. Pratt, Tax Agent, C.P.R. Depot	Station Grounds, Yards and Rights-of-Way and Buildings as described on attached lists.	Freight and Passenger Transportation Service	859,850 00	L	12½

The Board of Revision will fix a date, notice of which will be given by publication in a newspaper of the City of Winnipeg, for hearing of appeals from the assessment. Notice of appeal in writing must be given to the Secretary, seven clear days, including Sunday, before the sitting of the Board.

WINNIPEG, JUNE 11, 1948, L. F. BORROWMAN, Assessment Commissioner

Record
Exhibits

No. 17
City of Winnipeg
Business Assessment Notice.
June 11, 1948.

In the
Supreme
Court of
Canada.

Formal Judgment Canadian Pacific Railway Co. v. City of Winnipeg.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Monday, the 22nd day of October, A.D. 1951.

Present :

- The Right Honourable The CHIEF JUSTICE OF CANADA,
- The Honourable Mr. Justice KERWIN,
- The Honourable Mr. Justice TASCHEREAU,
- The Honourable Mr. Justice RAND,
- The Honourable Mr. Justice KELLOCK,
- The Honourable Mr. Justice ESTEY,
- The Honourable Mr. Justice LOCKE,
- The Honourable Mr. Justice CARTWRIGHT,
- The Honourable Mr. Justice FAUTEUX.

10

Between :

CANADIAN PACIFIC RAILWAY COMPANY ... (*Plaintiff*) *Appellant*
 and
 THE CITY OF WINNIPEG ... (*Defendant*) *Respondent*.

THE APPEAL of the above named Appellant from the judgment of 20
 the Court of Appeal for Manitoba pronounced in the above cause on the
 17th day of April, A.D. 1950, varying the judgment of the Court of King's
 Bench for Manitoba rendered in the said cause on the 7th day of October,
 A.D. 1949, having come on to be heard before this Court on the 20th, 21st,
 26th, 27th and 28th days of February, A.D. 1951, in the presence of Counsel
 as well for the Appellant as for the Respondent, whereupon and upon
 hearing what was alleged by Counsel aforesaid this Court was pleased to
 direct that the said appeal should stand over for judgment, and the same
 coming on this day for judgment ;

This Court did order and adjudge that this appeal should be and the 30
 same was allowed, that the said judgment of the Court of Appeal for Mani-
 toba should be and the same was reversed and set aside and that the said
 judgment of the Court of King's Bench for Manitoba should be and the same
 was restored.

And this Court did further order and adjudge that the said Respondent
 should and do pay to the said Appellant the costs incurred by it in the said
 Court of Appeal for Manitoba, and in this Court.

Settled the 29th day of January, A.D. 1952.

PAUL LEDUC,
Registrar. 40

In the
Supreme
Court of
Canada.

No. 36.

Reasons for Judgment.

No. 36.
Reasons for
Judgment.
(a) Locke, J.

(a) LOCKE, J.

By the agreement which provided for the construction of the Canadian Pacific Railway made between Her Majesty, acting in respect of the Dominion of Canada, and George Stephen and others, referred to therein as the Company, dated October 21, 1880, it was provided *inter alia* that the portions of the proposed line which were to be built by the latter should be completed and in running order on or before May 1, 1891, and after providing that the portions to be constructed by the Government of Canada should be duly completed and then conveyed to the Company, the latter agreed to "thereafter and forever efficiently maintain, work and run the "Canadian Pacific Railway." In addition to the land grant and subsidy in money provided by the contract, it was agreed that there should be granted to the Company the lands required for its road-bed, stations, station grounds, buildings, yards and other appurtenances required for the convenient and effectual construction and working of the railway, in so far as such land should be vested in the Government, and that, in addition, there should be admitted free of duty all steel rails and a number of other enumerated articles required for the construction of the road free of duty. By a further term, it was stipulated that the Company should have the right, subject to the approval of the Governor in Council to lay out and locate the line of the railway. 10

The first reference to the incorporation of a company appears in paragraph 17 of this contract which commences :—

"The Company shall be authorized by their Act of incorporation
"to issue bonds, etc. . . ."

and this is followed by the language which has given rise to so much discussion in the present matter, incorporated in Sections 21 and 22 which read :— 30

"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." 40

Schedule A to the contract bears the heading "Incorporation" and is expressed in the language in common use for the incorporation of companies by private Acts. Section 4 of this document reads :—

“ 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.”

In the
 Supreme
 Court of
 Canada.

—
 No. 36.
 Reasons for
 Judgment.

(a) Locke, J.
 —continued.

10 By Chapter I of the Statutes of Canada, 1881, assented to on February 15th of that year, the contract was approved and ratified by Parliament and the Government authorized to perform and carry out its conditions. While Section 21 of the contract made it clear that what was contemplated was that the Company to be formed should be created by an Act of Parliament, the statute contained as Section 2 the following provision :

20 “ 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.”

30 What was meant by the word “ charter ” in this section was immediately made clear. On February 16, 1881, letters patent of incorporation under the Great Seal of Canada were issued incorporating the Canadian Pacific Railway Company. There is apparently no explanation as to why this procedure for the incorporation of the Company was followed rather than that contemplated by the contract. While Section 4 of the Schedule referred to above indicated that the proposed company was to have the widest powers to enable it to carry out its undertaking and to take advantage of the various privileges and advantages which it was to receive from the Crown, it was perhaps considered advisable that it would be preferable to vest in the Company the powers of a common law corporation restricted
 40 only in the matter defined by the contract and the Schedule rather than to enumerate those powers which it was to be authorized to exercise. But this is mere speculation. If, therefore, assuming that the powers of the Company are only those which it would have enjoyed had the incorporation been by a special Act of Parliament, the contract entered into by it with the City of Winnipeg was beyond its powers, it would be necessary to determine a second question, i.e., as to whether the Railway Company has all the powers of the natural person.

In the
Supreme
Court of
Canada.

No. 36.
Reasons for
Judgment.

(a) Locke, J.
—continued.

By its statement of claim, the Railway Company alleges that on or about September 5, 1881, an agreement was made between the Company and the City granting to it the exemptions from taxation which are in issue in the present matter, the terms of which are stated to be set forth in certain by-laws of the City of Winnipeg. From the terms of the first of these by-laws, it is evident that there had been an agreement between the parties but, if it was reduced to writing, the document has not been produced. By-law No. 148 was adopted by the City on September 5, 1881, the date of the alleged agreement. After reciting that it was desirable that a line of railway should be built towards the westerly limit of the Province of Manitoba through the Pembina Mountain district, for the purpose of developing traffic and trade between the City of Winnipeg and those portions of the province and :—

“ to secure the location of the work-shops 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 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 the manner as in this by-law hereinafter mentioned,
“ and have agreed to establish and continue their ‘ principal work-
“ shops and stockyards for the province of Manitoba in the city of
“ Winnipeg aforesaid,’ ”

the by-law authorized 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 on the performance by it of certain defined conditions. Of primary importance is Condition 3, which provided as follows :—

“ 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.”

In addition to providing for the delivery of the debentures, the by-law declared that :—

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

By a by-law No. 195, adopted by the City on October 30, 1882, by-law No. 148 was amended and re-enacted and by Cap. 64 of the Statutes of Manitoba for 1883 assented to. On July 7 of that year the Act of Incorporation of the City was amended upon the petition of the Mayor and Council by declaring *inter alia* that these two by-laws were "legal, binding and valid upon the said the Mayor and Council of the city of Winnipeg." The learned trial judge has found as a fact that the Railway Company performed its various obligations referred to in the by-law in accordance with the terms of the agreement referred to : and that the City, on its part, discharged the obligations which it had assumed.

In the
Supreme
Court of
Canada.

No. 36.
Reasons for
Judgment.

(a) Locke, J.
—continued.

The first question to be determined is raised by the plea in the statement of defence of the City of Winnipeg that the Railway Company :—

" had no right, power or authority under its Charter or otherwise, to
" make, or execute, or deliver such a bond and covenant,"

referring to the bond and covenant required to be given by the Company under Condition 3 above referred to, and by a further plea that the Railway Company was without power under its Charter or otherwise, to agree to build within the City of Winnipeg, or at any other place, its principal workshops for the main line of its railway within the Province of Manitoba and to continue them forever.

For the Railway Company, it is contended that the incorporation being by letters patent, under the Great Seal of Canada, it has all the powers of a natural person and that the doctrine of *ultra vires* does not apply to it and reliance is placed upon the judgment of the Judicial Committee in *Bonanza Creek Gold Mining Company v. The King*, 1916 A.C. 566. For the City, it is said that the powers of the City are those only which it would possess if incorporated by an Act of Parliament and that the principle stated in *Ashbury Railway Carriage and Iron Company v. Riche*, L.R. 7 H.L. 653, applies.

The learned Chief Justice of the Court of King's Bench was of the opinion that the Railway Company had all of the powers of a common law corporation and in the Court of Appeal the Chief Justice of Manitoba and Coyne and Adamson, J.J.A., agreed. The late Mr. Justice Richards considered that the Company's powers were limited to those set forth in the Act authorizing its charter but that to enter into the agreement was within its powers. Dysart, J.A., concluded that although the charter was in the form of a Royal Charter it was in substance a statutory one and the agreement *ultra vires* the company.

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.

In the
Supreme
Court of
Canada.

No. 36.
Reasons for
Judgment.

(a) Locke, J.
—continued.

By the contract of October 21, 1880, which was approved and ratified by Cap. 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. While certain of the terminal points of the line then in part under construction were to be preserved, the Company was to have the right, subject to the approval of the Governor-in-Council, to lay out and locate the proposed line and advantage was taken of this provision by abandoning the proposed route running generally westward from Selkirk and establishing the main line of the railway on a line which included the City of Winnipeg and changing the route through the mountains from the Yellow Head to the Kicking Horse Pass. 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 realized 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. 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. It would have been quite unnecessary to particularize these powers in this manner had it been contemplated in 1880 that the incorporation should be by letters patent under the Great Seal, without any restriction upon the powers which such an incorporation would have vested in the Company. Whatever the reasons which led to the grant of letters patent and whether or not it was intended by that Act to vest in the Company the powers of a common law corporation, Paragraph 4 of Schedule A was incorporated verbatim in the letters patent. Thus, there was 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. It was, in my opinion, for the Railway Company to determine the location of its principal workshops for the main line of the Canadian Pacific Railway within Manitoba and the branches radiating from Winnipeg and that these workshops should be continued in such location as it should determine and to conclude as favourable a bargain as could be negotiated with the city or municipality where these were to be located. By the Fall of 1881 the directors of the Company had evidently reached the conclusion that Winnipeg, by virtue of its location, was to be the principal city in the Province of Manitoba and, thus, the most suitable place from which branch lines such as the line running south to Morris and Westerly through the Pembina Mountains areas, should have their Eastern terminus. The Company was not asked by the City in exchange for the promised tax exemption and the grant of the debentures to maintain its only railway workshops for the main line in Manitoba in Winnipeg, but merely the principal workshops: others might be constructed elsewhere in the

province. The further obligation was to erect large and commodious stock and cattle yards suitable and appropriate for the central business of the main line and the several branches as mentioned in Section 3 of the by-law, language which was incorporated in the covenant rather than that of paragraph 2 of the preamble to the by-law which referred to the "principal workshops and stockyards." The power of the Company to agree to build a general passenger depot upon a designated site in the City is not, of course, questioned.

In the
Supreme
Court of
Canada.
—
No. 36.
Reasons for
Judgment.

The comment of Lord Selborne, L.C., on the decision of the House of
10 Lords in *Ashbury Railway Co. v. Riche*, in *Attorney-General v. Great Eastern Railway Co.*, 1880, 5 A.C. 473, at 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 authorized 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,
20 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. 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.

(a) Locke, J.
—continued.

As a further defence to the action, the Defendant pleads that it had no right, power or authority under its Charter or otherwise, to pass by-laws Nos. 148 or 195. The original Charter of Incorporation of the Defendant is contained in Cap. 7 of the Statutes of 1873 and thereby the inhabitants of the City and their successors were declared to be :—

30 " A body politic and corporate in fact and in law by the name of
" ' The Mayor and Council of the City of Winnipeg ' and separated
" from the county of Selkirk for all municipal purposes."

It was by this name that the corporation was described in the consolidated Charter of the City in Cap. 36 of the Statutes of 1882. The language of Section 6 of Cap. 64 of the Statutes of 1883, in so far as it affects the present matter, reads :—

40 " That by-law No. 148 to authorise the issue of debentures granting by way of bonus to the Canadian Pacific Railway Company the sum of \$200,000 in consideration of certain undertakings on the part of the said Company ; and by-law 195 amending
" by-law No. 148 and extending the time for the completion of the
" undertakings expressed in by-law No. 148 by the Canadian Pacific
" Railway Company, and all debentures and coupons for interest
" issued under each and every of the said by-laws, be and the same
" are hereby declared legal, binding and valid upon the said the
" Mayor and Council of the City of Winnipeg."

In the
Supreme
Court of
Canada.

No. 36.
Reasons for
Judgment.

(a) Locke, J.
—continued.

Without considering the question as to whether the corporation had the power to agree to the tax exemption and the granting of the bonus under its existing powers, it is clear that it was intended to validate the by-laws and declare that the obligations on the part of the City referred to in them were binding upon it. To otherwise construe the section would be, in my opinion, to defeat the intention of the Legislature. Section 14 of the Interpretation Act (Cap. 105, R. S. M. 1940) declares that :—

“ Every Act and every regulation and every provision thereof
“ shall be deemed remedial and shall receive such fair, large and
“ liberal construction and interpretation as best insures the
“ attainment of the object of the Act, regulation or provision.” 10

The object of the amendment was to set at rest any doubts as to the power of the corporation to obligate itself in the manner described in the by-laws and the section must, in my opinion, be so construed.

The bond and covenant of the Railway Company, dated October 10, 1881, delivered in pursuance of the agreement recited in the city by-laws, after referring in a recital to the agreement of the City to grant aid to the Company to the extent of \$200,000 by the issue of debentures and by exempting the property of the Company from certain taxation, obligated the Company to :—

“ establish and build within the limits of the said City of Winnipeg
“ their principal workshops for their main line of railway within the
“ province of Manitoba and for the branches thereof, radiating
“ from the said City of Winnipeg within the limits of the said province
“ and that they will forever continue the same within the said City
“ of Winnipeg.” 20

At the time this instrument was made, the area contained within the limits of the City of Winnipeg were those defined by Chapter 7 of the Statutes of Manitoba for 1873 and an extension provided by Cap. 38 of the Statutes of 1875, and it was within this area that the workshops erected in pursuance of the covenant were placed. Thereafter, on various occasions, the limits of the City were extended : large areas were added by Cap. 45 of the Statutes of 1882 and these limits were further extended in the years 1902, 1906 and 1907. In the year 1903, the Railway Company removed the workshops from the original site to a point further west within the area added in 1882 where they have since been maintained. By an amendment to its statement of defence, the City alleges that the Railway Company is not entitled to the exemptions from taxation claimed, since it did not fulfil the conditions mentioned in By-law No. 148 in that about the year 1903, the Company built their principal workshops or a substantial part thereof, outside the limits of the City of Winnipeg as defined and constituted in the year 1881. The recitals in the by-law declared *inter alia* that it was desirable to secure the location of the workshops and stockyards of the 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 that the Company had agreed to establish and continue its 30 40

principal workshops and stockyards for the province in the city. "Desirable" meant desirable in the interest of the municipal entity known as the City of Winnipeg and of its inhabitants. The purpose of those negotiating on behalf of the municipal corporation was to ensure in its interest and in the interest of its present and future inhabitants that these activities of the Railway Company, with the manifest benefits which would result, should be continued for all time in Winnipeg. They did not seek the benefit merely for the then residents of the city living within its existing limits, but also for those who would thereafter live within the limits of the corporation from time to time, and the corporation whatever might be its limits. They did not stipulate the place within the corporate limits where the workshops should be placed which was apparently not regarded as a matter of moment: they sought to ensure simply that they should be constructed and maintained and operated within the limits of the corporation as they might be from time to time. The purpose of the Railway Company which had obligated itself by its contract with the Government to operate the railway line in perpetuity was to obtain, not only immediate financial help, but exemption from municipal taxes for all time.

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20 In *River Wear Commissioners v. Adamson*, 1877—2 A.C. 743, at 763, Lord Blackburn stating the principle to be applied in the construction of the language of instruments in writing, said in part:—

“ In all cases, the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.”

30 The question is what is the meaning of the words “ within the said City of Winnipeg ” as used in this covenant and it is permissible, in my opinion, to consider the language of the by-law in pursuance of which it was given as an aid to construction. Once the object of both parties is ascertained, it seems to me that the meaning is made perfectly clear. Without resorting to other aids to interpretation, it is my opinion that the obligation was to continue the workshops within the limits of the City of Winnipeg as they might be from time to time.

40 Assuming that there is doubt as to the meaning to be assigned to these words, the subsequent conduct of the parties may be examined to resolve the ambiguity and to do this in the present matter makes certain what both parties intended by the language employed. The workshops were built within the limits of the City of Winnipeg as defined by the City Charter as it read in the year 1881, but in the following year, those limits were largely extended. The Railway Company owned properties within the new areas added to the City in 1882. Presumably, if effect is to be given to the argument of the City on this aspect of the matter, the expression “ the city of

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Winnipeg” in Section 8 of by-law No. 143 which declared the right to the tax exemption, should be construed in the same manner as those words in Section 3 and of the covenant given in pursuance of the terms of the latter section. However, it is admitted that none of these lands either in the original or in the added area were subjected to municipal taxation between the years 1882 and 1900 except that in 1894 the City sought to levy school taxes upon the Railway Company’s property and brought an action to recover them, which failed. Between the years 1900 and 1947, the City was prohibited by the terms of the Railway Taxation Act (63 and 64 Vict. Cap. 57) from taxing the property of the Company. Apart from any question 10 as to the effect of the judgment in this action may have upon the present proceedings by rendering issues here sought to be raised *res judicata*, it is of importance to note, as relating to the subsequent conduct of the parties, that in that action (*City of Winnipeg v. Canadian Pacific Railway Company*, 12 M.R. 581 ; 30 S.C.R. 558), which was decided upon a demurrer, the question litigated was as to whether school taxes were within the class of taxes for which exemption had been promised, and it was not then contended by the City that that exemption was in any event limited to lands owned by the Railway Company for railway purposes within the limits of the City of Winnipeg as they existed in 1881. It is perhaps further 20 worthy of note that the claim that the Railway Company had lost its right to any tax exemption provided by the by-law by virtue of the fact that in 1903 it had established its principal workshops or a substantial part thereof outside the limits of the City of Winnipeg as defined and constituted in the year 1881 was first raised by an amendment to the statement of defence made some months after the original defence, some thirty-five paragraphs in length, had been filed. This suggests that this point had not occurred to the City or any of its legal representatives until after the original statement of defence was filed.

In the view that I take of this matter it is unnecessary to deal with the question as to whether the power of the City to enter into the agreement is 30 *res judicata* by reason of the litigation between the parties commenced in the year 1892 above referred to (12 M.R. 581 ; 30 S.C.R. 561).

The question as to whether business taxes are within the exemption provided for by the by-law is, in my opinion concluded in favour of the Appellant by our decision in *Canadian Pacific Railway v. Attorney General of Saskatchewan*, 1951 S.C.R. 190.

There remains the question as to whether the Royal Alexandra Hotel property falls within the exemption. The promised exemption was of all property then owned or which might thereafter be owned by the Railway 40 Company within the limits of the City of Winnipeg :—

“ 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. Accommodation is furnished to extra sleeping and dining car conductors and dining cars 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

10 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.

20 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

30 and the hotel are incorporated in one building, is commonplace in England and has been for a very long time. I think Section 4 of the Charter 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.

40 It has been contended in argument that the decision of the Judicial Committee in *Canadian Pacific Railway v. Attorney General for British Columbia*, 1950, A.C. 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

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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. 10

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. 20

The appeal of the Railway Company should be allowed with costs and that of the Respondent City dismissed with costs ; the Judgment of the Court of Appeal should be set aside and that of the learned trial judge restored. The Appellant should have its costs in the Court of Appeal.

(b) Rand, J.

(b) RAND, J. :

Of the several points raised, I shall deal with only one : the authority of the company to bind itself forever to maintain the principal workshops for the province in the city and the legal situation resulting from its absence.

On the first branch of the argument, that is, whether the company, from its incorporation by letters patent under the Great Seal of Canada, possesses all the powers of a common law corporation, the controlling consideration, as decided by the Judicial Committee in the *Bonanza Creek Co.* case, (1916) 1 A.C. 566, is the source from which the incorporating efficacy is drawn, whether from the statute or from the prerogative. On this, I should say that that source cannot be the prerogative alone for the reason that the authority to construct a railway, as given to the company, could not arise from it. The incorporation not only creates the capacities of the company but clothes it with essential powers and some of these latter impinge on common law rights and liberties for which legislation is essential. Nor can I infer from the statute an intention to authorize faculties proceeding from both sources : the incorporation was of an entirety of objects, capacities and powers ; and although special powers can by legislation be conferred on a common law corporation, I know of no authority under the prerogative to add capacities to a statutory corporation. 30 40

Then it is argued that the scope of the statutory endowment was sufficient for the covenant given. Viewing the question from the standpoint of the interest of the company as a private enterprise, it is difficult to see

the creation of any obligation that violates the original compact of the shareholders *inter se*; but the principle of *ultra vires*, in addition to the general public interest in the authorisation of corporate action, has public aspects of special significance in enterprises of the nature of that before us.

Here was an undertaking conceived primarily for a high national purpose; it was designed as a bond to complete the scheme and organization of a Dominion extending from ocean to ocean by furnishing the essential means for the settlement and the utilization of the resources of its western half; and the company was made the beneficiary of substantial assistance from the public in money, lands and privileges. That object indeed exemplifies the importance of the initial construction; once permanent works were established, they would tend to draw to themselves an adjustment of other services and arrangements and the system of operations would become a settled accommodation which, in ordinary circumstances, would deepen its rigidity with the years. All this, in turn, would have its reflex in shaping the course and development of the social and business life of the community which it was to serve. But unusual circumstances, as at times eventuated in the early days of railway projects, might necessitate changes in 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.*, 1 O.L.R. 481.

I do not find it necessary, however, to decide the question. I will assume that the company could not bind itself to continue for ever the workshops, and the question is, what follows from that. The entire transaction must be kept in view, and for that purpose it is desirable to summarize the details.

By-law No. 148 (later embodied in By-law No. 195) was passed by the city on September 5th, 1881, and its provisions were to take effect from September 21st, 1881. Along with others it was confirmed by Chap. 64, Statutes of Manitoba, 1883, and by Chap. 52 of the Statutes of 1886. It was to become effective as a contractual obligation of the city on the performance by the company, to which it is to be observed the company did not bind itself, of certain conditions. These were the construction of the Pembina branch line to the southwest on or before February 1st, 1883; the construction of a passenger depot in the city within the same time; and the giving of a covenant forthwith after the passing of the by-law to build within the city and with all reasonable despatch and forever to continue the principal workshops of the railway within Manitoba, and as soon as convenient to erect suitable stockyards. Upon the fulfilment of those three conditions, bonds of the city in the sum of \$200,000.00 were to be delivered to the company and all property of the company within the city was thereafter and forever to be free and exempt from municipal taxation.

A deed of the land on which the station was to be built was to be delivered to the company upon the delivery of the covenant. On April 18th, 1882, that deed was executed and it recites in the preamble that "the said bond (covenant) has been by the said company made, executed and delivered as required in the said by-law mentioned." Upon the further completion of the branch line and the depot within the time stated, the bonds

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were delivered under the authority of By-law No. 219 passed on March 30th, 1883. In its preamble it is recited :—

“ AND WHEREAS the Canadian Pacific Railway Company mentioned in said By-law No. 195 have completed and performed all the conditions mentioned in the said by-law and in all other respects complied with the same : and it is desirable that the said trustee should be instructed to deliver the bonds mentioned therein, with the coupons still unmatured, to the Canadian Pacific Railway Company or their proper officer on that behalf.”

Later, pursuant to the covenant, the workshops and the stockyards were constructed and the former have at all times since then been maintained. As from the same time, that is, the time for the delivery of the bonds, the exemption from taxation has been respected until 1948. 10

The language of By-law No. 148 dealing with the furnishing of the covenant should be noticed :—

“(3) 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 . . .*”

The company was clearly within its powers in building the branch line, depot, workshops and stockyards as it did ; it would be absurd to say that the city could object to any part of that performance on the ground that the obligation to make it was invalid : and the remaining obligation to continue the workshops is clearly severable from that for their construction. But on the assumption I am now making the instrument cannot be said to furnish the entire consideration to which the city was entitled and there is, to that extent, a partial failure of a promissory character, although the performance has to this moment been completely and validly maintained. 20

The question of law then is this : 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 and substantial obligation on the part of the latter can be repudiated. Rescission is obviously impossible as it has been from the moment the first work was completed. As early as 1888 the city could have taken the ground it now takes : and it is only the accident of the present search for grounds of escaping taxation exemptions that discloses the flaw to-day. 30

The significance of the contract to the city lay in the location of the railway and its centres of administration. The city was at the beginning of its life : it was seeking to establish itself as a focal point in the massive development of the West which was then in prospect. At that stage the action of the railway was of controlling importance. Transportation was the paramount agency in creating and promoting business and population groupings and probably no single factor has contributed so largely to the growth and wealth of what is now a great metropolis than the measures 40

10 dealt with in the contract before us. The railway system is now too deeply integrated with the settled life of the province and the entire West to permit of any major readjustment: the city has attained a dominant position on the prairies, and the removal of the workshops could have no more than a minor effect on its economic life or interest. In other words, the city having absorbed irrevocably the substance of the benefit under the contract seizes upon this item which may never manifest itself in default, and which even in actual breach would create little more than a ripple on the surface of its economy, to justify repudiation notwithstanding that the courts, as I shall endeavour to show, could deal effectively with such a default should it ever arise.

20 Both parties assumed the capacity of the company to make the covenant and acted under a common mistake of law; as executed it was in the precise form stipulated by the by-law; and it was accepted as a fulfilment of one of the conditions upon which the exemption from taxation became effective. On the strength of that acceptance, the construction of the workshops and stockyards was carried out. In these circumstances, the city is now estopped from taking the position that the exemption clause in the by-law never became effective; the coming into force of that provision is in the same category as to effectiveness as was the delivery of the bonds to the company: it is the same as if a new by-law had then been passed. The exemption provision became therefore and remains in effect, and in the absence of its repeal, there is to-day no authority in the city to tax the company's property.

30 The principle of enforcement in equity of contractual obligations with compensation is long established, and its employment here is dictated by the reasons on which it is based. Its general application has been confined to contracts for the sale of land. But the sale of land was part of the consideration here; the remainder was and is an indirect interest in and a beneficial consequence resulting from the operation of works on land. The controversy is broadly, then, within the scope of matters in which the principle has in the past been employed: there is not merely a close analogy, the actual items of land and interest constitute the basic subject-matter.

40 The circumstance that differentiates the situation here from the generality of *ultra vires* contracts is the characteristic of time attached to the physical acts of performance. Those acts by both parties are *intra vires*: the exemption was confirmed by the legislature; the workshops may, in the discretion of the company, be continued within the city limits forever, indeed the existing circumstances may in fact compel that performance, and the city would then receive from the company the whole of what, by the contract, it sought. It is only the substitution of obligation for discretion in that continuance that raises the difficulty.

The company could, at the outset, have validly accepted and can to-day accept the future tax exemption on the condition that if at any time the workshops should be removed, the amount of the taxes so saved would be recouped to the city to the extent of damages it might suffer from the removal: it would be the return of a benefit conditioned on a failure to

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maintain a work within the power of the company to create, maintain, or abandon. Such an arrangement would, I think, be clearly within the company's powers expressly or impliedly conferred by the incorporating statute as well as the Railway Act.

That is closely analogous to one case of specific performance with compensation. When a vendor seeks to enforce an agreement, compensation is a voluntary condition of relief; the vendor enters Court offering to give up a portion of the price of what he promised to and cannot fully convey. This may, roughly, be equivalent to damages, but it is not in law of that character.

10

Such a mode of adjustment may here be said to substitute a conditional for a promissory term in the contract: 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. It is modifying the legal situation no doubt, but that would not be novel in equitable administration: all equitable relief modifies the legal situation; and since, at law, the parties would now be left as they are, that neither of the outstanding obligations would be enforced, it is just such a result that the principle of relief against unjust enrichment is in every case called in to redress.

20

In this exceptional conjunction of circumstances, to carry a rule of *ultra vires* to an ultimate logic would, in the presence of the institution of equity, be its reduction to absurdity. At such a point, logic must yield to common sense as well as to justice. The city, by reason of these matters, has drawn upon itself an equity of obligation; it would be inequitable and unjust while it is enjoying to the full the actual benefit for which it bargained to refuse to pay the price for them. There is no question of enforcing an *ultra vires* promise against the company nor of exacting performance by the city as the consideration of an *ultra vires* promise. The position of the city before any step was taken to withdraw the exemption, a position of full current but unenforceable performance on both sides, can in substance, from now on, be preserved by the application of established principles; and as equity looks at the substance and not the form of what is presented to it, to maintain that position would accord with the basic reason for equitable interposition at any time.

30

As the company asserts the covenant to be good, it is as if it were proffering an undertaking, in the event of the removal of the workshops from the city, to recoup to the city out of the benefit received through the future tax exemption, such amount of compensation as the Court might determine to be the loss the city might thereby sustain; on that basis, the declaration and injunction asked for should go.

40

In all other respects, I concur in the views reached by my brother Kellock whose reasons I have had the privilege of reading.

(c) Estey, J.
(concurring
in by
Cartwright,
J.)

(c) ESTEY, J. (concurring in by CARTWRIGHT, J.).

The Canadian Pacific Railway Company (hereinafter referred to as the Company) contends that it is exempt from realty and business taxes

assessed and levied in the year 1948 by the City of Winnipeg (hereinafter referred to as the City). This contention is based upon an agreement made between the City and the Company in 1881 under which the Company undertook to build 100 miles of railway south-west from the City, a passenger station and stock yards in the City and to execute and deliver to the City a bond and covenant under its corporate seal to the effect that the Company would

10 “ 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 for ever
 “ continue the same within the said City of Winnipeg.”

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The City, on its part, undertook to issue debentures in the sum of \$200,000 at 6 per cent., payable to the Company on September 20, 1901, and to convey to the Company the land upon which the station was constructed. This agreement also included the following provision :

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

This agreement is set out in By-law 148 as passed by the City on September 5, 1881, and amended by By-law 195 passed by the City on October 30, 1882. Apart from extending the time for completing the 100 miles of railway and the passenger depot and cancelling the first two interest coupons on the debentures, By-law 195 effected no other changes. The Province of Manitoba in 1883, by statute (46-47 Vict., S. of M. 1883,
 30 c. 64), declared that the By-laws (148 and 195) were “ legal, binding and
 “ valid upon the said the Mayor and Council of the City of Winnipeg”
 It is conceded that the Company has not made default under this agreement, that the City conveyed the land and delivered the debentures and, apart from an unsuccessful attempt (*The Canadian Pacific Railway Company v. The City of Winnipeg*, (1900) 30 S.C.R. 558) to levy school taxes for the years 1890-94, no further or other taxes have been levied in respect of this property by the City until 1948, from which the Company in this litigation claims exemption.

40 The four main questions raised, and all decided by the learned trial
 judge in favour of the Company, are as follows :—

- (a) Is the agreement between the City and the Company, contained in By-laws 148 and 195, valid and binding ?
- (b) If valid and binding, is the exemption operative only within the limits of the City of Winnipeg as these limits existed at the time the agreement was made or as these limits have been from time to time constituted ?

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(c) If the agreement is valid and binding, is the exemption therein provided for applicable to the Royal Alexandra Hotel and restaurant of the Company within the City of Winnipeg ?

(d) If the agreement is valid and binding, does the exemption therein provided for include the business tax ?

In the Appellate Court the decision of the learned trial judge on question (a) was affirmed, but a majority of that Court reversed the learned trial judge upon questions (b), (c) and (d).

The City contends that while the Canadian Pacific Railway Company was incorporated by letters patent under the Great Seal of Canada dated February 16, 1881, it is not a common law corporation endowed with the powers of an individual, but is, in effect, a statutory corporation and, therefore, can exercise only those powers expressly provided in, or necessarily implied from the terms of incorporation and that these terms do not expressly, or by necessary implication, give to the Company the powers to bind itself forever, as it purported to do by the agreement of September 5, 1881. 10

The original agreement for the construction and operation of the Canadian Pacific Railway executed between a group therein styled "the Company" and the Government of Canada, under date of October 21, 1880, contemplated an Act of incorporation as evidenced by para. 21 thereof :— 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."

Before the statute (44 Vict., S. of C. 1881, c. 1) approving and ratifying this contract was enacted it was evidently deemed desirable to provide for an alternative method of incorporation and accordingly Section 2 of that statute provided :— 30

" 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 40
" 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."

The language of this Sec. 2 is consistent with the view that Parliament intended the letters patent should be issued by the Governor-General in the exercise of the prerogative right. At the outset it is provided that

“ For the purpose of incorporating . . . and of granting to
 “ them the powers necessary to enable them to carry out the said
 “ contract according to the terms thereof”

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This wide and comprehensive language is not limited or restricted by the provision

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“ a charter conferring upon them the franchises, privileges and
 “ powers embodied in the schedule to the said contract”

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The position is similar to that in the *Bonanza Creek* case, 1916—1 A.C. 566, where, though granted in accord with the statute, the letters patent were granted by the Lieutenant-Governor of Ontario in the exercise of the prerogative right. The company, therefore, was endowed with the powers and capacities of a natural person, subject to any limitations or restrictions imposed by the statute.

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Moreover, while this alternative method is provided in the same statute (S. of C. 1882, c. 1) in which statutory effect is given to Section 21 of the contract, under which it was contemplated incorporation would be by statute it was, as already pointed out, arranged for at a date subsequent to the contract. In these circumstances the intent and purpose of Parliament in making this alternative provision would be to provide something different in effect from that of incorporation by statute, and in the absence, as here, of any specific explanation, that intent and purpose would appear to be that if letters patent were issued the Governor-General would do so in the exercise of the prerogative right and thereby give to the Company the powers and capacities of a natural person, possessed only by corporations created in that manner, subject to such limitations or restrictions as the statute imposed.

The position is somewhat analogous to that in *Elve v. Boyton*, (1891) 1 Ch. 501, where it was contended that a company incorporated by letters patent pursuant to a statute (6 Geo. I, 1719, c. 19) was not incorporated by an Act of Parliament. Lindley, L.J., with whom Lopes, L.J., agreed, stated at p. 508 :

“ The answer is, it would have been impossible, without the Act
 “ of Parliament, to create such a corporation by that charter or any
 “ other charter. The real truth is that, if you look at it very closely,
 “ the corporation owed its birth and creation to the joint effect of the
 “ charter and of the Act of Parliament, and you can no more neglect
 “ the Act of Parliament than you can neglect the charter.”

The language of Lindley, L.J., is particularly apt as, apart from Section 2 above quoted, the company could not have been, in 1881, incorporated by letters patent. Parliament had, in 1877, expressly prohibited that possibility by providing that the incorporation of companies for the “ construction and operation of railways ” could not be effected by “ Letters Patent under the Great Seal ” (40 Vict., S. of C. 1877, c. 43, s. 3). When, therefore, it was decided that the alternative method of incorporation by letters patent should be made available, it was necessary that such be provided for by an express statutory provision, as indeed it was in Section 2.

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This statute (44 Vict., S. of C. 1881, c. 1) was assented to on February 15, 1881, and on the following day letters patent were issued under the Great Seal of Canada incorporating the Company. These letters patent recited the contract of the 21st of October, 1880, and the foregoing Section 2 and that “the said persons have prayed for a charter for the purpose aforesaid” and then provided :

“Now know ye, that, by and with the advice of our Privy Council for Canada, and under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in Us vested in this behalf, We Do, by these our Letters Patent, grant, order, declare and provide are hereby constituted a body corporate and politic, by the name of the ‘Canadian Pacific Railway Company.’” 10

The reference to statutory authority in the foregoing paragraph immediately followed by the words “and of any other power and authority whatsoever in Us vested in this behalf,” with great respect to those who entertain a contrary view, leads rather to the conclusion that the Governor-General, in issuing the letters patent, acted not only pursuant to the statutory but to another authority separate and apart therefrom which, in the circumstances, could be only the prerogative right. 6 Halsbury, 2nd Ed., p. 459, sec. 547. The words “in this behalf,” again with great respect, do not, in this context, refer to the contract but rather the power and authority to issue letters patent for the incorporation of companies. 20

In the *Bonanza Creek* case, *supra*, the letters patent, apart from the inclusion of the word “Statute” instead of “Act,” included the following identical words that appear in the foregoing :

“under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in Us vested in this behalf.”

The phrase “in part recited Statute,” in the *Bonanza Creek* letters patent, refers to the Companies Act of Ontario (R.S.O. 1897, C. 191), Sec. 9 of which reads, in part, as follows :— 30

“The Lieutenant-Governor in Council may, by letters patent, grant a charter creating and constituting a body corporate and politic for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends, except the construction and working of railways,”

Viscount Haldane points out that Sec. 9 of the Ontario Act corresponds to Sec. 5 of the Dominion Companies Act (R.S.C. 1906, c. 79), the predecessor of which is Sec. 3 of the Companies Act of 1877 (40 Vict., S. of C. 1877, c. 43). While letters patent were not granted to the Company under any of the foregoing general statutory provisions, they would, no doubt, be present to the minds of the parties when determining the method of incorporation. 40

The contract, statute and charter must all be construed in relation to the circumstances that obtained in 1880 and 1881. The construction,

10 maintenance and operation of the railway was then an undertaking of the greatest magnitude. Parliament, particularly because of its obligation to British Columbia under the terms and conditions of the latter's admission into Confederation, desired not only that the railway should be constructed, but that its maintenance and operation should be efficient. It had provided that two parts of the railway should be constructed by the Government of Canada and, when completed, handed over to the Company. It was in these circumstances that Parliament enacted the provisions in Sec. 2 that, as an alternative to the incorporation by the Act of Parliament, letters patent might be issued. The language then adopted, particularly when construed in relation to the letters patent, as well as the circumstances of 1880 and 1881, discloses an intention that these were issued in the exercise of the prerogative right and thereby ensure to the Company the benefits and advantages of that method of incorporation, subject only to the provisions of the statute.

20 Even if, however, the letters patent incorporating the Company were not issued by the Governor-General in the exercise of his prerogative right, but rather in the exercise of a power delegated to him by the statute and, therefore, the Company must be treated as if it had been incorporated by statute, it would seem that the power to execute the contract here in question would be necessarily incidental to those powers expressed in the charter. That it was present to the minds of the parties that the Company would be called upon to pay taxes is evident from the fact that they had provided for certain property of the Company to be forever exempt in the contract with the Government (Cl. 16). In the same contract (Cl. 7) the Company agreed to "forever efficiently maintain, work and run the Canadian "Pacific Railway." Under these circumstances the power to make agreements binding forever with respect to payment of and exemption from taxes would be included, or at least necessarily incidental to the powers 30 conferred upon the Company by the words "granting to them the powers "necessary to enable them to carry out the said contract according to the "terms thereof," (Sec. 2 supra). This provision is in accord with Cl. 21 of the contract, where it was provided :—

"The Company to be incorporated, with sufficient powers to
"enable them to carry out the foregoing contract,"

and all this is implemented in the letters patent where it is provided that the Company shall possess

40 "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,"

It is not suggested that at the time the contract with the City was made, or at any time thereafter, it has not proved useful to the Company.

The concluding words of Sec. 2 above quoted make it clear that, while the charter is not an Act of Parliament, it shall have the force and effect

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thereof and shall be held to be in compliance with the provisions of the contract relative to incorporation. This provision was necessary by virtue of the terms of Cl. 21 of the contract and it would appear that that was the only reason for its insertion.

In either view, the Company, in executing the contract, did not exceed its powers as provided in its charter. This distinguishes this case from that of the *Corporation of Whitby v. The Grand Trunk Railway Company*, (1901)—1 O.L.R. 480, where the contract to erect and maintain the chief workshops of the Company at Whitby was held to be beyond the powers given to the Company incorporated in Ontario by 31 Vict., c. 42.

The Company's covenant to "for ever continue" its principal workshops for the main line in Manitoba and the branch lines radiating out of the City and within the Province does not offend against the principle that a company incorporated and entrusted with powers and duties by the Legislature "cannot enter into any contract or take any action incompatible with the due exercise of its powers or the discharge of its duties." 8 Halsbury, 2nd Ed., 74, para. 126.

The contention of the City is that this covenant is incompatible with the Company's obligation to "forever efficiently maintain, work and run the Canadian Pacific Railway." The foregoing principle was applied in *The Montreal Park and Island Railway Company v. The Chateauguay and Northern Railway Company*, (1904) 35 S.C.R. 48, where Davies J. (later C.J.C.), with whom Girouard, J., agreed, stated at p. 47 :

" . . . the courts ought not to enforce and will not enforce
" an agreement by which a chartered company undertakes to bind
" itself not to use or carry out its chartered powers. I do not think
" such an agreement ought to be enforced because it is against public
" policy."

The learned judge went on to explain that if the Company can covenant not to exercise its powers in part it may do so in whole and that

" The courts have no right to speculate whether Parliament
" would or would not have granted these chartered powers to the
" Defendant company over the limited area. Parliament alone can
" enact the limitation, and neither courts of justice nor companies
" can substitute themselves for Parliament."

See also *Winch v. The Birkenhead, Lancashire and Cheshire Junction Railway Company*, (1852) 5 DeG. & Sm. 562, 64 E.R. 1243 ; *Ayr Harbour Trustees v. Oswald*, (1883) 8 A.C. 623 ; *Town of Eastview v. Roman Catholic Episcopal Corporation of Ottawa*, (1918) 47 D.L.R. 47 ; *Re Heywood's Conveyance* (1938) 2 All E.R. 230.

The Company's powers do not require the construction of its said principal workshops in any particular place in the Province of Manitoba. They might, therefore, have been placed by the Company at any point that it might have selected. What is significant is that its placing of them in the City has never been regarded as inconsistent or incompatible with its duty to forever maintain and operate the railway efficiently. In other words,

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the complaint is not that the Company has failed or contracted not to exercise its power, but only that it has contracted not to exercise that power elsewhere in the Province of Manitoba than the City of Winnipeg. That City may always remain the proper place for the maintenance of these principal workshops. Therefore, the language of the contract does not disclose any inconsistency or incompatibility with the Company's duty. The City, however, suggests that future events, such as war, floods or other emergency, amalgamation or development in transportation equipment or methods may require the Company, in the discharge of its duty, to move these principal workshops elsewhere, which would then be prevented by virtue of the existence of this covenant to forever maintain them in Winnipeg.

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This is not a case, therefore, such as the *Montreal Park and Island Railway Company, supra* where the Company contracted not to construct its railway in an area where its powers authorised it to do so. It is equally distinguishable from *Ayr Harbour Trustees v. Oswald, supra* where the Trustees purported to bind themselves in respect to the use of land and thereby to impose restrictions upon their use thereof, contrary to the purpose as contemplated under the statute under which they had acquired same. In both of these cases the language of the covenant was incompatible with the due exercise of the Company's power. On the same basis the other cases above mentioned are also distinguishable.

Moreover, where, as already pointed out, the language of the covenant is not, upon its face, inconsistent or incompatible with the due exercise of the powers and the performance of the duties of the Company, then, as pointed out by Lindley, L.J., in *The Grand Junction Canal Company v. Petty*, (1888) 21 Q.B.D. 273, the presence of incompatibility must be established by evidence. This view was referred to by Lord Sumner in *Birkdale District Electric Supply Company, Limited v. Corporation of Southport*, (1926,) A.C. 355, and where, as here, no evidence is adduced, the statements of Lord Sumner would appear relevant where, at p. 375, he states :

“ In the present case the company's activities have not yet been
“ and may never be impaired by the agreement at all. So far it may
“ have been and probably has been safe and beneficial. How, then,
“ can it have been *ultra vires* hitherto ? ”

These remarks are particularly applicable because the possible incompatibility here present is founded upon the future possibility that these workshops, as located, would prevent the efficient management of the Canadian Pacific Railway. In such circumstances a finding of incompatibility should be established by evidence and not founded upon speculations as to the future, particularly in respect of a company that has been carrying on for over seventy years in a manner that in no way constitutes a suggested inconsistency or incompatibility.

No case was cited, nor have we found one, which, in principle, would justify the decree here requested, where the incompatibility is neither

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apparent from the language used nor established by evidence, but is supported only upon the possibility of future events which, even if they should occur, might not require the removal of the workshops in order that the railway might be efficiently maintained and operated, and, therefore, would not establish the suggested incompatibility.

Moreover, it should be noted that the covenant here in question is concerned only with the principal workshops and, therefore, what other workshops may be necessary may be constructed by the Company at such points in Manitoba as it may deem necessary or desirable.

Counsel on behalf of the City contends that it had no power to pass By-laws 148 and 195. The City derives its corporate powers from the Province of Manitoba and even if, at the time, the Province had not vested the City with the necessary power to pass the by-laws, any deficiency in that regard was supplied when the Province enacted 46-47 Vict., S. of M. 1883, c. 64, declaring these By-laws 148 and 195 to be "legal, binding and valid upon the said the Mayor and Council of the City of Winnipeg" This language does not support the City's contention that the statute merely validated the power of the City to enter into the agreement with the Company and did not validate the agreement itself. The view that it did validate the agreement is not only supported by the foregoing language, but is strengthened by the language of the recital of the statute which reads, in part : 10 20

"And whereas, it is deemed expedient to set at rest all doubts that may exist as to the validity of any or all the above in part recited by-laws and the debentures issued thereunder, and to legalize and confirm the same, and each of them respectively."

The City of Winnipeg possessed the authority to enact by-laws, but it was the terms or the substance of By-laws 148 and 195 that gave rise to the questions as to their validity and the Legislature resolved those questions by the foregoing enactment. In *Ontario Power Company of Niagara Falls v. Municipal Corporation of Stamford*, (1916) 1 A.C. 529, where similar questions were raised, the Legislature of Ontario "legalized, confirmed, and declared to be legal, valid and binding . . ." the by-law. Then once the terms of the by-law were validated there remained only the question of the construction of the terms thereof. 30

It was also submitted that the agreement was negotiated under the mistaken belief that it would assure the passage of the main line of the railway through the City of Winnipeg. By-laws 148 and 195 do not contain any undertaking on the part of the Company to construct the main line through that City. On the contrary, throughout these by-laws it is rather assumed, as indeed the fact was, that the main line had already been altered to run through that City. In the recital Winnipeg is declared to be "a central point on the Main line" and in the operative part the Company undertakes to "establish and build within the limits of the City of Winnipeg, their principal workshops for the Main line . . ." It, therefore, appears that the parties were contracting upon the basis that the main 40

line had already been altered to run through the City of Winnipeg and, therefore, there was no misunderstanding or mistake as to the facts in relation to which they were contracting, nor was there any failure of consideration.

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The City contends that the Company's obligation to build their principal workshops "within the limits of the City of Winnipeg" should be construed to mean the limits as constituted on September 5, 1881, the date of the passage of By-law 148. It is important to observe that this phrase is not contained in an enactment of a law providing merely for an exemption from taxation, but is rather a law embodying the terms of an agreement in which the City, in consideration of undertakings to be and, in fact, later executed by the Company, obligated itself to exempt the Company from taxation as therein provided. In these circumstances it should be construed, as stated by Lord Sumner, as "one of bargain and of mutual advantage," rather than as a statute providing for an exemption from taxation. *City of Halifax v. Nova Scotia Car Works Limited*, (1914) A.C. 992. When the contract, as set out in By-law 148, is read as a whole, the conclusion is inevitable that the parties were looking to the future. The railway was not entirely constructed. The route of its main line had been altered to pass through Winnipeg. It would, when in operation, open up a vast new territory and Winnipeg was anxious to become an important commercial and railway centre. With this end in view, it agreed to help the Company if the latter would construct certain facilities within its boundaries. The first recital states that 100 miles of railway south-west out of Winnipeg

"should be built for the purpose of developing and advancing the traffic and trade between the City of Winnipeg and . . ."

The second recital emphasizes the establishment and continuation of the principal workshops and the stock yards. Then in the operative part, particularly in para. 4, the Company undertakes to

"erect . . . large and commodious stock or Cattle Yards, suitable and appropriate for the central business of their Main line of railway and the several branches thereof."

At the time this covenant was given there was at Winnipeg neither main line nor branch lines and, of course, no railway business and, while it is not necessary to determine the precise extent of this undertaking, it is obvious that it was looking to future circumstances. There is found, therefore, both in the recital and the operative parts, language that supports the view that the parties were, in this contract, looking to the future development of both the railway and the City. In so far as the contract provided for the debentures of \$200,000 and the payment therefor, it could only deal with the limits as then constituted.

It is significant that between the passage of By-laws 148 and 195 the area of the City of Winnipeg was more than doubled. By-law 148 was passed on September 5, 1881. The legislation providing for the enlargement of the City boundaries was assented to on May 30, 1882. About five months

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thereafter, on October 30, 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. 10

It is contended that, because By-law 148 specified that it should take effect as of the 21st day of September, 1881, and this date was carried forward in By-law 195, that the parties intended the words "within the limits of the City of Winnipeg" to mean the limits as constituted at the date of the contract. It is important to observe that the statute (37 Vict., S. of M. 1873, c. 7) incorporating the City of Winnipeg, as amended in 1875 (38 Vict., S. of M. 1875, c. 50, s. 93, subsec. 1), provided that a by-law such as 148 would not be valid unless it set out a day when the by-law should take effect. In accordance with that provision, By-law 148 set out that it should take effect on the 21st day of September, 1881. It had a particular significance in this case because the debentures were to be granted by way of bonus payable in twenty years from the day this by-law was to take effect with interest at 6 per cent. per annum. Any amendment, therefore, changing this date would affect the provisions for the issue of the debentures which were left, apart from that with respect to the first two coupons, entirely unchanged by the By-law 195. In these circumstances the fact that this provision was carried forward in identical language in By-law 195 does not support a conclusion that the parties intended thereby that the exemption should apply only to the boundaries of the City of Winnipeg as constituted on the date of the contract. 20 30

The workshops, as originally constructed, were within the limits of the City of Winnipeg as it existed at the time of the execution of the contract, and there remained, until 1903, when they were moved and reconstructed upon a location within the area added to the City in 1882. The City now, so far as the record discloses, for the first time contends that this removal of the workshops constituted a breach of the conditions of the contract and of the bond and covenant given as provided. This removal was openly made in a manner that could not but have been known to the officials of the City of Winnipeg. They did not then nor at any time have they made any objection thereto and have never sought to impose taxes thereon. 40

The subsequent conduct of the parties may be looked at, not to add to or vary the contract, but to assist in determining the intent and meaning of the parties. The record discloses that throughout the period from 1881 to date the City of Winnipeg has not, at any time, suggested that the phrase

“ within the limits of the City of Winnipeg ” meant the limits as constituted at the date of the contract, but, on the contrary, the terms of the contract itself and the subsequent conduct of the parties indicate that such was never intended. *The City of Calgary v. The Canadian Western Natural Gas Company*, (1917) 56 S.C.R. 117.

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It is suggested that in using the words “ within the limits of the City of Winnipeg ” the parties intended to designate the boundaries as then constituted, particularly as in other parts of the by-law the phrase used is “ in the City of Winnipeg.” It will be observed that in the second recital
10 it is stated that the Company have agreed to establish and continue their principal workshops and stock yards for the Province of Manitoba “ in the City of Winnipeg ”; that with respect to the stock or cattle yards the Company undertook to erect them “ within the City of Winnipeg.” When they come to the exempting paragraph (cl. 8) they again use the words “ on property now owned or that hereafter may be owned by them within the limits of the City of Winnipeg.” It does not appear to me, in these circumstances, that the parties had in mind any particular distinction between the words “ within the City of Winnipeg ” and “ within the limits of the City of Winnipeg.”

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20 When the contract is read as a whole and regard is had to the purpose and object thereof, as well as the circumstances surrounding the parties as they negotiated and executed it, and the subsequent conduct of the parties, particularly that of the City, one is led to the conclusion that the parties were contracting in respect of Winnipeg as an entity, regardless of its boundaries at any particular time, and, therefore, the exemption is applicable to areas that have been subsequently included within the boundaries of the City.

The Company was authorized to own and operate hotels in 1902 (2 Edw. VII, S. of C. 1902, c. 52). Under this authority it constructed, in 1906, the
30 Royal Alexandra Hotel, and it is now contended by the City that the Royal Alexandra Hotel and the restaurant therein are not included within the scope of the exemption set out in para. 8 of by-law 148, wherein it is provided, in part, that

“ all property now owned, or that hereafter may be owned
“ 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.”

The evidence in this case establishes that the hotel is adjoining the
40 railway station and physically attached thereto; that “ the railway uses the hotel services extensively ”; that through the medium of its restaurant, dining room and other hotel facilities it provides food and lodging to passengers and employees of the Company. It is conceded that these services are available to and utilized by the general public; the laundry in the hotel provides services to the sleeping and dining car department of the railway; that in the hotel “ railway conferences and staff meetings are

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held ” ; that supplies for the hotel are provided or purchased for the hotel by the railway purchasing department.

The language of the exemption does not require that the property should be used exclusively “ for railway purposes or in connection therewith ” and, having regard to the evidence adduced in this case, it cannot but be concluded that even if the Royal Alexandra Hotel and restaurant are not used for railway purposes they are used “ in connection therewith ” and, therefore, within the terms of the exemption.

This case must be determined upon the language adopted by the parties, which raises issues quite distinct from that of determining whether the 10
Empress Hotel was an integral part of the Canadian Pacific Railway system within the meaning of the British North America Act. *Canadian Pacific Railway Company v. The Attorney-General of British Columbia*, (1950) A.C. 122 ; (1950) 1 W .W.R. 220.

It is suggested that, because the Canadian Pacific Railway Company was not authorised to own and operate hotels until 1902, the exemption provided for in 1881 cannot be said to cover an enterprise which, at that date, would have been illegal. In the construction and operation of this hotel the Company has acted within the authority granted to it by the 20
statute of 1902. As already indicated the Company had, from the date of its incorporation, all the powers possessed at common law by a corporation created by charter. Even if this were not so, it is my opinion that, while the parties to the contract did not contemplate illegal acts, they did contemplate that as the enterprise developed significant changes would be made and, therefore, provided that not only the property “ now owned ” but also “ that hereafter may be owned ” by the Company “ shall be forever free and exempt.” The fact that in 1902 the Company was granted further statutory powers does not limit or restrict the meaning and effect of the words “ that hereafter may be owned.” The Royal Alexandra Hotel and 30
the restaurant are, therefore, included within the language of the foregoing exemption.

In 1906, in 1914 and again in 1942 the parties to this litigation entered into agreements under which the Canadian Pacific Railway Company paid certain amounts in lieu of taxation in respect of the hotel. These agreements disclose that there was a disagreement as to whether the property was taxable and that in lieu of determining the issue the Canadian Pacific Railway Company agreed to pay, and the City to accept, the specified amounts. Counsel for both parties ask that certain conclusions be drawn favourable to their respective contentions from the language used, but, 40
having regard to the nature and character of the agreement and the language used, no conclusion ought to be drawn that would assist either party in determining their rights in these matters. These agreements were essentially made in lieu of the determination of those rights.

Then with respect to the validity of the business tax prior to 1893 the City of Winnipeg was authorized to impose taxation upon real and personal property. In that year, by an amendment to the Assessment Act (56 Vict., c. 24), the City was no longer empowered to impose taxation upon personal

property but was authorized to impose a business tax and it was expressly provided that this tax was “levied in lieu of a tax upon personal property.” This has since been continued and is now found in the charter of the City of Winnipeg (S. of M. 1940, c. 81, as amended in 1948 by S. of M., c. 92) as Sec. 291 (1):

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“291. (1) . . . every person carrying on any business in the city whether he resides therein or not shall be assessed for a sum equal to the annual rental value of the premises”

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and Section 9 provides :

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“9. Nothing in this Act shall

“(a) injure, affect, prejudice, or cause the forfeiture or impairment of, the benefit, right, exemption, or privilege, if any, of the Canadian Pacific Railway Company under

“(i) by-laws numbered respectively 148 and 195 or any other by-law of the City of Winnipeg ;”

20

Apart from this statutory recognition of the exemptions created by By-laws 148 and 195 with respect to the business tax, the language of this exemption which we are here considering—“all property now owned, or that hereafter may be owned . . . shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind,”—is even more broad and comprehensive than that in Cl. 16 considered in *Canadian Pacific Railway Company v. The Attorney-General for Saskatchewan*, (1951), S.C.R. 190, where this Court held that the business tax was included within the exemption there provided for. The principle of that decision resolves this issue in favour of the Company.

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The appeal should be allowed. The costs at trial should remain as directed by the Chief Justice of the Court of King’s Bench for Manitoba. The Appellant Canadian Pacific Railway Company should have its costs in the Court of Appeal. In this Court the two appeals, by order of Mr. Justice Kerwin, were consolidated and proceeded with as one appeal. The Appellant Canadian Pacific Railway Company should have its costs in this Court.

(d) KELLOCK, J.

(d) Kellock,
J.

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This is an appeal from a Judgment of the Court of Appeal for Manitoba in an action brought by the Appellant for a declaration that certain property owned by it in the Respondent municipality is entitled to exemption from municipal assessment under By-law No. 148 as amended by By-law No. 195 of the City, both having been validated by provincial legislation. The Appellant succeeded at the trial but, while the agreement evidenced by the by-laws was upheld on appeal, it was construed so as to deprive the Appellant of the essential relief claimed. Four questions are involved :

(1) The capacity of the Appellant to enter into the agreement evidenced by the by-laws ;

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- (2) whether the exemption is confined to property within the limits of the city existing at the effective date of the by-law ;
- (3) whether business taxes are included in the exemption ; and
- (4) whether the exemption is applicable to the Appellant's Royal Alexandra Hotel.

As to the first question, it was held by the Chief Justice, Coyne and Adamson, J.J.A., in agreement with the learned trial judge, that the Appellant has all the powers of a common law corporation and accordingly had capacity to enter into the agreement in question. Dysart and Richards, J.J.A., were, however, of opinion that the Appellant had only statutory powers. The former considered that the agreement was not within those powers. The latter was of a contrary opinion. 10

With respect to the other questions, the opinion of Richards, Dysart and Adamson, J.J.A., was in favour of the Respondent. The Chief Justice and Coyne, J.A., dissented.

By-law No. 148, passed September 5, 1881, recites that it is desirable that a line of railway south-westerly from the City should be built for the purpose of developing and advancing the traffic and trade between the City and the southern and south-western portions of Manitoba ; that it is also desirable to secure the location of the workshops and stockyards of the Company for the Province of Manitoba at the City of Winnipeg, as a central point on the *main* line of the railway and the several branches thereof, and that it is expedient for the City, in consideration of the agreement of the Company to do these things, to lend their aid to the Company by granting to the Company debentures of the City to the amount of \$200,000, and by exempting property of the Company 20

“ now owned or hereafter to be owned by the said Railway Company
“ for Railway purposes within the City of Winnipeg from taxation
“ forever.”

A suitable site for a station was also to be conveyed by the City to the Company. 30

The by-law authorizes the issue and delivery of the debentures upon fulfilment by the Railway Company of certain conditions, namely,

1. Construction of the railway mentioned in the recital by February 1, 1883 ;
2. Construction by the same date of a station on the lands to be conveyed to the Company by the City ;
3. Delivery by the Company, upon ratification of the by-law by the ratepayers, of a formal covenant that the Company would, with all convenient and reasonable dispatch, establish and build 40
“ within the limits of the City of Winnipeg ” their principal workshops for “ the main line within the Province of Manitoba,
“ and the branches radiating from the City,” and “ forever continue
“ the same within the said City of Winnipeg ;

4. The covenant should extend also to the erection within the "City of Winnipeg" of stock or cattle yards suitable for the central business of the main line and the said branches.

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The covenant does not of itself stipulate the continued maintenance of the stock yards within the City, but the recital states that the Company had so agreed.

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10 With respect to the question of capacity, I agree with the conclusion of Richards and Dysart, J.J.A., 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 S. 2 of the statute of Canada, 44 Vict., c. 1, assented to on February 15, 1881. The statute approved of a contract dated October 21, 1880, for the construction of "The Canadian Pacific Railway" as described in the Act of 1874, 37 Vict., c. 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 :

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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 incorpora- " tion 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."

30 The schedule referred to in par. 21 above provides by par. 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.' "

Par. 4 reads as follows :

40 " 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."

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Par. 17 contains provisions similar to par. 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.

With respect to the enacting provisions of the statute itself, s. 2 reads as follows :

“ 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 10
“ 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.”

The Appellant contends that in the change from the method of 20
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 s. 2 of the statute, namely, by letters patent under the Great Seal,
Parliament had in mind the decision in *Ashbury v. Riche*, L.R. 7 H.L. 653,
decided some six years earlier, and intended that the ambit of the powers of
the appellant Company 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 30

“ 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 A.C. 566.

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 40
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 Vict. c. 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."

10 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
 20 existence from the act of the Sovereign and not merely from the words of a regulating statute.

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 Vict. c. 43, and prior thereto by Section 3 of the Act of 1869, 32-33 Vict.
 20 c. 13. Accordingly, the language in par. 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; *Attorney General v. De Keyser's Royal Hotel* (1920) A.C. 508, particularly at pp. 526 and 539-540.

30 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 Vict. c. 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
 40 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 authorized, 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

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“ 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,

“ and such charter, being published . . . shall have force and 10
“ 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,”

extends in no way the effect of the preceding language.

The contract itself contemplates nothing more than a statute of incorporation with the powers mentioned in the schedule to the contract. The contractors themselves contracted with the Government on that basis, and it surely cannot be supposed that it was in the minds of any of the contractors, or of the Government, that the capital of the corporation to be created could be devoted to any purpose but the construction and 20 continued operation of the railway therein described. It was an express term of the contract (par. 21) that the contractors were to be bound only in the event of an Act of incorporation being granted to the Company “ in the form herein appended as Schedule A.” That schedule contemplates no powers being granted to the Company apart from those contained within the four corners of the schedule itself. Accordingly, in my opinion, it was intended, by the words last quoted above, to satisfy the terms of par. 21 of the contract and to do no more. I think it is impossible to read into the legislation some bestowal of power upon the Company outside of that which 30 was contracted for.

It would no doubt be speculation as to why incorporation by letters patent was adopted rather than by a special statute. It is to be observed, however, that the letters patent were issued the very day after assent was given to the statute, so that time seems to have been an important factor. It may have been thought that to have incorporated all the terms of the letters patent in 44 Vict. c. 1 itself would have been awkward from a drafting standpoint and that an additional statute would have consumed more time, and getting on with the business of the transcontinental railway was an urgent matter. However that may be, it would seem, if the Appellant’s contention on this point be correct, that under a statute approving of a 40 contract, a very large departure from the contract was at the same time effected in a very unobtrusive way. In my opinion, however, upon the true construction of the language of the statute, no such intention can fairly be gathered.

The subsequent legislative history of the Appellant Company, for what it may be worth, is consistent with this interpretation. It may be said, and

it was said on behalf of the Appellant, that the subsequent legislation granting additional powers to the Appellant Company, was merely obtained *ex abundanti cautela*. Such a theory, however, is rather negatived by the preamble to the Act of 1890, 53 Vict. c. 47, to which no reference was made on the argument. That Act recites *inter alia*,

10 “ and whereas several other railway companies are duly empowered
 “ to enter into agreements whereby the Canadian Pacific Railway
 “ Company may work, lease, or obtain running powers over their
 “ respective lines, and the Canadian Pacific Railway Company, *not*
 “ *having the requisite legislative authority for taking part in such an*
 “ *agreement*, has prayed that the necessity for special legislation,
 “ *giving such authority in each case* in which it may find it expedient
 “ to do so, be avoided, and that Parliament give it the general
 “ authority hereinafter mentioned . . .”

20 It might be said that this recital refers not to the creation of further capacity on the part of the Appellant Company, but to the granting of further rights, and such an answer might account sufficiently for Section 6 of the statute which authorized the Appellants to enter into certain arrangements with Canadian companies. Such an explanation cannot account, however,
 30 for Section 7 which authorizes the Appellant to make similar arrangements with companies outside Canada. Parliament can only create capacity to receive rights outside Canada. It cannot create the rights themselves. While the above recital may not be conclusive, and while it cannot control, if on a proper construction of the Act of 1881 the situation were otherwise, the position clearly appearing on the recital indicates that the conclusion to which I have come as to the proper construction of the incorporating Act is the one entertained by the Appellant itself.

30 Reduced to its essence, the contract, for the performance of which the Appellant was incorporated, was for the construction by the Company of certain parts of the railway, and, upon the completion and conveyance to the Company of the parts constructed by the Government, for the permanent operation of the whole by the Company. Apart from certain specific powers which are not relevant, the powers actually conferred upon the Company by par. 4 of the letters patent were all the franchises and powers necessary or
 “ useful ” to the Company to enable it to carry out, perform, enforce, use, and avail itself of every condition, stipulation, obligation, duty, right, remedy, privilege and advantage agreed upon, contained or described in the contract. It is the contention of the Respondent that the covenant of the Appellant with respect to the maintenance of the shops at Winnipeg amounts
 40 to a covenant not to exercise its statutory powers.

It is said for the Respondent that the removal in fact of the Appellant's shops from their original location to a point outside the 1881 boundaries of the city, and the establishment of additional stockyards outside those boundaries, shows that the covenant in question is incompatible with the efficient operation and management of the railway required by the contract with the Crown. It is said that other unforeseen events, such as excessive

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floods, might not only interfere with or prevent efficient operation, but might even yet render necessary the entire removal of the shops and yards from the city.

The Respondent also points to par. 13 of the contract which reads,

“ The Company shall have the right, subject to the approval of
“ the Governor in Council, to lay out and locate the line of 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 western section at Kamloops by way of Yellow
“ Head Pass,”

10

and contends that a later event of the character already mentioned might have resulted in the establishment of the centre of population at Selkirk instead of at Winnipeg, and that the obligation to build and forever maintain the shops for the main line at Winnipeg, involving as it did an obligation (I quote from Respondent's factum) “ by necessary implication “ to establish Winnipeg as a terminus of the railway in lieu of preserving “ the same at Selkirk,” or to establish Winnipeg as a “ central point ” on the main line, was in conflict with par. 13.

It may be pointed out, however, that the obligation of the Appellant under the covenant was not to establish Winnipeg as a “ central point ” on the main line. What the Appellant covenanted to do was to establish and build within the city limits their “ *principal* workshops for their main line of railway within the Province of Manitoba, and for the branches thereof, radiating from the said City ” and to continue them forever within the city, and it would seem obvious that shops for the branches radiating “ from ” the city at least, could hardly, from a practical point of view, be located elsewhere than at Winnipeg.

20

I do not think, either, that the covenant involved any implied obligation upon the Appellant to substitute Winnipeg for Selkirk as a “ terminal point ” of the main line. There appears to be involved in this contention of the Respondent that the maintenance of the principal workshops at Winnipeg necessarily involved Winnipeg as a “ terminal ” or “ divisional ” point from the standpoint of the operation of the railway, and that as Selkirk and Winnipeg are only some twenty miles apart, the latter would be elbowed out of its position as such a point, contrary to the statute. This argument is, in my opinion, founded on a misconception of the statute.

30

Par. 1 of the contract defines four sections of the main line, with Selkirk as the western end of the Lake Superior section, which was to be built by the Government, and the eastern end of the Central section which was to be completed by the Appellant. The “ terminal points ” mentioned by par. 13 have nothing to do, in my opinion, with the operation of the railway but only with construction.

40

It may perfectly well have been, and probably was intended when the statute was passed, that from Selkirk west the main line would run north of Winnipeg, but under the terms of par. 13, the Appellant with the concurrence of the Governor in Council, was free to construct the Central section of the main line from Selkirk to Winnipeg and then west if it saw fit.

As appears from par. 15 of the letters patent, there was already in existence, at the time of the contract, a branch line of railway from Selkirk to Pembina. It appears also from the schedule to c. 13 of the Act of 1879, 42 Vict., that this line was in course of building, and by par. 2 of the contract contained in the schedule to the Act, the Government had undertaken to complete the line by August 3rd of that year. Winnipeg or Fort Garry was, of course, on this line. Chapter 14 of 42 Vict. establishes this, if it needs to be established.

10 P.C. 1458, dated November 19, 1881, shows that the main line had by that time been routed through Winnipeg. That this in no way interfered with the position of Selkirk is clear from the Act of 1882, 45 Vict., c. 53. This statute amends the very paragraph of the contract under consideration, viz., par. 13, with respect to a change in the location of the railway through the Yellow Head Pass, but the statute, by S. 1, shows clearly that Selkirk was still on the main line.

20 If it were necessary to decide as to whether or not the covenant to build and forever maintain the workshops at Winnipeg was a covenant which the Company could validly enter into, regard should be had to the principle laid down by Lord Selborne in *Attorney-General v. Great Eastern Railway Company*, 5 A.C. 473, namely, that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized ought not, unless expressly prohibited, to be held by judicial consideration to be *ultra vires*. However, I do not consider it necessary to decide the question for the reason that, assuming the covenant to have been beyond the power of the Company, the Respondent, in the circumstances here present, is not now entitled to take the position that its obligation with respect to the exemption from taxation, is no longer binding upon it.

30 The position of the Respondent, as set out in its factum, is that the "purported agreement" between the parties is void for want of mutuality and that no consideration for the tax exemption was received by the Respondent for the agreement or by-law or the granting of the exemption from taxation, and that the Plaintiff did not as a result of or in reliance upon said agreement or any term or terms thereof, exercise any forbearance or change its plans or incur any expense or make any investment or in any way change or alter or prejudice its position or the location, construction or operation of its railway or of any works connected with its railways, or give any consideration. It is said that the giving of the bond and covenant amounted to a covenant by the Appellant not to exercise its
40 statutory powers which it had no right to do.

In my opinion, it is plain that both parties contracted on the basis that the Appellant had the power to give the covenant in question, and each was in as good a position as the other to ascertain whether or not that was so. The contract has been fully executed except as to the future performance on the part of the City as to the maintenance of the tax exemption, and on the part of the Appellant as to the maintenance of its shops at their present location.

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With respect to the point taken as to the lack of power on the part of the Company, the view expressed by Lord Cairns, L.C., in *Ashbury's* case at p. 672, is, in my opinion, applicable. There is nothing involved in the covenant, in my view, which “involves that which is *malum prohibitum* or *malum in se* or is a contract contrary to public policy and illegal in “itself.” The question is not “as to the legality of the contract; the question is as to the competency and power of the company to make the “contract.” The covenant here in question, on the assumption it was beyond the powers of the Company, which I make for present purposes, was simply void. Being *ultra vires* the Appellant, and therefore void, 10 there can be no question of damages. Otherwise, the case would fall, in my opinion, within the principle of *Boone v. Eyre*, 1 H. Bl. 273 Note; 126 E.R. 160. In that case, the plaintiff had conveyed to the defendant by deed the equity of redemption of a plantation together with the stock of negroes upon it in consideration of £500 and an annuity of £160 per annum for his life; and covenanted that he had a good title to the plantation, was lawfully in possession of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. The breach assigned 20 was the non-payment of the annuity, while the plea was that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey. On demurrer, it was held by Lord Mansfield that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent. Lord Mansfield went on to say,

“If this plea were to be allowed, any one negro not being the 30
“property of the plaintiff would bar the action.”

In *Carter v. Scargill*, L.R. 10 Q.B. 564, there was in question an agreement between the parties for the sale and purchase of a business the estimated profit of which was £7 per week, and it was agreed that in the event of it being proved by the books of the vendor that the profit should be as stated, the purchaser was to pay the purchase price in specified instalments. Possession was taken of the business by the Defendant and resold, but in an action to recover the balance of the instalments, the position was taken that the Plaintiff had not established that the business was as profitable as stated. It was there held by Cockburn, C.J., Quain and 40 Field, JJ., that that which might have been a condition precedent had ceased to be so by the Defendant's subsequent conduct in accepting less than his bargain, with the result that the condition went only to a portion of the consideration and that not a substantial portion.

While the present case is not one in which the Respondent may be compensated in damages should it suffer any in the event that the assumed

obligation of the Appellant to maintain the shops at Winnipeg cannot be enforced against it, I think that the view more fully expressed by my brother Rand as to the proper relief in equity is the correct one. It is past question, in my view, that the case is one for equitable relief rather than that the Respondent, having obtained to date everything for which it originally stipulated with the exception of a binding agreement in which the existing status of the shops will be maintained, cannot in conscience be allowed to take the position that its agreement with respect to the tax exemption is no longer to be enforced against it. I think the facts are eminently such as to call for the application of the principle of compensation insofar as performance on the part of the Appellant may fall short of that which it would have been obliged to provide if the covenant on its part, and which it asserts to be binding, were binding in law. I therefore agree on this branch of the case with the order proposed by my brother Rand.

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. Under the terms of par. 8 of the by-law, the exemption was to extend to

"all property now owned, or that hereafter may be owned by them" (the Company) "within the limits of the City of Winnipeg, for Railway purposes, or in connection therewith."

This provision itself looks to the future, and on the natural reading of the language employed, the words "within the limits of the City of Winnipeg" should be held to mean within the limits of the city as they shall from time to time exist. The whole object of the agreement was to induce the continued development and growth of the city, and that being so, it would be in contradiction to the plain meaning of the language to restrict the paragraph to the limits then existing. 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 par. 8, that the city spoken of there, with respect to which traffic and trade

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was to be “developed and advanced” meant the City of Winnipeg as it should from time to time develop and expand.

It is pointed out on behalf of the Respondent that while by-law 148 was passed on September 5, 1881, and the amending by-law on October 30, 1882, the amended by-law was to take effect from September 21, 1880, and it is contended that had the agreement been intended to apply to any territory not within the city at the effective date of the by-law, some express language to that effect would have been employed. In my opinion, this is not the situation to which these provisions were directed.

In the first place, the by-law provides for the issue of debentures payable in twenty years from the day “this by-law takes effect.” By par. 1, the debentures were made payable on September 20, 1901, and accordingly, the date upon which the by-law should come into operation had to be fixed, as it was fixed by par. 9, on September 21, 1881. In addition, the provincial Act of 1875, 38 Vict. c. 50, provided by Section 931 that any by-law for contracting debts by borrowing money would be valid only if the by-law should name a day in the financial year in which the same was passed when the by-law should take effect. I think it is clear, therefore, that the contention under consideration is not well founded. 10

It is also contended on behalf of the Appellant that the exemption extends to so-called business taxes. As this point is concluded in this court by our decision in *Canadian Pacific Railway Company v. Attorney-General for Saskatchewan*, (1951) 1 D.L.R. 721, effect must be given to this contention. 20

The remaining question is as to whether or not the exempting provision extends to the Royal Alexandra Hotel and restaurant of the Appellant Company. 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. 30

It is to be observed that the only property which the by-law exempts is property owned by the Appellant for “Railway purposes or in connection therewith,” i.e. in connection with “railway” purposes. As pointed out by their Lordships in *Canadian Pacific Railway v. Attorney-General for British Columbia*, (1950) A.C. 122, a company may be authorized to carry on, and may in fact carry on, more than one undertaking, but merely because the company is a railway company, it does not follow that all its activities must relate to its railway undertaking. As shown by the evidence, the first Canadian Pacific hotels were established in the Rocky Mountains. Because of the very heavy grades existing in the early days, the trains were not able to have diners, and it was necessary that they be stopped at convenient 40

points to enable the passengers to take food and rest. That day has long since passed, and hotels of the type at present under consideration do not owe their existence to any necessity in connection with the operation of the railway proper.

As pointed out earlier in this judgment, the Company was incorporated for the purpose of carrying out the contract of October 21, 1881, and for no other purpose. The power to erect the mountain hotels was no doubt incidental to the powers conferred upon the Company at its incorporation, but until 1902 the Company did not have the power to go into the hotel business in connection with such hotels as the Royal Alexandra at Winnipeg and the Empress at Victoria.

Their Lordships in the Empress case state that the case with which they were dealing was not the case of an hotel conducted solely or even principally for the benefit of travellers on the system of the Appellant Company, and that there was little to distinguish the Empress Hotel from an independently owned hotel in a similar position. The same applies with equal force to the Royal Alexandra. No doubt, the fact that there is a large and well managed hotel at Winnipeg does tend to increase traffic on the Appellant system, and it may be that the Appellant's railway business and hotel business help each other, but that does not prevent them from being separate businesses or undertakings which, in my view, is the case so far as the Royal Alexandra is concerned.

In my opinion, therefore, the conduct of such an hotel as the Royal Alexandra was not within the contemplation of the contracting parties at the time of the passing of by-law 148, and I do not think that such an hotel is owned by the Company for "railway" purposes or "in connection therewith" within the meaning of the by-law. The fact that the business of the hotel may be operated in connection with the business of the railway does not, in my opinion, make the hotel exempt property within the meaning of par. 8 of the by-law. That the hotel is in physical connection with the Appellant's Winnipeg railway station does not affect the matter.

By an agreement of August 4, 1906, entered into between the Appellant and the Respondent at a time when, by c. 57 of the Statutes of Manitoba, 63-64 Vict. (1900) s. 18, the property of the Appellant Company within the city was exempt from municipal taxation, it was arranged that the Appellant should pay a stated sum to the Respondent in lieu of taxation in respect of the hotel "if the same were anyway liable to any taxation." The Appellant points to the first recital in the agreement which states that the Company has built "in connection with its railway and the operation thereof," as a recognition that the hotel is owned by the Company in connection with "railway purposes" within the meaning of by-law 148. The agreement contains a further recital, however, that the "City has claimed that said hotel property should be made subject to municipal taxation on the grounds that an hotel was not originally included within the meaning of a "railway" enterprise. In view of this, I think that the first recital cannot be taken as a recognition that the hotel was to be considered as within the meaning of the agreement of 1881, but rather the contrary.

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I further think that the words in the first recital, “ in connection with its railway and the operation thereof,” have not the same meaning as the words, “ property owned for Railway purposes or in connection therewith,” in by-law 148. In the case of the latter, the property dealt with was property owned for the purpose of the construction and operation of the railway described in the statute of 1881, while the property referred to in the first recital of the agreement of 1906 was property acquired by virtue of the express power granted to the Appellant by Section 8 of its Act of 1902 by which it was authorized to conduct an hotel business “ for the purposes of its railway and steamships and in connection with its business ” of operating the railway, which in 1881 had been its exclusive business. The first recital in the agreement of 1906 is evidently based on this legislation. Moreover, as by-law 148 and the amending by-law required and received validation at the hands of the provincial legislature, it was not competent for the City, without further legislation, to vary by any act or conduct, the terms of the agreement evidenced by the by-law. 10

In my opinion, therefore, Appellant derives no assistance from anything contained in the agreement of 1906. In 1909, amending legislation was passed by the provincial legislature which deprived the hotel of its exemption from municipal taxation, following which, in 1914 and 1942, 20 further agreements were made between the parties with respect to payment to the City by the Appellant in respect of the hotel property in lieu of municipal assessment. The Appellant again says that these agreements are a recognition that the Respondent construed the exemption in by-law 148 as extending to the hotel in question. I do not think, however, that, apart from enabling legislation, it was competent for the city in this way to extend the meaning of the words used in 1881, or to exempt property, which by general law was subject to taxation. I think, therefore, the Appellant’s contention with respect to the hotel fails. We heard no argument that, in this event, the restaurant could be considered in any other position. 30

In the result, the Appellant succeeds substantially, and should have three-quarters of the costs in this court and in the Court of Appeal. The judgment of the trial judge should be restored with the variation indicated above as to the hotel and restaurant. The order as to costs at trial should not be interfered with.

(e) Kerwin,
J. (con-
curred in
by the
Chief
Justice,
Taschereau
and
Fauteux,
JJ.)

(e) KERWIN, J. (concurrent in by the CHIEF JUSTICE, TASCHEREAU and FAUTEUX, JJ.):

The Canadian Pacific Railway Company appeals and the City of Winnipeg cross-appeals against a judgment of the Court of Appeal for Manitoba. The dispute between the parties hinges upon clause 8 of by-law 148 of the City—passed September 5, 1881, which clause reads as follows : 40

“ 8. Upon the fulfilment by the said Company of the conditions “ and stipulations herein-mentioned, by the said Canadian Pacific “ Railway Company all property now owned, or that hereafter may “ be owned by them within the limits of the City of Winnipeg, for

“ Railway purposes, or in connection therewith shall be forever free
 “ and exempt from all municipal taxes, rates and levies, and
 “ assessments of every nature and kind.”

In the
 Supreme
 Court of
 Canada.

The conditions and stipulations referred to are contained in preceding clauses of the by-law by which the Company undertook to build, construct and complete, on certain property in the City, a substantial and commodious general passenger railway depot, and particularly clause 3, reading as follows :—

—
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 Judgment.

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

(e) Kerwin,
 J. (con-
 curred in
 by the
 Chief
 Justice,
 Taschereau,
 and
 Fauteux,
 JJ.)—
continued.

- 20 This by-law and an amending by-law No. 195 passed September 20, 1882, were ratified and confirmed by an Act of the Manitoba Legislature. It is admitted that the Company fulfilled its obligations and with the exception of an abortive attempt by the City to impose school taxes, *Canadian Pacific Railway Company v. City of Winnipeg*, (1900) 30 S.C.R. 558, no question arose between the parties as to the Company's liability to taxation until, in the year 1948, the City attempted to assess and levy realty and business taxes, when this action was brought for a declaration that the Company was not so liable.

- The Company succeeded at the trial but the judgment in its favour was
 30 set aside by the Court of Appeal by a majority, although there a majority were in agreement with the conclusions of the trial judge upon the first question involved, viz., the capacity of the Company to enter into the agreement evidenced by by-laws 148 and 195. The trial judge considered that the Company had the status of a common law corporation with powers analogous to those of a natural person and in that view the Chief Justice of Manitoba and Coyne, J.A., and Adamson, J.A., agreed. The latter also held, as had the trial judge, that in any event the expressly enumerated powers of the Company gave it authority to make the agreement, and on this additional ground held the agreement *intra vires*. Richards, J.A., and
 40 Dysart, J.A., held that the Company's powers were limited to those set forth in a special Act authorizing its charter but the former held that the agreement was within such powers and *intra vires* the Company so that the latter was the only member of the Court dissenting on the question as to the Company's power to enter into the agreement.

On this first point I find it unnecessary to determine whether the 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

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Canada.

No. 36.
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Judgment.

(e) Kerwin,
J. (con-
curred in
by the
Chief
Justice,
Taschereau,
and
Fauteux,
JJ.)—
continued.

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 authorize the Company to do as it agreed, and as was subsequently carried out. Decisions like *Corporation of Whitby v. Grand Trunk Railway Company*, (1901) 1 O.L.R. 48, relied upon by the City, depend upon the terms of the enactments conferring the particular powers there in question. I might add that I have found it unnecessary in the consideration of this point, or any of the others, to deal with the Company's argument that because of the decision in *Canadian Pacific Railway Company v. City of Winnipeg* 10 (1900) 30 S.C.R. 558, several of the matters now raised by the City are *res judicata*.

The second question is whether the exception is confined to property within the limits of the City existing at the date of by-law 148. Upon a review of all the terms of the by-law, and in view of the circumstances that existed at the time of its enactment, I have come to the conclusion that this question should be answered in the negative. If there be any ambiguity in the construction of those terms, which I do not think there is, the Company's contention would be advanced by the fact that by the time by-law 195 was passed the Company had executed part of its obligation on 20 land that had been taken into the City subsequent to the enactment of by-law 148.

The third question, whether business taxes are included in the exemption is settled by the decision of this Court in *Canadian Pacific Railway Company v. Attorney General of Saskatchewan*, (1951) S.C.R. 190.

The fourth question, whether the exemption is applicable to the Company's Royal Alexandra Hotel and the restaurant in the railway station should be answered in the affirmative. Whatever bearing the Company's enumerated powers under its charter might have upon the point as to the power of the Company to build hotels need not be considered in 30 view of the Act of 1902. Undoubtedly since then the Company has such power and the Royal Alexandra Hotel and the restaurant fall in my opinion within the words of the exemption :—" all property owned or that hereafter may be owned . . . for railway purposes, or in connection therewith." The hotel property or restaurant need not be owned exclusively either for railway purposes or in connection with railway purposes. Other cases decided upon other provisions are not helpful but in connection with the point as to the limits of the City, as well as the point now under discussion, the arrangement set forth in by-law 148 as amended should be construed as is said by Lord Sumner in *City of Halifax v. Nova Scotia Car Works, Limited*, (1914) A.C. 992, as " one of bargain and of mutual advantage." 40 The decision of the Judicial Committee in *Canadian Pacific Railway Company v. Attorney General of British Columbia*, (1950) A.C. 122, depended upon the construction of the British North America Act, 1867.

The appeal should therefore be allowed and the cross-appeal dismissed, both with costs, the judgment of the Court of Appeal set aside and that of the trial judge restored. The Appellant should have its costs in the Court of Appeal.

No. 37.

Order in Council granting special leave to appeal.

In the
Privy
Council.

AT THE COURT AT BUCKINGHAM PALACE.

The 18th day of July, 1952.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT.

MR. PEAKE.

MR. MACMILLAN.

MR. LENNOX-BOYD.

No. 37.
Order in
Council
granting
special
leave to
appeal.
18th July
1952.

WHEREAS there was this day read at the Board a Report from the
10 Judicial Committee of the Privy Council dated the 15th day of July 1952,
in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the
Seventh's Order in Council of the 18th day of October 1909 there was
referred unto this Committee a humble Petition of the City of
Winnipeg in the matter of an Appeal from the Supreme Court of
Canada between the Petitioner Appellant and the Canadian Pacific
Railway Company Respondent setting forth (amongst other matters) :
that the Petitioner desires special leave to appeal from a Judgment of
the Supreme Court of Canada dated the 22nd October 1951 dismissing
20 the Petitioner's Appeal from a Judgment of the Court of Appeal for
Manitoba dated the 17th April 1950 allowing the Appeal of the
Respondent from the said Judgment and restoring a Judgment of the
Court of King's Bench for Manitoba dated the 7th October 1949
in favour of the Respondent (Plaintiff in an Action against the
Petitioner) : that in the Action the Respondent claimed (A) A
declaration that all property then owned or that thereafter might be
owned by the Respondent within the limits of the City of Winnipeg for
railway purposes or in connection therewith was forever free and exempt
from all municipal taxes rates and levies and assessments of every
30 nature and kind ; (B) A declaration that the Respondent was not liable
to the Petitioner for any real property tax or business tax in respect of
any property within the limits of the City of Winnipeg then owned by
the Respondent for railway purposes or in connection therewith and
other relief : that the Respondent's claim was based upon the provisions
of the Petitioner's By-law 148 dated the 5th September 1881 (as
amended by By-law 195 dated the 30th October 1882) whereby
according to the Respondent's claim the Petitioner gave effect to an
Agreement between the Petitioner and the Respondent made on or
about the 5th September 1881 : that the By-law as amended provided

In the
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continued.

that upon the fulfilment by the Respondent of the conditions and stipulations therein mentioned ' All property now owned or that may hereafter be owned by them (the Respondent) within the limits of the City of Winnipeg, for railway purposes or in connection therewith, shall be forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind ' : that on the 10th October 1881 the Respondent executed a deed of covenant and by an indenture made the 18th April 1882 the Petitioner conveyed to the Respondent the land on which a passenger depot was to be constructed : that in the year 1948 the Petitioner raised assessments upon the Respondent for the purpose of levying realty tax and business tax in respect of properties owned by the Respondent within the present limits of the City of Winnipeg : that these assessments gave rise to the present proceedings : that the principal issues for determination are (i) Whether the Deed of Covenant dated 10th October 1881 was *ultra vires* the Respondent with the result that the exemption from taxation purported to be conferred on the Respondent by By-law 148 never became effective ; (ii) Whether, if perpetual exemption from taxation is conferred by the said By-law, such exemption does or does not extend to the business tax ; (iii) Whether, if perpetual exemption from taxation is conferred by the said By-law, such exemption extends only to property situate within the limits of the City of Winnipeg as they existed at the time the By-law was enacted ; (iv) Whether, if perpetual exemption from taxation is conferred by the said By-law, such exemption does or does not extend to the Royal Alexandra Hotel and Restaurant in Winnipeg the property of the Respondent : that this case is of considerable importance to the Petitioner involving as it does the right of the Petitioner to levy taxes amounting to some 500,000 dollars per annum : And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the Supreme Court dated the 22nd October 1951 and for further or other relief :

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its Appeal against the Judgment of the Supreme Court of Canada dated the 22nd day of October 1951 but that the Appeal ought to be limited to the following questions :—(1) Whether the Deed of Covenant dated 10th October 1881 was *ultra vires* the Respondent with the result that the exemption from taxation purported to be conferred on the Respondent by By-law 148 never became effective and (2) Whether, if perpetual exemption from taxation is conferred by the said By-law, such exemption does or does not extend to the business tax :

“ AND THEIR LORDSHIPS do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal.”

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HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed
10 and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

continued.

F. J. FERNAU.

In the Privy Council.

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.

RECORD OF PROCEEDINGS

LAWRENCE JONES & CO.,
Winchester House,
Old Broad Street,
London, E.C.2,
Solicitors for the Appellant.

BLAKE & REDDEN,
17 Victoria Street,
S.W.1,
Solicitors for the Respondent.