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*Feb. 19, 20, 21, 24
**Nov. 3

IN THE MATTER OF AN ACT FOR EXPEDITING THE DECISION OF CONSTITUTIONAL AND OTHER PROVINCIAL QUESTIONS, BEING CHAPTER 37 OF THE REVISED STATUTES OF MANITOBA, 1940,

AND

IN THE MATTER OF A REFERENCE PURSUANT THERETO BY THE LIEUTENANT-GOVERNOR-IN-COUNCIL TO THE COURT OF APPEAL FOR THE HEARING OR CONSIDERATION OF CERTAIN QUESTIONS ARISING WITH RESPECT TO CLAUSE 16 OF THE CONTRACT SET FORTH IN THE SCHEDULE TO CHAPTER 1 OF THE STATUTES OF CANADA, 1881, AND THE MUNICIPAL ACT, BEING CHAPTER 141 OF THE REVISED STATUTES OF MANITOBA, 1940, AS AMENDED.

THE ATTORNEY-GENERAL FOR MANITOBA ..... APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY ..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law—Railways—Municipal taxation—Whether C.P.R. property in area added to Manitoba in 1881 taxable by municipalities—Statutes of Canada (1881), c. 1—B.N.A. Act, 1871 (Imp.), c. 28—Boundaries Act, 1881 (Can.), c. 14; 1881 (Man.), c. 1 and c. 6.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.

**The Chief Justice, owing to illness, took no part in the judgment.

The exemption given to the Canadian Pacific Railway from taxation by "the Dominion or by any Province hereafter to be established, or by any Municipal Corporation therein", which is contained in cl. 16 of the contract between the company and the Government of Canada, approved and ratified by c. 1 of the Statutes of Canada (1881), applies to the territory taken from the then North-West Territories in 1881 and added to the existing Province of Manitoba by the *Boundaries Act,* 1881 (Can.), c. 1, to which the Province consented in c. 1 and c. 6 of its statutes for the year 1881.

Per Taschereau, Rand, Cartwright, Fauteux and Abbott JJ.: The exemption was more than a term of a contract, it was a "provision enacted" within the meaning of ss. 2 and 3 of the *Boundaries Act.* The effect of the charter as an Act was to declare that exemption legislatively. When a contractual right of this nature becomes vested by statute in a company, in order to carry out the legislative intent, there is necessarily to be attributed to it the character of enactment. But even if that is not so, yet, as being contained in an Act of Parliament, it is a provision enacted respecting the railway and its lands within s. 2(*b*) of the *Boundaries Act.*

The exemption, not from taxation by a future province, but from taxation under future-created provincial power, having become legislative in character, as law was in force in the added territory when the extension became effective in 1881; it was continued in force by the *Boundaries Act,* which, by its terms, withdrew from provincial taxation the subject-matter described, which it was not beyond the competence of Parliament to do. *Attorney General of Saskatchewan v. C.P.R.,* [1953] A.C. 594.

The tax exemption did not cease to exist when, in 1906, the provisions of the *Boundaries Act* which had been repealed and re-enacted in 1887, were in turn repealed and not re-enacted. The *Boundaries Act* became a limitation of the taxing power of the province embodied in its constitution.

Per Locke and Cartwright JJ.: Sections 2 and 3 of the *B.N.A. Act,* 1871, empowered Parliament to impose the restriction on the powers of taxation of the Province of Manitoba as its limits were defined by the legislation of 1881 and the latter section empowered the legislature to agree to this as one of the terms upon which the addition to its boundaries were made and to pass the legislation of that year. The judgment of the Judicial Committee in *Attorney General for Saskatchewan v. C.P.R.,* [1953] A.C. 594, has settled the question as to whether taxes may be levied in respect of the business carried on as a railway upon the main and the branch lines as distinct from general municipal taxation.

The Dominion has not expressly or impliedly repealed, by acts passed since 1881, the restriction on taxation: *Minister of National Revenue v. Molson,* [1938] S.C.R. 213 at 218. As to the province, it was without power to pass any legislation which might affect in any way the restriction on its taxation powers provided by the legislation of 1881: an Act of the Imperial Parliament would have been required.

Canadian Pacific Railway Company v. Burnett (1889), 5 Man. R. 395; *Canadian Pacific Railway Company v. Municipality of Cornwallis* (1890), 7 Man. R. 1; (1891), 19 S.C.R. 702; *Canadian Pacific Railway*

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Company v. Municipality of North Cypress (1905), 14 Man. R. 382; (1905), 35 S.C.R. 550; *Reference Re Section 17 of the Alberta Act*, [1927] S.C.R. 364, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], on a reference by the Lieutenant-Governor in Council. Appeal dismissed.

The following questions were asked and were answered as follows by the Court of Appeal[2]:

1. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the province of Manitoba in 1881?

Answer: Yes.

2. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the Province of Manitoba in 1881?

Answer: No, except as in the answer to Question 4.

3. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the following property situated in the said territory added as aforesaid to the Province of Manitoba in 1881: All stations and station grounds, work shops, buildings, yards and other property and appurtenances required and used for the construction and working of the said main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the Province of Manitoba in 1881?

Answer: Yes.

4. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the following property situated in the said territory added as aforesaid to the Province of Manitoba in 1881: all stations and station grounds, work shops, buildings, yards and other property and appurtenances required and used for the construction and working of the said branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the Province of Manitoba in 1881?

[1] [1956] 2 D.L.R. (2d) 112, 73 C.R.T.C. 208.
[2] [1956] 2 D.L.R. (2d) at 131, 73 C.R.T.C. at 228.

Answer: No, except such of those properties above as are also required and used for the construction and working of the main line.

5. Does said clause 16 exempt and free from taxation the Canadian Pacific Railway Company under the said The Municipal Act of Manitoba in respect of the business carried on as a railway on the main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the Province of Manitoba in 1881?

Answer: Yes.

6. Does said clause 16 exempt and free from taxation the Canadian Pacific Railway Company under the said The Municipal Act of Manitoba in respect of the business carried on as a railway on the branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the Province of Manitoba in 1881?

Answer: No, except such business as above carried on as a railway on branch lines as is required for or in connection with the construction and working of the main line or with or for the purpose of business on the main line.

A. E. Hoskin, Q.C., J. Allen, Q.C., and *J. H. Stitt, Q.C.,* for the appellant.

C. F. H. Carson, Q.C., A. Findlay, Q.C., and *H. M. Pickard,* for the respondent.

D. H. W. Henry, Q.C., for the Attorney General of Canada, intervenant.

The judgment of Taschereau, Rand, Fauteux and Abbott JJ. was delivered by

RAND J.:—This appeal raises a question of exemption from taxation of that portion of the main line with its appurtenances of the Canadian Pacific Railway lying within an area of Manitoba which, in 1881, was taken from the then North-West Territories and added to the province by complementary legislation of Parliament and legislature. The exemption is based upon cl. 16 of the agreement providing for the construction of the railway, originally between the government of Canada and the promoters of the undertaking for whom the Canadian

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Pacific Railway Company was by legislation substituted. The issues, in substance, are whether it was competent to the Dominion to make the exemption a term or condition of the legislation effecting the extension, and if so, whether the language employed was adequate to the purpose.

The same question as applied to lands granted to the company as subsidy was before this Court in 1891 and 1904 and on both occasions the claim of the company was upheld: *The Rural Municipality of Cornwallis v. Canadian Pacific Railway Company*[1] and *The Rural Municipality of North Cypress et al v. Canadian Pacific Railway Company*[2]. Those judgments are now challenged generally. Since they were rendered important constitutional questions arising from the establishment of provinces out of Rupert's Land and the North-West Territories have been passed upon by the Judicial Committee; and although in this appeal we are, as I think, concluded by them, since the controversy is intended, in any event, to be carried to the Committee and elaborate arguments have been presented to us, it may not be out of place to state the considerations which lead me independently of them to their result.

The obligation on the Dominion government to construct a railway between the Pacific coast and the railway system in Ontario arose as one of the terms of the entry of British Columbia into the Dominion. That union was effected as of July 20, 1871, and shortly afterwards Parliament enacted legislation containing general provisions as the first step towards implementing the obligation. After a series of difficulties, embarrassments and vicissitudes, the government and the promoters came to a final accord in 1881.

The constituting documents with the accompanying legislation contain the provisions on which the issue is to be decided. They consist of the contract with a draft charter annexed to it; the statute of Parliament, 44 Vict., c. 1, to which it was a schedule, ratifying it, authorizing the Dominion government to incorporate the promoters and their associates, and generally to take the necessary measures to set the project on its course; the dominion and provincial enactments bringing about the extension of the provincial

[1] (1891), 19 S.C.R. 702.

[2] (1905), 35 S.C.R. 550.

boundaries; and the *British North America Acts* of 1867 and 1871. The charter, in the form of letters patent, was, by s. 2 of c. 1, to embrace all authority required to carry the contract into execution, and to confer upon the company the powers and privileges embodied in the draft annexed to the contract. Section 2 declared:

> . . . 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.

Chapter 1 was passed on February 15, 1881; on February 16, letters patent issued constituting the Canadian Pacific Railway Company a body corporate and politic. Clause 3 of the letters declared that as soon as certain of the stock of the company had been subscribed, a percentage paid up, and the sum of $1,000,000 deposited with the Minister,

> the said contract *shall become and be transferred to the Company,* without the execution of any deed or instrument in that behalf; and the Company shall, thereupon, become and be vested *with all the rights of the contractors* named in the contract, and shall be subject to, and liable for, all their duties and obligations to the same extent and in the same manner as if the said contract had been executed by the said Company instead of by the said contractors;

and cl. 4 that:

> 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 cl. 16 of the contract, the exemption provision,

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

In the meantime negotiations had been proceeding between the Dominion government and that of Manitoba for the enlargement of the area of the province by the

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annexation of adjacent lands within the then Territories. This question seems to have arisen shortly after the admission of the province to the union and in 1873 the legislature passed an Act, 37-38 Vict., c. 3, declaring the consent of the province to an increase of territory, subject to approval of the terms and conditions of dominion legislation effecting it.

By 33 Vict., c. 3 of Parliament, Manitoba, as of July 15, 1870, had been established out of Rupert's Land and the North-West Territories which, as of the same day, had been transferred to Dominion jurisdiction by an Imperial Order-in-Council. It was evidently considered that having been vested with complete jurisdiction over these territories, Parliament possessed power to carve new provinces out of them. But doubts arose as mentioned in the recital to the Imperial Act of 1871, 34-35 Vict., c. 28, to remove which that statute was passed. Section 2 authorizes Parliament to establish "new provinces in any territories forming, for the time being, part of the Dominion of Canada, but not included in any province thereof" and at the time of that establishment to

> make provision for the constitution and administration of any such province and for the passing of laws for the peace, order and good government of such province and for its representation in the said parliament.

By s. 3, with the consent of the legislature of any province, Parliament may increase, diminish, or otherwise alter the limits of such province "upon such terms and conditions as may be agreed to by the said legislature"; and with like consent,

> to make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any province affected thereby.

By s. 5, the *Manitoba Act*, c. 3, 32-33 Vict., is "to be and to be deemed to have been valid and effectual for all purposes whatsoever". Section 6 declares Parliament to be incompetent, except as provided by the third section, to alter the provisions of the *Manitoba Act* "or of any other Act hereafter establishing new provinces in the said Dominion", reserving to Manitoba certain powers of modification of the *Manitoba Act* not pertinent here. The effect of s. 6 is to give to any Act constituting a province

the character of an Imperial statute. It was under the authority of s. 3 that the enlargement of the provincial boundaries of Manitoba was brought about.

The legislation providing for this consisted of 44 Vict., c. 6 of the province, and 44 Vict., c. 14 of Parliament. Section 2 of c. 14 provided:

> 2. (*a*) All the enactments and provisions of all the Acts of the Parliament of Canada which have, since the creation of the Province of Manitoba, been extended into and made to apply to the said Province shall extend and apply to the territory by this Act added thereto as fully and effectually as if the same had originally formed part of the province and the boundaries thereof had, in the first instance, been fixed and defined as is done by this Act, subject, however, to the provisions of section three of this Act.
>
> (*b*) The said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted, respecting the Canadian Pacific Railway and the lands to be granted in aid thereof.

And s. 3:

> 3. All laws and ordinances in force in the territory hereby added to the Province of Manitoba at the time of the coming into force of this Act, and all courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative and ministerial, existing therein at the time of coming into force in this Act, shall continue therein as if such territory had not been added to the said province, subject nevertheless with respect to matters within the legislative authority of the Legislature of the Province of Manitoba to be repealed, abolished, or altered by the said Legislature.

It was argued by Mr. Hoskin that by these sections the exemption is limited to "all such *provisions* as may have been or shall hereafter be *enacted*" respecting the railway or its lands, and that what the company has is only a term of a contract which is not a "provision enacted". By cl. 3 of the charter there was vested in the company "all the rights of the contractors", and by cl. 4

> . . . all the franchises and powers necessary or useful to enable the Company to enforce, use, and avail themselves of, every condition, stipulation . . . right, remedy, privilege and advantage agreed upon, contained or described in the said contract.

What was the "right" under cl. 16? Apart from Dominion taxation within existing provinces, it was exemption from taxation by any legislative organ, Dominion or provincial, of the main line of railway and the subsidy lands of the company which as of February 15, 1881, were not then contained within the territory of a province. The effect of the charter as an Act was to declare that exemption legislatively; in the statutory structure for such a national

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work, unless the language does not permit any other interpretation, it is not to be taken that that character of declaration was omitted. The express vesting of the right was more than effecting a contractual novation; that had sufficiently been done by substituting the company for the individual contractors. In the face of that statutory provision neither Parliament nor legislative delegate in the Territories could then have validly imposed taxation without repealing or conflicting with the exemption as law existing within the Territories. As a contractual right the enforcement of the exemption could strictly be by way of injunction only. By an exemption, as it might be called, "in rem", the taxing power is itself modified; and when a contractual right of that nature becomes the subject-matter of a statutory investment in a company, in order to carry out the legislative intent, there is necessarily to be attributed to it the character of enactment. In the Act of 1905 setting up the province of Saskatchewan, s. 24 makes the exercise of provincial powers "subject to the provisions of s. 16 of the contract". No one would suggest that this so far does not abstract legislatively from the taxing power of the province; there would be no question of enforcing that right as purely contractual: there is imported a legislative effect. The same result follows from cl. 4:

> . . . all the franchises . . . necessary or useful . . . to enable them to enforce, use and avail themselves of . . . every right, remedy, privilege and advantage agreed upon . . .

The "franchises" include legislative immunity from taxation.

But even if these two investments by the charter are to be taken in a contractual sense, yet, as being contained in an Act of Parliament, they are *provisions enacted respecting the railway and its lands* within s. 2(*b*) of c. 14. In that sense they are, verbally, of the same apparent character as s. 24 of the *Alberta Act;* and the interpretation given to the latter must be accorded the former.

It is then contended that, although cl. 16 is a "provision enacted", its own terms exclude its application to the situation here; the taxation of land which is to be exempt is that "by the Dominion or by any province hereafter to be established or by any municipal corporation

therein" and since Manitoba was already established it cannot be said that by enlarging its boundaries there was created a new province. Chapter 14 was passed by Parliament on March 21, 1881, c. 6 by the legislature on May 25, 1881, and by proclamations both came into force on July 1, 1881. The latter Act in its preamble recites ss. 2(*a*),(*b*), 3 and 4 of c. 14 (1881), declares the consent of the legislature to the terms and conditions of that Act, and by s. 1 enacts that:

> The territorial boundaries and limits of the province of Manitoba shall be extended and increased as in that Act is mentioned and expressed, subject to the terms and conditions therein contained, and the said Act and all the enactments and provisions thereafter shall have the force and effect of law in this province so enlarged and increased as aforesaid . . .

Section 2 in substance reproduces s. 3 of c. 14 continuing all existing laws in the added territory until

> . . . the same and every of them which are or is within the executive and legislative authority of the province of Manitoba, are or is from time to time, as may seem expedient, by Order in Council to be published in the Manitoba Gazette, altered or changed and brought under and subject to the laws of the province of Manitoba; . . .

The exemption, not, as I construe it, from taxation by a future province but from taxation under future-created provincial power, having become legislative in character, as law was in force in the added territory when the extension became effective, July 1, 1881; by s. 3 of c. 14 it was continued in force, and by its terms it withdrew from provincial taxation the subject-matter which it described. Chapter 14 appears to have been enacted on that assumption.

Section 2(*b*) declares the territory added to be subject to all such provisions "as may have been or shall hereafter be enacted" by Parliament *respecting the railway and the subsidy lands*. The reference to the railway and the subsidy lands could have no other than cl. 16 as subject-matter: all other matters respecting the railway would be independent of "terms and conditions" reserved, and within Dominion powers under ss. 91(29) and 92(10) of the Act of 1867. On the view urged, Parliament used this express language in relation to a situation to which, on its face, cl. 16 could not apply.

But whatever the precise construction we might give to s. 2(*b*) in the context of the contract, as in substance it deals with tax exemption of the property described, as the

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exemption is made a condition of the extension of boundaries, and as we cannot treat it as wholly ineffectual and nugatory, we are bound to take it to be an affirmative enactment withholding taxing powers from Manitoba over the railway works and subsidy lands within the added area; and from that moment, as law of the area, it is continued in force by both ss. 2(*b*) and 3.

It is argued that it was beyond the competence of Parliament to withhold the taxing power furnished the province by s. 92(2) of the 1867 Act. It has already been held by the Judicial Committee in *Attorney General of Saskatchewan v. Canadian Pacific Railway Company*[1], approving *Reference re Constitutional Validity of section 17 of the Alberta Act*[2], that in the constitution of Saskatchewan, which in this respect is identical with that of Alberta, a reservation to that effect was valid; both are provinces set up under the powers conferred upon Parliament by s. 2 of the *British North America Act, 1871*. That section provides for vesting in new provinces power to pass laws for their "peace, order and good government"; s. 3 enables the alteration of provincial limits on "such terms and conditions as may be agreed to". That these conditions embrace the preservation of one of the terms of fulfilling such a vital constitutional obligation as that being carried out in 1881 seems to me to be too clear for debate. The reservation in the case of the new provinces was a direct limitation of taxation power; and I am unable to distinguish that effect when confined to a portion of a province from its applicability to the whole. Considerations justifying such conditions are adverted to in *Attorney General of Saskatchewan v. Canadian Pacific Railway Company, supra*. At p. 615, Viscount Simon says:

> From the time that the North-West Territory was admitted into the Dominion, the Parliament of Canada had the widest powers of legislation under section 5 of the Rupert's Land Act, 1868. It might have caused great inconvenience if the Parliament of Canada, when carving new Provinces out of the added areas, could not make such deviation from section 92 as was necessary to make effective acts done under the powers conferred on it by section 5 of the Rupert's Land Act, 1868, and section 4 of the 1871 Act. These considerations support the conclusion of the Supreme Court in the *Alberta reference,* (1927) S.C.R. 364, and their Lordships are not prepared to differ from it.

[1] [1953] A.C. 594, 3 D.L.R. 785, [1953] C.T.C. 281.
[2] [1927] S.C.R. 364, 2 D.L.R. 993.

The obligation to construct the transcontinental railway was of that character.

A last contention is made in these terms: in the revisions of the statutes in 1886 the provisions of c. 14 (1881) were repealed and re-enacted in somewhat different form as ss. 1, 2 and 6 of c. 47, R.S.C. 1887; the latter, for the purposes of the revision in 1906, were in turn repealed by 6-7 Ed. VII, c. 43, and not re-enacted; by the last repeal the tax exemption ceased to exist.

Section 2(*b*) of c. 14 (1881) as a condition annexed to the legislation enlarging the provincial boundaries became a limitation of the taxing power of the province embodied in its constitution. The *Imperial Act* of 1871, by s. 3, empowered Parliament to "increase, diminish, or otherwise alter" the limits of a consenting province, but nothing in it touches a subsequent modification of conditions. Section 2 enabled Parliament to

> establish new provinces in any territory forming, for the time being, part of the Dominion of Canada but not included in any province thereof;

and by s. 6, subject to s. 3, Parliament is declared incompetent to alter the provisions of the *Manitoba Act* of 1870 so far as they relate to that province or "of any other Act hereafter establishing new provinces in the said Dominion". The Act is significantly entitled *The British North America Act, 1871*.

In enacting the legislation so authorized, Parliament is exercising a delegated power of the Imperial Parliament. Conceivably by reason of the nature of conditions, Parliament could amend or repeal them; but otherwise a unilateral or any modification would call for a clear authorization. When other interests than those of the Dominion and the Province are involved, that result would seem unquestionable; and it may be observed that the right to the exemption here has never been affected in the contract or legislation creating it. Like other constitutional provisions, these terms could, in 1906, be modified legislatively only by the Imperial Parliament; but this is not to be confused with a modification of any such right created by the legislation of Parliament enacted in its own as distinguished from its delegated right.

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It was urged that s. 6 of 6-7 Ed. VII, c. 43, *An Act Respecting the Revised Statutes* (1906), preserving existing rights and immunities as affected by the revision of the statutes, prevented the repeal from having the consequence claimed; but the view I take of the character of the legislation of 1881 dispenses with consideration of this submission.

I agree, therefore, with the answers given by the Court of Appeal to the questions put by the Reference, and I would dismiss the appeal. There should be no costs to any party.

LOCKE J.:—Clause 16 of the contract entered into between the Crown and George Stephen and his associates dated October 21, 1880, read as follows:

> The Canadian Pacific Railway and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof and the capital stock of the Company shall be forever free from taxation by the Dominion or by any Province hereafter to be established or by any Municipal Corporation therein; and the lands of the Company, in the Northwest Territories, until they are either sold or occupied shall also be free from such taxation for 20 years after the grant thereof from the Crown.

By c. 1 of the statutes of Canada for 1881 this contract which formed a schedule to the Act was approved and ratified. By s. 2, it was declared that for the purpose of incorporating the persons mentioned in it and those who should be associated with them in the undertaking the Governor might grant to them in conformity with its terms 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 that such charter, upon being published in the Canada Gazette with any Orders-in-Council relating to it, should have force and effect as if it were an Act of the Parliament of Canada and be held to be an Act of Incorporation within the meaning of the said contract.

The extent of the exemption from taxation afforded to the Canadian Pacific Railway Company in the province of Saskatchewan by s. 24 of the *Saskatchewan Act* of 1905 was considered by this Court in *Canadian Pacific Railway Company v. Attorney General for Saskatchewan*[1], and

[1] [1951] S.C.R. 190, 1 D.L.R. 721, [1951] C.T.C. 26.

the decision rendered was affirmed by the Judicial Committee[1]. In that case the Attorney-General for Manitoba intervened in the proceedings before the Judicial Committee, a circumstance which, in view of the argument advanced, is of some importance in determing the disposition to be made of the present reference.

This reference was made by the Lieutenant-Governor in Council of the province of Manitoba under the provisions of an *Act for Expediting the Decision of Constitutional and other Provincial Questions*, R.S.M. 1940, c. 37, and the following questions were referred to the Court of Appeal for consideration:

1. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the province of Manitoba in 1881?
2. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the province of Manitoba in 1881?
3. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the following property situated in the said territory added as aforesaid to the province of Manitoba in 1881—

   all stations and station grounds, work shops, buildings, yards and other property and appurtenances required and used for the construction and working of the said main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the province of Manitoba in 1881?
4. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the following property situated in the said territory added as aforesaid to the province of Manitoba in 1881—

   all stations and station grounds, work shops, buildings, yards and other property and appurtenances required and used for the construction and working of the said branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the province of Manitoba in 1881?
5. Does said clause 16 exempt and free from taxation the Canadian Pacific Railway Company under the said The Municipal Act of Manitoba in respect of the business carried on as a railway on the main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the province of Manitoba in 1881?
6. Does said clause 16 exempt and free from taxation the Canadian Pacific Railway Company under the said The Municipal Act of Manitoba in respect of the business carried on as a railway on the

[1] [1953] A.C. 594, 3 D.L.R. 785, [1953] C.T.C. 281.

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branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the province of Manitoba in 1881?

The Order of Reference was made on September 13, 1949, but the matter was not argued before the Court of Appeal until the year 1955 and the judgment of that Court was delivered on January 16, 1956.

The terms of the legislation which resulted in the large addition to the extent of the province in the year 1881 are stated in other reasons to be delivered in this matter.

The question as to the extent of the powers granted to Parliament by the Imperial statute of 1871 (c. 28, 34-35 Vict.) is the decisive question to be considered in disposing of this reference.

The province of Manitoba had been constituted by c. 33 of the statutes of Canada of 1870.

The preamble to c. 28 of the Imperial statutes, 34-35 Vict., which is described as the *British North America Act, 1871,* recites that doubts had been entertained respecting the powers of the Parliament of Canada to establish Provinces in territories admitted or which might thereafter be admitted into the Dominion and that it was expedient to remove such doubts and to vest such powers in the said Parliament. Section 2 of the Act declared that the Parliament of Canada might from time to time establish such new provinces and at the time of such establishment make provision for their constitution and administration and for the passing of laws for the peace, order and good government of any such province. Section 3 provided that Parliament might from time to time, with the consent of the Legislature of any Province of the Dominion, increase, diminish or otherwise alter the limits of such province upon such terms and conditions as may be agreed to by the Legislature and may, with the like consent, make provision respecting the effect and operation of any such increase or alteration in relation to any province affected thereby. Section 5 declared that the *Manitoba Act* above mentioned, *inter alia,* should be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which it received the assent in the Queen's name by the Governor General of Canada.

With the required consent of the legislature of the province of Manitoba expressed by c. 1 of the statutes of Manitoba for 1881, Parliament, purporting to act under powers vested in it by the *British North America Act, 1871,* enacted c. 14 of the statutes of 1881 which extended the boundaries of Manitoba to the westward so that the westerly boundary thereafter became the centre line of the road allowance between ranges 29 and 30 west of the first principal meridian. The territory thus added to the province was taken from the easterly part of what was then the Northwest Territories.

Section 2 of this Act declared that all the enactments and provisions of all the Acts of the Parliament of Canada which have, since the creation of the province of Manitoba, been extended into and made to apply to the province shall extend and apply to the added territory as fully as if the same had originally formed part of the province, subject, however, to the provisions of s. 3 of the Act, and subs. (*b*) reads:

> The said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof.

Following the passing of this statute by Parliament, c. 6 of the statutes of 1881 was enacted by the Legislature of Manitoba. Chapter 1 of the statutes of Manitoba of 1881 provided that what was referred to as the increased limits

> . . . shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof.

A provision to the like effect was repeated in c. 6 of the statutes of 1881 following the enactment of c. 14 of 1881 by Parliament.

The effect of this legislation in exempting properties of the Canadian Pacific Railway Company from taxation in the areas added to the province by the legislation of 1881 has been considered in certain cases decided in the Courts of the province and in this Court. Several of the contentions of the Attorney-General advanced in the present case have been decided adversely to the province in these cases.

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There has, however, been raised on the present reference both before the Court of Appeal and this Court questions as to the power of Parliament to exempt the lands of the railway company referred to in cl. 16 of the contract and of the Legislature to enact those portions of the legislation of 1881 which declared that the lands added to the province should be subject to the terms of the railway contract which were not argued in the Canadian cases or referred to in the judgments delivered. While a very similar issue was raised by counsel representing the Attorney-General of Manitoba as intervener during the argument before the Judicial Committee in *Attorney General for Saskatchewan v. Canadian Pacific Railway Company,* above referred to, that issue had not been raised when that reference was before this Court, and other than the judgment of the Court of Appeal in the present case the matter has not been directly dealt with by any Canadian Court.

The Order of Reference recites that doubts have arisen as to the power of the legislature to enact legislation which provides for the sale of the roadbed of a Dominion railway company such as the Canadian Pacific Railway in the event of default in the payment of municipal taxes. I think there was sound reason for such doubt: *Johnson and Carey v. Canadian National Railways*[1]. It does not otherwise suggest that there were then any doubts as to the validity of the legislation either in Canada or of the Province enacted in 1881. This appears to be an aspect of the matter which had not occurred to anyone until after the time the Order of Reference was made in 1949.

The decisions in Canada which have dealt with the matter must be considered. In the case of the *Canadian Pacific Railway Company v. Burnett*[2], the issue was as to whether lands agreed to be sold by the railway company to one Shiels by an agreement for sale were subject to taxation and to sale for taxes by the municipality of South Cypress. The land in question was part of the land grant made to the railway under the terms of the agreement of 1881 and while the agreement of sale had been entered into between the railway company and Shiels no patent from the Crown had been issued to the railway company

[1] (1918), 43 O.L.R. 10.

[2] (1889), 5 Man. R. 395.

and this contract had been terminated by the vendor for default in compliance with its terms. The matter was brought before the full Court of the province upon a special case. Taylor C.J., who presided, referred to the legislation of 1881 and held that the arrangements made between the Dominion and the province in 1881 as to the exemption of the lands added to the province were in the nature of a contract which could only be varied by mutual consent and that the lands in question had not been sold by the company within the meaning of that expression in cl. 16 of the railway contract of 1881. Killam J., after referring to cl. 16 of the company's contract with the government and to the statutes extending the limits of the province, said in part (p. 415):

> The provisions making the added territory subject to the enactments of Parliament "respecting the Canadian Pacific Railway and the lands to be granted in aid thereof" appear to me to be clear limitations upon the legislative authority of the Legislature of Manitoba and not merely stipulations in a contract or treaty which might be broken by that legislature.

Bain J., (p. 430) after referring to the Imperial Act of 1871, said:

> The Legislature having agreed upon the terms and conditions, and the Parliament of Canada having increased the limits subject to these terms and conditions, it seems to follow at once, that the terms and conditions specified become, as it were, part of the constitution of the added territory, subject to which the Provincial Legislature can alone exercise jurisdiction, and which it cannot alter or vary without the consent of the Imperial or Dominion Parliaments, any more than it could any of the provisions of the Manitoba Act. And in another view, the legislation above detailed may be looked at as an express contract between the Parliament of Canada and the Provincial Legislature, one of the terms of which was, that these lands were to be free from taxation, and neither this nor any other term specified can be varied by one party without the agreement of the other.

In *Canadian Pacific Railway Company v. Municipality of Cornwallis*[1], the company sued to recover moneys paid to the municipality in the following circumstances: several parcels of land within the municipality which lay in territory added to the province by the 1881 legislation had been sold by the railway company under agreements of sale and these had been cancelled. The municipality had assessed these lands for taxes and the railway company had refused payment and the lands were offered at a tax sale at which the municipality became the purchaser. The

[1] (1890), 7 Man. R. 1.

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railway company, before the time for redemption under the provisions of the *Municipal Act* had expired, paid the amount claimed due and asked the repayment of it. At the trial before Bain J. a verdict was entered for the plaintiff and the defendant appealed to the full Court. While the lands formed part of the subsidy granted to the railway company, no patent had been issued until the year 1890. Taylor C.J. considered that the matter was concluded by the decision of the Court in *Burnett's* case and adhered to the opinion he had expressed in that matter and Dubuc J. agreed. Killam J. dissented on the ground that there was no right in the railway company to recover the taxes which had been paid voluntarily. Dealing, however, with the argument that the lands had been sold by the railway company by reason of the agreements of sale that had been made, he referred to the decision in *Burnett's* case as deciding that matter and referring to the judgment in that case said that the Court had held that s. 2 of the Dominion Act of 1881:

> . . . places a limitation upon the authority which otherwise the provincial legislature would possess to impose or to empower municipalities to impose direct taxation upon the lands of the company.

The appeal to this Court was dismissed[1]. While as the report of the case indicates in the argument before the full Court of Manitoba the Honourable Joseph Martin, the Attorney-General of the province, who appeared for the defendant municipality had, in the course of his argument, contended that it was beyond the powers of the province to agree to the exemption granted by the Dominion Act, the point was not mentioned in the judgments delivered in Manitoba and the argument was not repeated by counsel appearing for the appellants in this Court and no mention is made of the matter in the judgments delivered.

In 1903 three actions which had been instituted by arrangement between the Government of Canada and the railway company for the purpose of settling the liability of the company's lands to taxation were considered by the full Court of Manitoba. The actions were brought respectively by the Rural Municipality of North Cypress, the Rural Municipality of Argyle, both municipalities

[1] (1891), 19 S.C.R. 702.

being in that portion of Manitoba added to the province by the Act of 1881 and the Springdale School District No. 263 of the Northwest Territories and had been consolidated for the purpose of trial. The claim of the municipalities was for taxes upon lands forming part of the railway subsidy and the action of the school district was for a parcel of land in the Northwest Territories.

The report of this case[1] shows that in the argument for the municipalities and the school district it was contended that the powers given to the province by heads 2 and 8 of s. 92 of the *British North America Act* to make laws in relation to direct taxation within the province and to municipal institutions were unchangeable, and that while subs. (*b*) of s. 2 of the Dominion Act of 1881 and the Manitoba statutes of that year provided that the territory added to the province should be subject to all such provisions as may have been or should thereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof, this did not include the arrangements made relating to the contract made by the promoters of the railway company and the Dominion Government since this was not an enactment. It was contended then, as it has been contended before us, that the Act (c. 1 of the statutes of Canada for 1881) merely authorized a certain contract to be made and did not enact its terms.

The grounds urged in argument in support of the claim of the Springdale school district need not be considered as in the appeal from the judgment of the Court to this Court which followed it was decided that there had been no jurisdiction in the Courts of Manitoba to entertain the claim.

The actions had all been dismissed at the trial. The Court, consisting of Killam C.J., Dubuc and Richards JJ., were unanimous in holding that the claims of the rural municipalities failed.

[1] (1905), 14 Man. R. 382.

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Killam C.J., holding that all questions as to the effect of the legislation of 1881 in limiting the powers of the provincial legislature had been settled by the decisions of the Court and of the Supreme Court of Canada in the *Municipality of Cornwallis* case, said (p. 402):

> The terms and conditions upon which the extension of the boundaries of Manitoba was made by the Dominion and accepted by the Province imposed constitutional limitations upon the authority of the Provincial Legislature with respect to the added territory, different from those existing with respect to the original Province.
>
> The restriction in the 6th section of The British North America Act, 1871, upon the power of the Parliament of Canada to alter the Act establishing the Province of Manitoba, was subject to an exception of the provisions in the 3rd section relating to the alteration of Provincial boundaries. The expression "terms and conditions" in the latter section was apt to include limitations of Provincial powers, and was accepted by both the Dominion Parliament and the Provincial Legislature as appropriate for the purpose.

Further, the Chief Justice said that the terms of the agreement between the Government of Canada and the promoters of the Canadian Pacific Railway Company and those of the company's charter, in view of the Act of Parliament confirming and authorizing them constituted provisions

> "enacted respecting the Canadian Pacific Railway and the lands to be granted in aid therof."
>
> By these provisions the Parliament of Canada enacted that the powers of taxation of these lands by the Dominion should be limited, and the Dominion transferred the territory to Manitoba subject to that limitation, which must thereafter apply to the Province.

While no question of *ultra vires* had been argued, the Chief Justice added (p. 403):

> It was quite competent for the Government to contract not to tax the property in the hands of the Company, and not to create another authority with power to do so.

The appeal to this Court is reported[1]. The headnote which correctly summarizes what was decided reads in part:

> *Held,* that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba the latter was a province "thereafter established" and such added territory continued to be subject to the said exemption from taxation.
>
> The limitations in respect of legislation affecting the territory so added to Manitoba by virtue of the Dominion Act, 44 Vict. ch. 14, upon the terms and conditions assented to by the Manitoban Acts, 44 Vict.,

[1] (1905), 35 S.C.R. 550.

(3rd Sess.), chs. 1 and 6, are constitutional limitations of the powers of the Legislature of Manitoba in respect of such added territory and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of its construction.

The Court was unanimous in deciding that the appeal of the municipalities should be dismissed and that of the railway company against the judgment in favour of the Springdale school district allowed. Taschereau C.J. adopted the reasons given by Killam C.J. Girouard J. referred to the limitation expressly assented to by the legislature of Manitoba in the legislation of 1881 and considered that the matter had been settled by the judgment of this Court in the *Municipality of Cornwallis* case. Davies J., with whose judgment Sedgewick and Nesbitt JJ. both agreed, expressed his agreement with what had been said by Killam C.J. that the effect of the 1881 legislation was a constitutional limitation on the powers of the provincial legislature *quoad* this added territory. It was contended, apparently, for the first time, in this Court that the province of Manitoba, as its limits were defined by the legislation of 1881, was not a "province hereafter to be established" within the meaning of cl. 16 of the railway contract as the province had been already established in 1870 and the legislation of 1881 merely extended its limits. As to this Davies J. said (p. 566):

> Mr. Riddell argued with great force that even granting such a construction to be correct it could not be applied further or beyond the three specified classes of taxation mentioned in the 16th clause of the section, namely, by the Dominion, by a province thereafter to be established, or by any municipal corporation therein, and that the words "such taxation" refer to these three classes only. I am disposed to agree with him that the word "therein" has reference to a municipal corporation in a province thereafter to be established and that the words "such taxation" clearly refer to the three antecedent specified classes. If that is so, then the exemption can only be upheld by holding that so far as the added territory was concerned the Province of Manitoba was established with respect to it when and at the time it was added to the old province. I have no difficulty in accepting that as a reasonable construction and the more so as its rejection would operate to defeat the plain, clear and obvious intention of the Dominion Parliament and the Manitoba Legislature. Beyond doubt, as Mr. Robinson put it in his argument, the Province of Manitoba as it now exists was not established in 1870 nor before 1881. It was established, as it now exists and is bounded, in 1881. The Province of Manitoba was created in 1870 but its area then was comparatively small and circumscribed, a very large part of the present area of the province was added to it in 1881, and so the whole province as it now stands may fairly and reasonably be said to have been established in 1881. Whether or not apter language might have been chosen I am not prepared to say.

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The land sought to be taxed, if it had remained as part of the Northwest Territories, would unquestionably have been entitled to the exemption and as to this Davies J. said (p. 567):

> Manitoba, therefore, in my opinion, having asked for an addition of lands to its territories, a block of which lands were at the time subject to be exempt from all taxation by any authority having power to tax it for a specified period, and having agreed to accept the added territory subject to the then existing Dominion enactments regarding these lands, is bound by the terms of this 16th clause as being one of those enactments. Being so bound constitutionally, an interpretation must be given to the clause which, while consistent with its language, carries out the object and intent with which it was entered into. This being so, all subsequent legislation by the Legislature of Manitoba, even if broad enough in the language used to cover the exempted block, must be read and construed subject to the exemption and not as an attempt to repudiate or escape from a constitutional limitation the province had openly accepted.

Nesbitt J., in addition to stating his agreement with what had been said by Davies J., said that in his opinion Manitoba had been granted and received the additional territory with the special exemption attached.

With the exception of the argument made by the Honourable Joseph Martin, Attorney-General of Manitoba, in the *Cornwallis* case who had contended that the legislature of Manitoba had been without power to agree to the exemption of the lands in question by the 1881 legislation, no question that the legislation of that year passed by Parliament and the legislature respectively was *ultra vires* was raised in any of the cases originating in Manitoba.

The matter has now been raised on behalf of the province and a further argument not considered in any of the other cases made asserting that the Dominion and the province respectively have, by Acts passed since 1881, expressly or impliedly repealed the relevant portions of the Acts in question.

The contention that the Acts are *ultra vires* may be summarized as follows: since head 2 of s. 92 of the *British North America Act* gives to the legislature exclusive power to make laws in relation to direct taxation within the province in order to the raising of revenue for provincial purposes and head 8 in relation to municipal institutions in the province and since the *British North America Act* of 1871 did not, in clear terms, alter these provisions, Parliament was without authority to restrict these powers

of the legislature by c. 14 of the statutes of 1881; as to the provincial legislation it is said that the province was without power to surrender or agree not to exercise its powers under heads 2 and 8 in the manner provided in the two provincial Acts of 1881.

In the *Reference re section 17 of the Alberta Act*[1], this Court considered the constitutional validity of a section of the *Alberta Act* which varied the provisions of s. 93 of the *British North America Act, 1867* in their application to the province of Alberta.

The *Alberta Act* passed, as the preamble shows, under the powers vested in Parliament by the *British North America Act* of 1871 established the province of Alberta out of part of the Northwest Territories. Section 93 of the *British North America Act* declares the powers of the legislature of a province to make exclusively laws in relation to education subject to certain exceptions in regard to separate schools and s. 17 of the *Alberta Act* amended these provisions in material particulars. Newcombe J., by whom the judgment of this Court was delivered, referred to the fact that s. 3 of the *Alberta Act* declared that the provisions of the *British North America Acts, 1867 to 1886,* shall apply to the province of Alberta to the like extent as they apply to the provinces heretofore comprised in the Dominion as if the said province had been one of those originally united "except insofar as varied by this Act" and that a corresponding provision was contained in s. 2 of the *Manitoba Act, 1870,* and in cl. 10 of the Terms of Union with British Columbia. After pointing out that by s. 2 of the *British North America Act* of 1871 Parliament was empowered at the time of the establishment of new provinces to make laws for the peace, order and good government of such provinces and referring to what had been said as to these powers in *Riel v. The Queen*[2] by Lord Halsbury, Newcombe J. said (p. 372):

> It is useless, in view of the governing cases, to suggest any doubt as to the authority of Parliament to confer these legislative powers. *The Queen v. Burah,* (1878) 3 A.C. 889: *Hodge v. The Queen,* (1883) 9 A.C. 117: *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick,* (1892) A.C. 437: These authorities make it clear that the Parliament of Canada had plenary powers of legislation as large and of

[1] [1927] S.C.R. 364, 2 D.L.R. 993.
[2] (1885), 10 App. Cas. 675 at 678-679.

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the same nature as those of the Parliament of the United Kingdom itself; and, thus construed, so long as there was no repugnancy to an Imperial Statute, there was no limit, operating within the Territories, to the legislative power which the Dominion might exercise for their administration, peace, order and good government, while they continued to be Territories, or, at the time of the establishment of new provinces therein, for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government thereof, . . .

And again:

> The Ordinances, as I have shown, derived their force mediately from the Parliament of Canada, which had conferred the territorial legislative powers under which they were directly enacted. It is unquestionable that they had the force of law in the Territories from the time of their enactment down to the constitution of the province of Alberta in 1905, and it seems to be as plain as words can tell that, at the time of the establishment of the province of Alberta, the Parliament of Canada had the power to define and to regulate the legislative powers which were to be possessed by the new province.

This, it will be noted, is in agreement with what had been said by Killam and Bain JJ. in *Burnett's* case, by Killam J. in the *Cornwallis* case and by him as Chief Justice in the *North Cypress* case and by Davies J. in the latter case in this Court.

By a further amendment to the *British North America Act* passed in 1886 (49-50 Vict., c. 35), it was provided that the Parliament of Canada might make provision for the representation in the Senate and House of Commons of any territories which, for the time being, form part of the Dominion of Canada, and s. 2 declared that any Act passed by the Parliament of Canada for the purpose mentioned in this Act shall be deemed to have been valid and effectual from the date at which it received the assent. The concluding clause of this section read:

> It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of Members of the House of Commons specified in the last-mentioned Act is increased by the number of Senators or of Members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or territories of Canada.

Referring to this Act, Newcombe J. said that if the second paragraph of s. 2 was intended to have general application, the case was relieved of any posibility of a suggestion

of doubt, but that in the view which he took of the matter it was not necessary to consider the application of the provision which, having regard to the title of the Act, might suggest that its purpose was limited.

The case of the Attorney General of Saskatchewan to which I have above referred[1] was brought before the Court of Appeal of that province by a reference by the Lieutenant-Governor in Council. The questions submitted were as to whether municipalities created by the province with powers of taxation might impose general municipal taxes or business taxes upon the railway company in respect of its operation of its main line and its branch lines in the province. The answers made by this Court which varied those made by the Court of Appeal are to be found at p. 192 of the 1951 reports[2].

Saskatchewan was created a province in the same year as was Alberta by c. 42 of the statutes of Canada of 1905. As in the case of the *Alberta Act,* the preamble shows that the Act was passed under the powers conferred upon Parliament by the *British North America Act, 1871.*

Section 24 reads:

> The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company.

The report of the argument of this case before the Judicial Committee shows that counsel for the Attorney-General contended that when, pursuant to the powers conferred by s. 2 of the *British North America Act, 1871,* Parliament enacted the *Saskatchewan Act* of 1905 it had no power to impose a constitutional limitation upon the right to taxation possessed by the Canadian provinces under s. 92 of the *British North America Act.* Counsel for the Attorney General of Manitoba, intervener, contended, *inter alia,* that the limitation imposed by s. 24 could not be justified under the Act of 1871 or validated under the Act of 1886. It was said that the power given by s. 2 of that statute to:

> make provision for the constitution and administration of any such province and for the passing of laws for the peace, order and good government of such province

did not justify the limitation imposed.

[1] [1953] A.C. 594, 3 D.L.R. 785, [1953] C.T.C. 281.
[2] [1951] S.C.R. 190, 1 D.L.R. 721, [1951] C.T.C. 26.

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These arguments were rejected in the judgment delivered by Viscount Simon. Saying that the question could only be raised on appeal to the Privy Council inasmuch as the question had already in effect been decided, in a sense adverse to the appellant's contention in the judgment of this Court in the *Reference re Constitutional Validity of section 17 of the Alberta Act*, above mentioned, Viscount Simon said (p. 613):

> Section 2 of the Act of 1871 empowers the Parliament of Canada at the time when it establishes new provinces in the added territories to make provision
>
> (*a*) for the constitution and administration of any such province;
>
> (*b*) for the passing of laws for the peace, order, and good government of any such province; and
>
> (*c*) for its representation in the Dominion Parliament.
>
> The words "peace, order and good government" are words of very wide import, and a legislature empowered to pass laws for such purposes had a very wide discretion. But Mr. Leslie and Lord Hailsham emphasized the distinction between section 4 of the Act of 1871, which enabled the Parliament of Canada to provide from time to time for peace, order, and good government in territories not included in a province, and section 2, which only enabled them to provide for the passing of laws for the peace, order, and good government of a province at the time when it was established. Section 2, they argued, enabled the Canadian Parliament to define the machinery for the passing of laws, but not to prescribe what laws might be passed by the province. The prescription, they contended, had been done for good and all by section 92 of the Act of 1867.
>
> But their Lordships would observe that if this argument was well founded the words in section 2 of the Act of 1871 "for the passing of laws for the peace, order, and good government" would be superfluous. The power to make provision for the "constitution" of the new province would be sufficient to enable the Parliament of Canada to provide a restriction on the normal range of taxing power exercised by the provincial legislature. The words under discussion being words of general import, their Lordships do not feel justified in placing on them the narrower meaning for which the appellant and Lord Hailsham contend.

Dealing with an argument that by reason of the terms of s. 146 of the Act of 1867, it should be implied that the structure of new provinces should be analogous to that of the original provinces, he said that so far as the lands comprising Rupert's Land and the Northwest Territories were concerned, s. 146 was exhausted when they were admitted to the union by the *Rupert's Land Act, 1868*.

Viscount Simon further said that there was no complete equality of powers between the four original provinces and that the Act of 1867 contained no such definition of provinces as would involve any conflict between that Act and the 1871 Act. A further passage reads (p. 614):

> The Manitoba Act, 1870, shows that an Act constituting a province might depart from the strict 1867 pattern. No doubt one reason for the passing of the 1871 Act was to remove any doubt as to the validity of the Manitoba Act, but it is noteworthy that a section on the lines of section 2 of the Manitoba Act recognizing variations has been introduced into all the documents creating a province since that date . . .

The question as to whether taxes may be levied in respect of the business carried on as a railway upon the main and the branch lines as distinct from general municipal taxation is settled by the judgment of the Judicial Committee in the *Saskatchewan* case. The further question raised is as to whether by certain legislation passed subsequent to 1881 which authorized various municipal bodies in Manitoba to impose taxation on real and personal property and by certain provisions of the *Municipal Act* the legislature had impliedly repealed the restriction on taxation contained in the federal legislation of that year and as to whether ss. 1, 2 and 6 of c. 14 of the statutes of Canada of 1881 have been repealed by the revisions of the statutes of 1886 and 1906.

As to this I refer to the judgment of Sir Lyman Duff C.J. in the *Minister of National Revenue v. Molson*[1] and to the reference there made to the judgment of Chancellor Boyd in *Licence Commissioners of Frontenac v. County of Frontenac*[2]. As to the suggested repeal by the legislature of the province, that body was without power to pass any legislation which might affect in any way the restriction on its taxation powers provided by the legislation of 1881. I agree with Mr. Justice Coyne that any amendment to this provision of the federal legislation of 1881 would require an Act of the Imperial Parliament.

Sections 2 and 3 of the *British North America Act* of 1871, in my opinion, empowered Parliament to impose the restriction on the powers of taxation of the province of Manitoba as its limits were defined by the legislation of 1881 and the latter section empowered the legislature

[1] [1938] S.C.R. 213 at 218, 2 D.L.R. 481.
[2] (1887), 14 O.R. 741 at 745.

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to agree to this as one of the terms upon which the addition to its boundaries were made and to pass the provincial legislation of that year.

I would dismiss this appeal.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Rand and with those of my brother Locke and would dispose of the appeal as they propose.

Appeal dismissed, no costs to any party.

Solicitors for the appellant: A. E. Hoskin and J. Allen, Winnipeg.

Solicitors for the respondent: H. A. V. Green and H. M. Pickard, Winnipeg.

Solicitor for the Attorney General of Canada, intervenant: W. R. Jacket, Ottawa.