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# In the Supreme Court of Canada

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 LEGAL STUDIES  
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FACTUM OF THE APPELLANT

ON APPEAL FROM THE COURT OF APPEAL FOR  
MANITOBA

BETWEEN:

THE CITY OF WINNIPEG,

(Defendant) Appellant,

and

CANADIAN PACIFIC RAILWAY COMPANY,

(Plaintiff) Respondent.

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## FACTUM OF THE APPELLANT THE CITY OF WINNIPEG

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10 **FACTUM OF THE APPELLANT, THE CITY OF WINNIPEG**

## **PART 1**

### STATEMENT OF FACTS

This is an appeal from the judgment of the Court of Appeal for Manitoba delivered on the 17th day of April, 1950, in so far as and to the extent that the Court of Appeal disallowed the appeal by the City of Winnipeg from the judgment delivered by the Chief Justice of the Court of King's Bench on the 7th day of October, 1949, who had given judgment for the plaintiff as prayed in its statement of claim.

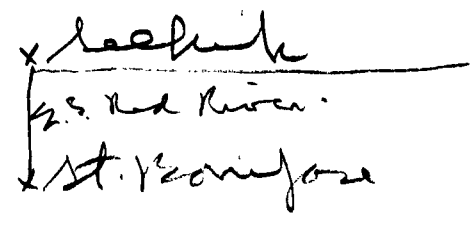
The action was commenced on the 3rd day of April, 1948, by the Canadian Pacific Railway Company (hereinafter referred to as "the railway" or "the railway company") against the City of Winnipeg (hereinafter referred to as "the city").

The railway claims *inter alia* 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, and the railway also asks for an injunction restraining the city from making any assessment of or in respect of any such property. The injunction is asked for both in respect of realty taxes and the tax commonly referred to as a business tax. The declaration and injunction is also

Chater CRK. Feb. 15, 1881

Ev. 4 & p 68 - shows state of  
construction of fall of 1881.

"Trunk line"

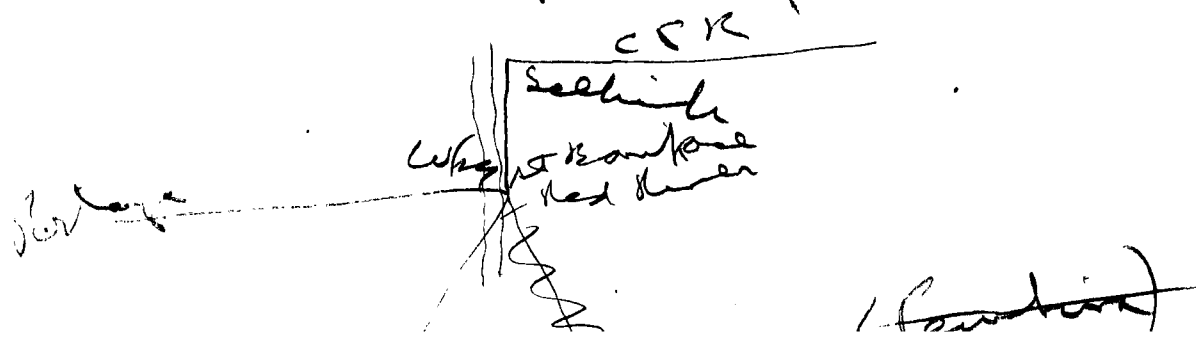


Fall of 1879 line from W. p. g. west had been  
located.

P. 106 opp. P.C. 1432 of Oct. 11, 1879 "A-B"  
108 .. .. . May 22, 1879 "B-C"

- 118 .. P.C. 1165 Aug 6, 1881
- 119 .. P.C. 1227 Aug. 25
- .. .. P.C. 1458 Nov. 19, 1881
- 122 .. P.C. 182 Aug. 18, 1915

C. 14 Ca. 1879 Branch W. p. g. west.  
Apparently abandoned.



asked for in respect of the railway's hotel property in the City of Winnipeg commonly referred to as the Royal Alexandra Hotel.

The claim for exemption is based on a by-law of the City of Winnipeg passed on the 5th day of September, 1881, known as by-law No. 148 (Case page 289) as amended by city-by-law No. 195 (Case page 301) dated 30th October, 1882. The city then had no statutory authority to pass either by-law. By chapter 64 Statutes of Manitoba 46-47 Victoria, section 7 (assented to July 7, 1883) said by-law No. 148 and said amending by-law No. 195 were declared to be legal,  
10 valid and binding on the city.

Said by-law No. 148 (Case page 292) *inter alia* provides as follows:

“4. (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.”

“(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.”  
30

The words in 4 (3) “after the ratification of this by-law as aforesaid” refer back to section 3 of the by-law which reads in part:

“3. The said debentures shall be issued forthwith upon ratification of this by-law in accordance with the Statutes of this Province in that behalf.”  
40

There does not appear to have been any statutory provision for submitting such a by-law to the ratepayers.

The so-called bond and covenant of the railway company which was delivered to the city in purported compliance with section 4, subsection 3 of by-law No. 148, is dated 10th of October, 1881. See Exhibit 6 (Case page 294).

By-law No. 148 was submitted to the ratepayers on the 24th of

Wp. about 79 00 over

Ry. Law 148 - P. 289

Keitel 2 individuals Wp. was in the main line.

I Power of City Power to continue work  
in Winnipeg,

Whitby v. T.R. 1 O.R. 480

Power

11 app. p. 11 Jan. 2

p. 18 Jan. 7.

19 Jan 13, 15

22 Jan. 21, 22

23 Jan 4

27 .. 17

Reas judicata

Same test is identity of issue.

Outram v. Dowd 3 East @ 355

Smith v. C. 12 <sup>Fraser</sup> Vol 2 p. 754

Opportunity to Plead

13 <sup>Ed.</sup> 411-412, see 466

Kang v. Hutton 67 C.T. 594

Hyatt 226 L16

C.P.R. does not allege res judicata as to ultra vi respect of the co.

Kennedy v. K 1914 Q.C. 215

Johanna v. C.P.R. 32 Man. 210

Hawlett v. Bate 10 C.B. N.S. 813

August, 1881, and by-law No. 195, which amended by-law No. 148, was submitted to the ratepayers on the 26th October, 1882. By-law No. 195 extends the time within which the railway company was to complete certain of the works referred to in by-law No. 148. Section 9 of by-law No. 195 provides that it shall take effect as of the 21st day of September 1881.

The submission of by-law No. 195 to the ratepayers was provided for by by-law No. 198 which was dated 20th September, 1882. This by-law is entitled as follows:

10 "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. (Case page 299.)

By 46 Vic. c. 24 s. 6 Statutes of Canada, 1883, assented to 25th May 1883, the Canadian Pacific Railway Company was declared to be a work for the general advantage of Canada.

As set out in the agreed admission of facts, Exhibit 5 (Case page 20 257), the workshops were moved to the location shown and numbered 4 on the plan, Exhibit 7 (Case page 261), in the year 1903 and have been continued in this location to the present date. This location is outside the original boundaries of the City of Winnipeg as same existed when by-law No. 148 was passed.

The admission of facts also contains the following:

30 "6. That in 1883 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;"

While the railway company apparently maintained stock yards in Winnipeg the principal stock yards are now in St. Boniface, near Winnipeg, and are operated by Public Markets Limited, and are commonly referred to as the St. Boniface Stock Yards. See evidence of M. J. Barry called by the railway. (Case page 41.)

40 However, in the Act, S.M. 1911 c.45, which incorporated Public Markets Limited, it was provided by Section 23 that anything done under and in pursuance of the Act should not injure, affect, prejudice or cause any forfeiture or impairment of any benefit, right or exemption of the railway company under by-law No. 148 as amended by by-law No. 195, etc.

The Canadian Pacific Railway Act, 1901-2 S. of C. c. 52, authorized the railway company to acquire hotels, restaurants, etc. A few years later the railway company built the Royal Alexandra Hotel in Winnipeg, which hotel is still in operation and has been the subject of various agreements between the City of Winnipeg and the railway company which will be referred to in the argument.

Haystead 1926 Q.C. 155, 166

Bradshaw, In re (1920) L.R. 2 K.B. 412

Henderson v Henderson 3 (Hare) 100

R. B. Ry. - Ritz 1939 Q.C. 1, 21, 37

Re Konigsberg 1949 Ch 348, 362

Haycraft 224

How far does res jud. apply in cases decided on demurrer?

Hawlett v Bate 10 C.B. 5 @ 822, 827

Admissions in a demurrer relate only

Wayward v Wayward (Board v. p. to)

Conduct of Parties (as to city limits).

Cannot apply where one of parties has to call in assistance of legislature.

Admon 233227

Williams, C. J. p. 341 v - as to hotel

Board I Lands outside original limits

See pp. 4 & 8ff. Exemption in any but exempting by parties from taxes except by taxation Act of 1900. No power in Act to exempt.

Ry. Law 178 took effect Jan Sept. 25, 1881

then co. had its workshops in city.

C.P.R. v Bennett 5 Dan. 295



The defences raised by the City of Winnipeg include the following, namely:

(a) Under the terms of section 4 subsection 8 of by-law No. 148 the railway company was to be free and exempt from all municipal taxes only upon fulfillment of the conditions and stipulations mentioned in said by-law.

The railway company did not and could not fulfill the conditions and stipulations which it was required to fulfill in order to obtain the tax exemption in that the railway company had no right, power or  
10 authority under the incorporating Act or its charter and contract appended thereto, or under the Consolidated Railway Act, being chapter 9, 42 Vic. Statutes of Canada, 1879, or otherwise, to covenant and agree to forever continue its principal workshops for the main line or any works essential to the operation or efficient operation of the railway within the City of Winnipeg, and in that if the plaintiff delivered such a form of bond and covenant to the defendant the same is invalid, illegal, null and void.

The defendant city further alleges that the effect of any such purported bond and covenant was to limit and restrict the plaintiff in  
20 the exercise of the powers conferred on it and amounted to a negation of its statutory powers and obligations and the railway company had no right, power or authority to make, execute and deliver such a bond and covenant.

It is alleged by the city that the purported agreement is void for want of mutuality and that no consideration for the tax exemption was received by the defendant 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  
30 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.

It is contended by the city that the alleged agreement was entered into under a misapprehension as to a basic fact, namely, on the assumption that in consequence thereof the railway company would locate its main line through Winnipeg whereas Winnipeg was already on the main line.

The city further contends that the railway company did not fulfill  
40 the conditions and stipulations which entitled it to tax exemption in that in or about the year 1903 the plaintiff established and built the principal workshops outside the limits of the City of Winnipeg as defined and constituted in the year 1881 when the by-law was passed.

The city also contends that business tax as provided for in the city charter is a personal tax and not a tax on the property of the railway and therefore the railway is not exempt from business tax under the terms of by-law No. 148 and; that land outside the limits of the city

Hotel

Carson 4924

59-61

1906, 1942 + 1946 agreements,

by taxation but in force 1900-1947

Arts 1.741 @ 85+ app.

Key. number 15 Nov. 288, 297, 302

mountain by 1.741 to have validated as  
by laws previously passed, holes holes.  
But see last sentence of sec.

Business Tax

Sec. 369(3) p. 6, hereof

no counterpart in back leg.

Richard 201. 17

Equities of Case

lypart 228

Failure

By laws admitted to have  
been passed (i.e. there was  
just in by Carson).

~~624~~

of Winnipeg as constituted on the 5th of September, 1881, is not exempt and; that the Royal Alexandra Hotel is not owned for railway purposes or in connection therewith and therefore is not exempt.

In its reply to the statement of defence delivered by the city the railway relied upon *res judicata* and estoppel.

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

(1) That the Company, by its incorporation, was granted the powers of a common law company (Richards and Dysart J.J.A. 10 dissenting).

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

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

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

(a) does not exempt the company from business tax (the Chief Justice and Coyne J.A. dissenting);

20 (b) does not exempt from taxation the property of the company situate outside the area of the city as existing before that area was enlarged in 1882 (the Chief Justice and Coyne J.A. dissenting);

(c) does not exempt from taxation the Royal Alexandra Hotel (Coyne J.A. dissenting).

The parties agreed upon certain admissions of facts for the purposes of this action which are found in the judgment of the Chief Justice of the Court of King's Bench. (Case page 80) and in (Case page 257) Exhibit 5.

### Historical Review

30 The incorporation of the railway company was provided for by an Act respecting the Canadian Pacific Railway, 44 Victoria, chapter 1, assented to 15th February 1881. The recitals refer to the fact that by the terms and conditions of the admission of British Columbia into Union with the Dominion of Canada the government had assumed the obligation of causing the railway to be constructed, connecting the seaboard of British Columbia with the railway system of Canada and that Parliament of Canada had declared a preference for the construction and operation of such a railway by means of an incorporated company aided by grants of money and land and that certain sections 40 of railway had been constructed by the government and others were in course of construction, etc., and that it is necessary for the preservation of the good faith of the government in performance of its obligations to complete the whole of the railway and that a contract had been entered into for the completion of the construction of the main line of the railway and for the permanent working of the whole line

which contract with the schedule annexed had been laid before Parliament for its approval and a copy appended to the Act.

Sections 1 and 2 of the incorporating Act read as follows:

“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.

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 wording of the authorized charter is Schedule “A” to the authorized contract. Section 1 of the contract divides the railway into the eastern section, Callander section, Lake Superior section, Central section and Western section. That portion of the railway extending from Lake Superior to Selkirk on the east side of the Red River is the Lake Superior section. That portion of the railway then partially in the course of construction extending from Selkirk to Kamloops is called the central section.

Section 7 of the contract (Case page 265) provides that upon completion the railway shall be the property of the company, etc. The last sentence of section 7 reads as follows:

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

Section 13 (Case page 268) reads as follows:

“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 following orders-in-council are found in the Appeal Case:

Exhibit No. 40, Order-in-council P.C. 1165 dated August 6, 1881, Case page 288.

Exhibit No. 41, Order-in-Council P.C. 1227 dated August 25, 1881, Case page 289.

Exhibit No. 42, Order-in-council P.C. 1458 dated November 19, 1881, Case page 296.

The City of Winnipeg is informed that the following orders-in-council will be printed as an addendum to the factum of the Canadian Pacific Railway Company, namely:

- Order-in-council P.C. 359 dated May 11, 1877.
- Order-in-council P.C. 486 dated June 1, 1877.
- Order-in-council P.C. 1432 dated October 11, 1879.
- Order-in-council P.C. 1730 dated December 22, 1870.
- 10 Order-in-council P.C. 210 dated February 9, 1880.
- Order-in-council P.C. 487 dated March 16, 1880.
- Order-in-council P.C. 528 dated March 23, 1880.
- Order-in-council P.C. 1052 dated June 23, 1880.
- Order-in-council P.C. 1397 dated August 17, 1880.
- Order-in-council P.C. 182 dated August 18, 1915.

These orders-in-council were not produced or referred to in the Manitoba courts.

Under the original government plan for the construction of the Canadian Pacific Railway the City of Winnipeg was not on the main 20 line. Sanford Fleming had reported against crossing the Red River at Winnipeg because of the history of flood conditions in that area. See report of Sanford Fleming to Sir Charles Tupper, Minister of Railways and Canals dated Ottawa, 8th December, 1879, which appears as Appendix No. 16 to report of April 18, 1880, page 272; also at pages 24 and 25, and also report of Sanford Fleming dated 8th April 1880.

The following is an extract from P.C. 486 dated June 1, 1877:

30 "On a Memorandum dated 21st May, 1877, from the Honourable the Minister of Public Works, recommending that the line of the Canadian Pacific Railway as laid down on a Map prepared by Mr. Sanford Fleming, Chief Engineer, of the said Railway, a copy of which accompanies said Memorandum, shall be determined, as required by Section 1 of the Canadian Pacific Railway Act of 1874, and which line may be briefly described as follows:

40 Commencing at Fort William on the Kaministiquia River, following a North-Westerly direction to the North of Lac-des-Milles-Lacs, and crossing the Winnipeg River at Keewatin; thence to a point on the **Red River named Selkirk**, as shown on the map; thence in a **direct line to a point near Swan River** named Northcote; thence South-Westerly to Livingston; thence in a nearly due West direction, to the crossing of the South branch of the Saskatchewan; thence in a North-Westerly direction to the neighbourhood of Fort Edmonton; thence by the McLeod and Athabaska Rivers to Jasper House and Henry House; and thence to Tete Jaune Cache."

Prior to February, 1881, the main line of the Canadian Pacific Railway had been partly constructed from Lake Superior to East

Selkirk, Manitoba, and a branch line known as the Pembina Branch had been constructed from East Selkirk to St. Boniface on the east side of the Red River and from there to Emerson, Manitoba.

Order-in-Council P.C. 182 dated 18th August 1915 contains the following:

10 "Under the original scheme for the construction of the Canadian Pacific Railway, the main line was to cross the Red River opposite Selkirk, on the east side, with a branch from Victoria junction—a point about 16 miles west of the River, and about 2 miles east of what is known now as Stonewall—to Winnipeg."

"This scheme was abandoned in favour of a route south from Selkirk to St. Boniface and Winnipeg, thence northerly from Winnipeg, and thence westerly via Stonewall and Ossawa to Portage la Prairie, a distance of 70 miles, thus placing Winnipeg on the main line."

20 A perusal of the statutory agreement between the promoters of the Canadian Pacific Railway and the Government and in particular paragraphs 1, 4 and 5 thereof, together with a consideration of orders-in-council P.C. 1482 dated October 11, 1879, P.C. 1730 dated December 22, 1879 and P.C. 1397 dated August 17, 1880, indicates that the decision to abandon the original route was made by the Government prior to February 15, 1881. The line from Winnipeg to Portage la Prairie by way of Stonewall was then under construction.

The line from Winnipeg to Portage la Prairie by way of Stonewall was subsequently relocated by a more direct line, and permission given to the railway company by orders-in-council P.C. 1165 dated 6th August, 1881 (Case page 288) Exhibit 40, and P.C. 1227 dated August 25, 1881 (Case page 289) Exhibit 41, each of which covers a part of the relocated line.

30 The following is a quotation from the recital contained in P.C. 1165 dated August 6, 1881:

40 "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 westerly course running nearly parallel with the Assiniboine River and 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."

A statement of the route of the Canadian Pacific Railway and its branches as far as settled together with the mileage of same is shown in a report by the Engineer in Chief of the Canadian Pacific Railway to the Department of Railways dated 13th March 1882. It is pub-

lished in Sessional Papers 22-48 Vol. 15, No. 9, 1882, page 68. 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.”

After by-law No. 148 was passed the city did not attempt to collect any taxes from the Canadian Pacific Railway Company until it levied school taxes for the years 1890 to 1894 and the city brought action against the railway company to recover these school taxes.

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

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

20 No further attempt was made to collect taxes from the Canadian Pacific Railway until 1948 when the railway was assessed for realty and business tax by the City of Winnipeg. By by-law No. 16306, dated 23rd February, 1948, Exhibit 22 (Case page 368) the city purported to repeal by-law No. 148 as amended by by-law No. 195 and by Statutes of Manitoba, 1948, chapter 92, certain amendments were made to the city charter.

In the year 1900 the Legislature of Manitoba passed the Railway Taxation Act, 63 & 64 Vic. chapter 57. This Act imposed a tax on the earnings of railway companies and **exempted railway companies** 30 **from all other taxes.** This Act remained in effect until 1947 when the Manitoba Legislature passed the Statutes of Manitoba, chapter 56, 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.”

In 1881, when by-law No. 148 was passed, 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 40 Winnipeg was concerned, and this business tax was stated to be in lieu of the personal property tax which was abolished.

## PART II

**Statement of points in issue on appeal  
and  
Statement setting out in what respects and on what issues  
the majority judgments are alleged to be erroneous.**

*Points in Issue which were decided in favour of the  
Railway Company by the majority judgments*

Did the railway company have the right, power or authority under its Act of incorporation or charter or under the Consolidated Railway Act of 1879 to give the bond and covenant which was stipulated in city by-law No. 148 to be a condition precedent to tax exemption?

Was the railway company by virtue of its charter, which was issued under the Great Seal, thereby granted all the powers of a common law corporation?

*Points in Issue which were decided in favour of the  
city by majority judgments*

Are the above questions *res judicata* by reason of certain prior litigation between the railway company and the city respecting school taxes?

20 Is the city estopped from raising the above points by reason of its conduct and certain by-laws and resolutions and agreements in respect of the Royal Alexandra Hotel property?

Is the business tax in the nature of a personal tax or a tax on property?

Is the land now comprised within the city limits, which was added thereto after the date of by-law No. 148, exempt from taxation?

Is the Royal Alexandra Hotel "owned for railway purposes or in connection therewith"?

30 **Statements setting out in what respects the majority  
judgments are alleged to be erroneous**

It is submitted that the majority judgments were erroneous in holding that the railway company had any right, power or authority under its incorporating Act or under the Consolidated Railway Act of 1879 or charter, to covenant and agree to establish and build within the limits of the City of Winnipeg their principal workshops for the main line, etc., and **forever** continue the same within the City of Winnipeg.

40 There is nothing in the incorporating Act or the said Railway Act or in the statutory agreement or charter which confers any such authority on the railway company.

The majority judgments erred in holding that the railway company



has all the powers of a common law corporation. The charter was authorized in exact terms for a specified purpose and made subject to the Consolidated Railway Act of 1879, and the rights and powers contained in the constituting Act, in the approving agreement, charter and the Railway Act of 1879 created and constituted a body which has no other rights or powers except those set out therein or which arise by necessary implication.

It is submitted that the majority erred in holding that the affixing of the Great Seal to the authorized charter amplified and extended 10 the statutory powers of the company and invested it with all the powers of a common law corporation.

It is further submitted that the majority judgments on the points decided in favour of the city are sound in law and in fact and should be approved.

### PART III

#### BRIEF OF ARGUMENT

20 **Did the railway company have the right, power or authority under its Act of Incorporation or charter or under the Consolidated Railway Act of 1879 to give the bond and covenant which was stipulated in city by-law No. 148 to be a condition precedent to tax exemption?**

**Was the railway company by virtue of its charter which was issued under the Great Seal, thereby granted all the powers of a common law corporation?**

(a)(i) It is alleged by the railway company that an agreement was arrived at between the company and the city the terms of which are embodied in by-law No. 148 as amended by by-law No. 195. Exhibit 2 (Case page 289) and Exhibit 3 (Case page 301).

Subsection 8 of section 4 of said by-law reads as follows:

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."

The conditions and stipulations which were required to be fulfilled by the railway company as a condition precedent to tax exemption are set out in section 4, subsections 1, 2, 3 and 4 of by-law No. 148.

40 The railway company constructed the branch line and built the passenger depot and built their principal workshops and erected stock yards within the City of Winnipeg and also delivered what purported to be the bond and covenant referred to in subsections 3 and 4 of section 4 in an attempted compliance therewith. The

obligations of the railway company under the bond may be summarized as follows:

To maintain large and commodious stock yards in Winnipeg;

To build and forever continue the principal workshops for the main line of the railway in Manitoba within the said City of Winnipeg, and (by necessary implication) to establish Winnipeg as a terminus of the railway in lieu of preserving the same at Selkirk as required by section 13 of the agreement with the government. (Case page 268.)

10 While the railway company delivered to the city a form of bond and covenant in purported compliance with the conditions and stipulations set out in section 4, subsections 3 and 4 of by-law No. 148, such bond and covenant was of no force or effect as the railway company had no power either expressly or arising by necessary implication, to give such a bond and covenant.

The fact that it was soon found necessary or advisable to remove the workshops outside the original limits of the City of Winnipeg shows that the original site was not suitable and that the covenant to forever continue the same within the City of Winnipeg as then  
20 constituted was incompatible with the efficient operation and management of the railway.

The fact that it was found advisable and necessary to locate other stock yards outside the City of Winnipeg shows that the covenant to maintain stock yards in Winnipeg was ill-advised. Section 4, subsection 4 does not provide that stock yards shall be forever continued within the City of Winnipeg but the second recital to the by-law reads as follows:

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 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."

It is then submitted that the then directors of the railway company had no power to enter into an agreement so onerous on the railway  
40 company and binding on it for all time. Such a bond and covenant both from the practical and economic point of view might have, and may still, on account of events now unforeseen, interfere with or prevent the efficient and economical operation of the railway; for example the recurrence of disastrous floods which had taken place in the Winnipeg area prior to 1881 might have made it necessary to move the shops and stock yards to another location.

The recurrence of such floods shortly after the year 1881 might

have resulted in the main centre of population being established at or near Selkirk instead of at Winnipeg. The 1948 and 1950 floods in the Red River Valley indicate that this flood danger was and is not a remote contingency.

By the terms of section 13 of the contract, (Case page 268) the railway company was bound to preserve Selkirk as a terminal point. The agreement to establish the City of Winnipeg as a central point on the main line of the railway and the several branches thereof was in conflict with the statutory requirement to preserve Selkirk as a  
10 terminus.

The giving of such a bond and covenant amounted to a covenant by the railway company not to exercise its statutory powers. The then directors had no right to forever tie the hands of future boards in the management of the railway.

If the then directors could enter into such an agreement there is no limit to the extent to which a temporary board might stultify the powers of a future board of directors.

In order to develop these submissions it is necessary to review the incorporating Act, the contract with the promoters thereby approved,  
20 and the form of charter provided for by the incorporating Act and contract. (44 Vic. c. 1, assented to 15th February 1881, and the Consolidated Railway Act of 1879, cap. 9).

The preamble to the incorporating Act indicates that one of the main purposes and objects of the Act was to carry out the obligation of the Dominion to construct a railway to the seaboard of British Columbia.

Section 2 of the Act provides as follows:

“2. For the purpose of incorporating the persons mentioned  
30 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  
40 to be an Act of incorporation within the meaning of the said contract.”

The first schedule to the Act is the contract with the promoters. Clause 1 of the contract defines the different sections of the railway then under construction. One portion is from Lake Superior to Selkirk on the east side of the Red River; another that portion of the railway then partially in the course of construction extending from Selkirk to Kamloops called the central section.

Clause 7 provides that upon completion of the Canadian Pacific Railway it shall become the absolute property of the company and that "the company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway."

By clause 9 of the agreement the company agrees to complete the main line of the railway as established in accordance with the various provisions thereof.

Clause 13 reads as follows:

10 "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."

Clause 16 provides that the railway, its stations, etc., shall be forever free from taxation by the Dominion or by any province thereafter to be established or by any municipal corporation therein.

Clauses 21 and 22 are as follows:

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

30 "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 the prescribed charter, Schedule "A," under the heading of "Powers" we find the following:

"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."

40 "18. As respects the said railway, the seventh section of 'The Consolidated Railway Act, 1879,' relating to POWERS, and the eighth section thereof relating to PLANS AND SURVEYS, shall be subject to the following provisions:"

The provisions which follow are not material to this subject.

It is to be noted that the incorporating Act (Sec. 2) grants to the company to be incorporated the powers necessary to enable them to **carry out the contract** according to the terms thereof and that the Governor may grant to it, **in conformity with the contract**, a charter in the prescribed form.

It will also be noted that clause 4 of the charter (Case page 274) confers upon the company all franchises and powers necessary or useful to enable the company to **carry out the contract** and to avail themselves of every advantage conferred upon the company **by the contract**. Neither the incorporating Act nor the charter *per se* deal with what is commonly referred to as "company powers." The Act and documents constituting and providing for the incorporation merely impose upon the railway company the obligation to carry out the contract and confer upon the railway company all the powers  
 10 required by it to perform its obligations under the contract and to avail itself of the benefits thereby conferred.

To enable the railway company to carry out its contract with the government it was not necessary for it to agree to forever maintain any certain part of its works and undertaking at a designated point. Tax exemption is desirable but it could not be purchased by entering into a bond and covenant which it had no power to give and which was in conflict with contractual obligations of the railway to the government, for example, the obligation to forever efficiently maintain, work and run the Canadian Pacific Railway.

20 In order to ascertain the statutory powers of the company it is necessary to turn to the Consolidated Railway Act of 1879, chapter 9, to which the charter is subject.

Attention is called to the following sections of that Act which appear to be all the sections which are material to the subject under discussion.

Section 2, subsection 2.

30 "The said sections (5 to 34 both inclusive) shall also apply to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada, and shall, so far as they are applicable to the undertaking, and unless they are expressly varied or excepted by the Special Act, be incorporated with the Special Act, form part thereof, and be construed therewith as forming one Act."

Section 5, subsection 1.

"The expression 'the Special Act' used in this Act shall be construed to mean any Act authorizing the construction of a railway, with which this Act or 'The Railway Act, 1868,' is incorporated."

Section 5, subsection 16.

40 "The expression 'the railway' shall mean the railway and the works by the Special Act authorized to be constructed."

Section 6.

"Every company established under any Special Act shall be a body corporate under the name declared in the Special Act, and shall be vested with all the powers, privileges and immunities necessary to carry into effect the intentions and objects of this Act and of the Special Act therefor, and which are incident to

such corporation, or are expressed or included in 'The Interpretation Act'."

A similar section in the Railway Act, Consolidated Statutes of Canada, c. 66, was before the Ontario Court of Appeal in the case of *Whitby v. Grand Trunk Railway Company* 1 O.L.R. 480, which case is reviewed later on.

The heading to section 7 of the Consolidated Railway Act of 1879 is "Powers" and this section provides that the company shall have power and authority,—

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;"

"2. To purchase, hold and take of any corporation or person any land or other property necessary for the construction, maintenance, accommodation and use of the railway, and also to alienate, sell or dispose of the same:"

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 benefitting such line of railway, or for any other purpose of public advantage, may make such change; and all and every the clauses of this Act shall refer as fully to the part of such line of railway, so at any time changed or proposed to be changed, as to the original line; but no railway company shall have any right to extend its line of railway beyond the termini mentioned in the Special Act:"

These are the only subsections which appear to be of interest.

Subsection 10 was commented upon by Mr. Justice Estey who delivered the judgments of himself and Mr. Justice Taschereau in 40 the case of *Canadian Pacific Railway Company v. Attorney-General of British Columbia*, 1948 S.C.R. 373, as follows:

At page 386—

"Then in section 7(10) of The Consolidated Railway Act, 1879, (1879, 42 Vict. c. 9) the company is authorized:

'7. (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.'

“This subsection appears among a large number of subsections detailing powers of the company and immediately follows authority to erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, etc., to make branch lines and to manage same, and it is suggested that this very general language justifies the inclusion of hotels as an integral part of a railway. Clauses of this type following specific authorizations are obviously intended to authorize some matter closely related and necessary to the authority already given, but do not and are not intended to give authority for the undertaking of works such as hotels.”

10 It is submitted therefore that nowhere in the incorporating Act or charter of the company or in the Consolidated Railway Act of 1879 is there any express power conferred on the railway company to enter into a perpetual covenant such as a covenant to forever maintain their principal workshops for the main line at any designated location. The cases reviewed later on hold that such a power is not to be inferred.

On the contrary, there are clear implications that the railway company had no such right or authority, namely:

20 1. The fact that no express power to enter into a perpetual covenant with any local body restricting the operation of the railway is granted by the charter or by the Consolidated Railway Act of 1879.

2. The most unusual nature of the covenant.

3. It amounts to an agreement not to exercise statutory powers.

4. The covenant to forever efficiently maintain, work and run the railway.

5. The prohibition against changing the location of the main line without the consent of the Governor-in-Council.

6. The obligation to preserve Selkirk as a terminus.

7. Subsection 19 of section 7 of the Consolidated Railway Act of 1879 provides that a railway company desiring at any time to change the location of its line . . . or for any other purpose of public advantage may make such change.

8. The railway company was a work for the public advantage. The Board of Directors as of 1881 were not given the power to tie the hands of future directors for all time in relation to the operation and management of the railway.

40 The railway company has not been able to point to any express power in any of its constituting documents, or in the said Railway Act, which enabled it to give such a bond and covenant but it is argued that the railway company has all the powers of a common law company on account of the charter having been dealt with under the Great Seal. This contention will be dealt with later on.

As to the powers of the directors or company to enter into a perpetual covenant relating to the operation of the railway, the city

relies upon the unanimous decision of the Court of Appeal for Ontario in the case of the Corporation of Whitby v. Grand Trunk Railway, Vol. 1 O.L.R. 481 (1901).

The court consisted of Armour, C.J.O., MacLennan, Moss and Lister, J.J.A. The judgment of the court was delivered by Armour, C.J.O. The judgment of the trial court is reported in 32 O.R. 99.

The bond in question in that case read in part as follows:

10       “1st. That the Port Whitby and Port Perry Railway Company do and shall and hereby agree to establish and maintain hereafter the head office of the company in the town of Whitby and also to erect and maintain during the operation of the railway in the said town the chief workshops of the company which may be required for the construction and repair of the company's rolling stock, plant and machinery.”

This was an action to compel the defendants, who had acquired The Port Whitby and Port Perry Railway Company, to restore and maintain certain workshops pursuant to the conditions of a bond given by the provisional directors of the latter company to the plaintiffs upon receiving a bonus in aid of the railway of \$50,000, or 20 for damages for the breach thereof.

Some of the defences raised were (See 32 O.R. 100):

“That The Midland Railway Company ceased to maintain the head office and workshops at Whitby.

The statement of defence set up that the provisional directors of The Port Whitby and Port Perry Railway Company had no power under the original charter to sign the bond, and as it was signed by the then president, although under seal, it was not the official seal of the company, the bond did not bind the company but only the provisional directors.

30       That The Whitby, Port Perry and Lindsay Railway became merged in The Midland Railway of Canada, ceasing to be an independent company, and it became impracticable to carry out the terms of the bond.”

This case is of particular importance because the Port Whitby and Port Perry Railway Company was incorporated by the Act, 31 Vict. ch. 42 (6), and by it there was incorporated with it sec. 9 of the Railway Act, C.S.C. ch. 66, which provides that the company shall have power and authority to receive, hold and take all voluntary grants and donations of land or other property made to it to aid in 40 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.

These statutory powers were similar to those conferred upon the Canadian Pacific Railway Company. For example, section 9 of C.S.C. 1859, c. 66 is to the same effect as section 7 of the Consolidated Railway Act 1879, c. 9, and section 8 of C.S.C. chapter 66 is the same as section 6 of the Consolidated Railway Act of 1879 which reads:



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

The following is an extract from the judgment of the Ontario Court of Appeal which was delivered by Armour, C.J.O.

10 “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: *Baroness Wenlock v. River Dee Company*, 10 App. Cas. 354; *Caledonian and Dumbartonshire Junction R.W. Co. v. Magistrates of Helensburgh* (1856) 2 Macy. 391; *Earl of Shrewsbury v. North Staffordshire*

20 *R.W. Co.* (1865) L.R. 1 Eq. 593.”

Chief Justice Armour also cites at page 483 the following quotation from the case of *Baroness Wenlock v. River Dee Company*, 10 App. Cas. 354:

30 “And in *Baroness Wenlock v. River Dee Company* (1885), 10 App. Cas. 354, Lord Watson said: ‘Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying those purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.’ ”

The Canadian Pacific Railway was incorporated by a special Act and for a particular purpose. This point will be elaborated later on in connection with the Great Seal argument.

To the same effect in principle is the decision in the case of *Montreal Park and Island Railway Company v. Chateauguay and Northern Railway Company*, 35 S.C.R. 48. In that case it was held that an

40 agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy and cannot be enforced by the courts.

This was an action in which plaintiffs sought an injunction restraining the defendants from constructing a tramway being built by them on a highway between the City of Montreal and a point in the

Parish of Longue Pointe, and for damages. The grounds of action were *inter alia*:

1. That the plaintiffs and defendants had, on 6th February 1899, entered into an agreement, that they would abstain from constructing lines of their respective railways in each other's local territory and that the attempted construction of the railway or tramway in question within the limits of the Parish of Longue Pointe was in violation of this agreement;

The following is an extract from the judgment of Mr. Justice  
10 Davies at page 57:

20 "Passing by that objection, however, I am of the opinion that 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. If enforceable it practically amounts to an amendment and limitation of the chartered powers granted to the company by Parliament. Who can tell whether Parliament would have granted the limited powers only had they been asked or would have agreed to pass an amending Act limiting these powers or the areas within which they were exercisable as the agreement contemplated? **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.** 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. If the  
30 principle is once conceded that chartered companies which have obtained powers from Parliament, presumably for the public good, can by contract with a rival company, or with others, limit themselves and their successors not to use those powers in whole or in part, the most serious consequences might result and the chief object of Parliament in chartering companies authorized to construct railways in certain sections of country or to promote legitimate rivalry and competition in such construction, might be defeated."

At page 59 Mr. Justice Davies gives the following quotation from  
40 the judgment of Lord Blackburn in the well-known case of *Ayr Harbour Trustees v. Oswald*, 8 App. Cas. 623, namely:

"I think that where the legislature confers powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in

either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal v. Birmingham Canal* (2); and on which the late Master of the Rolls acted in *Mulliner v. Midland Railway Co.* (3).”

10 The following is an extract from the judgment of Mr. Justice Killam at page 62:

“I agree with my brother Davies in thinking that the contract upon which the plaintiff company relies is one which should not be enforced by the courts. In *Doane v. Chicago City Ry. Co.* (1), Gray J., laid down a principle, which I conceive to be sound,

20 ‘that 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 that case an agreement by a street railway company with a private individual that it would not construct more than a single line of railway upon a certain street was held to be unenforceable. The principle is supported by *Thomas v. The West Jersey Railway Co.* (2); *Gibbs v. The Consolidated Gas Co. of Baltimore* (3); and *Central Transportation Co. v. Pullman’s Palace Car Co.* (4), as well as by the cases to which my brother Davies has referred.”

We also refer to the *Town of Eastview v. Roman Catholic Episcopal Corporation of Ottawa*, 47 D.L.R. 47, Ontario Court of Appeal. In 30 this case it was held that a corporation cannot by any contract divest itself of its powers or abridge them and that if a corporation could contract itself out of its statutory powers such a contract would be equivalent to amending the legislation which created it.

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: *Shrewsbury & Birmingham Railway Company v. North-Western Railway Company*, 6 House of Lords Cases, English Reports Reprint, Vol. 10, page 1237. The following 40 is a quotation from page 136, 6 House of Lords Cases page 1246, E.R.

“There is abundant authority to show that there are many contracts into which, without express authority, a Railway Company cannot enter. The Railway Clauses Consolidation Act (the 8th Vict. c. 20, s. 86) authorizes every such Company to run carriages and generally to act as a carrier on its own line of railway, and by the next section the Company is enabled to make arrangements with other Companies having continuous

railways for the use of their respective lines for their mutual benefit. All this would have been unnecessary if it had not been considered that but for such enactments no such power would have existed under the mere incorporation of the Company for the purpose of making and maintaining a railway."

We also refer to York Corporation v. H. Leetham & Sons Limited, 1924 1 Ch. Div. 557. The following is an extract from the judgment of Mr. Justice Russell at page 569:

10 "No matter what emergency may arise during the currency of the agreements the Corporation have deprived themselves of the power to charge the defendants such increased tolls as might enable them to cope with the emergency. They have for so long a time as the defendants desire to that extent wiped out or fettered their statutory power. If that be, as I think it is, the effect of these agreements, they are, in my opinion, agreements which are *ultra vires* the Corporation."

See also Winch v. Birkenhead etc., Railway Company, 64 Eng. Reports Reprint, page 1243. The following are two extracts from page 1251:

20 "There is here an agreement, the object of which is that the London and North Western Railway Company, for a term of ninety-nine years, may work the line of the Birkenhead Railway Company, using the property and plant of the latter company, except the land and buildings specified in the first schedule; and the property and plant of the Birkenhead Railway Company is to be valued and restored at the termination of the agreement, of the same working value."

30 "I think that it is impossible that that can be carried out without delegation or transfer to the London and North-Western Railway Company of some, at least, of the duties and powers which are given exclusively to the Birkenhead Railway Company by their Acts of Parliament. It appears to me, although the Birkenhead Company are not at all bound to be carriers, that what is called working the line is a duty that is imposed by the Act of Parliament upon them; and it appears to me, therefore, that the agreement is that they shall part with certain statutory powers which they have no authority to part with, and, moreover, that they are to part with them to a body who, by their constitution, cannot accept them."

40 It is submitted that the Canadian Pacific Railway Company had no express or implied power to fetter or part with its statutory powers by entering into the covenant which under the terms of subsection 8 of section 4 of the by-law was a condition precedent to tax exemption. It is further submitted that any implications to be found in the charter of the railway company and relevant statutes are to the contrary. As stated by Mr. Justice Davies in the case of Montreal Park and Island Railway Company v. Chateauguay and Northern

Railway Company above referred to, if it is lawful for a company possessing special powers to bind themselves for a consideration not to exercise any part they can do so in whole, and that Parliament alone can enact such a limitation.

It is further submitted that such a covenant is in conflict with the agreement between the railway company and the government and in particular with the obligation to forever efficiently maintain, work and run the Canadian Pacific Railway.

It was suggested by the majority judges in the court below that the  
 10 railway company had power to enter into the perpetual covenant in question because the railway company had a right to build workshops, etc., also because it was an advantage to the railway company to get tax exemption and because it now appears that the railway company made a good bargain as Winnipeg was in any event the logical place for the location of the principal workshops for Manitoba.

Such an argument assumes that the agreement was *intra vires* because it is assumed to have been to the advantage of the railway company. This view ignores the possibility that in the unforeseeable  
 20 future it may turn out to be to the disadvantage of the railway company who could then repudiate the agreement on the ground that the Board of Directors as of 1881 had no power to give such a bond and covenant. It is not difficult to surmise situations which would necessitate a change. For example, the amalgamation of the Canadian Pacific Railway Company with the Canadian National Railways might make it necessary or advisable to establish the principal workshops for the amalgamated company at Transcona, Manitoba, in the interest of economical and efficient operation. In the event of a world war it might become inadvisable to have the principal workshops concentrated at any one point. Changes in methods and  
 30 modes of transportation or means of supplying power therefor may change the picture entirely.

Mr. Justice Adamson states (Case page 233):

“The argument that the company has denuded itself of essential powers fails on the facts.”

This proposition is erroneous. One of the essential powers of a railway company is to locate its principal workshops and other undertakings at such points as may from time to time be consistent with economical and efficient management. If the directors for the time being of the railway company could forever crystallize the  
 40 location of any essential works they would thereby denude the company of its power to meet the exigencies of any situation that might arise and prevent any future board from exercising its ordinary powers of management. If the company can denude itself of one kind of essential power then, as previously pointed out, there would be no limit to the extent to which the operation of the railway could be put in a straight-jacket for all time:

In this connection we refer to a passage from the case of *York Corporation v. Leatham*, 1924 1 Ch. 557 at 569 where Mr. Justice Russell states:

10       “The question of *ultra vires* is not to be decided by the pecuniary result of the bargain which was struck. If the bargain was at its date within the powers of the corporation, the fact that it turned out a bad bargain from their point of view would not convert it into an *ultra vires* transaction. Conversely, if it was at its date beyond the powers of the corporation the fact that it proved a profitable one for the corporation would not render it *intra vires*.”

The agreement must be construed as if the controversy had arisen the day after the agreement had been executed. You cannot test the question of *ultra vires* by waiting to see whether the corporation which acted beyond its express powers made a good bargain. *Re North Eastern Railway v. Hastings*, 1900 A.C. 260 at page 266, also *Charrington v. Wooder*, 1914 A.C. 71 at 82.

20       The agreement must be evaluated in the light of the circumstances existing at the time it was entered into. *Bank of New Zealand v. Simpson*, 1900 A.C. 182 at 188, and *River Weir Commissioners v. Adamson et al.*, 2 App. Cas. 743 at 763.

#### Effect of Great Seal

(a)(ii) The railway company contends that on account of the charter of the company being issued under the Great Seal of Canada it is a common law corporation to which the doctrine of *ultra vires* does not apply. The railway company relies on the case commonly referred to as the *Bonanza Creek* case, 1916 A.C. 566.

30       The city contends that the incorporating Act, the contract thereby approved and the schedule annexed (the form of charter) together with the Consolidated Railway Act of 1879, exhibit all the powers which Parliament granted or authorized to be granted to the company to be known as the Canadian Pacific Railway and that the doctrine of *ultra vires* does apply.

In particular the city submits that:

(a) The incorporating Act was a special Act.

40       (b) The recitals in the incorporating Act and in the charter show that the Governor in Council carried out the directions of Parliament and acted as its delegate in issuing the prescribed charter to the railway company and did not purport to exercise and did not exercise the royal prerogative in that behalf.

(c) The Governor in Council could not by royal prerogative create a railway company with all the powers, privileges and property rights granted to the Canadian Pacific Railway, and the charter would have been invalid without the Act of Parliament.

(d) Any intention to create a common law corporation is excluded by necessary implication.

### **The incorporating Act was a special Act**

It is submitted that the incorporating Act was not only a special Act but it was a special Act for a special purpose. The form of charter was prescribed verbatim. Section 2 of the incorporating Act makes provision for the manner and method by which the charter is to be issued and provides that when published in the Canada Gazette it shall have force and effect as if it were an Act of Parliament of Canada and be held to be an Act of incorporation within the meaning of the said contract.

It should also be pointed out that sections 21 and 22 of the approved contract read as follows:

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

20 “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.”

We again refer to section 5(1) and section 5(16) of the Consolidated Railway Act, which read as follows:

30 “5. 1. The expression ‘the Special Act’ used in this Act shall be construed to mean any Act authorizing the construction of a railway, with which this Act or ‘The Railway Act, 1868,’ is incorporated:

“16. The expression ‘the Railway’ shall mean the railway and the works by the Special Act authorized to be constructed.”

Corresponding sections in the Railway Act of 1919 were discussed by the Supreme Court of Canada in the recent case of the Canadian Pacific Railway Company v. Attorney-General of British Columbia, 1948 S.C.R. 373, affirmed 1950 A.C. page 122.

In that case the Supreme Court had under consideration the Canadian Pacific Railway Act 1902. It was held that it was only by virtue of this Act that the railway company had power to acquire 40 hotels, etc.

It was also the opinion of the court or some members thereof that the Canadian Pacific Railway Act of 1902 was a special Act. We refer in particular to the observations by Mr. Justice Estey at pages 386 and 387. Mr. Justice Estey states at page 387:

“The Canadian Pacific Railway Act, 1902, (1901-2 S. of C., c. 52) is a Special Act within the meaning of sections 2 (28) and 3 (a), *supra*, and therefore The Railway Act of 1927 ‘shall be construed as incorporate with’ it. Sections 6 (c) and 2 (21), (both already quoted), are therefore to be construed as part of the 1902 Act.”

This opinion is in line with a unanimous decision of the Court of Appeal of England, namely *Elve v. Boyton*, 1891 Ch. 501:

10 “A trustee of a will, who had power to invest in shares of ‘any company incorporated by Act of Parliament,’ invested in shares of the London Assurance:

HELD, that the London Assurance was a company incorporated by Act of Parliament within the meaning of the investment clause.”

The point considered by the court was whether that company derived its powers from the royal prerogative or by virtue of certain Acts of Parliament. The incorporating act, *inter alia* consolidated the capital stock of two existing companies to which a charter had been granted by the King pursuant to an Act of Parliament passed 20 in the year 1719. The following is a quotation from the judgment of Lindley, L. J., at page 508:

30 “Now let us take the case and stop there, and ask ourselves whether such a corporation so created is not, in the language of this will, incorporated by Act of Parliament? It is said, no; it is incorporated by charter. 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. It appears to us, upon any reasonable construction of this clause, this first corporation was a corporation incorporated by Act of Parliament within the true meaning of that clause. I stop there. That is quite sufficient for the purpose. There are other Acts of Parliament which have reconstituted the corporation. Especially there is the Act which Mr. Cozens-Hardy drew our attention to carefully and properly, the 16 Vict. c. 1. I am not prepared to base my decision upon the provision of that Act of Parliament.

40 It appears to me that it is consistent with those provisions to hold that the effect of that Act of Parliament was not to create a new corporation, but to extend the powers of the old corporation. If it is consistent with that, I do not think it would be right to imply a new and fresh incorporation of the larger body. I prefer to base my judgment upon the ground which I have mentioned, that, looking to the fact that this corporation was



created by a **charter which would have been invalid without the Act of Parliament**, this particular corporation was incorporated by Act of Parliament within the true meaning of the investment clause. The appeal must be dismissed."

At page 582 of the Bonanza Creek case, 1916 A.C., we find the following passage in the judgment of Lord Haldane:

10 "Part 2 of the Dominion Companies Act stands on another footing. This part deals only with companies directly incorporated by special Act of the Parliament of Canada and to these it is obvious that other considerations may apply."  
and at page 584:

"In the case of a company the legal existence of which is wholly derived from the words of a statute the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies."

It is submitted that "other considerations" do apply because the Canadian Pacific Railway Company was incorporated by Special Act and that the company derives its legal existence wholly from the incorporating statute and the charter thereby prescribed and author-  
20 ized.

**The recitals in the Incorporating Act and in the charter show that the Governor-in-Council carried out the directions of Parliament and acted as its delegate in issuing a charter to the railway company and did not purport to exercise and did not exercise the Royal Prerogative in that behalf.**

We call attention to section 2 of the Act which is quoted above under the heading of Part III (a) (i), and to one of the recitals in the charter (Case page 272) which reads as follows:

30 "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; 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  
40 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, 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 incorporation within the meaning of the said contract;”

- 10 This recital indicates in clearest terms that the Governor-General of Canada in issuing the charter was only purporting to act and was acting in conformity with his statutory instructions and that His Excellency had no intention of exercising and did not exercise the royal prerogative.

In this connection we wish to apply the reasoning found at pages 87 and 88 in the judgment handed out by Mr. Justice Masten (*ad hoc*) in the case of the Town of Cobalt v. Temiskaming Telephone Company, 59 S.C.R. 62.

- 20 “It seems to me that when the agreement of June 1912, was made the respondent company was governed by the ‘Companies Act’ of 1907 as amended in 1908 and 1910. In support of that view I refer to secs. 210(c) and 211(l) of the ‘Companies Act’ of 1907. I agree with the view that the ultimate source from which the powers of a company are derived is the legislature and in certain cases the Crown (Bonanza Creek Gold Mining Co. v. Rex (1)).”

- 30 “I also agree that the legislature can clothe the company with rights as well as with powers and that in so doing it can act either directly or by delegating to the Governor-in-Council the necessary authority. I fail, however, to find in the provisions of the ‘Companies Act’ of 1907, as amended in 1908 and 1910, any warrant for holding that there has been delegated by the legislature to the Lieutenant-Governor-in-Council power to confer on a company objective rights as distinguished from subjective powers, or that this company was invested with such rights in 1912. I think that the ‘pith and marrow’ of the ‘Companies Act’ of 1907 is the incorporation of a company—the designation of its powers and the definition of the mutual rights of its shareholders *inter se*. In other words, the authority conferred upon the Governor-in-Council is, in my opinion, merely
- 40 to bring into existence the entity known as the company and to endow it with certain powers, but I think the Act gives to the Governor-in-Council no authority as against other subjects of His Majesty to confer on the company so created objective rights of the kind here in question.”

As the exact form of charter was prescribed by statute and agreed upon by the approved contract between the government and the

promoters of the Canadian Pacific Railway it is clear that the authority conferred upon the Governor-General was merely to bring into existence the entity to be known as the Canadian Pacific Railway. The Governor-General could not and did not purport to over-ride the Act of Parliament or the approved agreement by conferring additional powers on the railway company.

**The Governor-in-Council could not by Royal Prerogative create a railway company such as the Canadian Pacific Railway and the charter would have been invalid if not authorized by an Act of Parliament.**

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 . . .**”

Interprovincial railways come under the legislative authority of the Parliament of Canada which has the exclusive right to prescribe regulations for the construction, repair and alterations of such railways and for their management and to dictate the constitution and powers of the company. See *C.P.R. v. Notre Dame de Bonsecours Parish*, 1899 A.C. 367. (See B.N.A. Act, sec. 92, subs. 10 (a) and (c).)

In this connection we again refer to the case of *Elve v. Boyton* and to a passage from the judgment of Lindley L.J. at page 507:

“Now, the history of this corporation is this. It was created in 1720 by a charter from the Crown, which itself was granted pursuant to the provisions of an Act of Parliament of 6 Geo. 1, c. 18. Now consider for a moment what the Crown could do, and what it could not do at that time. The Crown could by its prerogative incorporate any number of persons who assented to be incorporated, and it was the prerogative of the Crown to give them power to sue and be sued by their corporate name, to use a common seal, to make byelaws, and so on. But it was not in the power of the Crown to give those persons any rights in the way of monopolies. It was not in the power of the Crown so to incorporate those persons as to make them liable to any extent to the debts of the corporation. What does this Act of Parliament of the 6 Geo. 1 do? 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. It empowers the Crown to grant charters of incorporation to persons who should be liable to calls, amongst other things, which the Crown could not do.”

Another indication that the Governor General did not and could not exercise the prerogative power is as stated by Mr. Justice Dysart (Case page 213) as follows:

“(7) . . . Many of the powers of the Company were beyond the prerogative rights of the Crown to confer by any charter. Examination of the charter and contract will reveal many powers and privileges which Parliament alone had the right to confer. For instance, the Company was, by the contract, entitled to get large grants of public domain, to import its materials free of tariff duties, and to have other large public aids. These could only come from Parliament—they were beyond any prerogative power to confer. True, they were to come by virtue of the contract, which the charter was intended to enable the Company to carry out, but the contract was ‘only to be binding’ if the charter was ‘in the form’ prescribed in the Schedule A (Sec. 21). That means that no powers were contemplated or permitted for the company larger or other than those 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.”

The city calls the attention of the court to, and relies upon, the judgment handed down by Mr. Justice Dysart, and submits it should be followed in all respects.

We might add that there are other privileges conferred on the railway company which Parliament alone had the right to confer, for example, section 16 of the approved agreement (Case page 269) provides *inter alia* that the railway company . . . shall be forever free from taxation by the Dominion or by any province hereafter to be established or by any municipal corporation therein.

The company is also given the right to take land (section 14 of the agreement); and for twenty years from the date no line of railway may be authorized by Parliament to be constructed south of the Canadian Pacific Railway in a certain area (section 15). Large money subsidies are also provided which could be granted only by Parliament.

**Any intention to create a common law corporation  
is excluded by necessary implication**

It is submitted that any prerogative power in the Governor-General to create a common law corporation was precluded by the very fact that the whole plan and scheme for incorporating the railway company and completing the railway was crystallized in the Act of incorporation, the approved contract and the authorized charter.

It must be assumed that if Parliament had intended to grant any

powers except such as were necessary to carry into effect the purposes and objects of the contract between the government and the promoters, such powers would have been expressly granted.

It is clear from the terms of the incorporating Act and the approved contract and the prescribed charter that no other powers were conferred or intended to be conferred.

For example, the concluding words of section 2 of the incorporating Act are "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 10 the meaning of the contract."

Section 21 of the approved contract reads as follows:

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

As the contract which was the basis of the whole undertaking was only to be binding in the event of an Act of incorporation being granted in the form appended, it necessarily follows that the charter 20 was to be in that exact form. Surely this prohibits some other kind of a charter. This must be regarded as a statutory restriction which necessarily excluded any power in the Governor in Council to go beyond his instructions.

There is nothing in the statute or agreement or form of incorporation to indicate that the Great Seal of Canada is to be affixed to the charter to be granted, or that the company was to have any powers other than those granted by the relevant statutes and the contract. Every implication is to the contrary.

It is submitted that the railway company derived its entire exist- 30 ence from the act and will of Parliament and did not require and did not receive any grant from the Crown either directly or through the Governor General as its delegate. The Canadian Pacific Railway Company was brought into existence by direct legislative action.

In this connection we refer to the judgment of Mr. Justice Anglin, in the *Town of Cobalt v. Temiskaming Telephone Company*, 59 S.C.R. 62 at pages 74 and 75. We also refer to the judgment by Masten (*ad hoc*) which is referred to above.

The case of the *Attorney-General v. De Keyser's Royal Hotel, Limited*, 1920 A.C. 508 (House of Lords) appears to be in point. 40 This case is authority for the proposition that when there exists a statutory provision covering the same ground there is no longer any room for the exercise of the royal prerogative. It has been taken away by necessary implication because the two rights cannot live together. The prerogative is merged in the higher title derived by the Act of Parliament. We refer in particular to the judgment of Lord Dunedin at page 526, and the judgment of Lord Atkinson reported at page 539 *et seq.*

We also refer to the case of the British Coal Corporation v. The King, 1935 A.C. 500, in which it was held that section 91 of the B.N.A. Act read with the rest of the Act, not by express words but by necessary intendment invests the Canadian Legislature with power to regulate or prohibit appeals to the King in Council in criminal matters.

The Bonanza Creek case was distinguished by the Supreme Court of Canada in the case of the Canadian Bank of Commerce v. Cudworth Telephone Company, 1923 S.C.R. 618. The telephone company was organized under the Rural Telephone Act of Saskatchewan. After being organized under the Rural Telephone Act it became incorporated under the Companies Act of Saskatchewan and the question was whether such incorporation conferred upon it the power under section 14 of that Act to do what it could not do before and to make the promissory note in question. Section 14 of the Act read in part as follows:

“Every company heretofore or hereafter created . . . shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.”

The majority of the court held that the telephone company had no power to make a promissory note. It was further held that section 14 of the Companies Act did not apply to a company incorporated for the purpose of working a rural telephone system under “The Rural Telephone Act,” since the memorandum of association of such a company must be read as incorporating the restrictions upon the capacities of such a company to be found in “The Rural Telephone Act” which by necessary implication exclude the operation of section 14 in relation to such companies.

The Bonanza Creek case was referred to in one case in the Court of Appeal in Manitoba, namely in re Northwestern Trust Company and The Winding-up Act: 35 M.R. 433. In that case the Court of Appeal for Manitoba had under consideration a section of the Manitoba Companies Act similar to section 14 of the Saskatchewan Act which was considered in the Cudworth case. It was held that notwithstanding the statute that a company incorporated by an Act of the Manitoba Legislature for the purposes of a trust company cannot bind itself by guaranteeing payment of a debt proposed to be incurred by a trading company. The Cudworth case was followed and the Bonanza Creek case was distinguished.

We also rely on the case of the Toronto Finance Corporation Limited v. Banking Corporation Limited, 59 O.R. 278, (Ontario Court of Appeal). The following is a quotation from the judgment of Mr. Justice Hodgins at page 291. After referring to the Bonanza Creek case the learned judge states:

“The power given by that Act to the Governor in Council was to grant, by letters patent, charters of incorporation to companies for certain purposes, which companies should be ‘capable forthwith of exercising all the functions of an incorporated company, as if incorporated by a special Act of Parliament.’ Companies incorporated under a special Act of Parliament were, however, limited by the doctrine of *ultra vires*, which was strictly applied to them, as is evidenced by such cases as Eastern Counties Railway Co. v. Hawkes (1855), 5 H.L.C. 331, and East Anglian Railway Co. v. Eastern Counties Railway Co. (1851), 11 C.B. 775. It is somewhat perplexing to arrive at the conclusion that power to incorporate such companies by letters patent under the great seal was authority for the exercise of the prerogative in order to create companies wholly free from the doctrine of *ultra vires*.”

Although the powers of the Canadian Pacific Railway and the Canadian Pacific Railway Act of 1902 are discussed at length in the case of Canadian Pacific Railway Company v. Attorney General for British Columbia, 1948 S.C.R. 373, the contention that the railway company possessed all the powers of a common law corporation was apparently not made in the argument or referred to in any of the judgments. On this point the city refers to and relies on the judgment of Mr. Justice Dysart, which was concurred in by Mr. Justice Richards.

It is submitted that the majority of the judges in the court below failed to appreciate that the railway company was not incorporated under a Joint Stock Companies Act but was a company incorporated for a special purpose and pursuant to a contract between the government and the promoters. It cannot be assumed that the Parliament of Canada intended to confer on the company or intended that the Governor in Council should confer on the company rights and powers in excess of those which it had agreed to give.

It is further submitted that the majority judges in the court below failed to appreciate that the Bonanza Creek Gold Mining Company was incorporated by letters patent under the Ontario Joint Stock Companies Act and in the opinion of Lord Halsbury purported to derive its existence from the Act of the sovereign (through his representative the Lieutenant-Governor) and not merely from the words of the regulating statute and therefore possessed a status resembling that of a corporation at common law—a general capacity analogous to that of a natural person.

The city submits that in view of the method and manner in which the railway company was created and in view of all the facts and circumstances surrounding its creation it is abundantly clear that the exercise of the royal prerogative was intended to be excluded.

It is submitted that it cannot be assumed that the Governor General was authorized to add to the powers conferred by statute

unlimited objective powers merely because His Excellency was directed to perform the administrative act by which the charter was issued.

This was a matter of procedure only dealing with the method in which the charter was to be issued and not intended to authorize the Governor in Council to confer added rights or powers on the company to which the charter was to be granted in specified terms.

**Effect of Manitoba statute validating by-law No. 148  
as amended by by-law No. 195**

10 (a)(iii) By-law No. 148 which was passed by the city council on the 5th day of September, 1881, was amended by by-law No. 195 passed on the 30th October, 1882. These by-laws were declared "legal, binding and valid upon the Mayor and Council of the City of Winnipeg" by cap. 64 S.M. 1883, assented to July 7, 1883.

This Act provides in part as follows: That by-law No. 148 to authorize the issue of debentures by way of bonus to the Canadian Pacific Railway Company in the sum of \$200,000.00 in consideration of certain undertakings of the said company, and by-law No. 195 amending by-law No. 148—be and the same are hereby declared  
20 legal, binding and valid upon the Mayor and Council of the City of Winnipeg and the Mayor and Council shall pay the debentures, etc. The validating Act was necessary because the city had no power to pass such a by-law.

The effect of the validating Act was to give the city statutory power to enter into the agreement with the Canadian Pacific Railway. In 1881 and 1882 the city did not have and it never has had power to grant any such tax exemption.

As to the effect of the validating Act see Ontario Power Company v. Municipal Corporation of Stamford, 1916 A.C. Vol. 1, 529. The  
30 following is a quotation from the Privy Council judgment at page 534:

"In the following year, on May 25, 1905, the statute was passed which has given rise to these proceedings. It is entitled 'An Act to confirm by-law No. 11 of the Corporation of the Township of Stamford.' This Act, after reciting the petition of the appellant company representing that by-law No. 11 of the municipal council should be confirmed and made legal and binding, in accordance with the intention and meaning thereof, contains in s. 1 the following passage: 'By-law No. 11 of the Municipal Corporation of the Township of Stamford, set forth  
40 as Schedule "A" to this Act, is legalized, confirmed, and declared to be legal, valid, and binding, notwithstanding anything in any Act contained to the contrary.' By-law No. 11 is then scheduled to the Act.

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."

To the same effect see *Winnipeg v. Winnipeg Electric*, 1921 D.L.R. 258 and 20 M.R. 337 at 354. Mr. Justice Mathers states—"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."

The Province of Manitoba could not make any agreement binding on the Canadian Pacific Railway which is entirely under Dominion jurisdiction.

The *Government of the Province of Manitoba v. C.N.R. et al.*, (1925) 1 D.L.R. 601; (1925) S.C.R. 18; 30 C.R.C. 27. *Wilson v. Esquimalt & Nanaimo Railway*, 1922 A.C. 202 at 208, and *Spooner Oils v. Turner Valley Gas*, 1933 S.C.R. 629.

The following are quotations from the judgment of Duff, C. J., at page 645:

20 "but if the enforcement of a tax, imposed by provincial legislation, would involve a nullification in whole or in part of competent Dominion legislation under which the right is constituted, then it is, to say the least, doubtful, whether such provisions could take effect."

"for example, the question whether it is competent to a legislature to sanction measures for the enforcement of a tax imposed upon a Dominion railway which would involve the dismemberment of the railway."

#### **There was no contract or there was failure of consideration for the tax exemption agreement**

(a)(iv) If Winnipeg was not on the main line when by-law No. 148 was 30 passed in September 1881 the railway company could not locate and had not the power to agree to locate the main line through Winnipeg without the consent of the Governor-in-Council as required by section 13 of the contract.

However it appears from the statutory contract and the orders-in-council referred to in the Statement of Facts that Winnipeg was on the main line at the time the railway was taken over by the Canadian Pacific Railway Company.

At this point we quote from the judgment of the Honourable the Chief Justice of Manitoba, Case page 183, l. 31 to page 184 l. 10:

40 "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 and the City and were set forth in by-law No. 148 passed by the Corporation.

10 Under the terms of the agreement the Company undertook to build its main line through the City; to build a branch therefrom running 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."

This historical review is in accordance with local tradition and history.

The Chief Justice further remarks:

20 "It is admitted that both parties to the agreement completed and fulfilled all the terms of same."

The City of Winnipeg does not and did not admit, as stated by the Chief Justice of Manitoba, that the railway company completed the agreement and fulfilled all the terms of same. The railway did not secure the main line for Winnipeg if Winnipeg was already on the main line.

The benefits which Winnipeg expected to receive by granting the perpetual tax exemption when giving the bonds and lands, etc., are set out in the second recital of by-law No. 148 which reads as follows:

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 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."

40 It thus appears that by enacting the by-law Winnipeg expected to secure not only the location of the workshops and stockyards for Manitoba in the City of Winnipeg but expected to secure the location of such undertakings in Winnipeg as a central point on the main line. Consistently with this recital section 4 subsection 3 of the by-law reads 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 dispatch 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 for ever continue the same within the said City of Winnipeg."

- 10 It must be pointed out here that the group of orders-in-council which are referred to in the Statement of Facts which bear date prior to the 15th February 1881 were not produced or referred to in the courts below so that the attention of the courts was not at any time directed to the point that the Government had located the main line through Winnipeg prior to the date of incorporation of the railway.

It appears from a perusal of the by-law itself that there was a mistake as to an essential and integral element of the subject-matter of the contract, and that the consensus was reached upon the basis  
20 of a particular assumption, namely that Winnipeg was not then on the main line of the railway.

If the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true. The obligation of the railway company to erect and forever continue the workshops, etc., in Winnipeg as a central point of the main line was, in contemplation of both parties, fundamental to the validity of the agreement. If Winnipeg was already on the main line there was no foundation for the agreement.

- 30 If there was a fundamental difference between what the situation was supposed to be and what it actually was as regards the location of the main line, there was such a failure of consideration as to justify rescission.

The consideration for the contract, or in any event for the perpetual tax exemption, was to secure the location and continuance of the workshops and stockyards for Manitoba in Winnipeg as a central point on the main line of the railway and the perpetual maintenance of the specified works within the City of Winnipeg on the main line. If this consideration was based on a false premise, i.e., that the  
40 railway would locate the main line through Winnipeg, there was no valid consideration.

In this connection we refer to *Beel v. Lever Bros. Limited et al.*, 1932 A.C. 161. See passages from the judgment of Lord Atkin at pages 219, 220 and 225. We refer to the following sentences taken from pages 220 and 225 of 1932 A.C.:

"It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter

into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration." Page 220, Lord Atkin.

10 "The proposition does not amount to more than this that if the contract expressly and impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true." Page 225, Lord Atkin.

We also refer to the following passage of the judgment of Lord Thankerton at page 236:

"There are many other cases to the same effect, but I think that it is true to say that in all of them it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject-matter of the contract, or it was an inevitable inference from the nature of the contract that all the parties so regarded it."

20 We also cite the case of Norwich Union Fire Insurance Company Limited v. W. H. Price Limited, 1934 A.C. 455, in which Bell v. Lever Bros. Limited was referred to. The following is a quotation from the judgment of their Lordships which was delivered by Lord Wright. At this point Lord Wright quotes from a judgment of Lord Shaw handed down in the case of Kelly v. Solari.

30 "The true facts may not have been known to the grantor, or may have been misrepresented with such a result that the mind of the grantor does not go with the transaction at all; his mind goes with another transaction, and he is meaning to give effect to that other transaction, depending on facts different from those which were the true facts.' Thus, in the present case the only transaction with which the mind of the appellants went was payment of a claim on the basis of the truth of facts which constituted a loss by perils insured against: they never intended to pay on the basis of facts inconsistent with any such loss by perils insured against. The mistake was as vital as that in Cooper v. Phibbs (4) in respect of which Lord Westbury used these words: 'If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.' "

40

Lord Wright then continues:

"At common law such a contract (or simulacrum of a contract) is more correctly described as void, there being in truth no intention to contract. Their Lordships find nothing tending to contradict or over-rule these established principles in Bell v. Lever Bros. Ltd."

### Res Judicata

(b) In the event of the Court holding that it was beyond the power of the Company to give the bond and covenant mentioned in by-law No. 148 as amended by by-law No. 195, the question arises whether the city is estopped from setting this up by reason of the judgment in *C.P.R. v. Winnipeg* (1909), 30 S.C.R., 558, reversing the judgment of the Court of Queen's Bench for Manitoba, 12 M.R., 581.

That action was brought and conducted under the rules of practice in force in Manitoba prior to 1895. The practice at that time was the same as that which existed in England on the 15th day of July, 1870, except as changed by any Act or Acts of the Legislature, or of the Parliament of Canada, or by any Act or Acts of the Parliament of the United Kingdom affecting Manitoba, or by any rules or orders of the Court. R.S.M. (1891), c. 36, s. 9; Rule 1, Q.B., Rules of Man. (1886). The action was brought by the City against the Company to recover school taxes for the years 1890 to 1894, both inclusive. The Company set up as a defence by-law No. 148 as amended by by-law No. 195. The city replied by setting forth the by-laws above mentioned and pleading that "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." The Company demurred to the replication and the Supreme Court held that the replication was bad and dismissed the action. The power of the Company to give the bond and covenant was not discussed nor even mentioned in the pleadings or in the judgment or reasons for judgment in the Supreme Court or in the Court below, and it is submitted that no issue was raised in the pleadings upon which this question could have been determined.

It is submitted that there can be no estoppel by *res judicata* unless everything in controversy in the proceedings where the question of estoppel is raised, was also in controversy in the litigation which resulted in the judicial decision relied upon as an estoppel.

In *Outram v. Morewood* (1803) 3 East, 346, Lord Ellenborough at p. 355 said: "It is not the recovery, but the matter alleged by the party and upon which the recovery proceeds which creates the estoppel . . . the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them . . . has been, on such issue joined, solemnly found against them."

In *Smith's Leading Cases*, 12th Ed., Vol. 2, p. 754, in the notes to the *Duchess of Kingston's* case, it is stated at p. 788: "The omission by a defendant to set up a defence in an earlier action does not estop him 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."

Spencer Bower in his book on *Res Judicata*, at p. 121, citing *Moss*

v. Anglo Egyptian Navigation Co., (1865) 1 ch. App., 108, says: "And generally there can be no *eadem quaestio* and therefore no estoppel by *res judicata* unless everything in controversy in the proceedings where the question of estoppel is raised was also in controversy in the litigation which resulted in the judicial decision relied upon as an estoppel.

In 13 Hals., pp. 411-12, s.466 (2nd ed.) the law is stated as follows: "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  
10 the plaintiff has had an opportunity for recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger or that the same point has been actually decided between the same parties. Where the former judgment has been for the defendant the conditions necessary to conclude the plaintiff are not less stringent. 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."

20 Note (*u*) to the last mentioned quotation states that the opportunity of recovering must be open to the plaintiff on the pleadings, and re Hilton (1892) 67 L.T., 594, is cited in support of this statement.

In Langmead v. Maple (1865), 18 C.B. (N.S.) 255, Willes, J., at p. 270, said: "I apprehend that if the same matter or cause of action has already been finally adjudicated on between the parties by a court of competent jurisdiction the plaintiff has lost his right to put it in suit before that or any other court. The conditions for the exclusion of jurisdiction on the ground of *res judicata* are that the  
30 same identical matter shall have come in question in a court of competent jurisdiction, that the matter shall have been controverted and that it shall have been finally decided."

The question of *res judicata* was also discussed fully in Johansson v. C.P.R., (1922) 32 M.R., 210. Dennistoun, J. A., at pp. 238-9 said: "The true test is identity of issue. If a particular point or question is in issue in the second action and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second, if that point or question was in issue and adjudicated in the first suit, otherwise not."

The cases of Johnson v. Henry (1911) 21 M.R., 347; Harriman v.  
40 Harriman (1909) P. 123; Carroll v. Erie Natural Gas & Fuel Co., (1899) 29 S.C.R., 591, and Kennedy v. Kennedy (1914) A.C. 215, are referred to and discussed in the reasons for judgment of Dysart, J.A., Case from p. 226, l. 9, to p. 227, l. 6.

In Howlett v. Tarte, 10 C.B. (N.S.) 813, the plaintiff brought an action for rent under a building agreement. The defendant pleaded in that action pleas which were not issuable and judgment was signed against him. The plaintiff subsequently brought a second action

for further rent under the same agreement. The defendant pleaded that after making the agreement it was agreed between the parties that a tenancy from year to year should be created in substitution for the former tenancy, and that notice to quit had been given and had expired, and the defendant had duly given up possession of the premises, and that no rent had become due since possession was given up. The plaintiff replied by setting up that the defendant was estopped by the judgment in the first action.

Williams, J., at p. 826 said: "I think it is quite clear upon the 10 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. But the defence set up here is quite consistent with every allegation in the former action. The plea admits the agreement, but shows by matter *ex post facto* that it is not binding upon the defendant."

Willes, J., at p. 827, said: "It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded but has chosen to let the proper time go by. 20 But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action."

The effect of *Howlett v. Tarte* is that while the defendant would be estopped from disputing the judgment in the first action or from traversing any facts upon which the judgment in the first action was based, he would not in the second action be precluded from setting up any pleading which was not inconsistent with any traversable allegations in the first action, and he would not be estopped from setting up any special plea or any plea by way of confession and 30 avoidance.

In *Humphries v. Humphries* (1910) 1 K.B., 796; (1910) 2 K.B., 531, the plaintiff brought an action for arrears of rent alleged to be due under an agreement for a lease. The defendant pleaded no agreement had been completed but did not rely upon the Statute of Frauds. Judgment was given for the plaintiff. Further arrears having accrued due plaintiff brought a second action. Defendant pleaded there was no memorandum in writing of the agreement for the lease sufficient to satisfy the Statute of Frauds. It was held that the defendant was precluded from raising the defence of the Statute 40 of Frauds in the second action.

The reasons for the judgment are quite clear. At common law and under the Common Law Procedure Act a declaration setting up an agreement had to state whether it was in writing, otherwise it was demurrable. Even under the present practice a statement of claim must show whether an agreement is in writing. See *Neal v. Park*, 10 P.R., p. 476, Per Boyd, C., at pp. 478-9. The fact that by the rules

of court the Statute of Frauds is required to be specially pleaded does not affect the question.

According to Farwell, L.J., (1910) 2 K.B., at p. 535, the denial of the agreement in the first of the Humphries actions involved the denial that it was in writing. The setting up of the Statute of Frauds in the second action was therefore inconsistent with the traversable pleading contained in the statement of claim in the first action.

In his judgment at p. 535, Farwell, L.J., says: "The rule laid down in *Howlett v. Tarte* is confined to allegations which the defendant  
10 could have traversed and does not extend to pleas which confessed or avoided, or to matters which were not raisable by traverse but by special plea necessitating proof on the part of the defendant, such as fraud, gaming, release or infancy, allegations which do not amount to denial but confession and avoidance of the contract," and at p. 536: "It is, we think, clear that Williams, J., in *Howlett v. Tarte* intended his question to be answered as counsel answered it, in the negative; it was as follows: 'Suppose a defendant in an action for an instalment due on a bond set up a release or coverture, and issue taken upon it, and found against the defendant, the doctrine of estoppel would  
20 prevent that defence being set up in an action for a second instalment. But suppose the defendant neglected to set up the defence in the first action, would she be precluded from relying on it in the second action?' counsel answered, 'Clearly not.' This is in accordance with justice, for while interest reipublicae that litigation should cease so far as matters directly adjudicated upon are concerned, it is not expedient that litigants should be deprived of independent defences through oversight when the matter can again be properly raised in court."

The denial of a deed, that is, a plea of *non est factum*, operated  
30 merely as a denial of the execution of the deed in point of fact only. All other defences had to be specially pleaded, including matters which made the deed absolutely void as well as those which made it voidable. Rule 10, Trinity Term, 1853, Day's Common Law Procedure Acts, p. 495.

The plea that it was beyond the power of the company to give the bond and covenant is not a plea that could be raised by traverse. It is a special plea, just as infancy and coverture are special pleas, and it is submitted that the failure to raise this defence in the first action does not preclude a party from setting it up in the second  
40 action.

The question of *ultra vires* on the part of the company could not have been raised in the first action upon the pleadings as they stood. It could only have been raised by special plea. Where the matter can be raised only by special plea the cases of *Howlett v. Tarte* and *Humphries v. Humphries* indicate that there is no estoppel if there has been no special plea in respect to the matter in the first action.

The *Humphries* case was discussed and distinguished by Meredith,



C.J.O., in *County of Wentworth v. Hamilton Radial Electric R.W. Co.*, 41 O.L.R., 524. Meredith, C.J.O., at p. 532, said: “. . . 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  
 10 not 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.” The admission of the agreement mentioned by Meredith, C.J.O., as precluding the setting up in a subsequent allegation that it was invalid, is shewn in the report of the previous case contained in 31 O.L.R., p. 659 at p. 664, where Meredith, C.J.C.P., stated that the question whether the county had power to  
 20 enter the agreement was raised by the City of Hamilton but the parties to the agreement were content with it.

In *Hoystead v. Commission of Taxation* (1926) A.C. 155, the trustees of an estate claimed in the previous proceedings that they were entitled under the terms of an Australian statute to deduct six sums of £5000. in respect of six beneficiaries. In order to succeed on that issue they had to establish that the testator died before July 1st, 1910, that the beneficiaries were relatives of the testator, that they were taxable as joint owners and that they held an original share. All those matters were set out in the objection which the  
 30 trustees took to the original assessment. The objection was disallowed by the revenue authorities and the matter went to the higher court where the questions were: First, whether the shares of the joint owners or any of them, and which of them, in the land, were original shares; Second, how many deductions of £5000. the respondent should make. The court decided that the shares were original shares and that there should be six deductions. It will be seen that it was fundamental to this decision that the holders of the shares were joint owners, and the Privy Council held that this matter was *res judicata* in the second case by reason of the decision  
 40 in the first proceedings.

Lord Shaw, at p. 166 said: “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."

It will be seen from this citation that there must be, 1. A point fundamental to the decision. 2. It must be taken or assumed by the plaintiff and traversable by the defendant. 3. It has not been traversed. This does not apply to the case at bar. The question for decision in the first action between the city and the company was whether school taxes were included in the term "municipal taxes."

*Ultra vires* on the part of the company to enter into the bond and 10 covenant was never mentioned. The question of *ultra vires* was not fundamental to the decision, nor was it traversable on the pleadings as they stood.

In *Bradshaw v. McMullan*, 1920, L.R. Ir., Vol. II, 412 K.B.D., Lord Shaw said at p. 424: "My Lords, as I have observed, the overruling consideration with regard to *res judicata* is that there must have been a *judicium*. That is to say that the merits of the identical dispute between the identical parties on the identical subject matter and on the same media should have been settled by judgment."

The Hoystead case was discussed and distinguished in *New Brunswick Rlwy. Co. v. British & French Trust Corp.*, 1939, A.C. 1; (1938) 4 All E.R., 747, and *In Re Koenigsberg*, 1949, Ch. 348; (1949) 1 All E.R., 804.

It is submitted that all that the court decided in the first action between the city and the company was that by-law No. 148 as amended by by-law No. 195 was a valid by-law and that school taxes were included in the phrase, "municipal taxes, rates and levies and assessments of every nature and kind." The question of whether it was *ultra vires* the company to give the bond and covenant was not fundamental to the decision in the first action, and it is not *res* 30 *judicata* in the present action.

At the trial of the first action the Company was allowed to amend its defence by pleading that "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." The effect of this amendment is dealt with by *Dysart J.A.*; *Case*, from p. 224, l. 7, to p. 225, l. 18, as follows: "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 enable the defendants (the Company) to the 40 benefit of exemption in the City 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 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  
 10 built the station, had established large and commodious stock yards and had given the bond and covenant. These, of course, are traversable please. Traverse of the plea that the 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 535. 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  
 20 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 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  
 30 Manitoba Killam C.J., states at pp. 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 applies to the school taxes as well as to other taxes to be levied by the City.' In the Supreme Court the  
 40 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 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"?' "

The previous case of Winnipeg v. C.P.R. as has already been stated,

was decided upon demurrer. It is submitted that all that was decided in that case was that the City's replication was bad by reason of the fact that the words "municipal taxes" mentioned in By-law No. 148, as amended by By-law No. 195, were wide enough to include school taxes. A demurrer was a pleading which raised an issue in law as distinct from an issue of fact, that is, it admitted for the purposes of the demurrer the truth of all the facts alleged in the pleading demurred to, but denied that they were sufficient in their legal effect to constitute the right of action or ground of defence or reply &c. which was  
10 relied upon by the opposite party. Bullen & Leake (6th Ed.) p. 561.

In *Howlett v. Tarte*, 10 C.B.N.S., 813, Willes J. at 822 during the argument, said: "Has it ever been held that where there has been a demurrer to the declaration the defendant is estopped by his admission of the allegations in the declaration?", and Counsel answered, "No. To constitute an estoppel the point in dispute must be the same." See also the judgment of Willes J., at p. 827.

The replication of the City to the statement of defence of the Company in the first action, while nominally a replication was in substance a demurrer. The Company's plea in that action had merely  
20 set up that it was exempt from taxation by reason of By-law No. 148 as amended by By-law No. 195, without setting forth the terms of the by-law. If the terms of the by-laws had been set forth the City might have demurred to the pleading; but as the terms of these by-laws were not set forth, the City pleaded the terms of the by-laws and alleged that save and except by these by-laws the lands of the Company were not in any way exempt from taxation. It is submitted that by setting forth the terms of the by-laws no admission was made by the City that the Company was empowered to enter into the bond and covenant mentioned in By-law No. 148 as amended by By-law  
30 No. 195, nor can the judgment of the Supreme Court holding that the replication was bad, be construed as an adjudication that the Company had power to execute the bond and covenant.

### Estoppel other than by *res judicata*

If the agreement set forth in By-law No. 148 was *ultra vires* the Company it cannot become *intra vires* by reason of estoppel, lapse of time, ratification, acquiescence or delay.

*York Corporation v. Henry Leatham & Sons Lim.* 1924, 1 Ch. 557, per Russell J. at 573; 94 L.J. Ch., 159 at 167. *Wegenast Canadian Companies*, 154, 155; 13 Hals. (2nd Ed.) p. 474, s. 542.  
40 In *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q.B.D., 714, Bowen L.J., at 718, said: "In the present case the defendant company could not have contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying they have done so."

If the Company cannot be estopped from denying their power to

enter into the bond and covenant, neither can the City be so estopped. Estoppels are mutual and both parties must be bound, otherwise there is no estoppel. *Grant (or Gaunt) v. Wainman* (1836) 3 Bing. N.C., 69, per Tindal C.J., at 70; *Concha v. Concha* (1886) 11 A.C., 541, per Lord Herschell at 554; 13 Hals., p. 401, s. 454 (2nd Ed.).

A public corporation cannot estop itself from performing its proper functions. *Street on Ultra Vires*, 84. See also *Brice on Ultra Vires III* (3rd Ed.).

The doctrine of acquiescence is inapplicable to public functionaries. 10 *Kerr v. Preston* (1876) L.R. 6, ch. D. 463.

In *County of Wentworth v. Hamilton Radial Electric R.W. Co. and City of Hamilton* (1914) 31 O.L.R., 659, Meredith C.J.C.P. said at p. 664: "Estoppel too was much relied upon for the city; and it is quite true that the county went a long way in acquiescing in the order of the Board; but municipalities cannot transfer their rights or obligations, generally speaking, in regard to public ways at their will, and so it is plain that they cannot get rid of them by estoppel as if they were private rights; so, without considering whether all that took place would or would not create an estoppel between private owners, 20 this point also fails."

In *Toronto Electric Light Co. v. City of Toronto* (1915) 33 O.L.R., 267; (affirmed 1916 A.C., 84) Meredith C.J.O. said at p. 283: "What the Legislature did was in truth to repose in the municipal authorities a trust and to impose upon them a duty to safeguard the public interests of the locality over which they had jurisdiction; and I cannot understand how, by the application of the doctrine of estoppel or by laches or acquiescence, the public can be deprived of the protection which the Legislature provided for them by sec. 2, merely because the municipal authorities, through carelessness or otherwise, have failed 30 in the performance of their duty." At pp. 284-5, Meredith C.J.O. said: "Now, in order to raise an estoppel, the person who sets it up must have been mistaken as to his own legal rights and must have expended money or done some act on the faith of his mistaken belief; and the person against whom the estoppel is set up must have known of his own rights and of the others person's mistaken belief, and must have encouraged him in his expenditure of money or other act, either directly or by abstaining from asserting his legal right: Halsbury's *Laws of England*, vol. 13, p. 167, para. 201." In the same case *Hodgins J.A.* at pp. 304-5 in discussing the limits of the doctrine of 40 acquiescence adopts the statement of the law as laid down by Fry J. in *Willmott v. Barber* (1880) 15 Ch. D., 96 at p. 101.

Waiver or acquiescence presupposes that the person to be bound is fully cognizant of his rights and being so, neglects to enforce them.

*Vyvyan v. Vyvyan* (1861) 30 Beav. 65 at 74.

See also *Hoare v. Kingsbury Urban Council* (1912) 2 Ch., 452, per *Neville J.* at 465.

If the exemption from taxation purported to be conferred by

By-law No. 148 as amended by By-law No. 195 applies only to the territory within the boundaries of the city as of the date of the by-laws, the City is not estopped by conduct from claiming that the exemption does not apply to the lands added to those boundaries.

Adamson J.A., Case, p. 233, l. 27, to p. 234, l. 2: “. . . 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 (Lord) 1900 A.C., 260, Lord Halsbury is reported at p. 263 as follows: ‘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.”

Even if there could be in law an estoppel from contending that it was *ultra vires* the Company to give the bond and covenant, it is submitted that the recital in By-law No. 219 would not effect such an estoppel. The effect of this recital is merely to admit that the Company had constructed the one hundred miles of railway, had built the station and had given the bond and covenant. It would not constitute an admission that it was within the power of the Company to give the bond and covenant.

It is also submitted that, for the reasons mentioned in paragraph 341 of the reasons for judgment of the learned trial judge, Case, p. 168, l. 1, 6 to 16, the agreements between the City and the Company relating to the Royal Alexandra Hotel dated August 4th, 1906, May 29th, 1914, and April 28th, 1942, do not operate as an estoppel as contended by the Plaintiff.

- (c) **Resume of the City’s Powers of Taxation 1873 to 1947.**
- (d) **Land Outside the Original Limits of the City of Winnipeg is not Exempt.**
- 40 (e) **Argument as to the City’s Right to Levy Taxes with respect to the Royal Alexandra Hotel.**
- (f) **Argument as to the City’s Power to Levy Business Tax.**

As a preliminary to the consideration of the above matters it might be of some assistance to this Court to outline briefly the powers

which, from time to time, the city has possessed with regard to taxation.

From the date of incorporation in 1873, to the year 1886, the government of the city was carried on under the powers of a special charter of incorporation granted by the Legislature of the Province of Manitoba. In 1886 this special charter was repealed and from that time until 1902 the city's affairs were administered under the provisions of the Municipal and Assessment Acts of the Province. In 1902 the city again obtained a special charter, and this charter  
10 was revised and consolidated in 1918 and again in 1940.

The original charter was enacted as 37 Victoria Cap. 7 and assented to on November 8th, 1873.

Section 112 (CXII) dealt with the assessing of property and read:

"All land and personal property in the city of Winnipeg shall be liable to taxation, subject to the following exceptions."

Then followed a number of exceptions, with which we are not concerned, i.e., Crown property, churches, etc.

The 1873 charter was consolidated in 1882 by "The Consolidated Act of Incorporation of the City of Winnipeg" of that year and a  
20 further consolidation was passed in 1884. (47 Victoria Cap. 78.)

In none of these acts was real property of railway companies excepted.

In 1886, the Municipal Act (49 Victoria Cap. 52) repealed the former charters (Sec. 747).

Section 512 of this Act reads:

"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 exceptions."

Likewise here the exceptions which followed did not include  
30 property of railway companies.

Subsection (8) of this section 512 included as an exemption "all lands legally exempted from taxation by a by-law of the Municipal Corporation." This sub-section was carried through the various city charters until 1948 when it was amended to read:

"271. (1) (h) All land exempted from taxation by a by-law of the City passed pursuant to the provisions of this Act, to the extent to which the same is so exempted." (S.M. 1948 Cap. 92, Sec. 3.)

This took care of charitable institutions, Y.W.C.A., Y.M.C.A.,  
40 War Veterans or Returned Soldiers Associations (Sec. 272, as enacted by S.M. 1940 Cap. 82), which would otherwise have been assessable pursuant to the provisions of this Act; but which could be exempted by a by-law of the city.

Section 272 reads:

"272. Subject to section 240 of "The Public Schools Act,"

the council may pass by-laws to exempt from taxation any building used exclusively as a charitable institution with the land in connection therewith, not exceeding two acres, and also the properties of the Young Men's Christian Association and the Young Women's Christian Association, and of any War Veterans or Returned Soldiers Association, to the extent of the value of such part or parts of such properties as shall be used for religious or associational purposes."

In 1890 "The Assessment Act" (S.M. 53 Victoria Cap. 53) was  
10 passed.

Section 3 of this Act provided:

"3. All lands and personal property shall be liable to taxation, subject to the following exceptions."

None of these exceptions referred to railway properties.

In 1892 (R.S.M. 1892 Cap. 101, Sec. 3) the following is found as an exception:

"(o) So much of the property of a railway company as is exempted under the forty-fifth section of this Act."

Section 45 exempted superstructures except station houses and  
20 freight sheds; but did not grant a general exemption.

In 1902 the city obtained another special charter ( (1902) 1-2 Ed. VII Cap. 77). The provisions of this charter with respect to taxable property and exemptions were similar to those of the preceding acts, except that by this time the tax on personal property had been dropped and a business tax had been imposed (56 Victoria (1893) Cap. 24, Secs. 3, 8 and 19).

Section 281 of the 1902 charter read:

"281. All lands shall be liable to taxation, subject to the following exceptions."

30 None of the exceptions mentioned refer to railway property.

The 1902 charter was superseded by a new charter in 1918 (8 Geo. V Cap. 120).

Section 278 of the 1918 charter read the same as Section 281 of the 1902 charter, except that the list of exceptions was increased but no exception was made of railway property. The Railway Taxation Act had been passed in 1900 and had prohibited municipalities from taxing railways.

Section 271 of The Winnipeg Charter, 1940 (S.M. 1940, Cap. 81) likewise provides that "All lands shall be liable to taxation" subject  
40 to similar exceptions which do not include railway properties.

In none of these various acts dealing with taxation by the city is there any provision exempting railway property from such taxation. However, as stated above, in 1900, the Railway Taxation Act ( (1900) 63-64 Victoria, Cap. 57, Sec. 18) was passed, exempting all



railways from municipal taxation. This Act was effective until 1947 when it was suspended and is still suspended.

**(d) Land Outside the Original Limits of The City of Winnipeg is not Exempt.**

Section 1 of by-law 148 (Exhibit No. 2 Case p. 290 ll. 36 to 43 and p. 291 ll. 1 to 3) purported to authorize the city to issue and deliver to the company debentures in the sum of \$200,000.00.

The delivery of these debentures was made subject to certain conditions which are set out in Section 4 of the by-law. (Exhibit 10 No. 2 Case p. 291 l. 34 to l. 26, p. 293.)

One of these conditions (Sec. 4(3), Case p. 292 ll. 20 to 29) was that

“(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.”

This by-law took effect from and after the 21st day of September, 1881. (Sec. 9, Case p. 293 ll. 24 to 26.)

At that time the company had its workshops within the limits of the city of Winnipeg as it was then constituted.

The map filed as Exhibit No. 7 (Case p. 261) shews certain lands colored yellow which were added to the city in 1882. It was upon these lands that the company subsequent to 1882 (namely, 1903) 30 built their principal workshops and have since continued them. (Exhibit No. 5 para. 5, Case pp. 257 l. 39 to l. 13 p. 258.)

These lands were not “within the limits of the City of Winnipeg” in 1881 when the by-law was passed and consequently were not the lands upon which it was provided in by-law 148 that the company’s principal workshops would be built and forever continued.

The workshops were to be built and maintained “within the limits of the City of Winnipeg.” It is submitted this meant Winnipeg as it then existed. Had it been intended to include contiguous territory, this could easily have been done in the by-law by saying “within 40 the limits of the City of Winnipeg as now or hereafter defined” or some similar phrase.

No such intention however appears.

It is submitted that had the language used been “within the City” it would still have meant the city as it then was. The use of the word “limits” emphasizes that intention, and must be given a meaning.

At the time the agreement was made there was only one thing to which the word could refer and that was the limits of the city at that time. It would be making a new agreement to interpret this clause "within the limits of the City of Winnipeg" as meaning "within the limits of the City as now or hereafter defined," or any other similar phrase.

10 Furthermore, by-law 148 was passed on September 5th, 1881 (Exhibit 2, Case p. 293, ll. 27 to 29). By-law 195, which amended by-law 148, was passed October 30th, 1882. (Exhibit 3 Case p. 306 ll. 19 to 21.) The last paragraph of by-law 148 reads: "this by-law shall take effect from and after the 21st day of September in the present year of our Lord one thousand eight hundred and eighty-one." This paragraph with the same date appears in by-law 195. Had it been intended that the agreement was to apply to the added territory, that date should and would have been changed in by-law 195.

It is submitted that it is the intention of the parties as evidenced by the agreement, when the agreement was made, which governs.

20 The words of the agreement are perfectly clear and must be taken to mean exactly what they say.

By-law 148 (4) (8) (Exhibit 2, Case p. 293 ll. 17 to 23) provided, "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."

It is submitted

30 (a) that the building of their workshops where they did in 1903 (see Admissions, Ex. 5, para. 5, Case pp. 257 l. 39 to l. 13 p. 258) in extended territory and maintaining them in that location were both done in breach of the conditions of their bond and covenant and of by-law 148, and that as a consequence under the above provisions the exemption was forfeit as from the date when the breach occurred; that is, if they had the power to give the bond and covenant and if by-law 148 was valid.

40 (b) in the alternative, that all extended territory (i.e., that added in 1882, 1906, 1907 and 1918) shewn on Map (Exhibit 7 Case p. 261), not being a part of the city of Winnipeg at the date of the alleged passing of by-law 148, land and buildings and other structures thereon owned by the company were not included in any alleged exemption from taxation and are consequently liable therefor now that the Railway Taxation Act has been suspended.

In support of these submissions see *Toronto v. Toronto Railway Company* (1906) 37 S.C.R. 430. (1937) A.C. 315.

This was a special case stating questions of law for the opinion of the Court.

The agreement between the City of Toronto and the Railway Company provided for the establishment of new lines of track within the city.

One of the questions was:

10 "Is the city or the company entitled to determine what new lines shall be established and laid down and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended?"

At p. 436 Sedgewick J. says:

"In my opinion the city clearly only purported to deal with streets within its jurisdiction."

At p. 445 Davies J. says:

20 "I have had the advantage of reading the judgments prepared by my brothers Sedgewick and Idington and for the reasons given by them I concur in the answer to the first question that there is no obligation on the part of the railway company, appellant, to lay down tracks and establish services on streets in territorial area added to the city since the date of the agreement."

At p. 450 Idington J. says:

30 "There seems to me to be a confusion of ideas in contending that this jurisdiction over a defined area and the inhabitants thereof must, of necessity, give such legal effect to a contract with a municipal corporation to do something to or in relation to its property as existent before extension as to bind the contracting parties to do or submit to have the things contracted for done to the new extension of property or domain."

"But for what has been brought under our notice and stoutly maintained I would have said that such a case needed only to be stated to carry with it refutation. If it need, as it seems to need, refutation I may illustrate the distinction by something like unto what may come to be within the range of modern possibilities.

40 "If a fire insurance company should undertake with a municipal corporation for a fixed compensation the fire risk for a number of years of all the houses within its bounds or a life insurance company undertake in like manner for such a term to pay at the death of each of the inhabitants a certain sum of money, and the risks were in either case within the term without further consideration doubled or trebled simply by joining one municipality to another and the name and jurisdiction of the one, thus supposedly contracted with, extended to include the increased size, surely there could not be found any one to claim that such added risks in such a contract were within the terms of the contract or the reasonable intendment thereof."

The Privy Council decision in this case is found in (1907) A.C. 315. At p. 320 Lord Collins, who delivered the judgment of the Court, says that the reasons given in the judgments of Sedgewick, Davies and Idington JJ. are full and satisfactory.

See also *United Gas and Fuel Co. of Hamilton Ltd. v. The Dominion Natural Gas Co.* 1933 O.R. 369 (Affirmed (1934) A.C. 435):

10 "Under by-law No. 533 passed by the Council of the Township of Barton in 1904 and under an agreement of the same year between the township and the defendant company, the latter, subject to certain conditions, acquired the right to lay "mains under highways in the township and to supply gas to the inhabitants thereof and before any portion of the township was detached therefrom the defendant company laid mains and pipes and supplied gas in the township. Subsequently from time to time portions of the township were annexed to the City of Hamilton and, without objection from the plaintiffs from 1905 until 1931, the defendant company continued to supply gas throughout those areas which had been annexed from the Township of Barton to the City of Hamilton.

20 "In 1931 the plaintiff company, by a franchise agreement between it and the City of Hamilton, ratified by the City of Hamilton Act, 21 Geo. V. ch. 100, sec. 4, acquired the exclusive right to distribute and sell gas throughout the City of Hamilton subject, however, to 'the extent of any existing rights and privileges then held by the Dominion Natural Gas Co. Ltd. under by-law 533 of the Township of Barton'."

30 "The plaintiffs brought action against the defendant company to restrain the defendant company from supplying gas throughout those areas now in the City of Hamilton but which formerly formed part of the Township of Barton. The trial judge dismissed the action with costs. The plaintiffs appealed to the Court of Appeal contending:

"(1) that the defendant company, under the agreement and by-law of the Township of Barton of 1904, acquired the right to supply gas only in that area which from time to time should comprise the Township of Barton."

"HELD, that the judgment of the trial Judge should be affirmed and the appeal dismissed with costs for the following reasons:

40 "(1) Having regard to the language and purpose of the by-law and agreement of 1904 between the township and 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 Barton it meant the geographical limits of the township **as they existed in 1904** as if the same were described by metes and bounds."

In *Union Natural Gas Co. of Canada v. The Chatham Gas Co.* 56 S.C.R. 253 it was held that the Union Natural Gas Co. of Canada was not obliged to supply gas for distribution and sale by The Chatham Gas Co. in territory annexed to the city after the contract was made.

All of the above cases support the interpretation that "within the limits of the City" means within the limits of the city at the time the agreement was made.

The learned trial judge held (Case p. 129, ll. 20 to 34):

10 "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. 315). 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  
20 construed agreements respecting services of gas, electricity, 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.' "

It is submitted that the difference here is that this is not a matter of interpreting an ordinary contract but is a claim for exemption from taxation and inasmuch as the Plaintiff is basing its claim for exemption on the wording of by-law 148 it is submitted that such by-law should be construed strictly against it. The ordinary lan-  
30 guage of the by-law as it stands without reading anything into it which would extend its ordinary meaning as of the time it was passed should be the construction given it. Had any other meaning been intended it could, and would have been stated in appropriate language.

See *Moose Jaw v. B.A. Oil Co. Ltd.* (1937) Vol. 2 W.W.R. 309 at 312:

"This Court has already laid down the rule that a statute giving exemption from taxation must be **strictly construed**: *Episcopal Corpn. of Saskatoon v. Saskatoon (City)* (1936) 2 W.W.R. 91, at 96, where my brother Mackenzie states as  
40 follows:

'The burden of establishing its right to the exemption claimed is upon the plaintiff and in determining that right the statutory provision creating such exemption is to be **strictly construed against the person seeking it.**' "

Reference re *Taxation C.P.R.* (1949) 1 W.W.R. 353 at 372:

"As the contract, appended to 44 Vict., ch. 1, was approved and ratified by Parliament **the exemption contained in clause 16**

is statutory and must be strictly construed. The burden of establishing exemption is upon the person seeking it: *Ruthenian Catholic Mission of St. Basil v. Mundare S.D.* (1924) S.C.R. 620 (affirming (1924) 2 W.W.R. 481, 20 Alta. L.R. 338), Idington, J., at p. 625, Newcombe, J., at p. 629; *Episcopal Corp'n. of Saskatoon v. Saskatoon (City)* (1936) 2 W.W.R. 91; *Toronto Gen. Trusts Corp'n. v. Ottawa (City)* (1935) S.C.R. 531, Lamont, J., pp. 536 and 537; Maxwell on Interpretation of Statutes, 9th ed., p. 298. In *Montreal (City) v. College of Ste. Marie* (1920) 89 LJPC 243, Duff, J., sitting as a member of the Board and speaking for the Privy Council, said:

10 "Their Lordships are not disposed to differ from the view pressed upon them that an agreement in order to receive effect under the statute must be very clearly made out; such an agreement, if effective, establishes a privilege in respect of taxation, and the principle is not only well settled, but rests upon obvious considerations, that those who advance a claim to special treatment in such matters must show that the privilege invoked has unquestionably been created." "

20 See also *Canadian Pacific Ry. v. Burnett* (1899) 5 M.R., p. 395. From 1900 to 1947 the city was prevented from taxing such property because of the Railway Taxation Act (1900) (63-64 Victoria Cap. 57). Consequently there could be no estoppel or acquiescence.

(e) **Argument as to the City's Right to Levy Taxes with Respect to the Royal Alexandra Hotel.**

(i) Paragraph 3 of the amended Statement of Claim alleges that the Plaintiff owns, maintains and operates within the limits of the city of Winnipeg, for railway purposes or in connection therewith *inter*  
30 *alia* an hotel and restaurants.

The question as to whether or not the Royal Alexandra Hotel is taxable by the Defendant City turns upon the meaning of the words "for railway purposes or in connection therewith." (By-law 148, Sec. 4 (8), Ex. 2 Case p. 293, ll. 17 to 23.)

In *Charrington & Co. Ltd. v. Wooder* (1914) A.C. 71, Lord Dunedin says (at page 82):

40 "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 by-law 148 was passed in 1881 the company did not own or operate hotels.

It was not until 1902 that the company was authorized to do so by "An Act Respecting the Canadian Pacific Railway Company," (1902) 2 Ed. VII, Cap. 52.

It may be assumed from this that neither the officials of the company nor the city intended by by-law 148 to exempt a hotel from taxation. It would be extraordinary if they did, since at that time the operation of hotels was beyond the power of the company. It was the railroad and works which essentially went with railroading that were exempted, and the operating of a hotel was not included  
10 in this classification.

The Royal Alexandra Hotel was built in 1906 (Case page 46, ll.30-1).

Mr. Manson, Vice-President of the company for the Prairie region, states in his evidence, how they are operated. (Case page 49, ll. 4 to 11 and ll. 24 to page 50, l. 3; page 59, l. 29 to page 61, l. 43.)

The above evidence shows that in 1946 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, and that the accounting of this department is treated  
20 separately from the railway operations proper.

He stated that hotel rooms are not confined to the use of travellers; that the hotel has a public beer parlor; and three main ballrooms as well as a number of smaller rooms where local functions are held; that service clubs use the hotel for luncheons and other functions; that during the depression in the 1930's possibly many local people had permanent rooms and that some still have; and that the restaurants are open to and used by the public generally. The hotel has 445 rooms, most of them available for guests.

It is submitted that the Royal Alexandra Hotel is in precisely the  
30 same relationship and connection with the railway as the Empress Hotel, in Victoria, British Columbia, with the exception that the Empress Hotel, instead of being attached to the company's railway station, is in close proximity to the dock which is connected with the railway by company steamers.

It is submitted that the words "connection therewith" in by-law 148 do not mean physical connection. It may be that a down-town ticket office of the company, some distance from its railway lines is connected with the railway; whereas the Royal Alexandra Hotel is not so connected.

40 This 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 Canadian Pacific Railway Co. (1950) 1 W.W.R. 220. In that case the question for decision was whether the Hours of Work Act, regulating hours of work applied to the employees of the company in the Empress Hotel. Its connection with and use to the railway is similar to that of the Royal Alexandra.

In the judgment of the Privy Council Lord Reid said at page 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 works must be railway works or that all its activities must relate to its railway undertaking.”

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And at pp. 232-3:

“Sec. 8 of the appellant’s Act of 1902 is in the following terms:

“ ‘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.’ ”

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“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 there is a large and well managed hotel at Victoria tends to increase the traffic on the

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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 "The 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."

At pp. 235-237:

20 "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 Lordship's 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 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 (its argument) 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 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 of the declaration enacted by the Parliament of Canada in sec. 6(c) of the Railway Act, 1927.”

From the facts on the Empress Hotel case and the evidence of Mr. Manson it is seen that the activities and business of the Empress Hotel are strikingly similar to those of the Royal Alexandra, and both carry on a general hotel business in competition with other privately owned hotels.

The learned trial judge did not have the benefit of the decision of the Privy Council when he rendered his judgment in this case.

It is submitted that the reasoning and findings in the above case apply in the case at bar.

(ii) Paragraphs 9 and 10 of the amended Statement of Claim allege the entering into of the agreements of 1906 (Exhibit 9, Case p. 349 to 351) 1914 (Exhibit 10, Case p. 352-3) and 1942 (Exhibit 12, Case p. 361-4) with respect to taxation of the Royal Alexandra hotel, and paragraph 11 alleges that despite these agreements the city is seeking to assess and tax the company with respect thereto.

As to the 1906 agreement (Exhibit 9, Case p. 349, 351) the last recital indicates the reason therefor.

Part of this recital reads:

“ . . . 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 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."

Mr. Manson's evidence, referred to above, shows it does so completely.

The agreement of 1906 did not purport to grant an exemption but was an agreement under which \$8500.00 was paid to "amicably adjust and settle" the differences arising therefrom. The same applied to the other agreements.

On the other hand assuming it did purport to grant an exemption (which the city denies) then the city had no power under its charter to do so and any such agreement is void.

This would also apply to the similar agreements of 1914 and 1942.

This agreement of August 4th, 1906 was approved by resolution of Council. (Exhibit 9A, Case p. 351.)

No by-law was passed authorizing or ratifying it.

In 1906 the 1902 Charter of the city was in force. Section 472 of this charter reads as follows:

"472. The jurisdiction of the Council shall be confined to the city, except where authority beyond the same is expressly given; and the powers of the Council shall be exercised by by-law when not otherwise authorized or provided for."

It is submitted that since no by-law was passed for entering into the agreement of 1906 nor was it validated by the Legislature, the same is not legally binding upon the city.

The agreements of 1914 and 1942 purport to be authorized by by-laws 8721 and 15455 respectively.

These latter agreements provide for increased payments with respect to the hotel property in lieu of taxes.

In 1914 the 1902 Charter was in effect and in 1942 the 1940 Charter.

In neither of these Acts is there any authority for the city to exempt a property of this nature from taxation.

Both the Winnipeg Charter of 1902 and the Winnipeg Charter, 1940 provide (Sec. 281) (Sec. 271) respectively "All lands shall be liable to taxation, subject to the following exemptions."

In the list of exemptions which follow, railway lands or hotel properties do not appear.

Neither by-law 8721 nor 15455 was validated by the Manitoba Legislature and since there is no authority in the city's charter enabling the city to pass them nor to enter into agreements which it is alleged they purported to authorize, such agreements are void.

See *Manning v. Winnipeg*, 21 M.R. 203 at 212, *Ponton v. Winnipeg*, 17, M.R. 514.

The only effect of these by-laws (8721 and 15455) would be to give the signing officers of the city some semblance of authority to sign the agreements. The passing of the by-laws could not make the agreements valid and binding since they were beyond the power of the city to pass.

**(f) As to the City's Power to Levy Business Tax.**

The company in its amended statement of Claim (para. 11A) 10 complains that

20 "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 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 Honorable 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."

When by-law 148 was passed business tax was not in existence in the city of Winnipeg, and was unknown in Western Canada.

From the time of incorporation in 1873 until 1893 the city levied a tax on personal property.

In 1893 the city was under the jurisdiction of the Provincial Municipal Act and the Municipal Assessment Act.

30 In 1893 the Municipal Assessment Act was amended by 56 Victoria Cap. 24, the pertinent sections of such amending act reading as follows:

Sec. 3. "Hereafter no personal estate or personal property in 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."

40 Sec. 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."

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Several paragraphs setting out the mode of computing the amount of the tax followed.

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

Section 8 above authorizing business tax was carried forward into the 1902 Charter as Section 303 and Section 19 as Section 314, and also into the 1918 Charter as Sections 281 and 308 respectively.

In 1935 the whole structure of the business tax was altered. Section 5 of S.M. 1935 Cap. 93 introduced the following change to Section 282 of the 1918 Charter:

"282. For the purpose of levying a business tax in the City of Winnipeg, the assessment commissioner shall classify in accordance with the classifications hereinafter set forth the business of each person, firm, partnership, corporation or company carrying on business in any way in the city according to the principal trade, business, profession or calling carried on by such person, firm partnership, corporation or company, and each person, firm, partnership, corporation or company shall pay to the city a business tax based on the annual rental value of the premises occupied, and at the rate per centum of the amount of business assessment for each such class thereof as shown on the business assessment roll; the said classes and the respective rates applicable thereto shall be as follows."

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In the classifications which followed railways were not included since they were exempt under the Railway Taxation Act, S.M. (1900) 63-64 Vic., Cap. 57, but hotels were required to pay a tax based on a rate of 6% of the annual rental value of the premises occupied (Class N).

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Various other businesses were included from time to time and in 1940 (S.M. 1940 Cap. 82) Section 297 of the 1940 Charter (S.M. 1940 Cap. 81) was amended to read as follows:

"297. (1) For the purpose of levying the business tax hereinbefore referred to, the assessment commissioner shall classify in accordance with the classifications hereinafter set forth, the

business of each person carrying on business in any premises in the city, according to the principal business carried on by him therein, and every such person shall in each year pay to the city a business tax based on the assessed annual rental value of the premises occupied or used by him for the purposes of such business and at such rate 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

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

Telegraph Service.....12½%

This covered all phases of a railway company's operations, but did not include hotels. The railway company *qua* railway was of course still exempt because of the Railway Taxation Act.

In 1948 Class L was further amended (S.M. 1948 Cap. 92, Sec. 7) by striking out the words "not otherwise exempt" so that Class L now reads:

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

Telegraph Service.....12½%

This amendment was obtained because the exemption granted by the Railway Taxation Act had been suspended by the Taxation Suspension Act, 1947 (S.M. 1947 Cap. 56).

30 If the agreements of 1906, 1914 and 1942 are invalid and beyond the power of either the city or the company, then there is nothing to prevent the city from levying a business tax with respect to the whole of the business carried on by the company in the city.

It is submitted that a careful perusal of these agreements will shew that insofar as taxation is concerned they were intended to apply only to the Royal Alexandra Hotel and the other premises specifically mentioned, and it was only in connection with these premises that further taxation was not to be sought until 1952.

40 If the hotel is not within the exemption of by-law 148, then the city council did not have the power to tax it by a system or at a rate other than that by which all other property is taxed. The basis of a valid taxation scheme is that it be equitable and equal to all taxpayers, and it should not be held that the compromise agreements of 1906, 1914 and 1942 either enlarged the scope of by-law 148 or estopped the city from insisting on their true interpretation and meaning.

If the company had no power to enter into the agreement and give the bond and covenant and as a consequence thereof by-law 148 and the exemption purported to be granted thereunder was null and void, then there would be no exemption with respect to business taxes.

If this Court should hold otherwise, then the question of exemption of the business tax will arise.

In view of the recent majority judgment of this Court in *Canadian Pacific Railway Company v. The Attorney-General for Saskatchewan*, we do not intend to make any lengthy argument before this honorable Court on the question of business tax except with respect to the Royal Alexandra Hotel.

We would direct the Court's attention to Section 369, subsection (3) of The Winnipeg Charter, 1940, which reads as follows:

"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."

Inasmuch as a similar section is not found in the Statutes of Saskatchewan considered in the Saskatchewan reference, the city submits that the decision in that case does not apply.

20 While not arguing this point at length the city desires to reserve its right to present argument on this question if this case should go beyond the Supreme Court of Canada.

For the reasons above outlined, it is submitted that the Canadian Pacific Railway Company is not exempt from taxation under the terms of by-law No. 148 or otherwise and that in any event the defendant company is liable for business tax and that the Royal Alexandra Hotel is liable both for realty and business tax and that by-law No. 148, if valid, did not exempt from taxation land owned by the company outside of the limits of the city as such limits existed 30 in 1881.

All of which is respectfully submitted.

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The City of Winnipeg.

*mainly wrong  
no lien*