1951
*Feb. 20, 21, 26, 27 and 28.
*Oct. 22

CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF) .... APPELLANT;

AND

THE CITY OF WINNIPEG (DEFENDANT) .... RESPONDENT

AND

THE CITY OF WINNIPEG (DEFENDANT) .... APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Taxation—Municipal Corporations—Companies—Covenant by C.P.R. to continue its workshops within limits of City of Winnipeg forever—Covenant by City to forever exempt C.P.R. property then owned or thereafter owned within city's limits for railway purposes from all municipal taxes forever—C.P.R. incorporated by Letters Patent under Great Seal authorized by special act of Parliament—Whether possessed

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

(1) [1932] S.C.R. 529 at 536. (2) [1949] S.C.R. 201 at 215.
(3) [1952] 1 S.C.R. 222.

of powers of a Common Law corporation or of statutory company—Whether possessed of power to so covenant—By-laws embodying agreement validated by Act of Provincial Legislature—Whether agreement ultra vires of City—Whether city's limits to be construed as of date of agreement or to apply to subsequent extensions—Whether business tax within exemption—Whether exemption includes C.P.R. hotel and restaurant.—The Canadian Pacific Railway Act, 1881 (Can.) c. 1; 1883 (Man.) c. 64; Canada Joint Stock Companies' Act, 1877 (Can.) c. 43, s. 3.

Under an agreement entered into by the Canadian Pacific Railway Company and the City of Winnipeg ratified by by-law of the latter and validated by statute, the C.P.R. undertook to construct 100 miles of railroad from the city south westerly and to erect a passenger depot within the city on or before February 1, and November 1, 1883, respectively, and to deliver to the city a bond obligating it with all reasonable despatch to build within the limits of the city its principal workshops for the main line of its railway within the Province and the branches thereof radiating from Winnipeg and to forever continue the same within the city, and to erect within the city cattleyards suitable for its main line and the said branches. The city undertook in return to convey the lands upon which the depot was to be built and to issue to the company debentures for the sum of $200,000. The agreement further provided that upon the fulfilment by the C.P.R. of the conditions stipulated in the by-law, all property then owned or that might thereafter be owned by the company "within the limits of the City of Winnipeg for railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind."

The obligations assumed by both parties were fulfilled and no question arose until 1948 when the City assessed all the lands and buildings, including a hotel and restaurant, owned by the company, for realty and business taxes.

In this action brought to restrain the assessment, four main questions arose:

(1) Is the said agreement valid and binding?
If valid—

(2) Is the exemption operative only within the limits of the city as these existed at the time the agreement was made or as those limits may have been from time to time constituted?

(3) Is the exemption applicable to the hotel and restaurant?

(4) Does the exemption include business tax?

All questions were decided by the trial judge in favour of the company. On appeal, his decision on question one was affirmed, but reversed on the others.

Held: The appeal of the C.P.R. should be allowed, the appeal of the City of Winnipeg dismissed, and the trial judgment restored. Rand and Kellock JJ. would have varied the judgment so as to exclude the hotel and restaurant from the exemption.

Per: Rinfret C.J., Kerwin, Taschereau, Locke and Fauteux JJ.—It was unnecessary to determine whether the company was a common law corporation; by virtue of 1881 (Can.) c. 1 and s. 4 of the Letters Patent, the company had the power to enter into the agreement.

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Per: Rand and Kellock JJ.—The powers of the company were not those of a common law corporation. Assuming that the company could not bind itself to maintain the works in the city forever, but considering that (1) the company might in fact maintain them indefinitely, (2) the city, having up to the present time received the entire current consideration for which it had bargained, (3) recission having been virtually impossible from the completion of the works, and (4) for any failure in the future, security by way of recoupment from future tax exemptions will be available, the city should be restrained from repealing the by-law, upon the company undertaking, in the event of any future removal of the works, to recoup the city for such damages, not to exceed the amount of the benefits enjoyed under the tax exemption hereafter, as might be found to be suffered by the city by reason of the removal.

Per: Estey and Cartwright JJ.—The power to execute the contract here in question was, in any event, necessarily incidental to the express powers.

APPEAL by the city of Winnipeg, and a further appeal by the Canadian Pacific Railway Company, from a judgment of the Court of Appeal of Manitoba (1) allowing in part an appeal by the city from a judgment of Williams C.J.K.B. (2) in favour of the C.P.R. in an action to enjoin the city of Winnipeg from imposing certain taxation.

C. F. H. Carson, K.C., H. A. V. Green, K.C. and Allan Findlay for the Appellant. As to whether the exemption is applicable to the part added to the City The City's contention is that the phrase "the City of Winnipeg", even though used without qualification, should be construed as meaning the City of Winnipeg as it existed at the time By-law 148 was passed. In the absence of such a qualification and of clear evidence to be derived from the facts and circumstances existing at the time or from subsequent conduct of the parties that such a qualification was intended, the phrase should be given its natural meaning, that is, the City as from time to time constituted. The facts and circumstances existing at the time of the By-law and the subsequent conduct of the parties indicate that it was not intended to give the phrase a restricted meaning but that it should have its natural meaning. *Charrington & Co. Ltd.* v. *Wooder* (3); *River Wear Commsrs.* v. *Adamson* (4). By-law 148 was submitted to

(1) (1950) 59 M.R. 230; 65 C.R.T.C. 129.
(2) (1950) 58 M.R. 117; 65 C.R.T.C. 1.
(3) [1914] A.C. 71.
(4) (1877) 2 App. Cas. 743 at 763.

and approved by the ratepayers of the city as then constituted on August 24, 1881, and less than a year later, on May 30, 1882, a considerable area was added to the city by c. 36 (Man.). On Sept. 20, 1882, By-law 195, the sole purpose of which was to amend By-law 148, was referred to the ratepayers of the city as extended. Had it been intended that the "City of Winnipeg" in By-law 148 was to have the restricted meaning, it might fairly be expected that this would have been indicated in the amending By-law. It was not. Similarly when the City became subject to the general Municipal Act of the Province, 1886, (Man.) c. 52, if the exemption was to be limited to the City as it existed prior to the 1882 extension, it might be expected that the City would have required some qualification to be inserted in the Act to make that clear.

According to the majority of the Court of Appeal the provision in clause 4(9) of By-law 148 that "this by-law shall take effect from and after" Sept. 21, 1881, indicated that the exemption was to be limited to the area of the City as it existed on the date the by-law came into effect. No such interpretation can be fairly put or any such inference drawn. There are at least two reasons why the by-law contained an express provision as when it was to take effect. 1st—the by-law recited that the debentures to be given by the City were to be payable in "twenty years from the date this by-law is to take effect"; 2nd—S. 931 of the City's charter 1875 (Man.) c. 50, provided that any by-law for contracting debts by borrowing money would only be valid if the by-law "shall name a day in the financial year in which the same is passed, when the by-law shall take effect". The subsequent conduct of the parties and the practices they followed under the agreement constitute a useful guide in determining the construction to be placed on the phrases in the agreement which are ambiguous. *Ottawa* v. *C.N.R.* (1). If the exemption clause had not been operative in the added area prior to the time when *The Railway Taxation Act,* 1900 (Man.) c. 57, came into force the City would have had the power and the duty to tax the property of the Company in that area. Realizing the exemption applied to it the City did not, except for an unsuccessful attempt to levy

(1) [1925] S.C.R. 494 at 497.

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school taxes, attempt to tax the Company's property situated either within the City's limits as constituted in 1881 or as subsequently enlarged. The fact that the property of the Company in the area added by the City after 1881 was not taxed from 1882 to 1900 and like other property of the Company was shown on the assessment rolls with the notation "exempt by By-law 148", is cogent evidence of the City's own interpretation of the phrase "within the limits of the City of Winnipeg".

Pursuant to the bond and covenant given by the Company it duly built its principal workshops for Manitoba in the City of Winnipeg as it existed at the date of By-law 148 whereby it was bound to "forever continue the same within the said City of Winnipeg." In 1903 it moved the workshops to a location in the area added to the City in 1882 and has continued them there ever since. No complaint was made by the City. This indicates that neither the Company nor the City regarded the phrase "within the limits of the City of Winnipeg" as used in clause 4(3) to have the restricted meaning now contended for. If it was not used in the restricted sense in clause 4(3) of By-law 148, it can hardly be suggested that the same phrase was used in a restricted sense in the exemption clause 4(8). In *City of Winnipeg* v. *C.P.R.* (1), the City did not contend that the exemption was inapplicable to the part of the City added after 1881, and therefore, that at the very least the property of the Company in that part of the City was liable for school taxes. This again indicates that the City regarded the agreement as meaning that the exemption applied to the added areas. Assistance may be furnished by other cases in which the court had to deal with a similar problem. In *City of Calgary* v. *Canadian Western Natural Gas Co.* (2), it was held that "the city" referred to in a franchise agreement was not restricted to the limits of the City as it existed when the franchise was granted. Other cases are: *Toronto Ry Co.* v. *Toronto* (3); *Union Natural Gas Co.* v. *Chatham Gas Co.* (4); *United Gas & Fuel Co. of Hamilton* v. *Dominion Natural Gas Co.* (5).

(1) (1900) 30 Can. S.C.R. 588.
(2) (1917) 56 Can. S.C.R. 117.
(3) (1906) Can. 37 Can. S.C.R. 460; 1907 A.C. 315.
(4) (1918) 56 Can. S.C.R. 253.
(5) [1933] O.R. 369; [1934] A.C. 435.

The question of whether the exemption is restricted in application to the City as it existed in 1881 is now *res judicata* by virtue of the *School Tax* case (1). The decision of the Court that the "property of the Company is exempt from any liability to contribute toward the support of the city schools", must be taken to have decided that the property of the Company in the area added to the City in 1882 was subject to exemption. *Hoystead* v. *Commissioner of Taxation* (2).

As to whether the exemption is applicable to the hotel and restaurant of the Company. The exemption as set out in clause 148 of By-law applies to "all property now owned or that hereafter may be owned" by the Company ". . . for railway purposes or in connection therewith". The question raised in the *Empress Hotel* case (3) was quite different. What was decided there was that that hotel within the meaning of s. 92(10) (*a*) of the B.N.A. Act and of ss. 2 (21) and 6(*c*) of *The Railway Act* 1919 (Can.) c. 68 was not *part of* the Company's "railway" as the expression "railway" was used in those sections. In the present case the question is whether the hotel is owned by the Company "for railway purposes or in connection therewith". In other words is the hotel owned by the Company for the purposes of the railway or in connection with the purposes of the railway. Even if the question had been the same in both cases, what the Privy Council decided as to the Empress Hotel could not bind this Court in considering the position of the Royal Alexandra Hotel. The decision of the Privy Council must be considered in the light of the facts of the case. The position here is different. The evidence as to the nature and functions of the hotel establishes clearly that it is owned "for railway purposes and in connection therewith."

The agreement dated August 4, 1906, whereby the Company agreed to make certain payments to the City, expressly recites that "the Company has built and constructed in the City of Winnipeg (in connection with its railway and the operation thereof) an hotel building..." Thus while the City had claimed that the hotel "was not originally included within the meaning of a railway or

(1) (1900) 30 Can. S.C.R. 558 at 564. (2) [1926] A.C. 155.
(3) [1948] S.C.R. 373; 1950 A.C. 122.

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railway enterprise" it recognized by the terms of the recital that the hotel was constructed "in connection with" the railway and its operation, a recognition that the hotel was owned "for railway purposes or in connection therewith" within the meaning of the exemption in By-law 148. The *Railway Taxation Act* up to 1909 exempted "the property of every nature and kind" of the Company, with certain exceptions not relevant, and there could be no doubt the exemption included the hotel. By the 1909 amending Act an additional exception was made namely "all lands and property held by the Company not in actual use in the operation of the railway." In 1914 and 1942 the Company was called on and agreed to make larger payments to the City, on neither occasion did the City base its claim for payment on the ground that the hotel and restaurant were not "in actual use in the operation of the railway" and that because of the change in the Act the conditions which existed when the agreement of 1906 was entered into no longer existed. Not only on the evidence of fact but also on the interpretation placed on the terms of the exemption by the parties to the agreement the hotel and restaurant constitute property owned for railway purposes and in connection with railway purposes and are thus within the exemption. As to whether the business tax is within the exemption. The majority of the Court of Appeal were of the opinion that under the terms of the City's charter the assessment for business tax was not an assessment of property and the tax itself was a tax on the person and not on property, and therefore that the exemption did not apply. Their decision was reached before judgment was delivered in *C.P.R.* v. *A.G. for Saswatchewan* (1). It is submitted that for the reasons given in the majority judgment in that case the judgment of the majority of the Court of Appeal in the present case on the question of business tax should be reversed.

Whether the agreement between the City and the Company set forth in By-law 148 as amended by By-law 195 is valid and binding is raised by the appeal of the City from the judgment of the Court of Appeal. So far as this question is concerned the City is the appellant and the Company the respondent. It is clear that all necessary steps

(1) [1951] S.C.R. 190.

were taken to render By-law 148 and amending By-law 195 valid and binding upon the City. If there was any doubt as to the powers of the City when the agreement was made to enter into the agreement and to enact the two by-laws, such doubt was removed by the Legislature of Manitoba. By statute, 1883 (Man.) c. 64, s. 6, the two by-laws were declared to be "legal, binding and valid upon the said Mayor and Council of the City of Winnipeg". The Supreme Court of Canada in *School Tax Case* (1) held that "the whole and every part of the by-law was in express words confirmed" by the validating act. The question has therefore been concluded against the City.

Another question arising out of the City's appeal is whether the Company had power to enter into the agreement. It is submited (i) That the Company had the status of a common law company and as such had power to enter into the agreement. (ii) It also had such power by virtue of its expressly enumerated powers. The following cases are submited in support of the first proposition. *Baroness Wenlock* v. *River Dee Co.* (2); *Bonanza Creek Gold Mining Co.* v. *The King* (3). As to the second submission, the Company had the power to enter into and perform the agreemnt by virtue of the expressly enumerated powers granted it by the charter. Even if it were held to have the status of a statutory company with powers restricted to those expressly enumerated, it is submitted that the Company had power to enter into and perform the obligations contained in the Contract. *Vide* para. 4 of the Charter; clause 7 and 8 of the Contract.

The agreement with the City was *intra vires* the Company as being expressly authorized by its charter or as being reasonably incidental to the business expressly authorized by its charter. *A. G.* v. *Mersey Ry.* (4); *A. G.* v. *Great Eastern Ry. Co.* (5); *Deuchar* v. *Gas Light & Coke Co.* (6). As to *Whitby* v. *G.T.R. Co.* (7), the facts and the conditions imposed differ and the case is to be distinguished.

W. P. Fillmore, K.C., F. J. Sutton, K.C., and *G. F. D. Bond, K.C.,* for the respondent. While the Company delivered to the City a form of bond and covenant in pur-

(1) (1900) 30 Can. S.C.R. 558 at 561.
(2) (1887) L.R. 36 Ch. Div. 675n.
(3) 1916 A.C. 566 at 583.
(4) 1907 A.C. 415 at 417.
(5) (1880) 5 A.C. 473 at 478.
(6) 1925 A.C. 691 at 695.
(7) (1901) 1 O.L.R. 480.

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ported compliance with the conditions and stipulations set out in By-law 148, s. 4 (3) and (4) such bond and covenant was of no force or effect as the Company had no power either expressly or by implication to give it. The fact that it was soon found necessary to remove the workshops outside the original limits of the City shows that the original site was not suitable and that the covenant to forever continue them within the City as then constituted was incompatible with the efficient operation and management of the railway. The directors of the railway had no power to enter into an agreement so onerous on the Company and binding on it for all time. It amounted to a covenant not to exercise its statutory powers. It was in conflict with the Company's contractual obligations to the government to forever efficiently maintain and operate the C.P.R. To ascertain the statutory powers of the Company it is necessary to turn to the Consolidated Railway Act, 1879 (Can.) c. 9, to which the charter is subject. The following sections appear material, ss. 2(2), 5 (1),(16), 6, and 7(1), (2), (8), (10) and (19). Nowhere in 1881 (Can.) c. 1, the incorporating Act or charter of the Company, nor in the Consolidated Ry. Act, 1879, is there any express power conferred on the Company to enter into a perpetual covenant to forever maintain their principal workshops for the main line at any designated location. On the contrary, there are clear implications that the Company had no such right or authority. The Company has not been able to point to any express power but it is argued that the Company has all the powers of a common law company on account of the charter having been dealt with under the Great Seal. As to the powers of the Company to enter into a perpetual covenant relating to the operation of the railway, the City relies upon *Whitby* v. *G.T.R.* (1); *Montreal Park & Island Ry. Co.* v. *Chateauguay & Northern Ry. Co.* (2); *Town of Eastview* v. *R. C. Episcopal Corporation of Ottawa* (3). The Company had no express or implied power to fetter or part with its statutory powers by entering into the covenant which was a condition precedent to tax exemption. Further any implications to be found in the charter and relevant statutes are to the contrary. The agreement must be construed as if the controversy had

(1) (1901) 1 O.L.R. 481.
(2) (1905) 35 Can. S.C.R. 48.
(3) 47 D.L.R. 47.

arisen the day after the agreement was 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 Ry.* v. *Hastings* (1); *Charrington* v. *Wooder* (2). The agreement must be evaluated in the light of the circumstances existing at the time it was entered into. *Bank of N.Z.* v. *Simpson* (3); *River Weir Commsrs.* v. *Adamson* (4).

The City contends that the incorporating Act, the contract thereby approved and the schedule annexed together with the Consolidated Ry. Act, 1879, exhibit all the powers Parliament granted or authorized to be granted the Company and the doctrine of *ultra vires* applies. It submits in particular that (*a*) The incorporating Act was a special Act. (*b*) The recitals in the incorporating Act and in the charter show that the Governor in Council carried out the directions of Parliament, acted as its delegate in issuing the prescribed charter 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 the Company 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 not only a special Act but a special Act for a special purpose and the Company derives its legal existence wholly from the incorporating statute and the charter thereby prescribed and authorized. 1881 (Can.) ss. 21, 22, *The Railway Act,* 1879, s. 5 (1) and (16). Corresponding sections of *The Railway Act,* 1919, were discussed in *C.P.R.* v. *A.G. of B.C.* (5). It was there held that it was only by virtue of this Act that the Company had power to acquire hotels, etc., and it was the opinion of the Court or some members thereof that the C.P.R. Act of 1902 was a special Act. (Estey J. at 386, 87). This opinion is in line with *Elve* v. *Boyton* (6). In the *Bonanza Creek* case (7) Lord Haldane at 584: "In the case of a company the legal existence of which is wholly derived from the

(1) [1900] A.C. 260 at 266.
(2) [1914] A.C. 71 at 82.
(3) [1900] A.C. 182 at 188.
(4) (1877) 2 App. Cas. 743 at 763.
(5) [1948] S.C.R. 373; [1950] A.C. 122.
(6) (1891) Ch. 501.
(7) [1916] A.C. 566.

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words of a statute the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies".

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 Company and did not purport to exercise and did not exercise the Royal Prerogative in that behalf. *Vide* s. 2 of the Act and the recital in the charter. *Cobalt* v. *Temiskaming Telephone Co.* (1). As the exact form of charter was prescribed by statute and agreed upon by the approved contract 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 C.P.R. and the charter would have been invalid if not authorized by an Act of Parliament. The *Canada Joint Stock Companies Act,* 1877 (Can.), c. 43, s. 3. *C.P.R.* v. *Notre Dame de Bonsecours Parish* (2).

Any intention to create a common law corporation is excluded by necessary implication. The Company derived its entire existence 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. It was brought into existence by direct legislative action. *Cobalt* v. *Temiskaming Telephone Co. supra* at 74, 75. *A.G.* v. *De Keyer's Royal Hotel* (3), *B.C. Coal Corp.* v. *The King* (4), *Canadian Bank of Commerce* v. *Cudworth Telephone Co.* (5), where the Bonanza Creek case was distinguished. In *Re Northwestern Trust Co. and the Winding-up Act* (6), the *Cudworth* case was followed and the *Bonanza Creek* case distinguished. *Toronto Finance Corp.* v. *Banking Corp.* (7) is also relied on.

The powers of the C.P.R. and the C.P.R. Act of 1902 are discussed at length in *C.P.R.* v. *A.G. for B.C.* (8) but

(1) (1919) 59 Can. S.C.R. 62.
(2) [1899] A.C. 367.
(3) [1920] A.C. 508.
(4) [1935] A.C. 500.
(5) [1923] S.C.R. 618.
(6) 35 Man. R. 433.
(7) 59 O.R. 278.
(8) [1948] S.C.R. 373.

the contention that the C.P.R. 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 Dysart J.A. in the court below, concurred in by Richards J.A. The majority of the judges in the court below failed to appreciate that the 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. They failed to appreciate that the Bonanza Creek Gold Mining Co. was incorporated by letters patent under the Ontario Joint Stock Companies Act and in the opinion of Lord Haldane purported to derive its existence from the Act of the sovereign and not merely from the words of the regulating statute and therefore possesed a status resembling that of a corporation at common law.

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 148 as amended by By-law 195, the question arises whether the City is estopped from setting this up by reason of the judgment in *C.P.R.* v. *Winnipeg* (1). The power of the Company to give the bond and covenant was not discussed or even mentioned in the pleadings or 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 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. *Outram* v. *Morewood* (2); Notes to the *Duchess of Kingston's case* (3) Spencer Bower's *Res Judicata* at p. 121 citing *Moss* v. *Anglo Egyptian Navigation Co.* (4); 13 Hals. pp. 411-12, s. 466 (2nd ed.) *Langmead* v. *Maple* (5); *Johanesson* v. *C.P.R.* (6); *Howlett* v. *Tarte* (7).

(1) (1909) 30 Can. S.C.R. 558.
(2) (1803) 3 East 346.
(3) Smith's Leading Cases, 12 ed. Vol. 2, p. 754.
(4) (1865) I Ch. App. 108.
(5) (1865) 18 C.B.N.S. 255.
(6) (1922) 32 M.R. 210.
(7) 10 C.B. (N.S.) 813.

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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 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 judicata* in the present action.

If the agreement set forth in By-law 148 was *ultra vires* the Company it cannot become *intra vires* by reason of estoppel, lapse of time, ratification, acquiesence or delay. *York Corp.* v. *Henry Leetham & Sons Ltd.* (1); *Toronto Electric Light Co.* v. *City of Toronto* (2). It is also submitted for the reasons mentioned in para. 341 of the reasons for judgment of the learned trial judge, the agreements between the City and the Company relating to the Royal Alexandra Hotel in 1906, 1914 and 1942, do not operate as an estoppel as contended by the plaintiff.

The judgment of the Chief Justice, Kerwin, Taschereau and Fauteux, JJ. was delivered by:

KERWIN J.:—The Canadian Pacific Railway Company appeals and the city of Winnipeg cross-appeals against a judgment of the Court of Appeal for Manitoba. The dispute between the parties hinges upon clause 8 of by-law 148 of the city, passed September 5, 1881, which clause reads as follows:

> 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 referred to are contained in preceding clauses of the by-law by which the company undertook to build, construct and complete, on certain property in the city, a substantial and commodious

(1) [1924] 1 Ch. 557.

(2) (1915) 33 O.L.R. 267; [1916] A.C. 84.

general passenger railway depot, and particularly clause 3, reading as follows:

3. The said Canadian Pacific Railway Company, shall immediately after the ratification of this by-law as aforesaid, make, execute and deliver to the mayor and Council of the City of Winnipeg a Bond and Covenant under their Corporate Seal, that the said company shall with all convenient and reasonable dispatch establish and build within the limits of the City of Winnipeg, their principal workshops for the 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.

This by-law and an amending by-law No. 195 passed September 20, 1882, were ratified and confirmed by an Act of the Manitoba Legislature. It is admitted that the company fulfilled its obligations and with the exception of an abortive attempt by the city to impose school taxes, *Canadian Pacific Railway Co.* v. *City of Winnipeg* (1), no question arose between the parties as to the company's liability to taxation until, in the year 1948, the city attempted to assess and levy realty and business taxes, when this action was brought for a declaration that the company was not so liable.

The company succeeded at the trial but the judgment in its favour was set aside by the Court of Appeal by a majority, although there a majority were in agreement with the conclusions of the trial judge upon the first question involved, viz., the capacity of the company to enter into the agreement evidenced by by-laws 148 and 195. The trial judge considered that the company had the status of a common law corporation with powers analogous to those of a natural person and in that view the Chief Justice of Manitoba and Coyne J.A. and Adamson J.A. agreed. The latter also held, as had the trial judge, that in any event the expressly enumerated powers of the company gave it authority to make the agreement, and on this additional ground held the agreement *intra vires*. Richards J.A. and Dysart J.A. held that the company's powers were limited to those set forth in a special Act authorizing its charter but the former held that the agreement was within such powers and *intra vires* the company so that the latter was the only member of the court dissenting on the question as to the company's power to enter into the agreement.

(1) (1900) 30 Can. S.C.R. 558.

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On this first point I find it unnecessary to determine whether the city was incorporated by Royal Charter and hence had all the powers of a natural person, and therefore it is inadvisable to say anything upon the subject. The enumerated powers of the company, which appear in the reasons for judgment of several of the members of this court, and in the reasons for judgment in the courts below are sufficient in my view to authorize the company to do as it agreed, and as was subsequently carried out. Decisions like *Whitby* v. *Grand Trunk Railway Co.* (1) relied upon by the city, depend upon the terms of the enactments conferring the particular powers there in question. I might add that I have found it unnecessary in the consideration of this point, or any of the others, to deal with the company's argument that because of the decision in *C.P.R.* v. *City of Winnipeg* (*supra*), several of the matters now raised by the city are *res judicata.*

The second question is whether the exception is confined to property within the limits of the city existing at the date of by-law 148. Upon a review of all the terms of the by-law, and in view of the circumstances that existed at the time of its enactment, I have come to the conclusion that this question should be answered in the negative. If there be any ambiguity in the construction of those terms, which I do not think there is, the company's contention would be advanced by the fact that by the time by-law 195 was passed the company had executed part of its obligation on land that had been taken into the city subsequent to the enactment of by-law 148.

The third question, whether business taxes are included in the exemption is settled by the decision of this court in *C.P.R.* v. *Attorney General of Saskatchewan* (2).

The fourth question, whether the exemption is applicable to the company's Royal Alexandra Hotel and the restaurant in the railway station should be answered in the affirmative. Whatever bearing the company's enumerated powers under its charter might have upon the point as to the power of the company to build hotels need not be considered in view of the Act of 1902. Undoubtedly since then the company has such power and the Royal Alexandra Hotel and the restaurant fall in my opinion within the

(1) (1901) 1 O.L.R. 480.
(2) [1951] S.C.R. 190.

words of the exemption: "all property owned or that hereafter may be owned . . . for railway purposes, or in connection therewith." The hotel property or restaurant need not be owned exclusively either for railway purposes or in connection with railway purposes. Other cases decided upon other provisions are not helpful but in connection with the point as to the limits of the city, as well as the point now under discussion, the arrangement set forth in by-law 148 as amended should be construed as is said by Lord Sumner in *City of Halifax* v. *Nova Scotia Car Works, Limited* (1), as "one of bargain and of mutual advantage." The decision of the judicial committee in *Canadian Pacific Railway Company* v. *Attorney General for British Columbia* (2), depended upon the construction of the British North America Act, 1867.

The appeal should therefore be allowed and the cross-appeal dismissed, both with costs, the judgment of the Court of Appeal set aside and that of the trial judge restored. The appellant should have its costs in the Court of Appeal.

RAND J.:—Of the several points raised, I shall deal with only one: the authority of the company to bind itself forever to maintain the principal workshops for the province in the city and the legal situation resulting from its absence.

On the first branch of the argument, that is, whether the company, from its incorporation by letters patent under the Great Seal of Canada, possesses all the powers of a common law corporation, the controlling consideration, as decided by the judicial committee in the *Bonanza Creek Co. case* (3), is the source from which the incorporating efficacy is drawn, whether from the statute or from the prerogative. On this, I should say that that source cannot be the prerogative alone for the reason that the authority to construct a railway, as given to the company, could not arise from it. The incorporation not only creates the capacities of the company but clothes it with essential powers and some of these latter impinge on common law rights and liberties for which legislation is essential. Nor can I infer from the statute an intention to authorize faculties proceeding from both sources: the incorporation

(1) [1914] A.C. 992.
(2) [1950] A.C. 122.
(3) [1916] A.C. 566.

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was of an entirety of objects, capacities and powers; and although special powers can by legislation be conferred on a common law corporation, I know of no authority under the prerogative to add capacities to a statutory corporation.

Then it is argued that the scope of the statutory endowment was sufficient for the covenant given. Viewing the question from the standpoint of the interest of the company as a private enterprise, it is difficult to see the creation of any obligation that violates the original compact of the shareholders *inter se*; but the principle of *ultra vires,* in addition to the general public interest in the authorization of corporate action, has public aspects of special significance in enterprises of the nature of that before us. Here was an undertaking conceived primarily for a high national purpose; it was designed as a bond to complete the scheme and organization of a Dominion extending from ocean to ocean by furnishing the essential means for the settlement and the utilization of the resources of its western half; and the company was made the beneficiary of substantial assistance from the public in money, lands and privileges. That object indeed exemplifies the importance of the initial construction; once permanent works were established, they would tend to draw to themselves an adjustment of other services and arrangements and the system of operations would become a settled accommodation which, in ordinary circumstances, would deepen its rigidity with the years. All this, in turn, would have its reflex in shaping the course and development of the social and business life of the community which it was to serve. But unusual circumstances, as at times eventuated in the early days of railway projects, might necessitate changes in transportation plans and arrangements and we might have such a situation as was presented to the courts of Ontario in *Whitby* v. *Grand Trunk Railway Co.* (1).

I do not find it necessary, however, to decide the question. I will assume that the company could not bind itself to continue forever the workshops, and the question is, what follows from that. The entire transaction must be kept in view, and for that purpose it is desirable to summarize the details.

(1) 1 O.L.R. 481.

By-law No. 148 (later embodied in by-law No. 195) was passed by the city on September 5, 1881 and its provisions were to take effect from September 21, 1881. Along with others it was confirmed by c. 64, Statutes of Manitoba, 1883, and by c. 52 of the Statutes of 1886. It was to become effective as a contractual obligation of the city on the performance by the company, to which it is to be observed the company did not bind itself, of certain conditions. These were the construction of the Pembina branch line to the southwest on or before February 1, 1883; the construction of a passenger depot in the city within the same time; and the giving of a covenant forthwith after the passing of the by-law to build within the city and with all reasonable despatch and forever to continue the principal workshops of the railway within Manitoba, and as soon as convenient to erect suitable stockyards. Upon the fulfillment of those three conditions, bonds of the city in the sum of $200,000 were to be delivered to the company and all property of the company within the city was thereafter and forever to be free and exempt from municipal taxation.

A deed of the land on which the station was to be built was to be delivered to the company upon the delivery of the covenant. On April 18, 1882 that deed was executed and it recites in the preamble that "the said bond (covenant) has been by the said company made, executed and delivered as required in the said by-law mentioned". Upon the further completion of the branch line and the depot within the time stated, the bonds were delivered under the authority of by-law No. 219 passed on March 30, 1883. In its preamble it is recited:

> AND WHEREAS the Canadian Pacific Railway Company mentioned in said by-law No. 195 have completed and performed all the conditions mentioned in the said by-law and in all other respects complied with the same: and it is desirable that the said trustee should be instructed to deliver the bonds mentioned therein, with the coupons still unmatured, to the Canadian Pacific Railway Company or their proper officer on that behalf.

Later, pursuant to the covenant, the workshops and the stockyards were constructed and the former have at all times since then been maintained. As from the same time, that is, the time for the delivery of the bonds, the exemption from taxation has been respected until 1948.

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The language of by-law No. 148 dealing with the furnishing of the covenant should be noticed:

(3) The said Canadian Pacific Railway Company shall immediately after the ratification of this by-law as aforesaid, make, execute, and deliver to the mayor and council of the City of Winnipeg a bond and covenant *under their corporate seal* * * *

The company was clearly within its powers in building the branch line, depot, workshops and stockyards as it did; it would be absurd to say that the city could object to any part of that performance on the ground that the obligation to make it was invalid: and the remaining obligation to continue the workshops is clearly severable from that for their construction. But on the assumption I am now making the instrument cannot be said to furnish the entire consideration to which the city was entitled and there is, to that extent, a partial failure of a promissory character, although the performance has to this moment been completely and validly maintained.

The question of law then is this: whether a partial and severable failure of promissory consideration, followed by an entirety of irrevocable execution of the remaining consideration to the benefit of the other party, can be the ground on which a continuing and substantial obligation on the part of the latter can be repudiated. Rescission is obviously impossible as it has been from the moment the first work was completed. As early as 1888 the city could have taken the ground it now takes: and it is only the accident of the present search for grounds of escaping taxation exemptions that discloses the flaw today.

The significance of the contract to the city lay in the location of the railway and its centres of administration. The city was at the beginning of its life: it was seeking to establish itself as a focal point in the massive development of the West which was then in prospect. At that stage the action of the railway was of controlling importance. Transportation was the paramount agency in creating and promoting business and population groupings and probably no single factor has contributed so largely to the growth and wealth of what is now a great metropolis than the measures dealt with in the contract before us. The railway system is now too deeply integrated with the settled life of the province and the entire West to permit of any major readjustment: the city has attained a dominant position

on the prairies, and the removal of the workshops could have no more than a minor effect on its economic life or interest. In other words, the city having absorbed irrevocably the substance of the benefit under the contract seizes upon this item which may never manifest itself in default, and which even in actual breach would create little more than a ripple on the surface of its economy, to justify repudiation notwithstanding that the courts, as I shall endeavour to show, could deal effectively with such a default should it ever arise.

Both parties assumed the capacity of the company to make the covenant and acted under a common mistake of law; as executed it was in the precise form stipulated by the by-law; and it was accepted as a fulfilment of one of the conditions upon which the exemption from taxation became effective. On the strength of that acceptance, the construction of the workshops and stockyards was carried out. In these circumstances, the city is now estopped from taking the position that the exemption clause in the by-law never became effective; the coming into force of that provision is in the same category as to effectiveness as was the delivery of the bonds to the company: it is the same as if a new by-law had then been passed. The exemption provision became therefore and remains in effect, and in the absence of its repeal, there is today no authority in the city to tax the company's property.

The principle of enforcement in equity of contractual obligations with compensation is long established, and its employment here is dictated by the reasons on which it is based. Its general application has been confined to contracts for the sale of land. But the sale of land was part of the consideration here; the remainder was and is an indirect interest in and a beneficial consequence resulting from the operation of works on land. The controversy is broadly, then, within the scope of matters in which the principle has in the past been employed: there is not merely a close analogy, the actual items of land and interest constitute the basic subject-matter.

The circumstance that differentiates the situation here from the generality of *ultra vires* contracts is the characteristic of time attached to the physical acts of performance. Those acts by both parties are *intra vires*: the exemption

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was confirmed by the legislature; the workshops may, in the discretion of the company, be continued within the city limits forever, indeed the existing circumstances may in fact compel that performance, and the city would then receive from the company the whole of what, by the contract, it sought. It is only the substitution of obligation for discretion in that continuance that raises the difficulty.

The company could, at the outset, have validly accepted and can today accept the future tax exemption on the condition that if at any time the workshops should be removed, the amount of the taxes so saved would be recouped to the city to the extent of damages it might suffer from the removal: it would be the return of a benefit conditioned on a failure to maintain a work within the power of the company to create, maintain, or abandon. Such an arrangement would, I think, be clearly within the company's powers expressly or impliedly conferred by the incorporating statute as well as the Railway Act.

That is closely analogous to one case of specific performance with compensation. When a vendor seeks to enforce an agreement, compensation is a voluntary condition of relief; the vendor enters Court offering to give up a portion of the price of what he promised to and cannot fully convey. This may, roughly, be equivalent to damages, but it is not in law of that character.

Such a mode of adjustment may here be said to substitute a conditional for a promissory term in the contract: instead of mutual promises to maintain and exempt, the obligations would be, to exempt so long as the workshops are maintained and to recoup should that cease. It is modifying the legal situation no doubt, but that would not be novel in equitable administration: all equitable relief modifies the legal situation; and since, at law, the parties would now be left as they are, that neither of the outstanding obligations would be enforced, it is just such a result that the principle of relief against unjust enrichment is in every case called in to redress.

In this exceptional conjunction of circumstances, to carry a rule of *ultra vires* to an ultimate logic would, in the presence of the institution of equity, be its reduction to absurdity. At such a point, logic must yield to common sense as well as to justice. The city, by reason of these

matters, has drawn upon itself an equity of obligation; it would be inequitable and unjust while it is enjoying to the full the actual benefits for which it bargained to refuse to pay the price for them. There is no question of enforcing an *ultra vires* promise against the company nor of exacting performance by the city as the consideration of an *ultra vires* promise. The position of the city before any step was taken to withdraw the exemption, a position of full current but unenforceable performance on both sides, can in substance, from now on, be preserved by the application of established principles; and as equity looks at the substance and not the form of what is presented to it, to maintain that position would accord with the basic reason for equitable interposition at any time.

As the company asserts the covenant to be good, it is as if it were proffering an undertaking, in the event of the removal of the workshops from the city, to recoup to the city out of the benefit received through the future tax exemption, such amount of compensation as the Court might determine to be the loss the city might thereby sustain; on that basis, the declaration and injunction asked for should go.

In all other respects, I concur in the views reached by my brother Kellock whose reasons I have had the privilege of reading.

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba in an action brought by the appellant for a declaration that certain property owned by it in the respondent municipality is entitled to exemption from municipal assessment under by-law No. 148 as amended by by-law No. 195 of the city, both having been validated by provincial legislation. The appellant succeeded at the trial, but, while the agreement evidenced by the by-laws was upheld on appeal, it was construed so as to deprive the appellant of the essential relief claimed. Four questions are involved:

(1) the capacity of the appellant to enter into the agreement evidenced by the by-laws;

(2) whether the exemption is confined to property within the limits of the city existing at the effective date of the by-law;

(3) whether business taxes are included in the exemption; and

(4) whether the exemption is applicable to the appellant's Royal Alexandra Hotel.

As to the first question, it was held by the Chief Justice, Coyne and Adamson JJ.A., in agreement with the learned trial judge, that the appellant has all the powers of a common law corporation and accordingly had capacity to enter into the agreement in question. Dysart and Richards JJ.A. were, however, of opinion that the appellant had only statutory powers. The former considered that the agreement was not within those powers. The latter was of a contrary opinion.

With respect to the other questions, the opinion of Richards, Dysart and Adamson JJ.A. was in favour of the respondent. The Chief Justice and Coyne J.A. dissented.

By-law No. 148, passed September 5, 1881, recites that it is desirable that a line of railway southwesterly from the city should be built for the purpose of developing and advancing the traffic and trade between the city and the southern and southwestern portions of Manitoba; that it is also desirable to secure the location of the workshops and stockyards of the company for the province of Manitoba at the city of Winnipeg, as a central point on the *main* line of the railway and the several branches thereof, and that it is expedient for the city, in consideration of the agreement of the company to do these things, to lend their aid to the company by granting to the company debentures of the city to the amount of $200,000, and by exempting property of the company

> now owned or hereafter to be owned by the said Railway Company for Railway purposes within the City of Winnipeg from taxation forever.

A suitable site for a station was also to be conveyed by the city to the company.

The by-law authorizes the issue and delivery of the debentures upon fulfilment by the railway company of certain conditions, namely,

> 1. Construction of the railway mentioned in the recital by February 1, 1883;
>
> 2. Construction by the same date of a station on the lands to be conveyed to the company by the city;
>
> 3. Delivery by the company, upon ratification of the by-law by the ratepayers, of a formal covenant that the company would, with all convenient and reasonable dispatch, establish and build "within the limits of the city of Winnipeg" their principal workshops for "the main line within the province of Manitoba, and the branches radiating from the city," and "forever continue the same within the said city of Winnipeg";

4. The covenant should extend also to the erection within the "city of Winnipeg" of stock or cattle yards suitable for the central business of the main line and the said branches.

The covenant does not of itself stipulate the continued maintenance of the stockyards within the city, but the recital states that the company had so agreed.

With respect to the question of capacity, I agree with the conclusion of Richards and Dysart JJ.A. that the appellant has not the powers of a common law corporation. Appellant was incorporated by letters patent under the Great Seal issued pursuant to s. 2 of the statute of Canada, 44 Vict. c. 1, assented to on February 15, 1881. The statute approved of a contract dated October 21, 1880, for the construction of "the Canadian Pacific Railway" as described in the Act of 1874, 37 Vict. c. 14, in part by the company and in part by the government, the whole of which was to become the property of the company, which obligated itself forever thereafter to "efficiently maintain, work and run" the same. Paragraphs 21 and 22 of the contract read as follows:

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

22. The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the company, shall apply to the Canadian Pacific Railway.

The schedule referred to in para. 21 above provides by para. 1 that certain individuals,

with all such other persons and corporations as shall become shareholders in the company hereby incorporated, shall be and they are hereby constituted a body corporate and politic, by the name of the "Canadian Pacific Railway".

Para. 4 reads as follows:

All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.

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Para. 17 contains provisions similar to para. 22 of the contract, and by paragraphs 18 to 23 inclusive, certain sections of the Consolidated Railway Act are varied in their specific application to the company. The schedule, in subsequent sections, bestows further specific powers.

With respect to the enacting provisions of the statute itself, s. 2 reads as follows:

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

The appellant contends that in the change from the method of incorporation provided for by the contract, namely, by special Act in the form of the schedule appended to the contract, to the method provided for by s. 2 of the statute, namely, by letters patent under the Great Seal, Parliament had in mind the decision in *Ashbury* v. *Riche* (1), decided some six years earlier, and intended that the ambit of the powers of the appellant company should not be restricted in accordance with the principle which had been applied in that case, but should be those of a common law corporation. Appellant stresses that the letters patent recite that they are granted not only under the authority of the Special Act, but also under the authority of

"any other power and authority whatsoever in us vested in this behalf,"

and counsel refers to the judgment of the judicial committee in the *Bonanza Creek* case (2).

As stated by Viscount Haldane in the course of his judgment in that case, the question thus raised is simply one of interpretation of the language employed by Parliament. The words employed, to which the corporation owes its legal existence, must have their natural meaning, whatever that may be. Their Lordships, after tracing the prerogative power as to the incorporation of companies by the Governor

(1) (1875) L.R. 7 H.L. 653. (2) [1916] A.C. 566.

General and the Lieutenant Governors respectively, considered the question whether there was, in the case before them, any legislation of such a character that the power to incorporate by charter from the Crown had been abrogated or interfered with to the extent that companies so created no longer possessed the capacity which would otherwise have been theirs. Reference is made to the Act of 1864, 27-28 Vict. c. 23, which authorized the Governor to grant charters for incorporation of companies for certain purposes named in the statute. S. 4 provided that every company so incorporated should be a body corporate "capable forthwith of exercising all the functions of an incorporated company as if incorporated by a special act of Parliament."

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

It is to be observed that the Act of 1864 and the Dominion and provincial Companies Acts in question in the *Bonanza* case were each enacted at a time when the prerogative power to incorporate was unaffected by other legislation. In the case at bar, however, when the Act of 1881 was passed, any power to incorporate a company for the construction and working of railways by virtue of the prerogative, had previously been expressely abrogated by s. 3 of the Joint Stock Companies Act of 1877, 40 Vict. c. 43, and prior thereto by s. 3 of the Act of 1869, 32-33 Vict. c. 13. Accordingly, the language in para. 1 of the letters patent, so much relied upon by counsel for the appellant company, namely, "and of any other power and authority whatsoever in us vested in this behalf," is meaningless, there being in 1881 no power vested in the Governor General in Council with respect to the incorporation of a railway company, apart from that bestowed by the statute of 1881 itself. One must therefore find in that Act, or not at all, an intention

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to revive the prerogative for the purpose of the incorporation of the appellant company; *Attorney General* v. *De Keyser's Royal Hotel* (1), particularly at pp. 526 and 539-540.

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

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

"the franchises, privileges and powers embodied in the schedule to the said contract."

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

and such charter, being published * * * 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,

extends in no way the effect of the preceding language.

(1) [1920] A.C. 508.

The contract itself contemplates nothing more than a statute of incorporation with the powers mentioned in the schedule to the contract. The contractors themselves contracted with the government on that basis, and it surely cannot be supposed that it was in the minds of any of the contractors, or of the government, that the capital of the corporation to be created could be devoted to any purpose but the construction and continued operation of the railway therein described. It was an express term of the contract (para. 21) that the contractors were to be bound only in the event of an Act of incorporation being granted to the company "in the *form* herein appended as Schedule A." That schedule contemplates no powers being granted to the company apart from those contained within the four corners of the schedule itself. Accordingly, in my opinion, it was intended, by the words last quoted above, to satisfy the terms of para. 21 of the contract and to do no more. I think it is impossible to read into the legislation some bestowal of power upon the company outside of that which was contracted for.

It would no doubt be speculation as to why incorporation by letters patent was adopted rather than by a special statute. It is to be observed, however, that the letters patent were issued the very day after assent was given to the statute, so that time seems to have been an important factor. It may have been thought that to have incorporated all the terms of the letters patent in 44 Vict. c. 1 itself would have been awkward from a drafting standpoint and that an additional statute would have consumed more time, and getting on with the business of the transcontinental railway was an urgent matter. However that may be, it would seem, if the appellant's contention on this point be correct, that under a statute approving of a contract, a very large departure from the contract was at the same time effected in a very unobtrusive way. In my opinion, however, upon the true construction of the language of the statute, no such intention can fairly be gathered.

The subsequent legislative history of the appellant company, for what it may be worth, is consistent with this interpretation. It may be said, and it was said on behalf of the appellant, that the subsequent legislation granting additional powers to the appellant company, was merely

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obtained *ex abundanti cautela.* Such a theory, however, is rather negatived by the preamble to the Act of 1890, 53 Vict. c. 47 to which no reference was made on the argument. That Act recites *inter alia,*

and whereas several other railway companies are duly empowered to enter into agreements whereby the Canadian Pacific Railway Company may work, lease, or obtain running powers over their respective lines, and the Canadian Pacific Railway Company, *not having the requisite legislative authority for taking part in such an agreement,* has prayed that the necessity for special legislation, *giving such authority in each case* in which it may find it expedient to do so, be avoided, and that Parliament give it the general authority hereinafter mentioned * * *

It might be said that this recital refers not to the creation of further capacity on the part of the appellant company, but to the granting of further rights, and such an answer might account sufficiently for s. 6 of the statute which authorized the appellants to enter into certain arrangements with Canadian companies. Such an explanation cannot account, however, for s. 7 which authorizes the appellant to make similar arrangements with companies outside Canada. Parliament can only create capacity to receive rights outside Canada. It cannot create the rights themselves. While the above recital may not be conclusive, and while it cannot control, if on a proper construction of the Act of 1881 the situation were otherwise, the position clearly appearing on the recital indicates that the conclusion to which I have come as to the proper construction of the incorporating Act is the one entertained by the appellant itself.

Reduced to its essence, the contract, for the performance of which the appellant was incorporated, was for the construction by the company of certain parts of the railway, and, upon the completion and conveyance to the company of the parts constructed by the government, for the permanent operation of the whole by the company. Apart from certain specific powers which are not relevant, the powers actually conferred upon the company by para. 4 of the letters patent were all the franchises and powers necessary or "useful" to the company to enable it to cary out, perform, enforce, use, and avail itself of every condition, stipulation, obligation, duty, right, remedy, privilege and advantage agreed upon, contained or described in the contract. It is the contention of the respondent that the covenant of the

appellant with respect to the maintenance of the shops at Winnipeg amounts to a covenant not to exercise its statutory powers.

It is said for the respondent that the removal in fact of the appellant's shops from their original location to a point outside the 1881 boundaries of the city, and the establishment of additional stockyards outside those boundaries, shows that the covenant in question is incompatible with the efficient operation and management of the railway required by the contract with the Crown. It is said that other unforeseen events, such as excessive floods, might not only interfere with or prevent efficient operation, but might even yet render necessary the entire removal of the shops and yards from the city.

The respondent also points to para. 13 of the contract which reads,

> The company shall have the right, subject to the approval of the Governor in Council, to lay out and locate the line of railway hereby contracted for, as they may see fit, preserving the following terminal points, namely: from Callander station to the point of junction with the western section at Kamloops by way of Yellow Head Pass.

and contends that a later event of the character already mentioned might have resulted in the establishment of the centre of population at Selkirk instead of at Winnipeg, and that the obligation to build and forever maintain the shops for the main line at Winnipeg, involving as it did an obligation (I quote from respondent's factum) "by necessary implication to establish Winnipeg as a terminus of the railway in lieu of preserving the same at Selkirk," or to establish Winnipeg as a "central point" on the main line, was in conflict with para. 13.

It may be pointed out, however, that the obligation of the appellant under the covenant was not to establish Winnipeg as a "central point" on the main line. What the appellant covenanted to do was to establish and build within the city limits their "*principal* workshops for their main line of railway within the province of Manitoba, and for the branches thereof, radiating from the said city" and to continue them forever within the city, and it would seem obvious that shops for the branches radiating "from" the city at least, could hardly, from a practical point of view, be located elsewhere than at Winnipeg.

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I do not think, either, that the covenant involved any implied obligation upon the appellant to substitute Winnipeg for Selkirk as a "terminal point" of the main line. There appears to be involved in this contention of the respondent that the maintenance of the principal workshops at Winnipeg necessarily involved Winnipeg as a "terminal" or "divisional" point from the standpoint of the operation of the railway, and that as Selkirk and Winnipeg are only some twenty miles apart, the latter would be elbowed out of its position as such a point, contrary to the statute. This argument is, in my opinion, founded on a misconception of the statute.

Para. 1 of the contract defines four sections of the main line, with Selkirk as the western end of the Lake Superior section, which was to be built by the government, and the eastern end of the central section which was to be completed by the appellant. The "terminal points" mentioned by para. 13 have nothing to do, in my opinion, with the operation of the railway but only with construction.

It may perfectly well have been, and probably was intended when the statute was passed, that from Selkirk west the main line would run north of Winnipeg, but under the terms of para. 13, the appellant with the concurrence of the Governor in Council, was free to construct the central section of the main line from Selkirk to Winnipeg and then west if it saw fit.

As appears from para. 15 of the letters patent, there was already in existence, at the time of the contract, a branch line of railway from Selkirk to Pembina. It appears also from the schedule to c. 13 of the Act of 1879, 42 Vict., that this line was in course of building, and by para. 2 of the contract contained in the schedule to the Act, the government had undertaken to complete the line by August 3rd of that year. Winnipeg or Fort Garry was, of course, on this line. Chapter 14 of 42 Vict. establishes this, if it needs to be established.

P.C. 1458, dated November 19, 1881, shows that the main line had by that time been routed through Winnipeg. That this in no way interfered with the position of Selkirk is clear from the Act of 1882, 45 Vict. c. 53. This statute amends the very paragraph of the contract under consideration, viz., para. 13, with respect to a change in the

location of the railway through the Yellow Head Pass, but the statute, by s. 1, shows clearly that Selkirk was still on the main line.

If it were necessary to decide as to whether or not the covenant to build and forever maintain the workshops at Winnipeg was a covenant which the company could validly enter into, regard should be had to the principle laid down by Lord Selborne in *Attorney General* v. *Great Eastern Ry. Co.* (1), namely, that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized ought not, unless expressly prohibited, to be held by judicial consideration to be *ultra vires.* However, I do not consider it necessary to decide the question for the reason that, assuming the covenant to have been beyond the power of the company, the respondent, in the circumstances here present, is not now entitled to take the position that its obligation with respect to the exemption from taxation, is no longer binding upon it.

The position of the respondent, as set out in its factum, is that the "purported agreement" between the parties is void for want of mutuality and that no consideration for the tax exemption was received by the respondent for the agreement or bylaw or the granting of the exemption from taxation, and that the plaintiff did not as a result of or in reliance upon said agreement or any term or terms thereof, exercise any forbearance or change its plans or incur any expense or make any investment or in any way change or alter or prejudice its position or the location, construction or operation of its railway or of any works connected with its railways, or give any consideration. It is said that the giving of the bond and covenant amounted to a covenant by the appellant not to exercise its statutory powers which it had no right to do.

In my opinion, it is plain that both parties contracted on the basis that the appellant had the power to give the covenant in question, and each was in as good a position as the other to ascertain whether or not that was so. The contract has been fully executed except as to the future performance on the part of the city as to the maintenance of the tax exemption, and on the part of the appellant as to the maintenance of its shops at their present location.

(1) (1880) 5 A.C. 473.

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With respect to the point taken as to the lack of power on the part of the company, the view expressed by Lord Cairns L.C. in *Ashbury's* case at p. 672, is, in my opinion, applicable. There is nothing involved in the covenant, in my view, which "involves that which is *malum prohibitum* or *malum in se* or is a contract contrary to public policy and illegal in itself." The question is not "as to the legality of the contract; the question is as to the competency and power of the company to make the contract." The covenant here in question, on the assumption it was beyond the powers of the company, which I make for present purposes, was simply void. Being *ultra vires* the appellant, and therefore void, there can be no question of damages. Otherwise, the case would fall, in my opinion, within the principle of *Boone* v. *Eyre* (1). In that case, the plaintiff had conveyed to the defendant by deed the equity of redemption of a plantation together with the stock of negroes upon it in consideration of £500 and an annuity of £160 per annum for his life; and covenanted that he had a good title to the plantation, was lawfully in possession of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. The breach assigned was the non-payment of the annuity, while the plea was that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey. On demurrer, it was held by Lord Mansfield that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent. Lord Mansfield went on to say,

> If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

In Carter v. *Scargill* (2), there was in question an agreement between the parties for the sale and purchase of a business the estimated profit of which was £7 per week,

(1) 1 H. Bl. 273 note; 126 E.R. 160. (2) (1875) 10 L.R.Q.B. 564.

and it was agreed that in the event of it being proved by the books of the vendor that the profit should be as stated, the purchaser was to pay the purchase price in specified installments. Possession was taken of the business by the defendant and resold, but in an action to recover the balance of the installments, the position was taken that the plaintiff had not established that the business was as profitable as stated. It was there held by Cockburn C.J., Quain and Field JJ. that that which might have been a condition precedent had ceased to be so by the defendant's subsequent conduct in accepting less than his bargain, with the result that the condition went only to a portion of the consideration and that not a substantial portion.

While the present case is not one in which the respondent may be compensated in damages should it suffer any in the event that the assumed obligation of the appellant to maintain the shops at Winnipeg cannot be enforced against it, I think that the view more fully expressed by my brother Rand as to the proper relief in equity is the correct one. It is past question, in my view, that the case is one for equitable relief rather than that the respondent, having obtained to date everything for which it originally stipulated with the exception of a binding agreement in which the existing status of the shops will be maintained, cannot in conscience be allowed to take the position that its agreement with respect to the tax exemption is no longer to be enforced against it. I think the facts are eminently such as to call for the application of the principle of compensation insofar as performance on the part of the appellant may fall short of that which it would have been obliged to provide if the covenant on its part, and which it asserts to be binding, were binding in law. I therefore agree on this branch of the case with the order proposed by my brother Rand.

It is next argued for the respondent that the obligation to maintain the workshops and stockyards "within the city of Winnipeg" means within the limits of the city as they existed at the date of the by-law, and that the removal of the workshops in 1903 from their location within the original city to a location outside that area but within the limits of the city at the time of removal, was a breach of contract. It is contended that even if this did not put an

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end to the exemption *in toto,* no lands of the appellant company outside the existing limits at the date of the contract are entitled to the exemption.

In my opinion, this contention is without merit. Under the terms of para. 8 of the by-law, the exemption was to extend to

all property now owned, or that hereafter may be owned by them (the company) within the limits of the city of Winnipeg, for railway purposes, or in connection therewith.

This provision itself looks to the future, and on the natural reading of the language employed, the words "within the limits of the city of Winnipeg" should be held to mean within the limits of the city as they shall from time to time exist. The whole object of the agreement was to induce the continued development and growth of the city, and that being so, it would be in contradiction to the plain meaning of the language to restrict the paragraph to the limits then existing. That that is not even a plausible contention is, I think, borne out by reference to the first recital of the by-law, which is as follows:

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

When one looks at the words "the city of Winnipeg" where they secondly appear in the above recital, it is plain, in my opinion, as in the case of para. 8, that the city spoken of there, with respect to which traffic and trade was to be "developed and advanced," meant the city of Winnipeg as it should from time to time develop and expand.

It is pointed out on behalf of the respondent that while by-law 148 was passed on September 5, 1881, and the amending by-law on October 30, 1882, the amended by-law was to take effect from September 21, 1880, and it is contended that had the agreement been intended to apply to any territory not within the city at the effective date of the by-law, some express language to that effect would have been employed. In my opinion, this is not the situation to which these provisions were directed.

In the first place, the by-law provides for the issue of debentures payable in twenty years from the day "this by-law takes effect." By para. 1, the debentures were made

payable on September 20, 1901, and accordingly, the date upon which the by-law should come into operation had to be fixed, as it was fixed by para. 9, on September 21, 1881. In addition, the provincial Act of 1875, 38 Vict. c. 50, provided by s. 931 that any by-law for contracting debts by borrowing money would be valid only if the by-law should name a day in the financial year in which the same was passed when the by-law should take effect. I think it is clear, therefore, that the contention under consideration is not well founded.

It is also contended on behalf of the appellant that the exemption extends to so-called business taxes. As this point is concluded in this court by our decision in *Canadian Pacific Railway Company* v. *Attorney General for Saskatchewan* (1), effect must be given to this contention.

The remaining question is as to whether or not the exempting provision extends to the Royal Alexandra Hotel and restaurant of the appellant company. The hotel is a modern, high class structure of a well known type, having six floors with 445 rooms available for guests. It is one of a system maintained by the appellant company across the country. While it serves to draw traffic to the appellant's railway, it is not only available to the travelling public generally, but serves the local community in providing suitable space for entertainment and public functions as well as for more or less permanent guests. It is also used by the appellant to lodge employees from time to time, and it is a convenient place for the holding of railway conferences, and passengers are, at times, accommodated there in emergencies. The hotel laundry looks after some of the laundry for the railway.

It is to be observed that the only property which the by-law exempts is property owned by the appellant for "railway purposes or in connection therewith," i.e. in connection with "railway" purposes. As pointed out by their Lordships in *Canadian Pacific Railway* v. *Attorney General for British Columbia* (2), a company may be authorized to carry on, and may in fact carry on, more than one undertaking, but merely because the company is a railway company, it does not follow that all its activities must relate to its railway undertaking. As shown by the evidence,

(1) [1951] S.C.R. 190; 1 D.L.R. 721. (2) [1950] A.C. 122.

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the first Canadian Pacific hotels were established in the Rocky Mountains. Because of the very heavy grades existing in the early days, the trains were not able to have diners, and it was necessary that they be stopped at convenient points to enable the passengers to take food and rest. That day has long since passed, and hotels of the type at present under consideration do not owe their existence to any necessity in connection with the operation of the railway proper.

As pointed out earlier in this judgment, the company was incorporated for the purpose of carrying out the contract of October 21, 1881, and for no other purpose. The power to erect the mountain hotels was no doubt incidental to the powers conferred upon the company at its incorporation, but until 1902 the company did not have the power to go into the hotel business in connection with such hotels as the Royal Alexandra at Winnipeg and the Empress at Victoria.

Their Lordships in the *Empress* case state that the case with which they were dealing was not the case of an hotel conducted solely or even principally for the benefit of travellers on the system of the appellant company, and that there was little to distinguish the Empress Hotel from an independently owned hotel in a similar position. The same applies with equal force to the Royal Alexandra. No doubt, the fact that there is a large and well managed hotel at Winnipeg does tend to increase traffic on the appellant system, and it may be that the appellant's railway business and hotel business help each other, but that does not prevent them from being separate businesses or undertakings which, in my view, is the case so far as the Royal Alexandra is concerned.

In my opinion, therefore, the conduct of such an hotel as the Royal Alexandra was not within the contemplation of the contracting parties at the time of the passing of by-law 148, and I do not think that such an hotel is owned by the company for "railway" purposes or "in connection therewith" within the meaning of the by-law. The fact that the business of the hotel may be operated in connection with the business of the railway does not, in my

opinion, make the hotel exempt property within the meaning of para. 8 of the by-law. That the hotel is in physical connection with the appellant's Winnipeg railway station does not affect the matter.

By an agreement of August 4, 1906, entered into between the appellant and the respondent at a time when, by c. 57 of the Statutes of Manitoba, 63-64 Vict. (1900) s. 18, the property of the appellant company within the city was exempt from municipal taxation, it was arranged that the appellant should pay a stated sum to the respondent in lieu of taxation in respect of the hotel "if the same were anyway liable to any taxation." The appellant points to the first recital in the agreement which states that the company has built "in connection with its railway and the operation thereof", as a recognition that the hotel is owned by the company in connection with "railway purposes" within the meaning of by-law 148. The agreement contains a further recital, however, that the "city has claimed that said hotel property should be made subject to municipal taxation on the grounds that an hotel was not originally included within the meaning of a railway" enterprise. In view of this, I think that the first recital cannot be taken as a recognition that the hotel was to be considered as within the meaning of the agreement of 1881, but rather the contrary.

I further think that the words in the first recital, "in connection with its railway and the operation thereof," have not the same meaning as the words, "property owned for railway purposes or in connection therewith," in by-law 148. In the case of the latter, the property dealt with was property owned for the purpose of the construction and operation of the railway described in the statute of 1881, while the property referred to in the first recital of the agreement of 1906 was property acquired by virtue of the express power granted to the appellant by s. 8 of its Act of 1902 by which it was authorized to conduct an hotel business "for the purposes of its railway and steamships and in connection with its business" of operating the railway, which in 1881 had been its exclusive business. The first recital in the agreement of 1906 is evidently based on this legislation. Moreover, as by-law 148 and the amending by-law required and received validation at the hands of

the provincial legislature, it was not competent for the city, without further legislation, to vary by any act or conduct, the terms of the agreement evidenced by the by-law.

In my opinion, therefore, appellant derives no assistance from anything contained in the agreement of 1906. In 1909, amending legislation was passed by the provincial legislature which deprived the hotel of its exemption from municipal taxation, following which, in 1914 and 1942, further agreements were made between the parties with respect to payment to the city by the appellant in respect of the hotel property in lieu of municipal assessment. The appellant again says that these agreements are a recognition that the respondent construed the exemption in by-law 148 as extending to the hotel in question. I do not think, however, that, apart from enabling legislation, it was competent for the city in this way to extend the meaning of the words used in 1881, or to exempt property, which by general law was subject to taxation. I think, therefore, the appellant's contention with respect to the hotel fails. We heard no argument that, in this event, the restaurant could be considered in any other position.

In the result, the appellant succeeds substantially, and should have three-quarters of the costs in this court and in the Court of Appeal. The judgment of the trial judge should be restored with the variation indicated above as to the hotel and restaurant. The order as to costs at trial should not be interfered with.

The judgment of Estey and Cartwright JJ. was delivered by:

ESTEY J.:—The Canadian Pacific Railway Company (hereinafter referred to as the company) contends that it is exempt from realty and business taxes assessed and levied in the year 1948 by the city of Winnipeg (hereinafter referred to as the city). This contention is based upon an agreement made between the city and the company in 1881 under which the company undertook to build 100 miles of railway southwest from the city, a passenger station and stockyards in the city and to execute and

deliver to the city a bond and covenant under its corporate seal to the effect that the company would

build within the limits of the city of Winnipeg, their principal workshops for the mainline of the Canadian Pacific Railway within the province of Manitoba, and the branches thereof radiating from Winnipeg, within the limits of the said province, and for ever continue the same within the said city of Winnipeg.

The city, on its part, undertook to issue debentures in the sum of $200,000 at 6 per cent, payable to the company on September 20, 1901, and to convey to the company the land upon which the station was constructed. This agreement also included the following provision:

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

This agreement is set out in by-law 148 as passed by the city on September 5, 1881, and amended by by-law 195 passed by the city on October 30, 1882. Apart from extending the time for completing the 100 miles of railway and the passenger depot and cancelling the first two interest coupons on the debentures, by-law 195 effected no other changes. The province of Manitoba in 1883, by statute (46-47 Vict., S. of M. 1883, c. 64), declared that the by-laws (148 and 195) were "legal, binding and valid upon the said the mayor and council of the city of Winnipeg . . ." It is conceded that the company has not made default under this agreement, that the city conveyed the land and delivered the debentures and, apart from an unsuccessful attempt, *The Canadian Pacific Railway Company* v. *The City of Winnipeg* (1), to levy school taxes for the years 1890-94, no further or other taxes have been levied in respect of this property by the city until 1948, from which the company in this litigation claims exemption.

The four main questions raised, and all decided by the learned trial judge in favour of the company, are as follows:

(*a*) Is the agreement between the city and the company, contained in by-laws 148 and 195, valid and binding?

(*b*) If valid and binding, is the exemption operative only within the limits of the city of Winnipeg as these existed at the time the agreement was made or as these limits have been from time to time constituted?

(1) (1900) 30 Can. S.C.R. 558.

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(c) If the agreement is valid and binding, is the exemption therein provided for applicable to the Royal Alexandra Hotel and restaurant of the company within the city of Winnipeg?

(d) If the agreement is valid and binding, does the exemption therein provided for include the business tax?

In the Appellate Court the decision of the learned trial judge on question (*a*) was affirmed, but a majority of that court reversed the learned trial judge upon questions (*b*), (*c*) and (*d*).

The city contends that while the Canadian Pacific Railway Company was incorporated by letters patent under the Great Seal of Canada dated February 16, 1881, it is not a common law corporation endowed with the powers of an individual, but is, in effect, a statutory corporation and, therefore, can exercise only those powers expressly provided in, or necessarily implied from the terms of incorporation and that these terms do not expressly, or by necessary implication, give to the company the powers to bind itself forever, as it purported to do by the agreement of September 5, 1881.

The original agreement for the construction and operation of the Canadian Pacific Railway executed between a group therein styled "the company" and the government of Canada, under date of October 21, 1880, contemplated an Act of incorporation as evidenced by para. 21 thereof:

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

Before the statute (44 Vict., S. of C. 1881, c. 1) approving and ratifying this contract was enacted it was evidently deemed desirable to provide for an alternative method of incorporation and accordingly sec. 2 of that statute provided:

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 language of this s. 2 is consistent with the view that Parliament intended the letters patent should be issued by the Governor General in the exercise of the prerogative right. At the outset it is provided that

For the purpose of incorporating . . . and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof . . .

This wide and comprehensive language is not limited or restricted by the provision

a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract . . .

The position is similar to that in the *Bonanza Creek* case (1), where, though granted in accord with the statute, the letters patent were granted by the Lieutenant Governor of Ontario in the exercise of the prerogative right. The company, therefore, was endowed with the powers and capacities of a natural person, subject to any limitations or restrictions imposed by the statute.

Moreover, while this alternative method is provided in the same statute (S. of C. 1882, c. 1) in which statutory effect is given to sec. 21 of the contract, under which it was contemplated incorporation would be by statute, it was, as already pointed out, arranged for at a date subsequent to the contract. In these circumstances the intent and purpose of Parliament in making this alternative provision would be to provide something different in effect from that of incorporation by statute, and in the absence, as here, of any specific explanation, that intent and purpose would appear to be that if letters patent were issued the Governor General would do so in the exercise of the prerogative right and thereby give to the company the powers and capacities of a natural person, possessed only by corporations created in that manner, subject to such limitations or restrictions as the statute imposed.

The position is somewhat analogous to that in *Elve* v. *Boyton* (2), where it was contended that a company incorporated by letters patent pursuant to a statute (6 Geo. I, 1719, c. 19) was not incorporated by an Act of Parliament. Lindley, L.J., with whom Lopes, L.J., agreed, stated at p. 508:

The answer is, it would have been impossible, without the Act of Parliament, to create such a corporation by that charter or any other

(1) [1916] 1 A.C. 566. (2) (1891) 1 Ch. 501.

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charter. The real truth is, that, if you look at it very closely, the corporation owed its birth and creation to the joint effect of the charter and of the Act of Parliament, and you can no more neglect the Act of Parliament than you can neglect the charter.

The language of Lindley L.J., is particularly apt as, apart from s. 2 above quoted, the company could not have been, in 1881, incorporated by letters patent. Parliament had, in 1877, expressly prohibited that possibility by providing that the incorporation of companies for the "construction and operation of railways" could not be effected by "Letters Patent under the Great Seal" (40 Vict., S. of C. 1877, c. 43, s. 3). When, therefore, it was decided that the alternative method of incorporation by letters patent should be made available, it was necessary that such be provided for by an express statutory provision, as indeed it was in s. 2.

This statute (44 Vict., S. of C. 1881, c. 1) was assented to on February 15, 1881, and on the following day letters patent were issued under the Great Seal of Canada incorporating the company. These letters patent recited the contract of the 21st of October, 1880, and the foregoing s. 2 and that "the said persons have prayed for a charter for the purpose aforesaid" and then provided:

Now know ye, that, by and with the advice of our Privy Council for Canada, and under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in us vested in this behalf, We Do, by these our Letters Patent, grant, order, declare and provide * * * are hereby constituted a body corporate and politic, by the name of the "Canadian Pacific Railway Company."

The reference to statutory authority in the foregoing paragraph immediately followed by the words "and of any other power and authority whatsoever in us vested in this behalf," with great respect to those who entertain a contrary view, leads rather to the conclusion that the Governor General, in issuing the letters patent, acted not only pursuant to the statutory but to another authority separate and apart therefrom which, in the circumstances, could be only the prerogative right. 6 Halsbury, 2nd Ed., p. 459, s. 547. The words "in this behalf," again with great respect, do not, in this context, refer to the contract but rather the power and authority to issue letters patent for the incorporation of companies.

In the *Bonanza Creek* case *supra* the letters patent, apart from the inclusion of the word "Statute" instead of "Act," included the following identical words that appear in the foregoing:

under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in Us vested in this behalf.

The phrase "in part recited Statute," in the Bonanza Creek letters patent, refers to the Companies Act of Ontario (R.S.O. 1897, c. 191), s. 9 of which reads, in part, as follows:

The Lieutenant-Governor in Council may, by letters patent, grant a charter * * * creating and constituting * * * a body corporate and politic for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends, except the construction and working of railways, * * * *

Viscount Haldane points out that s. 9 of the Ontario Act corresponds to s. 5 of the Dominion Companies Act (R.S.C. 1906, c. 79), the predecessor of which is s. 3 of the Companies Act of 1877 (40 Vict., S. of C. 1877, c. 43). While letters patent were not granted to the company under any of the foregoing general statutory provisions, they would, no doubt, be present to the minds of the parties when determining the method of incorporation.

The contract, statute and charter must all be construed in relation to the circumstances that obtained in 1880 and 1881. The construction, maintenance and operation of the railway was then an undertaking of the greatest magnitude. Parliament, particularly because of its obligations to British Columbia under the terms and conditions of the latter's admission into Confederation, desired not only that the railway should be constructed, but that its maintenance and operation should be efficient. It had provided that two parts of the railway should be constructed by the government of Canada and, when completed, handed over to the company. It was in these circumstances that Parliament enacted the provisions in s. 2 that, as an alternative to the incorporation by the Act of Parliament, letters patent might be issued. The language then adopted, particularly when construed in relation to the letters patent, as well as the circumstances of 1880 and 1881, discloses an intention that these were issued in the exercise of the prerogative right and thereby ensure to the company the benefits and advantages of that method of incorporation, subject only to the provisions of the statute.

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Even if, however, the letters patent incorporating the company were not issued by the Governor General in the exercise of his prerogative right, but rather in the exercise of a power delegated to him by the statute, and, therefore, the company must be treated as if it had been incorporated by statute, it would seem that the power to execute the contract here in question would be necessarily incidental to those powers expressed in the charter. That it was present to the minds of the parties that the company would be called upon to pay taxes is evident from the fact that they had provided for certain property of the company to be forever exempt in the contract with the government (cl. 16). In the same contract (cl. 7) the company agreed to "forever efficiently maintain, work and run the Canadian Pacific Railway." Under these circumstances the power to make agreements binding forever with respect to payment of and exemption from taxes would be included, or at least necessarily incidental to the powers conferred upon the company by the words "granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof," (S. 2 *supra*). This provision is in accord with cl. 21 of the contract, where it was provided:

> The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, * * *

and all this is implemented in the letters patent where it is provided that the company shall possess

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

It is not suggested that at the time the contract with the city was made, or at any time thereafter, it has not proved useful to the company.

The concluding words of s. 2 above quoted make it clear that, while the charter is not an Act of Parliament, it shall have the force and effect thereof and shall be held to be in compliance with the provisions of the contract relative to incorporation. This provision was necessary by virtue of the terms of cl. 21 of the contract and it would appear that that was the only reason for its insertion.

In either view, the company, in executing the contract, did not exceed its powers as provided in its charter. This distinguishes this case from that of the *Whitby* v. *The Grand Trunk Railway Co.* (1), where the contract to erect and maintain the chief workshops of the company at Whitby was held to be beyond the powers given to the company incorporated in Ontario by 31 Vict., c. 42.

The company's covenant to "for ever continue" its principal workshops for the main line in Manitoba and the branch lines radiating out of the city and within the province does not offend against the principle that a company incorporated and entrusted with powers and duties by the legislature "cannot enter into any contract or take any action incompatible with the due exercise of its powers or the discharge of its duties." 8 Halsbury, 2nd Ed., 74, para. 126.

The contention of the city is that this covenant is incompatible with the company's obligation to "forever efficiently maintain, work and run the Canadian Pacific Railway." The foregoing principle was applied in *Montreal Park and Island Railway Company* v. *Chateauguay and Northern Ry. Co.* (2), where Davies J. (later C.J.C.), with whom Girouard J. agreed, stated at p. 57:

> * * * the courts ought not to enforce and will not enforce an agreement by which a chartered company undertakes to bind itself not to use or carry out its chartered powers. I do not think such an agreement ought to be enforced because it is against public policy.

The learned judge went on to explain that if the company can covenant not to exercise its powers in part it may do so in whole and that

> The courts have no right to speculate whether Parliament would or would not have granted these chartered powers to the defendant company over the limited area. Parliament alone can enact the limitation, and neither courts of justice nor companies can substitute themselves for Parliament.

See also *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Ry. Co.* (3); *Ayr Harbour Trustees* v. *Oswald* (4); *Town of Eastview* v. *Roman Catholic Episcopal Corp. of Ottawa* (5); *Re Heywood's Conveyance* (6).

(1) (1901) 1 O.L.R. 480.
(2) (1904) 35 Can. S.C.R. 48.
(3) (1852) 5 De G. & Sm. 562; 64 E.R. 1243.
(4) (1883) 8 App. Cas. 623.
(5) (1918) 47 D.L.R. 47.
(6) [1938] 2 All. E.R. 230.

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The company's powers do not require the construction of its said principal workshops in any particular place in the province of Manitoba. They might, therefore, have been placed by the company at any point that it might have selected. What is significant is that its placing of them in the city has never been regarded as inconsistent or incompatible with its duty to forever maintain and operate the railway efficiently. In other words, the complaint is not that the company has failed or contracted not to exercise its power, but only that it has contracted not to exercise that power elsewhere in the province of Manitoba than the city of Winnipeg. That city may always remain the proper place for the maintenance of these principal workshops. Therefore, the language of the contract does not disclose any inconsistency or incompatibility with the company's duty. The city, however, suggests that future events, such as war, floods or other emergency, amalgamation or development in transportation equipment or methods may require the company, in the discharge of its duty, to move these principal workshops elsewhere, which would then be prevented by virtue of the existence of this covenant to forever maintain them in Winnipeg.

This is not a case, therefore, such as the *Montreal Park and Island Railway Co. supra* where the company contracted not to construct its railway in an area where its powers authorized it to do so. It is equally distinguishable from *Ayr Harbour Trustees* v. *Oswald supra* where the trustees purported to bind themselves in respect to the use of land and thereby to impose restrictions upon their use thereof, contrary to the purpose as contemplated under the statute under which they had acquired same. In both of these cases the language of the covenant was incompatible with the due exercise of the company's power. On the same basis the other cases above mentioned are also distinguishable.

Moreover, where, as already pointed out, the language of the covenant is not, upon its face, inconsistent or incompatible with the due exercise of the powers and the performance of the duties of the company, then, as pointed out by Lindley L.J., in *Grand Junction Canal Co.* v. *Petty* (1), the presence of incompatibility must be established by

(1) (1888) 21 Q.B.D. 273.

evidence. This view was referred to by Lord Sumner in *Birkdale District Electric Supply Co.* v. *Corporation of Southport* (1), and where, as here, no evidence is adduced, the statements of Lord Sumner would appear relevant where, at p. 375, he states:

> In the present case the company's activities have not yet been and may never be impaired by the agreement at all. So far it may have been and probably has been safe and beneficial. How, then, can it have been *ultra vires* hitherto?

These remarks are particularly applicable because the possible incompatibility here present is founded upon the future possibility that these workshops, as located, would prevent the efficient management of the Canadian Pacific Railway. In such circumstances a finding of incompatibility should be established by evidence and not founded upon speculations as to the future, particularly in respect of a company that has been carrying on for over seventy years in a manner that in no way constitutes a suggested inconsistency or incompatibility.

No case was cited, nor have we found one, which, in principle, would justify the decree here requested, where the incompatibility is neither apparent from the language used nor established by evidence, but is supported only upon the possibility of future events which, even if they should occur, might not require the removal of the workshops in order that the railway might be efficiently maintained and operated and, therefore, would not establish the suggested incompatibility.

Moreover, it should be noted that the covenant here in question is concerned only with the principal workshops and, therefore, what other workshops may be necessary may be constructed by the company at such points in Manitoba as it may deem necessary or desirable.

Counsel on behalf of the city contends that it had no power to pass by-laws 148 and 195. The city derives its corporate powers from the province of Manitoba and even if, at the time, the province had not vested the city with the necessary power to pass the by-laws, any deficiency in that regard was supplied when the province enacted 46-47 Vict., S. of M. 1883, c. 64, declaring these by-laws 148 and 195 to be "legal, binding and valid upon the said the

(1) [1926] A.C. 355.

mayor and council of the city of Winnipeg * * * *" This language does not support the city's contention that the statute merely validated the power of the city to enter into the agreement with the company and did not validate the agreement itself. The view that it did validate the agreement is not only supported by the foregoing language, but is strengthened by the language of the recital of the statute which reads, in part:

> And whereas, it is deemed expedient to set at rest all doubts that may exist as to the validity of any or all the above in part recited by-laws and the debentures issued thereunder, and to legalize and confirm the same, and each of them respectively.

The city of Winnipeg possessed the authority to enact by-laws, but it was the terms or the substance of by-laws 148 and 195 that gave rise to the questions as to their validity and the legislature resolved these questions by the foregoing enactment. In *Ontario Power Co. of Niagara Falls* v. *Municipal Corporation of Stamford* (1), where similar questions were raised, the legislature of Ontario "legalized, confirmed, and declared to be legal, valid and binding * * *" the by-law. Then once the terms of the by-law were validated there remained only the question of the construction of the terms thereof.

It was also submitted that the agreement was negotiated under the mistaken belief that it would assure the passage of the main line of the railway through the city of Winnipeg. By-laws 148 and 195 do not contain any undertaking on the part of the company to construct the main line through that city. On the contrary, throughout these by-laws it is rather assumed, as indeed the fact was, that the main line had already been altered to run through that city. In the recital Winnipeg is declared to be "a central point on the main line" and in the operative part the company undertakes to "establish and build within the limits of the city of Winnipeg, their principal workshops for the main line * * * *". It, therefore, appears that the parties were contracting upon the basis that the main line had already been altered to run through the city of Winnipeg and, therefore, there was no misunderstanding or mistake as to the facts in relation to which they were contracting, nor was there any failure of consideration.

(1) [1916] A.C. 529.

The city contends that the company's obligation to build their principal workshops "within the limits of the city of Winnipeg" should be construed to mean the limits as constituted on September 5, 1881, the date of the passage of by-law 148. It is important to observe that this phrase is not contained in an enactment of a law providing merely for an exemption from taxation, but is rather a law embodying the terms of an agreement in which the city, in consideration of undertakings to be, and, in fact, later executed by the company, obligated itself to exempt the company from taxation as therein provided. In these circumstances it should be construed, as stated by Lord Sumner, as "one of bargain and of mutual advantage," rather than as a statute providing for an exemption from taxation. *City of Halifax* v. *Nova Scotia Car Works Ltd.* (1). When the contract, as set out in by-law 148, is read as a whole, the conclusion is inevitable that the parties were looking to the future. The railway was not entirely constructed. The route of its main line had been altered to pass through Winnipeg. It would, when in operation, open up a vast new territory and Winnipeg was anxious to become an important commercial and railway centre. With this end in view, it agreed to help the company if the latter would construct certain facilities within its boundaries. The first recital states that 100 miles of railway southwest out of Winnipeg

> should be built for the purpose of developing and advancing the traffic and trade between the city of Winnipeg and * * * *

The second recital emphasizes the establishment and continuation of the principal workshops and the stock yards. Then in the operative part, particularly in para. 4, the company undertakes to

> erect * * * large and commodious stock or cattle yards, suitable and appropriate for the central business of their main line of railway and the several branches thereof.

At the time this covenant was given there was at Winnipeg neither main line nor branch lines and, of course, no railway business, and, while it is not necessary to determine the precise extent of this undertaking, it is obvious that it was looking to future circumstances. There is found, therefore, both in the recital and the operative parts, language

(1) [1914] A.C. 992.

that supports the view that the parties were, in this contract, looking to the future development of both the railway and the city. In so far as the contract provided for the debentures of $200,000 and the payment therefor, it could only deal with the limits as then constituted.

It is significant that between the passage of by-laws 148 and 195 the area of the city of Winnipeg was more than doubled. By-law 148 was passed on September 5, 1881. The legislation providing for the enlargement of the city boundaries was assented to on May 30, 1882. About five months thereafter, on October 30, 1882, by-law 195 was passed amending by-law 148. Therefore, the amendment to by-law 148 contained in by-law 195 was passed at a time when the extension of the boundaries would be present to the minds of the mayor and the council of the city. If, therefore, the parties had intended in their contract, as evidenced by by-law 148, that the words "within the limits of the city of Winnipeg" meant the limits as they then existed, and those limits only, the possibility of misunderstanding and the desirability of clarification would have been equally present to their minds when amending by-law 148 by the passing of by-law 195. In these circumstances, had it been intended that the contract should forever apply only to the limits as fixed at the date of the contract, apt words would have been included in by-law 195 to give expression to that intention.

It is contended that, because by-law 148 specified that it should take effect as of the 21st day of September, 1881, and this date was carried forward in by-law 195, that the parties intended the words "within the limits of the city of Winnipeg" to mean the limits as constituted at the date of the contract. It is important to observe that the statute (37 Vict., S. of M. 1873, c. 7) incorporating the city of Winnipeg, as amended in 1875 (38 Vict., S. of M. 1875, c. 50, s. 93, subsec. 1), provided that a by-law such as 148 would not be valid unless it set out a day when the by-law should take effect. In accordance with that provision, by-law 148 set out that it should take effect on the 21st day of September, 1881. It had a particular significance in this case because the debentures were to be granted by way of bonus payable in twenty years from the day this by-law was to take effect with interest at 6 per cent per annum. Any

amendment, therefore, changing this date would affect the provisions for the issue of the debentures which were left, apart from that with respect to the first two coupons, entirely unchanged by the by-law 195. In these circumstances the fact that this provision was carried forward in identical language in by-law 195 does not support a conclusion that the parties intended thereby that the exemption should apply only to the boundaries of the city of Winnipeg as constituted on the date of the contract.

The workshops, as originally constructed, were within the limits of the city of Winnipeg as it existed at the time of the execution of the contract, and there remained, until 1903, when they were moved and reconstructed upon a location within the area added to the city in 1882. The city now, so far as the record discloses, for the first time contends that this removal of the workshops constituted a breach of the conditions of the contract and of the bond and covenant given as provided. This removal was openly made in a manner that could not but have been known to the officials of the city of Winnipeg. They did not then nor at any time have they made any objection thereto and have never sought to impose taxes thereon.

The subsequent conduct of the parties may be looked at, not to add to or vary the contract, but to assist in determining the intent and meaning of the parties. The record discloses that throughout the period from 1881 to date the city of Winnipeg has not, at any time, suggested that the phrase "within the limits of the city of Winnipeg" meant the limits as constituted at the date of the contract, but, on the contrary, the terms of the contract itself and the subsequent conduct of the parties indicate that such was never intended. *City of Calgary* v. *The Canadian Western Natural Gas Co.* (1).

It is suggested that in using the words "within the limits of the city of Winnipeg" the parties intended to designate the boundaries as then constituted, particularly as in other parts of the by-law the phrase used is "in the city of Winnipeg." It will be observed that in the second recital it is stated that the company have agreed to establish and continue their principal workshops and stock yards for the province of Manitoba "in the city of Winnipeg"; that with

(1) (1917) 56 Can. S.C.R. 117.

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respect to the stock or cattle yards the company undertook to erect them "within the city of Winnipeg." When they come to the exempting paragraph (cl. 8) they again use the words "on property now owned or that hereafter may be owned by them within the limits of the city of Winnipeg." It does not appear to me, in these circumstances, that the parties had in mind any particular distinction between the words "within the city of Winnipeg" and "within the limits of the city of Winnipeg."

When the contract is read as a whole and regard is had to the purpose and object thereof, as well as the circumstances surrounding the parties as they negotiated and executed it, and the subsequent conduct of the parties, particularly that of the city, one is led to the conclusion that the parties were contracting in respect of Winnipeg as an entity, regardless of its boundaries at any particular time, and, therefore, the exemption is applicable to areas that have been subsequently included within the boundaries of the city.

The company was authorized to own and operate hotels in 1902 (2 Edw. VII, S. of C. 1902, c. 52). Under this authority it constructed, in 1906, the Royal Alexandra Hotel, and it is now contended by the city that the Royal Alexandra Hotel and the restaurant therein are not included within the scope of the exemption set out in para. 8 of by-law 148, wherein it is provided, in part, that

all property now owned, or that hereafter may be owned * * * within the limits of the city of Winnipeg, for railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind.

The evidence in this case establishes that the hotel is adjoining the railway station and physically attached thereto; that "the railway uses the hotel services extensively"; that through the medium of its restaurant, dining room and other hotel facilities it provides food and lodging to passengers and employees of the company. It is conceded that these services are available to and utilized by the general public; the laundry in the hotel provides services to the sleeping and dining car department of the railway; that in the hotel "railway conferences and staff meetings are held"; that supplies for the hotel are provided or purchased for the hotel by the railway purchasing department.

The language of the exemption does not require that the property should be used exclusively "for railway purposes or in connection therewith" and, having regard to the evidence adduced in this case, it cannot but be concluded that even if the Royal Alexandra Hotel and restaurant are not used for railway purposes they are used "in connection therewith" and, therefore, within the terms of the exemption.

This case must be determined upon the language adopted by the parties, which raises issues quite distinct from that of determining whether the Empress Hotel was an integral part of the Canadian Pacific Railway system within the meaning of the British North America Act. *Canadian Pacific Ry. Co.* v. *The Attorney General of British Columbia* (1).

It is suggested that, because the Canadian Pacific Railway Company was not authorized to own and operate hotels until 1902, the exemption provided for in 1881 cannot be said to cover an enterprise which, at that date, would have been illegal. In the construction and operation of this hotel the company has acted within the authority granted to it by the statute of 1902. As already indicated, the company had, from the date of its incorporation, all the powers possessed at common law by a corporation created by charter. Even if this were not so, it is my opinion that, while the parties to the contract did not contemplate illegal acts, they did contemplate that as the enterprise developed significant changes would be made and, therefore, provided that not only the property "now owned" but also "that hereafter may be owned" by the company "shall be forever free and exempt." The fact that in 1902 the company was granted further statutory powers does not limit or restrict the meaning and effect of the words "that hereafter may be owned." The Royal Alexandra Hotel and the restaurant are, therefore, included within the language of the foregoing exemption.

In 1906, in 1914 and again in 1942 the parties to this litigation entered into agreements under which the Canadian Pacific Railway Co. paid certain amounts in lieu of taxation in respect of the hotel. These agreements disclose that there was a disagreement as to whether the property

(1) [1950] A.C. 122; 1 W.W.R. 220.

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was taxable and that in lieu of determining the issue the Canadian Pacific Railway Co. agreed to pay, and the city to accept, the specified amounts. Counsel for both parties ask that certain conclusions be drawn favourable to their respective contentions from the language used, but, having regard to the nature and character of the agreement and the language used, no conclusion ought to be drawn that would assist either party in determining their rights in these matters. These agreements were essentially made in lieu of the determination of those rights.

Then with respect to the validity of the business tax, prior to 1893 the city of Winnipeg was authorized to impose taxation upon real and personal property. In that year, by an amendment to the Assessment Act (56 Vict., c. 24), the city was no longer empowered to impose taxation upon personal property but was authorized to impose a business tax and it was expressly provided that this tax was "levied in lieu of a tax upon personal property." This has since been continued and is now found in the charter of the city of Winnipeg (S. of M. 1940, c. 81, as amended in 1948 by S. of M., c. 92) as sec. 291(1):

> 291. (1) * * * every person carrying on any business in the city whether he resides therein or not shall be assessed for a sum equal to the annual rental value of the premises * * *

and s. 9 provides:

> 9. Nothing in this Act shall
>
> (a) injure, affect, prejudice, or cause the forfeiture or impairment of, the benefit, right, exemption, or privilege, if any, of the Canadian Pacific Railway Company under
>
> (i) by-laws numbered respectively 148 and 195 or any other by-law of the city of Winnipeg; * * *

Apart from this statutory recognition of the exemptions created by by-laws 148 and 195 with respect to the business tax, the language of this exemption which we are here considering—"all property now owned, or that hereafter may be owned * * * shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind."—is even more broad and comprehensive than that in cl. 16 considered in *Canadian Pacific Ry. Co.* v. *Attorney General for Saskatchewan* (1), where this court held that the business tax was included within the exemption there provided for. The principle of that decision resolves this issue in favour of the company.

(1) [1951] S.C.R. 190.

The appeal should be allowed. The costs at trial should remain as directed by the Chief Justice of the Court of King's Bench for Manitoba. The appellant Canadian Pacific Railway Co. should have its costs in the Court of Appeal. In this court the two appeals, by order of Mr. Justice Kerwin, were consolidated and proceeded with as one appeal. The appellant Canadian Pacific Railway Company should have its costs in this court.

LOCKE J.:—By the agreement which provided for the construction of the Canadian Pacific Railway made between Her Majesty, acting in respect of the Dominion of Canada, and George Stephen and others, referred to therein as the company, dated October 21, 1880, it was provided *inter alia* that the portions of the proposed line which were to be built by the latter should be completed and in running order on or before May 1, 1891, and after providing that the portions to be constructed by the government of Canada should be duly completed and then conveyed to the company, the latter agreed to "thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway". In addition to the land grant and subsidy in money provided by the contract, it was agreed that there should be granted to the company the lands required for its road-bed, stations, station grounds, buildings, yards and other appurtenances required for the convenient and effectual construction and working of the railway, in so far as such land should be vested in the government, and that, in addition, there should be admitted free of duty all steel rails and a number of other enumerated articles required for the construction of the road free of duty. By a further term, it was stipulated that the company should have the right, subject to the approval of the Governor in Council to lay out and locate the line of the railway.

The first reference to the incorporation of a company appears in paragraph 17 of this contract which commences:

> The company shall be authorized by their Act of incorporation to issue bonds, etc. * * * *

and this is followed by the language which has given rise to so much discussion in the present matter, incorporated in sections 21 and 22 which reads:

> 21. The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be

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binding in the event of an Act of incorporation being granted to the company in the form hereto appended as Schedule A.

22. The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of Incorporation to be granted to the company, shall apply to the Canadian Pacific Railway.

Schedule A to the contract bears the heading "Incorporation" and is expressed in the language in common use for the incorporation of companies by private Acts. Section 4 of this document reads:

All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.

By chapter I of the Statutes of Canada, 1881, assented to on February 15th of that year, the contract was approved and ratified by Parliament and the government authorized to perform and carry out its conditions. While s. 21 of the contract made it clear that what was contemplated was that the company to be formed should be created by an Act of Parliament, the statute contained as s. 2 the following provision:

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.

What was meant by the word "charter" in this section was immediately made clear. On February 16, 1881, letters patent of incorporation under the Great Seal of Canada were issued incorporating the Canadian Pacific Railway Co. There is apparently no explanation as to why this procedure for the incorporation of the company was followed rather than that contemplated by the contract. While s. 4 of the schedule referred to above indicated that the proposed

company was to have the widest powers to enable it to carry out its undertaking and to take advantage of the various privileges and advantages which it was to receive from the Crown, it was perhaps considered advisable that it would be preferable to vest in the company the powers of a common law corporation restricted only in the matter defined by the contract and the schedule rather than to enumerate those powers which it was to be authorized to exercise. But this is mere speculation. If, therefore, assuming that the powers of the company are only those which it would have enjoyed had the incorporation been by a special Act of Parliament, the contract entered into by it with the city of Winnipeg was beyond its powers, it would be necessary to determine a second question, i.e., as to whether the railway company has all the powers of the natural person.

By its statement of claim, the railway company alleges that on or about September 5, 1881, an agreement was made between the company and the city granting to it the exemptions from taxation which are in issue in the present matter, the terms of which are stated to be set forth in certain by-laws of the city of Winnipeg. From the terms of the first of these by-laws, it is evident that there had been an agreement between the parties but, if it was reduced to writing, the document has not been produced. By-law No. 148 was adopted by the city on September 5, 1881, the date of the alleged agreement. After reciting that it was desirable that a line of railway should be built towards the westerly limit of the province of Manitoba through the Pembina Mountain district, for the purpose of developing traffic and trade between the city of Winnipeg and those portions of the province and:

to secure the location of the work-shops and stockyards of the said company for the province of Manitoba in the city of Winnipeg as a central point on the main line of the Canadian Pacific and the several branches thereof, and the said company have agreed to construct a railway south and south-westerly, as aforesaid, at the time and in the manner as in this by-law hereinafter mentioned, and have agreed to establish and continue their "principal workshops and stockyards for the province of Manitoba in the city of Winnipeg aforesaid."

the by-law authorized the council to issue debentures in the total sum of two hundred thousand dollars charged on the whole rateable property in the city of Winnipeg

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and to deliver them to the railway company on the performance by it of certain defined conditions. Of primary importance is condition 3, which provided as follows:

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

In addition to providing for the delivery of the debentures, the by-law declared that:

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

By a by-law No. 195, adopted by the city on October 30, 1882, by-law No. 148 was amended and re-enacted and by c. 64 of the Statutes of Manitoba for 1883 assented to. On July 7 of that year the Act of Incorporation of the city was amended upon the petition of the mayor and council by declaring *inter alia* that these two by-laws were "legal, binding and valid upon the said the mayor and council of the city of Winnipeg". The learned trial judge has found as a fact that the railway company performed its various obligations referred to in the by-law in accordance with the terms of the agreement referred to: and that the city, on its part, discharged the obligations which it had assumed.

The first question to be determined is raised by the plea in the statement of defence of the city of Winnipeg that the railway company:

> had no right, power or authority under its charter or otherwise, to make, or execute, or deliver such a bond and covenant,

Referring to the bond and covenant required to be given by the company under condition 3 above referred to, and by a further plea that the railway company was without power under its charter or otherwise, to agree to build within the city of Winnipeg, or at any other place, its principal workshops for the main line of its railway within the province of Manitoba and to continue them forever.

For the railway company, it is contended that the incorporation being by letters patent, under the Great Seal of Canada, it has all the powers of a natural person and that the doctrine of *ultra vires* does not apply to it and reliance is placed upon the judgment of the judicial committee in *Bonanza Creek Gold Mining Co.* v. *The King* (1). For the city, it is said that the powers of the city are those only which it would possess if incorporated by an Act of Parliament and that the principle stated in *Ashbury Ry. Carriage and Iron Co.* v. *Riche* (2), applies.

The learned chief justice of the Court of King's Bench was of the opinion that the railway company had all of the powers of a common law corporation and in the Court of Appeal the Chief Justice of Manitoba and Coyne and Adamson JJ.A. agreed. The late Mr. Justice Richards considered that the company's powers were limited to those set forth in the Act authorizing its charter but that to enter into the agreement was within its powers. Dysart J.A. concluded that although the charter was in the form of a Royal Charter it was in substance a statutory one and the agreement *ultra vires* the company.

In the view I take of this matter, it is unnecessary to decide whether or not the Canadian Pacific Railway Company is vested with the powers of a common law corporation. I think that, if it be assumed for the purpose of argument that the powers of the company are simply those it would possess if the incorporation had been by statute and the terms of the letters patent contained in that statute, to enter into the bond and covenant was within those powers.

By the contract of October 21, 1880, which was approved and ratified by c. 1 of the statutes of 1881, the contractors assumed the vast obligation of building the major portion of the proposed railway through a country largely unsettled and following a route only generally defined and thereafter together with those portions of the proposed road to be constructed by the government, to:

thereafter and forever efficiently maintain, work and run.

the railway. While certain of the terminal points of the line then in part under construction were to be preserved, the company was to have the right, subject to the approval

(1) [1916] A.C. 566. (2) L.R. 7 H.L. 653.

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of the Governor in Council, to lay out and locate the proposed line and advantage was taken of this provision by abandoning the proposed route running generally westward from Selkirk and establishing the main line of the railway on a line which included the city of Winnipeg and changing the route through the mountains from the Yellow Head to the Kicking Horse Pass. By s. 21 of the contract, the company to be incorporated was to have "sufficient powers to enable them to carry out the foregoing contract" and it was apparently realized that wide powers must be given to the proposed company to enable it to advantageously carry out its terms. It was, in my opinion, for this reason that s. 4 of Schedule A to the contract was expressed in such wide language. It is clear that when the contract was signed, that the proposed incorporation was to be by an Act of Parliament which, I think, explains the very broad powers described in para. 4. It would have been quite unnecessary to particularize these powers in this manner had it been contemplated in 1880 that the incorporation should be by letters patent under the Great Seal, without any restriction upon the powers which such an incorporation would have vested in the company. Whatever the reasons which led to the grant of letters patent and whether or not it was intended by that Act to vest in the company the powers of a common law corporation, para 4 of schedule A was incorporated verbatim in the letters patent. Thus, there was conferred upon the company by s. 4 of the letters patent all the powers necessary or useful to enable it to discharge its obligations under the contract. It was, in my opinion, for the railway company to determine the location of its principal workshops for the main line of the Canadian Pacific Railway within Manitoba and the branches radiating from Winnipeg and that these workshops should be continued in such location as it should determine and to conclude as favourable a bargain as could be negotiated with the city or municipality where these were to be located. By the Fall of 1881 the directors of the company had evidently reached the conclusion that Winnipeg, by virtue of its location, was to be the principal city in the province of Manitoba and, thus, the most suitable place from which branch lines such as the line running south to Morris and westerly through the

Pembina Mountains areas, should have their eastern terminus. The company was not asked by the city in exchange for the promised tax exemption and the grant of the debentures to maintain its only railway workshops for the main line in Manitoba in Winnipeg, but merely the principal workshops: others might be constructed elsewhere in the province. The further obligation was to erect large and commodious stock and cattle yards suitable and appropriate for the central business of the main line and the several branches as mentioned in section 3 of the by-law, language which was incorporated in the covenant rather than that of paragraph 2 of the preamble to the by-law which referred to the "principal workshops and stockyards." The power of the company to agree to build a general passenger depot upon a designated site in the city is not, of course, questioned.

The comment of Lord Selborne L.C., on the decision of the House of Lords in *Ashbury Railway Co.* v. *Riche, supra,* in *Attorney General* v. *Great Eastern Railway Co.* (1), is that the doctrine of *ultra vires* as explained in the earlier case is to be maintained but that it should be reasonably understood and applied and that whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorized ought not, unless expressly prohibited, be held by judicial construction to be *ultra vires.* There is nothing in the letters patent or in the Act of 1881 which prohibited the railway company from entering into such a covenant as the one here in question. It was, in the language of s. 4, undoubtedly "useful" to the company to enable it to carry out its contract to construct the railway and thereafter to operate it in perpetuity to give such a covenant, in order to obtain such extensive financial assistance and exemption from municipal taxation. In my opinion, the contention that it was beyond the powers of the Canadian Pacific Railway Co. to enter into the bond and covenant, fails.

As a further defence to the action, the defendant pleads that it had no right, power or authority under its charter or otherwise, to pass by-laws Nos. 148 or 195. The original charter of incorporation of the defendant is contained in

(1) (1880) 5 App. Cas. 473 at 478.

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c. 7 of the statutes of 1873 and thereby the inhabitants of the city and their successors were declared to be:

> A body politic and corporate in fact and in law by the name of "The Mayor and Council of the city of Winnipeg" and separated from the county of Selkirk for all municipal purposes.

It was by this name that the corporation was described in the consolidated charter of the city in c. 36 of the statutes of 1882. The language of s. 6 of c. 64 of the statutes of 1883, in so far as it affects the present matter, reads:

> That * * * by-law No. 148 to authorize the issue of debentures granting by way of bonus to the Canadian Pacific Railway Company the sum of $200,000 in consideration of certain undertakings on the part of the said company; and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertakings expressed in by-law No. 148 by the Canadian Pacific Railway Company, and all debentures and coupons for interest issued under each and every of the said by-laws, be and the same are hereby declared legal, binding and valid upon the said mayor and council of the city of Winnipeg.

Without considering the question as to whether the corporation had the power to agree to the tax exemption and the granting of the bonus under its existing powers, it is clear that it was intended to validate the by-laws and declare that the obligations on the part of the city referred to in them were binding upon it. To otherwise construe the section would be, in my opinion, to defeat the intention of the legislature. S. 14 of the Interpretation Act (c. 105, R.S.M. 1940) declares that:

> Every Act and every regulation and every provision thereof shall be deemed remedial and shall receive such fair, large and liberal construction and interpretation as best insures the attainment of the object of the Act, regulation or provision.

The object of the amendment was to set at rest any doubts as to the power of the corporation to obligate itself in the manner described in the by-laws and the section must, in my opinion, be so construed.

The bond and covenant of the railway company, dated October 10, 1881, delivered in pursuance of the agreement recited in the city by-laws, after referring in a recital to the agreement of the city to grant aid to the company to the extent of $200,000 by the issue of debentures and by exempting the property of the company from certain taxation, obligated the company to:

> establish and build within the limits of the said city of Winnipeg their principal workshops for their main line of railway within the province

of Manitoba and for the branches thereof, radiating from the said city of Winnipeg within the limits of the said province and that they will forever continue the same within the said city of Winnipeg.

At the time this instrument was made, the area contained within the limits of the city of Winnipeg were those defined by c. 7 of the statutes of Manitoba for 1873 and an extension provided by c. 38 of the statutes of 1875, and it was within this area that the workshops erected in pursuance of the covenant were placed. Thereafter, on various occasions, the limits of the city were extended: large areas were added by c. 45 of the statutes of 1882 and these limits were further extended in the years 1902, 1906 and 1907. In the year 1903, the railway company removed the workshops from the original site to a point further west within the area added in 1882 where they have since been maintained. By an amendment to its statement of defence, the city alleges that the railway company is not entitled to the exemptions from taxation claimed, since it did not fulfill the conditions mentioned in by-law No. 148 in that about the year 1903, the company built their principal workshops or a substantial part thereof, outside the limits of the city of Winnipeg as defined and constituted in the year 1881. The recitals in the by-law declared *inter alia* that it was desirable to secure the location of the workshops and stockyards of the company for the province of Manitoba in the city of Winnipeg as a central point on the main line of the Canadian Pacific Railway and the several branches thereof and that the company had agreed to establish and continue its principal workshops and stockyards for the province in the city. "Desirable" meant desirable in the interest of the municipal entity known as the city of Winnipeg and of its inhabitants. The purpose of those negotiating on behalf of the municipal corporation was to ensure in its interest and in the interest of its present and future inhabitants that these activities of the railway company, with the manifest benefits which would result, should be continued for all time in Winnipeg. They did not seek the benefit merely for the then residents of the city living within its existing limits, but also for those who would thereafter live within the limits of the corporation from time to time and the corporation whatever might be its limits. They did not stipulate the place within the corporate limits where the workshops should be placed

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which was apparently not regarded as a matter of moment: they sought to ensure simply that they should be constructed and maintained and operated within the limits of the corporation as they might be from time to time. The purpose of the railway company which had obligated itself by its contract with the government to operate the railway line in perpetuity was to obtain, not only immediate financial help, but exemption from municipal taxes for all time.

In *River Wear Commissioners* v. *Adamson* (1), Lord Blackburn stating the principle to be applied in the construction of the language of instruments in writing, said in part:

> In all cases, the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.

The question is what is the meaning of the words "within the said city of Winnipeg" as used in this covenant and it is permissible, in my opinion, to consider the language of the by-law in pursuance of which it was given as an aid to construction. Once the object of both parties is ascertained, it seems to me that the meaning is made perfectly clear. Without resorting to other aids to interpretation, it is my opinion that the obligation was to continue the workshops within the limits of the city of Winnipeg as they might be from time to time.

Assuming that there is doubt as to the meaning to be assigned to these words, the subsequent conduct of the parties may be examined to resolve the ambiguity and to do this in the present matter makes certain what both parties intended by the language employed. The workshops were built within the limits of the City of Winnipeg as defined by the city charter as it read in the year 1881, but in the following year, those limits were largely extended. The railway company owned properties within the new areas added to the city in 1882. Presumably, if effect is to be given to the argument of the city on this aspect of the matter, the expression "the city of Winnipeg" in s. 8 of by-law No. 148 which declared the right to the tax

(1) (1877) 2 A.C. 743 at 763.

exemption, should be construed in the same manner as those words in s. 3 and of the covenant given in pursuance of the terms of the latter section. However, it is admitted that none of these lands either in the original or in the added area were subjected to municipal taxation between the years 1882 and 1900 except that in 1894 the city sought to levy school taxes upon the railway company's property and brought an action to recover them, which failed. Between the years 1900 and 1947, the city was prohibited by the terms of the Railway Taxation Act (63 and 64 Vict. c. 57) from taxing the property of the company. Apart from any question as to the effect the judgment in this action may have upon the present proceedings by rendering issues here sought to be raised *res judicata,* it is of importance to note, as relating to the subsequent conduct of the parties, that in that action (*City of Winnipeg* v. *Canadian Pacific Railway Co.*) (1), which was decided upon a demurrer, the question litigated was as to whether school taxes were within the class of taxes for which exemption had been promised, and it was not then contended by the city that that exemption was in any event limited to lands owned by the railway company for railway purposes within the limits of the city of Winnipeg as they existed in 1881. It is perhaps further worthy of note that the claim that the railway company had lost its right to any tax exemption provided by the by-law by virtue of the fact that in 1903 it had established its principal workshops or a substantial part thereof outside the limits of the city of Winnipeg as defined and constituted in the year 1881 was first raised by an amendment to the statement of defence made some months after the original defence, some thirty-five paragraphs in length, had been filed. This suggests that this point had not occured to the city or any of its legal representatives until after the original statement of defence was filed.

In the view that I take of this matter it is unnecessary to deal with the question as to whether the power of the city to enter into the agreement is *res judicata* by reason of the litigation between the parties commenced in the year 1894 above referred to (12 M.R. 581; 30 S.C.R. 561).

The question as to whether business taxes are within the exemption provided for by the by-law is, in my opinion,

(1) 12 Man. L.R. 581; 30 Can. S.C.R. 558.

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concluded in favour of the appellant by our decision in *Canadian Pacific Ry.* v. *Attorney General of Saskatchewan* (1).

There remains the question as to whether the Royal Alexandra Hotel property falls within the exemption. The promised exemption was of all property then owned or which might thereafter be owned by the railway company within the limits of the city of Winnipeg:

"for railway purposes or in connection therewith".

The Royal Alexandra Hotel is built on railway property at the corner of Higgins avenue and Main street, in the city of Winnipeg, and is physically connected with the railway station. Part of the station building itself is used by the Royal Alexandra Hotel as a coffee shop which provides meals to the travelling public and railway employees. The hotel was originally constructed in 1906 and considerably enlarged in the year 1914. According to Mr. William Manson, vice-president of the prairie region of the railway company, the railway uses the hotel services of this hotel extensively. All linen from the sleeping and dining cars is laundered in the hotel laundries. Accommodation is furnished to extra sleeping and dining car conductors and dining car crews during periods of heavy traffic, meals are provided to these employees and some railway conferences and staff meetings are held there. In the same manner as the other hotels operated by the railway company in Toronto, Regina, Calgary and elsewhere, the Royal Alexandra Hotel provides food and lodging for the travelling public. Speaking generally of all the railway company's hotels, Mr. Manson said that they have been established for the traffic that they would draw to the railway and that it its considered essential to proper railway service to have an adequate hotel system. The Royal Alexandra, however, does not restrict its activities to those above described but is used by the general public, irrespective of whether they are making use of the railway's other facilities: balls and entertainments are held there and other public functions.

The question is simply one of construction of the language of the by-law. While the hotel is clearly not used exclusively for railway purposes or in connection therewith, to

(1) [1951] S.C.R. 190.

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

It has been contended in argument that the decision of the judicial committee in *Canadian Pacific Ry.* v. *Attorney General for British Columbia* (1), affects the matter, but I think that this is not so. The issue in that litigation was as to whether the hours of work of the employees of the Empress Hotel in Victoria, owned and operated by the present appellant, were regulated by The Hours of Work Act of British Columbia. Three questions were considered on the appeal: the first of these was raised by the contention that the Empress Hotel being an integral part of the railway system of the company and its activities having become such an extensive and important element in the national economy of Canada, the regulation of its activities did not come within the class of matters of a local or private nature comprised in the enumeration of the classes or subjects assigned by s. 92 exclusively to the legislatures of the provinces, so that parliament was entitled under the general powers conferred by the first part of s. 91 to regulate its affairs; the second was as to whether the hotel was part

(1) [1950] A.C. 122.

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of the appellant's railway works and undertaking connecting the province of British Columbia with other provinces and thus within the exception contained in head 10(*a*) of s. 92; the third was as to whether the hotel, as part of the company's railway system, fell within head 10(*c*) of s. 92 as a work which had been declared by parliament to be for the general advantage of Canada or of two or more of its provinces. All of these questions were decided contray to the contentions of the railway company. None of them appear to me to bear upon the present matter which, as I have said, is simply one of the construction of the particular language of the by-law.

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

The appeal of the railway company should be allowed with costs and that of the respondent city dismissed with costs; the judgment of the Court of Appeal should be set aside and that of the learned trial judge restored. The appellant should have its costs in the Court of Appeal.

Appeal of the Canadian Pacific Railway Co. allowed, judgment of Court of Appeal set aside and that of trial judge restored with costs here and in the Court of Appeal. Appeal of the city of Winnipeg dismissed with costs.

Solicitor for Canadian Pacific Railway Co.: *H. A. V. Green.*

Solicitor for The City of Winnipeg: *G. F. D. Bond.*