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In the Privy Council.

No. 49 of 1895.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN THE TORONTO RAILWAY COMPANY (PLAINTIFF) - *Appellant.*

AND

HER MAJESTY THE QUEEN (DEFENDANT) - - *Respondent.*

Case of the Respondent.

1. This is an Appeal of the above-named Appellant from the Judgment of the Supreme Court of Canada, delivered on the 26th June 1895, dismissing the Appellant's Appeal from the Judgment of the Exchequer Court of Canada, delivered on the 29th October 1894.

2. The Appellant is a Company incorporated by an Act of the Province of Ontario 55 Vic. c. 99, with power to acquire, construct, complete, maintain and operate a double or single track street railway upon or along all or any of the streets or highways of the City of Toronto and to carry passengers upon the same in accordance with the terms of an Agreement in the Act referred to.

3. The Action was brought by the Appellant to recover from the Government of the Dominion of Canada the sum of $55,610·60 and interest, the total amount paid by the Appellant on various dates, under protest, in respect of duties levied on certain steel rails imported by the Appellant on various dates into Canada at the port of Toronto, for the purpose of relaying the tracks of the Appellant's street railway. The Appellant claimed that the said rails were free from duty and also claimed a declaration that any steel rails which might be imported by the Appellant exceeding in weight 25 lbs. to the lineal yard, for the purpose of laying in its railway tracks, were not subject to duty.

Copy of the Statement of Claim which was delivered on the 23rd January 1894, will be found in the Record at page 2. Record p. 2.

The sum of $55,610·60 mentioned in the Statement of Claim, was by an amendment made during the trial on the 20th April 1894, increased to the sum of $56,044.17. Record pp. 1. 76. 123.

Record p. 5. 4. The Statement of Defence, a copy of which is printed on page 5 of the Record, was delivered on the 28th February 1894. Her Majesty's Attorney General alleged that the rails in question were liable to duty under 50 and 51 Vic. c. 39, (Canada) Schedule Item 88—

> " 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."

and did not, as the Appellant maintained, come within Item 173 which exempted from duty

> " Steel rails, weighing not less than twenty-five pounds per lineal " yard, for use in railway tracks."

Her Majesty's Attorney General further alleged that, if neither of the foregoing items covered the case, the rails in question were liable to duty under Item 89—

> " 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*."

Record p. 11. This contention was added by an amendment made during the trial on the 19th April 1894.

It was also contended that the rails in question most resembled rails for tramways and were therefore dutiable at $6.00 per ton under Item 189 of 50 and 51 Vic. 1887, c. 39, and under Section 13 of the " Customs Act," Rev. Stat. Can. c. 32, which is as follows :—

> " On each and every unenumerated Article which bears a " similitude, either in material or quality, or the use which it may be " applied, to any enumerated article chargeable with duty, the same " rate of duty shall be payable which is charged on the enumerated " article which it most resembles in any of the particulars before " mentioned."

5. The French version of Items 88 and 173 is as follows :—

> " Barres et rails de chemins de fer en fer ou acier, pour chemins " de fer et tramways de toutes formes, percés ou non, non spécifiés " ailleurs six piastres par tonne, $..... par tonne."

> " Rails d'acier, ne pesant pas moins de vingt cinq livres par " verge linéaire, pour servir aux voies de chemins de fer."

Record p. 7. 6. Issue was joined on the 2nd day of March 1894.

7. It was admitted on behalf of the Respondent on the 12th April 1894, Record p. 93. that the quantity of rails alleged by the Appellant to have been imported, had been imported, and that the Appellant had paid under protest for duty the said sum of $55,610·60. The Respondent admits that these admissions apply to the further claim added by amendment on the 20th April 1894, so as to make the total sum in dispute the sum of $56,044·17.

8. The case was tried before Mr. Justice Burbidge on the 19th and 20th April 1894. A copy of the shorthand notes of the Preliminary Argument and of the Evidence will be found in the Record at pp. 7 to 94. Record pp. 7 to 94.

9. It was proved by the evidence :—

(*a*) That the only steel rails manufactured in Canada were made by the Nova Scotia Steel and Iron Company or Steel and Forge Company, New Glasgow, who had for eight or nine years been making a twelve and eighteen pound rail, which was a small T rail and was used for light tramways for lumber yards and was similar to that actually used in Street Railways. Record p. 67. Record pp. 33. 36.42.55.56. 59.65.66.

(*b*) That the class of rails in question is imported into Canada almost exclusively from England, and that in England the use of the words " tramway rail " or " tram rail " would include this class of rail for street railways, and would be understood by the Canadian importer as designating rails similar to the rails in question. Record p. 56. Record pp. 46. 50. 71. 85.

(*c*) That over two-thirds of the rails in question had been bought by the Appellant from Messrs. Dick Kerr & Co., of London. The contract for the purchase of 3,000 tons of such rails on the 7th March 1892, is set out in the Record at pp. 103 and 104. That all the rails purchased from Messrs. Dick Kerr & Co. had been by them invoiced to the Appellant as Steel Girder Tramway Rails. That the balance of the rails in question (with the exception of a few rails which were obtained from the United States) had been bought from Messrs. Sanders & Co., of London, and had been invoiced by them to the Appellant as Steel Grooved Rails. Record pp. 103. 104. Record pp. 110 to 117. Record pp. 117. 118.

(*d*) That the rails in question had been entered by the Appellant at the Customs indiscriminately as " Steel Rails " or " Steel Railway Rails " or " Tramway Rails " or " Steel Tramway Rails." Record pp. 105 to 109.

10. The Appellant also called evidence to establish :—

(*a*) That the Appellant's system was of the same construction as that, and its powers the same as those, of any ordinary railway. Record p. 12.

(*b*) That the peculiar form of rail used was not a matter dependent upon the Appellant, but determined by the requirements of the city for the convenience of pavement purposes. Record p. 13.

(*c*) That the word " tramway " was in no way applicable to " street railways " in Ontario or America, but was confined to very light railways used either as auxiliary to another railway or in industrial works, such as mines or quarries, or in lumbering operations or in warehouses. Record pp. 22. 34. 41. 50. 58. 63. 69.

(*d*) That in the cases of the Niagara Falls Park and River Railway Company and of the Hamilton, Grimsby and Bramsville Electric Railway Company, the Controller of Customs had admitted the rails imported by those Companies free of duty. Record pp. 24. 109. 32. 96. to 102.

11. On behalf of the Respondent, evidence was called to establish :—

Record p. 79.

(*a*) That the word "tramway" according to the practice of the Department of Customs and Custom House was held to include street railways.

Record p. 81.

(*b*) That the Appellant's system was in principle and in substance the same as it had been before 1892, when horses and not electricity were the motive power.

Record p. 82.

(*c*) That the rails in question were not suitable for ordinary railways.

Record pp. 83. 87. 88. 90.

(*d*) That the word "Tramway" includes Street Railways, and that a Street Railway is a very improved form of Tramway.

12. Reliance was also placed on behalf of the Respondent on the proceedings in Parliament on the introduction of Item 88. On the proposed item—

> "Street railway bars or rails weighing not less than 25 pounds "per lineal yard for purposes other than railway tracks $6·00 per "ton."

coming up, Sir Charles Tupper, the then Minister of Finance, said—

Record p. 164.

> "I propose to substitute iron or steel railway bars and rails for "railways, tramways of any form, punched or not punched, not "elsewhere specified $6·00 per ton.
>
> "Mr. Mitchell asks, does that include street railways ?
>
> "Sir Charles Tupper. Yes."

Record p. 123.

13. On the 29th October, 1894, Mr. Justice Burbidge gave judgment and dismissed the Appellant's action with costs. A copy of his judgment will be found in the Record at pp. 118 to 122.

Record pp. 118 to 122.

14. Mr. Justice Burbidge was of opinion that the terms "railway" and "railways," commonly used, without any qualifying words or circumstances, would be taken to mean one of the ordinary railways of the country, which transport passengers and freight, and upon which, in general, locomotive engines have hitherto been in use. He referred to the fact that in the Act of 1885, in the item under which "steel railway rails" were made free of duty, it was declared in terms that the expression should not include "tram or street rails," using both words, the second of which he stated would be clearly superfluous if the term "tram rails" included street rails; and he stated that but for that circumstance he would have thought that the word "tramway" in the 88th item of the Act of 1887 included, and that the word "railway," in the 173rd item, did not include, a street railway. In view of that circumstance, however, he considered that if there were no legitimate aids to assist in discovering the intention of the Legislature other than the language used in the Acts of 1885 and 1887, the question would be so involved in doubt that the Plaintiff should

succeed. He then considered the fiscal policy and the national policy of the country and came to the conclusion that the exemption of steel rails from taxation was for the encouragement of the construction and extension of railways in the proper sense, namely, of railways of the same class as those which had been the objects of the care and bounty of Parliament, and had no application to the case of street railways. For these reasons he gave judgment for the Respondent.

15. The item in the Act of 1885 referred to by Mr. Justice Burbidge was Item 7, which placed in the free list

> " Steel railway bars or rails, not including tram or street rails."

The French version of this item is—

> " Barres ou rails d'acier pour chemins de fer non compris les rails pour tramways."

16. The Appellant appealed from this Judgment to the Supreme Court of Canada.

A copy of the Appellant's Factum will be found in the Record at pp. 123 to 139. Record pp. 123 to 139.

A copy of the Respondent's Factum will be found in the Record at pp. 140 to 171. Record pp. 140 to 171.

17. The appeal was heard on the 30th March 1895, before the Chief Justice Sir Henry Strong, Mr. Justice Taschereau, Mr. Justice Gwynne, Mr. Justice Fournier, and Mr. Justice King.

18. On the 29th June 1895, judgment was delivered and the Appellant's appeal was dismissed with costs, the Chief Justice and Mr. Justice King dissenting. Copies of the judgments will be found in the Record at pp. 172 to 179. Record p. 172. Record pp. 172 to 179.

19. The Chief Justice was of opinion that the Appellant's street railway was a railway and not a tramway within Item 88, and that even if it were a tramway within Item 88 the rails in question were exempted from duty by the provisions of Item 173. Record pp. 173 to 176.

Mr. Justice King concurred in this judgment. Record p. 176.

20. Mr. Justice Taschereau, Mr. Justice Gwynne and Mr. Justice Fournier were of opinion that by the course of the legislation of the Dominion the difference between railways and tramways was well recognised, that within the purview of such legislation the Appellant's street railway was a tramway, and that Item 173 had no application to the rails in question but applied only, in the words of Mr. Justice Gwynne, to— Record pp. 176 to 179.

> " steel rails for use in the tracks in those great arterial commercial
> " undertakings for the transport by interconnection with each other
> " throughout the continent not only of passengers, but of goods, wares,
> " merchandise, chattels, and cattle of every description, which are
> " denominated ' railways ' without any qualifying prefix."

21. The Appellant obtained special leave to appeal to Her Most Gracious Majesty the Queen in Council on the 13th day of August, 1895.

The Respondent submits that the said Judgments and Orders appealed from herein are correct and ought to be affirmed, and that this appeal should be dismissed with costs for the following (amongst other)

REASONS :

1. The rails in question are liable to duty under Item 88.

2. The rails in question are not exempted from duty by Item 173 which exempts from duty a different article altogether.

3. The rails in question being clearly liable to duty under Item 88, are not exempted from duty by Item 173 inasmuch as the exception is doubtful.

4. Mr. Justice Burbidge has in effect found as a fact that, according to common acceptation, the word "tramway" includes, and the word "railway" does not include, a street railway.

5. The word "tramway" is commonly used throughout Dominion and Provincial Legislation to describe a way such as that in question.

6. The Appellant carries on a purely street railway business, which is not a "railway" but a "tramway" within Item 88.

   (*a*) A distinction is drawn in the legislation of the Dominion of Canada and of the various Provinces between railways and tramways. The legislation as to tramways is, and as to railways is not, applicable to the Appellant's street railway.

   (*b*) The practice in the Customs Department has been to treat street railways as tramways.

   (*c*) In ordinary language the Appellant's street railway is a tramway.

   (*d*) The contract of March 7th 1892, the invoices and Customs entries describe the rails in question as tramway rails.

(*e*) The intention of Parliament as manifested in the discussion on Item 88 was to include street Railways under the word "tramways."

(*f*) The fiscal policy and national policy of the country was to exempt from duty rails for use in great commercial undertakings properly called "railways," and not rails for use in street railways.

7. The evidence introduced by the Appellant as to the meaning of the word "tramway" was inadmissible.

8. The Appellant's contention that the Act of 1885 shows that Parliament did not regard the word "tramway" as including street railway is negatived by Statute of Canada, 53 Vic., cap. 7.

9. The rails in question are not like rails used for railway tracks, and cannot be used by railways.

10. If the rails in question fall neither under Item 88 nor Item 173 the Respondent is entitled to retain the duty under Item 89 or under Item 189 and Section 13 of the "Customs Act," Rev. Stat. Can. c. 32.

11. The Judgments appealed from are right and should be affirmed.

E. L. NEWCOMBE.

H. W. LOEHNIS.

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