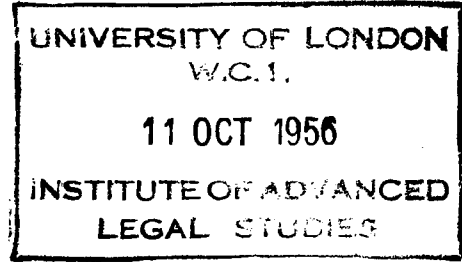


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In the Privy Council.

No. 49. 1895.



ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN THE TORONTO RAILWAY COMPANY (Plaintiffs) Appellants

AND

HER MAJESTY THE QUEEN (Defendant) . . . Respondent.

CASE FOR APPELLANTS.

1. This is an appeal from a judgment of the Supreme Court of Canada, pronounced on the 26th June, 1895, dismissing an appeal from the judgment of the Exchequer Court of Canada, delivered by his Lordship Mr. Justice Burbidge, the Judge of that Court, on the 29th October, 1894, the case having been tried by that learned judge without a jury, whereby the Appellants' action against the Respondent was dismissed with costs.

Record.  
pp. 172 179.  
p. 118.

2. That action was brought to recover \$56,044.17 paid by the Appellants under protest to the Collector of Customs at Toronto, in respect of duties upon certain steel rails imported by the Appellants for use in their railway tracks, and for interest thereon.

p. 4.

3. The real question in controversy is whether these duties were rightfully imposed.

4. The material facts are shortly as follow :—

(a) The Appellants were incorporated by an Act of the Legislature of the Province of Ontario (55 Vic. cap. 99), whereby a certain agreement with the City of Toronto was confirmed, and amongst other powers conferred upon the Appellants authority was thereby given—

20 By section 1.—To acquire, construct, complete, maintain and operate . . . a double or single track Street Railway, with the necessary side tracks, switches and turn-outs for the passage of cars, carriages and other vehicles adapted to the same, upon or along all or any of the streets or highways of the City of Toronto (subject to certain exceptions and qualifications) and to take, transport and carry passengers upon the same by the force and power of animals, electricity, or other motive power, in accordance with the terms of and subject to the provisions of the said agreement, and to construct and maintain, and from time to time alter, repair and enlarge all necessary and convenient works, stations, buildings and conveniences therewith connected or required for the due and efficient working thereof,

and to purchase, acquire, construct or manufacture all engines, carriages, cars and other machinery and contrivances necessary for the purposes of the undertaking, and shall have full power to carry out, fulfil and execute the said agreement and conditions.

By section 5.—To purchase, hold and take by purchase of any corporation or person any lands or other property necessary for the construction, maintenance, accommodation and use of the undertaking, and also to alienate, sell or dispose of the same.

By section 19.—To acquire, with the consent of any of the local municipal corporations in the County of York, privileges to build and operate surface railways within the limits of such municipalities, over roads within the same, and thereupon to construct, build and operate a railway or railways within such municipalities, over the roads therein in respect of which the privilege has been acquired. 10

By section 20.—To enter into agreements with any other company or corporation owning a privilege for the operation of a surface railway within the limits of the County of York, to acquire or lease any such privilege, or to make traffic or operating arrangements with any such company or corporation upon such terms as may be fixed.

By section 21.—To acquire and hold (with the consent of the municipality within which such lands may be situate) any lands or premises or any estate or interest therein for park or pleasure grounds, and to improve and lay out such lands or premises for parks or places of public resort, and to mortgage or lease the same or any portion thereof as the Company may think expedient, and to sell from time to time such portions thereof as they may deem unnecessary for the said purposes. 20

(b) The said Act further declared (section 18) that part of section 34 and sections 35, 36, 37, 38 and 42 of "The Railway Act of Ontario" (R.S.O. cap. 170) should be incorporated with and be deemed and taken to be clauses or sections and parts of the said Act, and should apply to the Appellants when not inconsistent with the provisions of the special Act. These sections deal with (34) the appointment and duties of the President and Directors of the Company; (35) calls upon shareholders in respect of capital stock subscribed; (36) dividends; (37) shares and their transfer; (38) shareholders and their liability; and (42) limitation clauses in respect of actions for damages and the recovery of fines and penalties, as will more fully appear upon reference to the said sections in the said "Railway Act of Ontario." 30

(c) The said Act of Incorporation further provides (section 16) that sub-sections 1, 2 and 3 of section 16 of "The Street Railway Act" of Ontario (R.S.O. cap. 171) should be deemed incorporated in and made part of said Act; and should apply to the acquisition of sites for power, buildings and other necessary privileges. The said sub-sections embody the powers of expropriating lands required for railway purposes contained in sections 11 to 20 inclusive of the said "Railway Act of Ontario" (R.S.O. cap. 170). 40

(d) For the purpose of relaying the tracks of the railway, which the

Appellants were authorised by their Act of Incorporation to acquire, with rails suitable for the operation of the same as an electric railway, and for building additional railway tracks, and providing extensions and "turn-outs," the Appellants imported into Canada at the Port of Toronto over 8,000 tons of steel "T" rails of the description known as girder rails weighing about 69 lbs. to the lineal yard, and the said rails were used in the said railway tracks of the Appellants.

pp. 3, 4.

10 (e) By section 1 of "The Act respecting the Duties of Customs" passed by the Parliament of Canada, and being chapter 39 of the Statutes of 1887 (50 and 51 Vic. cap. 39) certain duties are imposed upon certain specified articles, and item 88 of said section 1 imposes a duty upon :

"Iron or steel railway bars and rails for railways and tramways of any form, punched or not punched, not elsewhere specified—six dollars per ton."

By item 89 of the said section a duty is also imposed upon :

"Manufactures, articles or wares not specially enumerated or provided for composed wholly or in part of iron or steel, and whether partly or wholly manufactured—thirty per cent. *ad valorem*."

20 Section 2 of the said Act of 1887 relieves certain goods of duty, and by it is enacted as follows :

"2. The duties of customs, if any, imposed by the Act hereinbefore cited on the articles mentioned in this section are hereby repealed, and they may be imported into Canada or taken out of warehouse for consumption free of duty, that is to say . . . .

"Item 173. Steel rails, weighing not less than 25 lbs. per lineal yard, for use in railway tracks."

30 (f) The Appellants, claiming that the rails in question were exempt from duty by the last-mentioned provision, entered the same at the Port of Toronto as free from duty, but the Collector of Customs at the said port refused to admit the same without the payment of a duty thereon of \$6.00 per ton.

(g) The Appellants, in order to obtain the said rails for their railway tracks then under construction, paid the duty demanded by the said Collector under protest; the whole amount paid for duty in respect of the said rails being \$56,044.17.

(h) The Appellants then made application to Her Majesty's Comptroller of Customs and the Government of the Dominion of Canada for a refund of the amount so paid as aforesaid, but their application was refused.

40 (i) The Appellants then brought their action in the Exchequer Court of Canada for a declaration that the rails so imported, or any steel rails which might thereafter be imported by the Plaintiffs, exceeding in weight 25lbs. to the lineal yard for the purpose of being used in the Appellants' railway tracks were not subject to duty, and to recover the sum of \$56,044.17 so paid as aforesaid with interest thereon.

(j) Certain admissions in writing were made by the parties and filed at the trial in the following words :—

p. 93.

“ The parties hereto agree to admit without further proof the following facts at the trial hereof.

“ (1) That the Plaintiff Company imported certain steel rails, the number and gross tons of which, and the dates of importation are correctly set forth in paragraph 4 of the Statement of Claim.

“ (2) That the Plaintiffs paid thereon the amount of duty as set forth in paragraph 8 of the Statement of Claim, and paid the same under protest on the dates therein mentioned.”

pp. 5, 6.

(k) These admissions narrowed the defence down to the grounds set out in paragraphs 4, 5, and 8 of the statement in defence, which are as follows:— 10

“ (4) Her Majesty’s Attorney-General denies that the Plaintiffs were entitled to enter the steel rails mentioned and referred to in the said Statement of Claim as free from Customs duty, as the said rails were dutiable under the provisions of item 88 of the schedule of the Statute of Canada 50 and 51 Victoria, chapter 39, being an Act to amend the Act respecting the duties of Customs, which provides that ‘Iron or steel railway bars and rails for railways and tramways of any form, punched or not punched, not elsewhere specified—six dollars per ton’; or under the provision of item 89 of the schedule of the said Statute, which provides that Manufactured articles or wares not specially enumerated or provided for, composed wholly or in part of iron or steel, and whether partly or wholly manufactured—30 per cent. *ad valorem*.” 20

“ (5) Her Majesty’s Attorney-General says that the steel rails in the Statement of Claim mentioned were not entered by the Plaintiffs as free of duty, but were entered as tramway rails, and as subject to the duty collected and paid thereon.”

“ (8) Her Majesty’s Attorney-General says that the sums paid by the Plaintiffs to the Collector of Customs at the Port of Toronto and elsewhere were the proper and correct amounts of duty payable upon and in respect of the said several shipments of steel rails mentioned and referred to in the fourth paragraph of the Statement of Claim at the rate of six dollars per ton, or at the rate of 30 per cent. *ad valorem* under the said item of the tariff above referred to, and Her Majesty’s Attorney-General says that the said sums were not improperly imposed, as charged in the tenth paragraph of the said Statement of Claim.” 30

5. Evidence was given as to the mode of construction of the Appellants’ railway, and of the character and style of the rails used in the building of its roadway and the reason why the Appellants were compelled to use such rails. Evidence was also given on behalf of both parties by civil engineers and others as to the meaning of the word “tramway” as understood in Canada, with a view of ascertaining the interpretation to be placed upon the word where it occurs in item 88 of the said Act of 1889. Some evidence was also given in explanation of the description of the goods in the invoices furnished to the Appellants by the shippers. 40

With the exception of the testimony upon these points, the case came to

be disposed of simply upon the construction of the clauses in the Customs Act aforesaid.

6. The learned Judge at the trial dismissed the Plaintiff's action; his reasons for doing so being printed in the Record.

pp. 118-122.

7. From this judgment the Appellants appealed to the Supreme Court of Canada, and judgment therein was delivered on the 25th June, 1895, by the Full Court dismissing the appeal, their Lordships Gwynne, J., Taschereau, J., and Fournier, J., being the majority of the said Court, agreeing that the appeal should be dismissed, while their Lordships Sir Henry Strong, C.J., and King, J., were in favour of allowing the appeal. The reasons of their Lordships are printed in the Record.

p. 172.

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8. By chapter 33 of 57-58 Victoria the Parliament of Canada at its session of 1894 and after the trial of this action repealed the Act of 1887 including the items 88, 89 and 173 in question herein, and substituted therefor two new items, numbers 250 and 703 respectively; item 250 being that imposing the duty, and item 703 that exempting from duty. These items are as follow:—

pp. 173-179.

Item 250:

20 “ Iron or steel railway bars or rails of any form, punched or not punched, “ not elsewhere specified, for railways—which term, for the purposes of this “ item, shall include all kinds of railways, street railways and tramways, even “ although the same are used for private purposes only and even although they “ are not used or intended to be used in connection with the business of common “ carrying of goods or passengers—thirty per cent *ad valorem*.”

Item 703:

30 “ Steel rails weighing not less than forty-five pounds per lineal yard for “ use in railway tracks; but this item shall not extend to rails for use in the “ tracks of railways used or intended for private purposes only, nor shall it “ extend to rails which are not used or intended to be used in connection with “ the business of common carrying of either goods or passengers, nor shall this “ item extend to rails for use in the tracks of street railways or tramways.”

9. The Appellants submit that the said judgment of the Exchequer Court of Canada and the judgment of the Supreme Court of Canada should be set aside, and in lieu thereof judgment entered for the Appellant for the said sum of \$56,044.17, with interest and costs in this Court and in the Courts below, for the following among other

## REASONS.

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1. Because the reasons and conclusions of Sir Henry Strong, C.J., and King, J., are right in law and in fact, and those of Burbidge, J., and Gwynne, Taschereau, and Fournier, JJ., are incorrect.
2. Because the governing principle in the construction of statutes imposing duties or taxes is that the intention of the Legislature to impose the duty must be clear and unequivocal, otherwise

the subject is not liable to its payment; and in this case the rails in question fall within the terms of item 173 in section 2 of the Act, which relieves the articles therein enumerated from the duty to which they would otherwise be liable by item 88 of section 1 of the Act.

3. Because the rails in question being steel rails, and weighing more than 25 pounds to the lineal yard, and being imported for use in the railway tracks of the Appellants' railway, were by the statute exempt from duty.
4. Because the evidence shows that the Appellants' railway is 10 not a "tramway" within the meaning of the term as generally used and understood in Canada, and the expression "tramway" as found in item 88 of section 1 of the said Act should not be deemed to include it.
5. Because even if the term "tramway" as used in the said item of section 1 of that Act should be held to apply to the Appellants' railway, the rails in question are nevertheless exempt by item 173 of section 2 of the same Act.
6. Because the course of legislation by the Parliament of Canada with reference to the duties of Customs shows that rails such 20 as those in question were intended to be admitted free of duty.

C. ROBINSON.

B. B. OSLER.

In the Privy Council.

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No. 49. 1895.

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THE TORONTO RAILWAY COMPANY  
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HER MAJESTY THE QUEEN (Defendant)  
*Respondent.*

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CASE FOR THE APPELLANTS.

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FRESHFIELDS & WILLIAMS,

APPELLANT'S SOLICITORS.