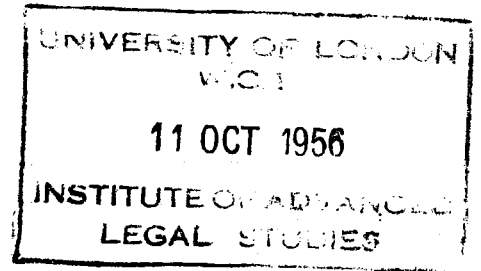


In the Privy Council.

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*.

RECORD OF PROCEEDINGS.

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In the Privy Council.

No. 49 of 1895.

ON APPEAL  
FROM THE SUPREME COURT OF CANADA.

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BETWEEN

THE TORONTO RAILWAY COMPANY - (*Plaintiff*) *Appellant*,

AND

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

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RECORD OF PROCEEDINGS.

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“ A. ”

IN THE SUPREME COURT OF CANADA.

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Appeal from the Exchequer Court of Canada.

Between

The Toronto Railway Company - - (*Plaintiff*) *Appellant*,

and

Her Majesty the Queen - - (*Defendant*) *Respondent*.

Statement of Case.

10 This is an Appeal by the above-named Appellant from the judgment of the Exchequer Court of Canada, which dismissed with costs the action brought by the Appellant to recover \$55,610. 60 (and an additional sum of \$433. 57 added to the claim by amendment at the trial) paid by the Appellant to the Collectors of Customs at Toronto and Montreal under protest, in respect of Customs duties collected in respect of certain quantities of steel rails imported by the Appellant Company for use in its tracks.

The trial took place at Toronto on the 19th and 20th days of April 1894, before Mr. Justice Burbidge, who reserved his judgment, which was delivered on the 29th day of October 1894, and which sustained the claim of right in the Respondent to collect the said duties.

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RECORD.

No. 2.  
Statement  
of Claim,  
23rd Jan.  
1894.

IN THE EXCHEQUER COURT OF CANADA.

Statement of Claim.

1. The Plaintiff was, by an Act of the Legislature of the Province of Ontario, intituled "An Act to Incorporate the Toronto Railway Company and to confirm an Agreement between the Corporation of the City of Toronto and George W. Kiely, William McKenzie, Henry A. Everett and Chauncey C. Woodworth," and being chaptered 99 of Acts passed in the year 1892, duly incorporated with power and authority:—

Section 4.—

- (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 the exceptions and under the qualifications contained in the first section hereof, 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. 10
- (2) To acquire privileges to build and operate surface railways within the limits of any Municipal Corporation in the County of York, 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. 20
- (3) To enter into agreement 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.
- (4) 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. 40
- (5) 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 necessary for the said purposes.

RECORD.  
No. 2.  
Statement  
of Claim,  
23rd Jan.  
1894—con-  
tinued.

10 2. By Section 18 of the said Act, Section 34 (except so much of Sub-section 15 thereof as is prohibitive of a person being chosen a Director by reason of his holding any office, place or employment in the Company), Sections 35, 36, 37, 38 and 42 of the Railway Act of Ontario (R.S.O. 170) are incorporated with and are to be deemed and taken to be clauses or sections or parts of the said Act, and are to apply to the Plaintiff, when not inconsistent with the provisions in the special Act contained.

3. Sub-sections 1, 2 and 3 of Section 16 of the Street Railway Act of Ontario (R.S.O. 171) are also incorporated in the said Act of incorporation, and made part of, and are to be considered as sections of such Act, and are to apply to the acquisition by the Plaintiff of sites for power, buildings and other necessary privileges, which said Sub-sections embody the powers as to expropriation of lands for Railway purposes contained in the said Railway Act of Ontario, and being Sections 11 to 20 thereof inclusive.

20 4. For the purpose of relaying the tracks of the Plaintiff's Railway, and in providing extensions and turn-outs the Plaintiff imported into Canada at the Port of Toronto, certain quantities of steel rails, to wit:—

			No. Rails.			Gross Tons.
	Oct. 21, 1891	-	-	-	-	72
	June 21, 1892	-	1,466	-	-	452 <sup>1354</sup>
	„ 22 „	-	1,172	-	-	361 <sup>1566</sup>
	July 7 „	-	2,392	-	-	725 <sup>680</sup>
	„ 18 „	-	1,496	-	-	462 <sup>114</sup>
	„ 21 „	-	1,592	-	-	500 <sup>1383</sup>
	Sept. 14 „	-	849	-	-	261 <sup>1817</sup>
	„ 12 „	-	18	-	-	6 <sup>2040</sup>
30	„ 27 „	-	1,607	-	-	496 <sup>1237</sup>
	Nov. 15 „	-	3,069	-	-	948 <sup>2223</sup>
	June 22, 1893	-	515	-	-	165 <sup>1867</sup>
	„ 26 „	-	1,250	-	-	408 <sup>711</sup>
	July 4 „	-	1,370	-	-	417 <sup>331</sup>
	„ 13 „	-	600	-	-	202 <sup>2097</sup>
	„ 13 „	-	870	-	-	284 <sup>343</sup>
	„ 26 „	-	1,200	-	-	405 <sup>1953</sup>
	„ 26 „	-	1,106	-	-	365 <sup>1060</sup>
40	Aug. 9 „	-	1,700	-	-	552 <sup>1706</sup>
	Oct. 10 „	-	450	-	-	146 <sup>1538</sup>
	„ 27 „	-	384	-	-	160 <sup>410</sup>
	Nov. 4 „	-	1,344	-	-	517 <sup>1588</sup>
	„ 20 „	-	840	-	-	346 <sup>401</sup>

RECORD.

No. 2.  
Statement  
of Claim,  
23rd Jan.  
1894—con-  
tinued.

5. The said rails were "T" rails weighing 69 lbs. or over per lineal yard, and were imported for the purpose of being used in railway tracks by the Plaintiff, and since the said dates of importation have been so used.

6. Under the provisions of "The Act respecting the Duties of Customs," Chapter 39 of the Statutes of 1887, and the amendment thereto, steel rails weighing not less than 25 lbs. per lineal yard, for use in Railway tracks can be imported and used free of duty, the item being No. 173 in the said Act, and No. 996 of the Departmental Tariff of 1890, and is in the words and figures following, *i.e.*, "Steel rails weighing not less than twenty-five pounds per lineal yard, for use in Railway tracks." 10

7. Being so entitled, the Plaintiff did duly enter the said rails as free from duty but the Collector of Her Majesty's Customs at the said Port of Toronto, refused to admit the same without the payment of a duty thereon of \$6 per ton, alleging that the said rails were subject to duty under the provisions of the said "Act respecting the Duties of Customs," and the amendments thereto.

8. The Plaintiff being unable to obtain such rails, except upon the payment of the duty so claimed, deposited with the said Collector, under protest, the duty so demanded as follows:—

Date of Entry.		Amount deposited.		
Oct.	21, 1891	-	\$ 433 57	20
June	21, 1892	-	3,041 50	
"	22 "	-	2,430 62	
July	7 "	-	4,941 24	
"	18 "	-	3,104 98	
"	21 "	-	3,364 14	
Sept.	14 "	-	1,759 37	
"	12 "	-	46 94	
"	27 "	-	3,648 67	
Nov.	15 "	-	6,377 21	30
June	22, 1893	-	1,114 40	
"	26 "	-	2,743 89	
July	4 "	-	3,004 83	
"	13 "	-	1,363 73	
"	13 "	-	1,909 51	
"	26 "	-	2,727 46	
"	26 "	-	2,457 78	
Aug.	9 "	-	3,706 83	
Oct.	10 "	-	985 73	
"	27 "	-	1,076 43	40
Nov.	4 "	-	3,479 02	
"	20 "	-	2,326 32	

9. Application has been made on behalf of the Plaintiff to Her Majesty's Comptroller of Customs, and Government of the Dominion of Canada, and to the said Collector, for a refund of the said deposit, but the said Comptroller,



Government and Collector have always neglected and refused, and still neglect and refuse to make such refund.

10. The Plaintiff submits that it had the right to import the said rails free of duty, and that the duty aforesaid was improperly imposed, and it is entitled to a return of the said amounts so deposited by it.

The Plaintiff therefore claims :—

1. That it may be paid the said sum of \$55,610. 60 and interest thereon from the dates of deposit as aforesaid.
2. That it may be declared that any steel rails so imported, or which may be imported by the Plaintiff, exceeding in weight 25 lbs. to the lineal yard, for the purpose of laying in its Railway tracks, are not subject to duty.
3. Such further or other judgment or relief in the premises as the Plaintiff may be deemed entitled to.
4. And the costs of this action.

The Plaintiff proposes that this action be tried in the City of Toronto.

Delivered this 23rd day of January 1894, by Kingsmill, Symons, Saunders and Torrance, of the City of Toronto, in the County of York, Solicitors for the Plaintiff.

RECORD.

No. 2.  
Statement  
of Claim,  
23rd Jan.  
1894—con-  
tinued.

---

Statement in Defence.

The Statement in Defence of Her Majesty's Attorney-General on behalf of Her Majesty the Queen, to the Statement of Claim of the above-named Plaintiffs.

No. 3.  
Statement  
in Defence,  
28th Feb.  
1894.

1. All admissions made herein are made for the purposes of this action only.

2. Her Majesty's Attorney-General admits the first, second and third paragraphs, together with the said sub-sections of those paragraphs as set out in the said Statement of Claim, so far only as they set out the provisions of and are in accordance with the Acts of the Legislature of Ontario recited therein, and will, at the trial of this action, ask leave to refer to the whole of the Acts therein mentioned, and the Agreement thereby confirmed.

3. Her Majesty's Attorney-General denies the statements made in paragraphs 4 and 5 of the Statement of Claim.

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

**RECORD.** 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*.

No. 3.  
Statement  
in Defence,  
28th Feb.  
1894—con-  
tinued.

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.

6. Her Majesty's Attorney-General says that the duty paid in respect to the following entries of rails were not paid under protest, namely the duty paid on the entries under the dates following:—

July 21, 1892	-	-	-	-	-	\$3,364	14	10
Sept. 14	„	-	-	-	-	1,759	37	
„ 27	„	-	-	-	-	3,648	67	
June 22, 1893	-	-	-	-	-	1,114	40	
„ 26	„	-	-	-	-	2,743	89	
July 4	„	-	-	-	-	3,004	83	
„ 26	„	-	-	-	-	2,727	46	
„ 26	„	-	-	-	-	2,457	78	
Aug. 9	„	-	-	-	-	3,706	83	

7. Her Majesty's Attorney-General says that the duty paid in respect of the rails mentioned in the Statement of Claim was not paid by the Plaintiffs, nor were the rails upon which said duty was paid the property of or imported by the Plaintiffs, and the Plaintiffs are not entitled to recover back in this action the said amounts of duty.

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.

9. Her Majesty's Attorney-General claims that the relief sought by paragraph 2 of the claim for relief in the Statement of Claim is not within the competence of this Court, and cannot be given in this action.

10. Her Majesty's Attorney-General claims that this action should be dismissed with costs.

Delivered this 28th day of February 1894, by Frank Egerton Hodgins, of the City of Toronto, Agent for Her Majesty's Attorney-General.

## Joinder of Issue.

RECORD.

The Plaintiff joins issue upon the Defendant's Statement of Defence delivered herein.

Delivered this second day of March 1894, by Messrs. Kingsmills, Symons, Saunders and Torrence, of 19 Wellington Street West, in the City of Toronto, Solicitors for the Plaintiff.

No. 4.  
Joinder of  
Issue, 2nd  
March 1894.

## Evidence

Taken at the Trial before the Hon. Mr. Justice Burbidge at Toronto,  
19th April 1894, 11 a.m. (Osgoode Hall).

No. 5.  
Evidence, &c.  
Preliminary  
Argument.

10 Mr. Robinson, Q.C., Mr. Osler, Q.C., and Mr. Symons, for the Claimants.  
Mr. Hodgins appeared for the Crown.

*Mr. Osler.*—The case appears in the printed pleadings. The claim is for duties paid under protest upon rails imported into this country by the Suppliants, starting during 1892 and 1893. The amount is something over \$50,000, and it is admitted that the Plaintiff Company imported certain steel rails, the number of gross tons, etc., are correctly set forth in paragraph 4 and that the Plaintiff paid the amount of duty as set forth in paragraph 3, and paid the same under protest on the dates therein mentioned. That is an admission which we file.

20 *His Lordship.*—The case comes before the Court on reference, and not on petition?

*Mr. Osler.*—It comes under fiat and Statement of Claim. The Statement of Claim is founded upon the reference.

*His Lordship.*—I see the reference is signed by the Comptroller of Customs. Perhaps there is some doubt whether the Comptroller of Customs can refer the case, but I will not raise any difficulty. Perhaps you will undertake to get the consent of the Minister of Customs. It is a question of jurisdiction only.

*Mr. Osler.*—Mr. Hodgins I think will see that there is no technical difficulty.

30 *His Lordship.*—But Mr. Hodgins cannot give me jurisdiction. I only get jurisdiction because there is a fiat of the Governor General, or because there is a reference by the head of the Department. Consent will not give me jurisdiction.

*Mr. Osler.*—Yes, my lord. I have a Statement of Claim here, with a Statement of Defence. Does your Lordship look behind that record?

*His Lordship.*—Here is the record. It is this reference that gives me jurisdiction. It is Mr. Wallace who signed it.

*Mr. Osler.*—We will undertake to get anything your Lordship desires.

40 *His Lordship.*—I have had the same question before, and the same undertaking with regard to the Comptroller of Inland Revenue. I do not anticipate any difficulty about it at all, except the Statute says it shall be the

**RECORD.** head of the Department. I think you should have the concurrence of the Minister.

No. 5.  
Evidence, &c.  
Preliminary  
Argument—  
*continued.*

*Mr. Osler.*—I think there will be no difficulty about that.

Then the question comes up under the Act respecting Duties and Customs, Chapter 39 of the Statutes of 1887, and the amendment thereto. We have the provision that the Crown relies on, that iron or steel railway bars and rails for railways and tramways of any form, punched or not punched, not elsewhere specified, are subject to a duty of six dollars a ton. Then we have this provision, "steel rails weighing not less than 25 pounds per lineal yard for use in railway tracks." The question then comes before your Lordship, whether the rails which the Plaintiff Company imported are subject to the duty of six dollars a ton, or not. It is claimed on the part of the Crown that they come under the enacting affirmative clause, and that they are subject to the six dollars a ton duty. It is claimed by the Plaintiff that they are steel rails, not less than 25 pounds per lineal yard, and for use in railway tracks. The Plaintiff's road is incorporated under the name of the Toronto Railway Company. It operates upon the streets of Toronto, and the streets in any Municipal corporation of the County of York, allowing them to do so by by-law. They have the right under the words of their Charter to operate a surface railway. There are incorporated in their special Acts, by a reference, various sections of the Railway Act of Ontario. They have the power of expropriation for certain purposes. 10

*His Lordship.*—For what purposes?

*Mr. Osler.*—For the acquisition of sites for power houses, buildings and other necessary privileges.

*His Lordship.*—But not for track purposes?

*Mr. Osler.*—And for track. The Street Railway Act of Ontario gives certain powers of expropriation for track, which they also have. Then they operate their road by the immediate force of electricity, electricity produced by steam. The particular section of rail which they are entitled to use is subject to the by-law, or the approval, of the city authorities, where they are operating upon the city streets. The section approved of and laid down, and the section imported, is the section a sample of which is here. It is a T rail with an elongated web which is a necessity only for street purposes, for the purposes of the pavement, and not for the purposes of the railway. The elongated web which your Lordship sees in the section produced is not a necessity for the railway, but to give the depth required for a pavement above the tie, the ordinary railway tie, upon which this rests. The construction of this road is the construction of a railway. The rail rests at intervals upon ordinary railway ties, fastened down to the ties, in the ordinary way by spikes, the rails united together by the ordinary fish-plate. The sole difference in the form of the rail is the elongated web in the first instance, which is necessary for pavement. and the lip which forms the depression for the flange of the wheel. This lip is unnecessary for the railway purposes, but is necessary for the pavement purposes. If the edge of the pavement was brought up to that point, without protection, it would be a source of weakness in the highway, but this lip projecting forms a depression for the flange of the wheel, and at the same 20 40

time gives the necessary protection to the edge of the asphalt, or other pavement which is continued from it.

Now, our contention is that we are a railway. We are incorporated as such. We are operating a railway. The contention of the Crown, as I understand it, is founded upon the wording, "iron or steel railway bars and rails for railways and tramways, not elsewhere specified, \$6. 00 per ton." The contention of the Crown, I believe, is that we are not a railway, but a tramway. We argue against such contention. We say that we are a railway. But we also say that it is not necessary for us to go that far. We say that the distinction, the sole distinction here is in the weight of the rail, and that the words "railway tracks" in the clause making steel rails of a certain class free, that the word "railway" there is to be taken in the larger sense, that it is a generic term, and not narrow, not limited to any particular class of railway, just as the words railway bars and railway rails. The word "railway" in the duty clause there as I have used it, must be a railway in a broader sense of the term, because after using the words "railway bars and rails" for railways and tramways, your Lordship sees that the word "railway," as first used, must have a larger sense and meaning than the word "railways" where used subsequently in the section as contrasted with "tramways."

Now, we say that the words "railway tracks" is to have that broader meaning. We say that it is to have the same meaning as "railway bars" or "railway rails" in the clause enacting the duty, and that where we read "railway bars" and "railway rails" in the larger sense, we also have to give that larger sense to the words "railway tracks." Your Lordship sees it is not steel rails weighing not less than 25 pounds per lineal yard for use in railways, but for use in "railway tracks." We also contend that the word "tramway," as used in the duty clause, has a very limited sense in this country, whatever it may have in England; the interpretation to be given to that word is one which does not in this country include street railways. I point out that railway legislation of the Dominion distinguishes tramways from street railways and electric railways. These remarks are all, I think, that will be necessary to enable your Lordship to follow the evidence that we propose to give.

*His Lordship.*—What are the words in the clause imposing the six dollars?

*Mr. Osler.*—"Iron or steel railway bars and rails for railways and tramways of any form, punched or not punched, not otherwise specified \$6. 00 a ton."

*His Lordship.*—That introduces the other clause?

*Mr. Osler.*—That introduces the other clause.

*His Lordship.*—And one will have to ask himself whether you would read that clause as being for use in railways if not more than 25 pounds in weight, and in tramways. That view of it would make every rail used for a tramway dutiable, no matter what its use was.

*Mr. Osler.*—In one case the weight is the test, and the other case is whether it is a tramway or not.

*His Lordship.*—But you were clear of any test of weight.

*Mr. Osler.*—Yes.

RECORD.  
 —  
 No. 5.  
 Evidence, &c.  
 Preliminary  
 Argument—  
 continued.

*His Lordship.*—If you are not excluded by being a Tramway Company, or if you are not excluded because it is not a railway, then you are entitled to have the duties ?

*Mr. Osler.*—Yes ; I might say that we have not in this case to contrast the road as it exists in Toronto with a road such as the Grand Trunk or Canadian Pacific. The Department have considered the question with reference to the Niagara Falls Railway, and they have considered it with reference to the Hamilton, Grimsby and Beamsville Street Railway, and the standards, the difference between those roads and the road in question would be the line for the consideration of the Court.

10

*His Lordship.*—That is, if the Department is right in the other case.

*Mr. Osler.*—The Department admit.

*His Lordship.*—You mean to say the Crown, in this case, will admit they were right in the other decision ?

*Mr. Hodgins.*—No.

*Mr. Osler.*—The Department have taken that position.

*His Lordship.*—But that would not be material in the construction of a Statute.

*Mr. Osler.*—I am not so sure as to that.

*His Lordship.*—It might be something to affect, or influence, men's minds, but still what the inquiry now is, is really what the law is, not what it has been construed to mean some other time. That would be a good argument to address to the Minister himself when you are asking him to make a given decision. I suppose you will try and get the benefit of it.

*Mr. Osler.*—It occurs to me in this way, if these two roads are conceded as being perfect railways.

*His Lordship.*—If Mr. Hodgins concedes it here, I have nothing more to say about it.

*Mr. Hodgins.*—No, my Lord. The only admission the Crown is prepared to make is before your Lordship.

30

*His Lordship.*—But what the Department has done in some other case, although I would not shut out the evidence, and would take it subject to objection, I would not consider relevant myself. Those decisions do not bind the hand of a Court ; it is all very well when addressing yourself to the Minister. He might feel himself bound by his own decision.

*Mr. Osler.*—That comes with greater force before this Court from the fact that will appear, that with regard to these roads, with great points of similarity to the road in question, very few dissimilar points, these questions have arisen since this action was commenced, and the Department, after careful consideration, has decided that these two were railways, and entitled to the free admission of their rails.

40

*His Lordship.*—No doubt what you say will be entitled to great consideration, but it will have no more weight than the reason that is behind it. They are not conclusive unless they are admitted to be conclusive. They will have whatever weight there is behind them.

*Mr. Osler.*—Your Lordship understands the class of decision which is very frequently quoted in the United States Courts, in Customs and Governmental matters, the opinions of the Attorney-General?

*His Lordship.*—Yes, I know.

*Mr. Osler.*—Which are acted upon by the Courts of the United States as being almost judicial authorities. You tender the opinion of an Attorney-General upon the question of the construction of a Customs Act, and that opinion is looked upon as the opinion of a judicial officer, and I propose to quote to your Lordship in argument, in the same way, that the opinion of the  
10 Attorney-General would be quoted in a Customs case in the United States, and they are frequently quoted; I propose to quote to your Lordship the opinions of the Department of Justice upon these two questions, as being judicial opinions upon the subject matter, and entitled, to the extent to which your Lordship will receive the opinion of the officer, to weight in coming to a conclusion. That is the way I will put it rather than a fact. It is not the fact that the Department acted in remitting the duties, but it is the opinion of the Department of Justice upon which the Customs acted, which is an authority to your Lordship, more or less binding.

*His Lordship.*—I am afraid we will not agree upon that point. We will  
20 discuss it when we come to it.

*Mr. Osler.*—Very well, my Lord.

*Mr. Hodgins.*—Perhaps it will be convenient for me now to mention a motion of which I gave my learned friend informal notice. I see from my learned friend's opening it may possibly be necessary. I understood my learned friend to say that he might contend, and would contend that this Company was not a tramway, that that had a certain limited sense in this country, and it occurs to my mind that we might find ourselves in the position that my learned friend might not be able to convince your Lordship that it was a railway Company, and I might not be able to convince your Lordship that it  
30 was a tramway, and in that case the duty, so far as it has been paid, would be collected under another item of the tariff, that is the general item, "manufactures, of articles or wares, not specifically enumerated, or provided for, composed wholly or in part of iron and steel, etc., 30 per cent. *ad valorem*." That is number 89 in the Statutes of 1887. Of course in making the motion, my Lord, I wish to say that it is the desire of the Crown to have a decision upon the question my learned friend has presented, as between the two particular class of items, but still I think it would be only right and fair, in case it might not, by some possibility, fall under either, that the Crown should have the right to retain the duty to the extent we have mentioned. I notified  
40 my learned friend that I would ask your Lordship to amend the Statement of Defence by setting that out as an alternative claim.

*His Lordship.*—That is, if the duty is not \$6 a ton, it is 30 per cent. *ad valorem*.

*Mr. Hodgins.*—Yes.

*His Lordship.*—I suppose there is no objection to the amendment, is there?

*Mr. Osler.*—That is not the question under the Reference.

RECORD.

No. 5.  
Evidence, &c.  
Preliminary  
Argument—  
continued.

*His Lordship.*—I suppose the Reference is really whether you are to get back this money or not.

*Mr. Osler.*—No, the claim is the payment of a duty of \$6 a ton.

*His Lordship.*—Your claim is to get back duties you paid at \$6 a ton.

*Mr. Osler.*—The terms of the Reference are, setting out the Petition of Right, which is in substance a Statement of Claim, "I do refer the claim above mentioned, a copy of which is hereto annexed," then "application has been made on behalf of your Suppliants, for a refund of the said deposit," etc., etc.

*His Lordship.*—I will allow the amendment, Mr. Osler. 10

*Mr. Osler.*—Very well. We will see how it can be worked out.

William  
McKenzie.

William McKenzie, sworn.

*Examined by Mr. Osler.*—*Question.* You are President of the Toronto Railway Company?—*Answer.* Yes.

*Q.* You are familiar with their affairs and construction?—*A.* Yes.

*Q.* There was a re-organization of the Toronto Street Railway, as an enterprise, within the last three or four years, the old Company having been purchased, their rights having been purchased by the City of Toronto, and a new organization entered upon, which appears by the Statute incorporating your Company, and the agreement in the Schedule?—*A.* Yes. 20

*Q.* You have been familiar with the matter since the re-organization?—*A.* Yes.

*Q.* You are the Mr. William McKenzie mentioned in the Act?—*A.* Yes.

*Q.* Then since that organization you have constructed about how many miles of railway?—*A.* Between 65 and 70 miles.

*Q.* That is miles of railway or street miles?—*A.* Miles of railway.

*Q.* The larger portion of which is double track?—*A.* Mostly all double tracked.

*Q.* And does any part of your road extend out of the City limits?—*A.* We have purchased other portions. 30

*Q.* Now, what is the construction?—*A.* It is the same construction as an ordinary railway.

*Q.* Your foundation is railway ties?—*A.* Yes, sir.

*Q.* Your construction is railway ties with the rails spiked upon those ties?—*A.* Yes.

*Q.* And this is the section? (Produced.)—*A.* Yes, and the same fish-plate. (Ex. 2.)

*Q.* That rail is spiked upon the ties. Does it differ in any way from that of the Grand Trunk?—*A.* Not the slightest.

*Q.* And the fish-plate?—*A.* Just the same.

*Q.* And your construction throughout is in that way?—*A.* Throughout it is a similar construction. 40

*Q.* And the paving connected with it is a City matter?—*A.* A City matter. The Railway Company does not do the paving. The City does that.



Q. Your construction, so far as you construct, is the rail of this section spiked upon a series of railway ties, and fastened together with fish-plates?—

A. Exactly.

Q. That is your whole construction?—A. The whole construction.

Q. Now, why have we this form of rail? Is that necessary for the purpose, or why is this form of rail adopted?—A. It is not at all necessary for us; it is a matter of City government, for their own purposes.

Q. For convenience of pavement purposes?—A. They added that to it for their own purposes; we wanted to use it without that. (Referring to the  
10 lip.)

Q. You have the long web, which is for the pavement purposes, and the lip?—A. Yes.

Q. For the protection of the edge of the pavement?—A. Yes, I suppose it is for that purpose they use it; I don't think it is necessary, because we use it in other cities without.

Q. Now, you are familiar with the construction of surface roads elsewhere, you have some interest, I think, in the Winnipeg Electric Road?—  
A. Yes.

Q. What section do you use there?—A. We use the same kind of a section  
20 without that lip, the same as is used in railway work generally.

Q. You use a rail which is ordinarily used in the steam railways?—  
A. Exactly.

Q. Is the web the same length, or a shorter web?—A. It is just the same rail, in fact we bought the 56-pound rail for Winnipeg, the same as they used on the prairie section on the Long Lake Railway, and Calgary and Edmonton, in fact they used the same rail.

Q. You met the pavement requirement in what way in Winnipeg?—  
A. Simply by putting a plank right along the side of it, within about three-quarters of an inch of the top of the rail.

Q. Leaving the grooved depression between the plank and the top of the  
30 T rail?—A. Yes, the same as the Railway Company when they are putting down a switch on a street in a city, I know of one in Montreal on the Grand Trunk.

Q. Or on the Esplanade track down here?—A. Yes.

Q. Then you operate your road by the trolley system?—A. Yes.

Q. And your original power is from your power house, run by a steam engine?—A. Yes.

*His Lordship.*—Is it contended that anything depends upon the power used?

40 *Mr. Hodgins.*—Oh, I think not, my Lord.

*Mr. Osler.*—Then we do not need to go into that.

Q. You have charter powers to carry mail, express and freight?—  
A. Yes.

*Mr. Hodgins.*—Where?

*Mr. Osler.*—In our agreement you will find it. Are you doing anything with reference to the freight matter?—A. Yes, we are negotiating with the City to-day for doing their garbage business.

RECORD.  
 No. 5.  
 Evidence—  
 continued.

*Q.* And are you building any cars?—*A.* Between ourselves and the City we have built some cars, and have been experimenting with the thing, and now we are getting into shape to carry for the City the garbage.

*Q.* And City refuse to a certain dumping ground?—*A.* Yes, and I have had negotiations too for carrying gravel into the City from outside.

*Q.* And have you done anything towards mail carrying yet?—*A.* I had an interview with the Postmaster-General and Mr. Patteson here.

*Q.* You have been negotiating as to that?—*A.* Yes, and it is under negotiation now.

*Cross-examined by Mr. Hodgins.*—*Q.* Do I understand you to say that this 10 rail is solely necessary on account of the pavement?—*Solely.*

*Q.* Not at all necessary for your road?—*A.* Not at all; we would far rather have it the same as the other rail.

*Q.* How did you come to select this pattern?—*A.* I did not select it.

*Q.* How did you come to get it for your road?—*A.* The City Engineer.

*Q.* Why did you get it from the City Engineer?—*A.* Well, they retained the power to compel us to put in whatever rail they adopted.

*Q.* And this rail is the rail they adopted?—*A.* Yes.

*His Lordship.*—Is the difference between 56 and 69 made by the lengthening of the web and the lip?—*A.* Oh no, that rail could be cut down to 20 any weight; we determine the weight.

*Q.* If you had used the other shape of rail what weight would you have used?—*A.* It might run up to that weight; some roads are really heavier than that, and it is a T rail that does not differ; of course that extra lip makes an extra weight that would not be necessary.

*Mr. Hodgins.*—You had a blue print with a section of this rail on before you purchased this from the City Engineer?—*A.* Yes.

*Q.* And have you got that section?—*A.* That is it.

*Q.* Practically no difference?—*A.* Slightly different.

*Q.* And this rail is what is called a tramway rail?—*A.* No, I do not call it 30 a tramway rail.

*Q.* Do you know what a tramway rail is?—*A.* Well, tramways that I have any acquaintance with, sometimes they are wooden rails, and sometimes strap rails on wood, and sometimes they are a T rail, and sometimes they are any kind of a rail.

*Q.* That illustrates your experience of what tramways are?—*A.* Yes, I know some tramways.

*Q.* You have been engaged in building railways. Not street railways?—*A.* I have been engaged in both.

*Q.* You never saw any tramway rail that was called a tramway rail and 40 known as such, except what you have told us, the strap rail—is that the case?—*A.* The strap rail is what I always looked upon as a tramway rail. Any kind of a strap rail on top of two wooden stringers.

*Q.* Do you know of any rail that is known as a tramway rail, apart from a strap rail?—*A.* Any light rails are generally called tram rails.

*Q.* Is that rail in front of you called a tramway rail?—*A.* Not that I know of.

Q. Is it called a girder tram rail?—A. Some people may call it that; we call it a street railway rail, or a railway rail, a girder rail. In our business we call it a girder rail.

Q. You went home to England and purchased these rails?—A. I purchased them while I was there.

Q. And you went home to England and purchased this particular rail. You made a bargain for it?—A. Yes.

Q. You made a contract with Dick, Kerr, & Co., and afterwards imported it?—A. Yes.

10 Q. Now, this is a section, or a copy of it, that you got from the City authorities when you went home?—A. No, I got a blue print.

Q. Have you got that blue print?—A. I don't know as I have. I probably left it in England.

Q. Is not this a correct delineation of that rail?—A. That is the shape of it.

Q. The one you admitted on your examination is practically the same as the blue print?—A. I admit here it is practically the same. (Exhibit A filed.)

20 Q. Whom did you get it from?—A. From the City Engineer, Granville C. Cunningham.

*His Lordship.*—The question does not seem to be whether it is a regular rail or a tramway rail, the question seems to be whether it is for use in a railway, or a tramway. You might get a tramway rail to use on a railway.

(The admissions are marked Exhibit No. 1; section of steel rail marked Exhibit No. 2.)

*Mr. Hodgins.*—Then I cannot get you to identify this as being a tramway rail?—A. Not from my experience.

30 Q. Have you ever built any other street railway except the Toronto Street Railway?—A. Yes, I built the Montreal.

Q. And any other?—A. Winnipeg, I was interested in it, I did not supervise it personally.

Q. In the Montreal Street Railway they used this same rail?—A. Both that and the ordinary T rail too.

Q. Now, can you form from your knowledge as a street railway man any idea why they use a rail of that particular form in the streets of a city?—A. The City authorities do that.

4 Q. But can you form any idea why?—A. They think it will keep the tracks from rutting by the wheels of ordinary vehicles, and keep the pavement to cross easily, as they do on the switch of any railway where it passes through a city.

Q. So that these can be laid down in the streets of a city, and traffic can take place over them by anyone who chooses to use the street?—A. You can do it with any rail.

Q. That is the reason that rail is in that form?—A. Some people think that is a better way to do it than the other.

RECORD.

No. 5.  
Evidence—  
continued.

*Q.* But the object is to get such a rail that when the pavement is constructed it will allow traffic by the public over it?—*A.* Yes.

*Q.* Without obstruction. Now, I understood you to say that you had power to carry express and freight?—*A.* Yes, I read it so in one of the clauses of our agreement with the City, which was confirmed by the Legislature.

*Mr. Osler.*—Do you wish this reference, “freight, express, mail?”

*Mr. Hodgins.*—You have not put either of these powers into operation yet?—*A.* We were carrying garbage, have carried it for quite a while, and we are now making permanent arrangements. We have been carrying it for quite a long while.

*Q.* I understand that you have not made permanent arrangements?—*A.* We have power to do it.

*Q.* This railway company of yours is what is ordinarily known as a street railway?—*A.* Well, we call it the Toronto Railway Company.

*Q.* Were you the author of the distinction?—*A.* We thought at the time it was just as much a railway as any other railway.

*Q.* Were you looking forward to the time when you would get your duty back?—*A.* Not at all; I never supposed there would be any duty.

*His Lordship.*—I suppose the principal idea of your construction is that you occupy the streets of the City?—*A.* Yes, and we have power to go outside as well, and we intend to go out.

*Q.* That is, to go on the roads outside?—*A.* Yes, or on private ground.

*Q.* It is a railway laid down upon the streets and roads?—*A.* We have part of our railway off the streets.

*Q.* But that is the incident, and not the main feature?—*A.* Probably it is.

*Q.* Is not that true?—*A.* We are on the streets principally yet.

*Q.* And the difference between your railway and the C. P. R. is that principally you run upon streets of the City, and roads in the county, or you may do so, and the going upon private land for the purposes of your railway is an incident to your main object?—*A.* We can do so; we can appropriate.

*Q.* But that is done as an incident?—*A.* Yes.

*Q.* Whereas, the C. P. R. has its own road bed, and any use it has of the streets is an incident, in their case? Is not that true?—*A.* Yes, I think that is true.

*Mr. Hodgins.*—Now, all these rails, as to which the duty is in question, are all laid down in the streets of the City?—*A.* I don't know that they are all laid down.

*Q.* Who would know?—*A.* I don't know that anyone would know; they are partly laid, and part of them not laid.

*Q.* Have any of them been laid outside of the City limits?—*A.* Yes, Toronto Junction.

*Q.* Is that a road that you operate?—*A.* We do not operate it; we furnish power for it.

*Q.* You sold the rails to them?—*A.* Yes.

Q. In your connection with your own Company who are claiming this refund, do you know whether any of the rails that you are claiming for have been used by your Company as part of its system outside the City of Toronto?—A. There is a small portion that was outside at one time, they are not outside now, because that part of the City has been annexed since.

Q. Cannot I get an answer to that question?—A. That is an answer. There was a part laid outside at Roncesvalles Avenue, and since they were put down the City has acquired that and taken it within the City limits.

Q. Then the only rails of this batch that were laid down outside the City  
10 limits were on Roncesvalles Avenue?—A. No, on the Lake Shore Road.

Q. In connection with your system?—A. Yes.

Q. And the City have acquired that?—A. Yes, it is within the City limits now.

Q. When were they laid down?—A. Before the 1st of July last year.

Q. Before July 1893?—A. Yes.

Q. Do you operate any other road in the County of York?—A. No, the Toronto and Mimico Railway, we operate that as the Toronto and Mimico Railway.

Q. The Toronto Railway Company do not operate it?—A. There is in  
20 course of arrangement the basis upon which it will be finally operated; it is not finally settled.

Q. The tickets of your road are not good over that road?—A. We issue separate tickets and charge extra fare.

Q. A different fare?—A. We run over part of the Mimico road with the Toronto Railway; we run over nearly a quarter of a mile of it with the Toronto Railway, and charge only the one fare.

Q. Where is that?—A. It is the part I was talking about.

Q. That would be on Queen Street produced?—A. West of Roncesvalles Avenue, the Lake Shore Road.

Q. And you only run over that for the purpose of turning your cars?  
30 A. Oh, no; we run down to the railway track to make connection with the Mimico cars.

Q. You spoke of the construction of the Winnipeg Railway? Is that a street railroad?—A. They call it an electric street railway, the Winnipeg Electric Street Railway.

Q. And what is your railway commonly called? A street railway?—A. No, the Toronto Railway.

*His Lordship.*—I do not think you need worry yourself about the name, Mr. Hodgins. It is a question of the use.

40 *Mr. Hodgins.*—I would like to have that contract that you made for these rails.

*Mr. Osler.*—We can sort it out afterwards.

*Mr. Hodgins.*—These form the contract with Dick, Kerr & Co. for the sale of these rails to your Company?—A. This is a letter I received from that firm in which he calls these "girder tram rails," but I never heard the expression until I went to London.

RECORD.

No. 5.  
Evidence—  
continued.

*His Lordship.*—Is that the correspondence respecting the purchase of these rails?—*A.* Yes. (Exhibit B.)

*Mr. Hodgins.*—You entered some of these rails, did you not?—*A.* I may have, I don't know that I did.

*Q.* At the Toronto Custom House?—*A.* I may have signed the document, but I did not enter them personally.

*Q.* Here is one entry, "No. 2109" of 1893 for part of these rails. You see on the back your signature?—*A.* If I signed it I signed it in blank, and would not know anything about it.

*Q.* I am sorry to hear that, because it is a declaration. That is your signature?—*A.* Yes. 10

*Q.* 2109. That is your signature on the back of it to that declaration?—*A.* Yes, it is all right so far as I know.

*Q.* Wherein you say that the invoices exhibit the fair market value thereof, and that the said goods are properly described in the said invoice. That is your signature?—*A.* These are all alike, and you have to sign them, or else not to get the goods. That is a thing that the Government insist on, that you have to sign whatever they put before you.

*Q.* Then take 4,318 of 1893, that is your signature on the back of that entry?—*A.* Yes. 20

*Q.* Then we will take No. 6,809, that is your signature on the back of that?—*A.* Yes.

*Q.* Then we take No. 24,932, that is also your signature on the back?—*A.* Yes.

*Q.* Then No. 27,815, that is also your signature on the back?—*A.* Yes, they came to me with the paper to pass.

*Q.* I notice the others connected with this shipment, that the name that appears on the back making these declarations for the Toronto Railway Company is James Gunn; who is he?—*A.* He is the Superintendent of the Railway. 30

*Q.* Who is John M. Smith?—*A.* He is Comptroller of the Railway.

*Q.* Who is Albert Rae?—*A.* I don't know.

*Mr. Hodgins.*—I put in these.

*Mr. Osler.*—Put them all in.

*His Lordship.*—Put them all in as Exhibit C.

*Mr. Osler.*—My learned friend will admit that there are some "girder tram" and some "girders."

*Witness.*—Any T rail is a girder rail.

*Mr. Hodgins.*—You were present at the meeting of the Railway Committee on the 23rd February this year?—*A.* I cannot locate the date. 40

*Q.* You remember the incident to which I refer, your being examined there in connection with the crossings of your road by the C. P. R. and the Grand Trunk?—*A.* Yes.

*Q.* Your Company was represented by whom?—*A.* By Mr. Osler.

*Q.* Were you there all the time?—*A.* Pretty much I think.

*Q.* You heard the address before the Railway Committee?—*A.* I think I did.

Q. On behalf of the Company?—A. Yes.

Q. And I suppose what Mr. Osler then stated as to the position of your Company and what your Company was, was correct, so far as you know?—A. I would like to have it correct so far as the crossings were concerned.

*His Lordship.*—Even before the Railway Committee Mr. Osler was not bound to speak to facts unless he was instructed, and he is not bound to express even his own opinion. He is only bound to express an argument, and the Committee had to judge of its reason and force; therefore, it cannot be very material here, except as to whether the argument has or has not weight.

10 *Mr. Hodgins.*—I am asking it with a view of showing what took place there.

*Mr. Osler.*—We object.

*Mr. Hodgins.*—They were giving a definition of this which is quite inconsistent with what they say to-day.

*Mr. Osler.*—Even in a desperate case it is not open to my learned friend. It shows a certain amount of desperation in his case.

*Re-examined by Mr. Osler.—Question.* I may as well prove by you the weight of this section?—*Answer.* Well, it was figured out to me in the first purchase that it would be 69 pounds to the yard.

20 Q. 69 pounds, with a variation of 1 per cent. either way?—A. Yes, but on the later rail we have got them run up to 73.

Q. But not under 69?—A. No.

Q. The actual weigh-out of the section is a little over 69 pounds to the lineal yard?—A. Yes.

Q. And it is made of steel?—A. Yes, that is what we bought it for.

Q. And you have no doubt of it?—A. No doubt.

Q. You had an inspector to see that it was good steel?—A. Yes, the very best.

Q. Now, is your system, or your construction yet complete?—A. No.

30 Q. You are still under construction?—A. Still under construction.

Q. And you have neither completed your passenger system nor your freight nor mail arrangements?—A. None of them.

Q. You are still under construction?—A. We are laying track at several points just now.

Q. This section we have here, is that constructed in the way the strap rails were constructed to allow traffic to run along, to allow wheels of waggons and carriages to run along?—A. Oh, no.

Q. In other words, will the ordinary waggon wheel adapt itself to that groove?—A. No.

40 Q. It is different entirely?—A. Different entirely. There is a piece of the old strap rail there.

Q. The old strap rail is as we have it here?—A. Made for vehicles to run on.

Q. Made so that there is a tramway for vehicles?—A. Yes.

*His Lordship.*—Exhibit 3 will be the form of the strap rail?

*Witness.*—That was taken up off the street here.

RECORD.

No. 5.  
Evidence—  
continued.

*Mr. Osler.*—In the new section they cannot?—*A.* It is not made for it.

*Q.* And when you say it is constructed for the street traffic, you mean the crossing?—*A.* Yes.

*His Lordship.*—When you speak of freight and passengers, the work they would do under that head would be what, at present, would be done by trucks and carts and express waggons by the City, I suppose. It is in lieu of truckage and carriage and City expressing.

*Mr. Osler.*—All railway is in lieu of waggon work.

*Witness.*—The Metropolitan Road is reaching out about thirty miles.

*Mr. Osler.*—It is a matter of degree altogether. 10

*His Lordship.*—Really the traffic they would displace would be traffic by trucks, carts and city express waggons.

*Mr. Osler.*—Just as the Northern Railway built up here taking all the wheat waggons off Yonge Street.

*Mr. Hodgins.*—There is no power to do that.

*Mr. Osler.*—Oh yes, there is legislative recognition.

*Mr. Osler.*—*Q.* You are extending your line to connect with railways up in the country?—*A.* Yes, we are being approached by the different lines outside to make connection to carry in all kinds of farm produce.

*Mr. Hodgins.*—*Q.* I did not understand from you when I was examining 20 you that you were extending your line outside the City?—*A.* Connected with outside lines to carry in farm produce and so on.

*Q.* You do not carry in any farm produce?—*A.* We are prepared to do it; we are preparing to do it.

*Q.* What line are you connecting with?—*A.* The Richmond Hill Road; they came to me and were arranging to take down farm produce.

*Q.* Is the Richmond Hill Road constructed?—*A.* No.

*Q.* Is there a rail laid?—*A.* I do not know, I could not tell you.

*Q.* You are simply negotiating with a railway that is still in the air?—*A.* It will soon be on the ground, probably. 30

*His Lordship.*—These rails were used in your City system?—*A.* Yes.

William T.  
Jennings.

William T. Jennings sworn.

*Examined by Mr. Osler.*—*Question.* You are a civil engineer and you have been concerned in railway construction largely?—*Answer.* Yes, sir.

*Q.* Concerned in the construction of the Canadian Pacific, and you have been lately concerned in the construction of the Niagara Falls Railway?—*A.* Yes.

*Q.* Describe to me the Niagara Falls Railway very shortly?—*A.* The construction of the permanent way of the Niagara Falls Electric Railway is similar to that of an ordinary steam railway. The rail is precisely the section 40 used on a good many hundred miles of the Canadian Pacific and other lines bonused by the Government, and the ties are placed two feet centres; the ballast is of broken stone; the fastenings are of the most approved and heaviest description.

*Q.* And what power?—*A.* Electric power with permission to use steam power on the portion north of the whirlpool for construction purposes.



Q. Then do you occupy any street allowance or road allowance?—A. We do; in the villages of Queenston and Chippawa and also throughout the Niagara Falls district. I think there would be three municipalities there; they use the highway along the whole extent of the river front between the whirlpool and the Burning Springs or Clifton House, properly speaking.

RECORD.  
—  
No. 5.  
Evidence—  
continued.

*His Lordship.*—Otherwise they have their own roadway?—A. In some districts we have our right of way purchased directly by the Company; at other points we use what was called the Military Reserve Strip, a strip set apart by the Imperial Government long ago.

10 Q. That is by permission of the Crown?—A. Yes.

Q. And it is not a public way?—A. Not now; it was a public way, but it has been closed for highway purposes, but that is only on about one-third of the distance.

Q. Can you give us some idea in miles?

*Mr. Osler.*—I was going to ask him.

20 Q. About how much of your road? Give me the total length of your road and about the mileage on streets or public road allowance?—A. The total mileage under operation at the present time would be twelve miles, that is the single track, for instance; I think about one-quarter would be on public highways, or three miles.

Q. And the rest on the Government Reserve or private way?—A. On the Government Reserve, the Queen Victoria Park, the Queenston Park or right-of-way purchased by the Company.

Q. About one-quarter would be along the line of highway?

*His Lordship.*—Running along the line of the highway?—A. On the highway allowance.

30 Q. The highway and the railway being on the same level?—A. Yes, practically. Just now the roadway is not completed, but that is our arrangement with the Park Commissioners that they shall be on the same level.

Q. I suppose in that case there was no widening of the street to make other conveniences of the highway? When a railway goes along the street, often it has, under the law, to make other conveniences for traffic?—A. At one point we bought an additional strip for one of the tracks; the first track was right on the highway; the second was laid on the strip purchased from the property adjoining the highway; we had not to purchase additional land to widen the highway.

40 Q. But in all cases where you used the highway you had to obtain the consent of the municipalities?—A. Yes, where the land did not belong or was not held by the commissioners in trust for the Government.

Q. Wherever you used the streets of the municipalities you obtained the consent of the municipalities?—A. Yes, if the municipality had control of the streets; between the Whirlpool and the Clifton House the municipality, I think, has no control of the highway; if so, it is of late date; it is the Park Commission, and we have their leave.

*Mr. Osler.*—That is a piece of land they got under the Parks' Act?—A. Yes, that is what I termed the Military Reserve.

## RECORD.

No. 5.  
Evidence—  
continued.

Q. If I may suggest, that was originally the Clifton and St. Catharines Stone Road, and then when the Park was formed that portion of it was incorporated and taken away from the public road and became a Park road. Now, will you tell me, as an engineer of many years' standing, whether the word "tramway" in this country is applicable to street railways, railways occupying the streets and operated under charters?—A. Well, I have never used the word "tramway" in connection with street railways, nor do I remember of seeing it used in connection with any document I have had to use in this country. I have known the expression of light railways for mining or other purposes, and I can recall two roads now that are termed "tramways," one is from the Don to Scarboro', on the Kingston Road. I think that was called The Toronto Construction Company's Tramway, and another from Queenston to Chippawa, an old horse railway; those are the only ones I can recall. Of course, I know the word "tramway" is used by people in this country now; you hear them talking of taking a tram, but more especially in British Columbia, but it is just an imported word. 10

Q. Would you recognize it at all in the popular sense as applying to street railway?—A. Oh, I think I would, if it was so applied. I would say that this man wishes to use an expression of that kind, but I do not think that it is a tram,—street railways, or electric railways. 20

*His Lordship.*—You would think he was English?

*Mr. Osler.*—You would think he was a foreigner or English if making use of it?

*His Lordship.*—Is the railway from New Westminster to Vancouver operated by electricity?—A. Yes.

Q. About thirteen miles?—A. About thirteen or fourteen miles.

Q. Do they call it a tram?—A. No, I think they call it The Electric Inter-Urban Railway. I think they use the 40 or 50 pound T rail.

*Cross-Examined by Mr. Hodgins.*—*Question.* You were City Engineer of Toronto for some time?—*Answer.* Yes. 30

Q. And you had something to do with fixing the shape of the rails now used and laid down in Toronto?—A. Yes.

Q. That is correct. But I believe you made a report to the City Council upon that?—A. I made a specification and report in connection with that whole matter.

Q. And how did you describe it?—A. I think I called it a girder rail.

Q. Did you call it a tramway rail?—A. I do not remember using that expression.

Q. Did you call it a street railway rail?—A. You can refer to my specification; I cannot remember now what I called it, but from my present recollection I would say I did not call it a tram rail. 40

Q. Who succeeded you?—A. I think Mr. Cuninghame was acting at the time the contract was finally closed or ratified by Parliament; that is the contract with the present Street Railway Company.

Q. You are the engineer of the Niagara Falls Park and River Railway Company?—A. Yes, sir.

Q. You had some correspondence too, I believe, with the Government with reference to the refund of the duties claimed upon the rails for that road?—*A.* Yes; I think I telegraphed to the Commissioner, Mr. Johnson, if I remember rightly.

RECORD.  
—  
No 5.  
Evidence—  
continued.

Q. Now, this Railway Company is incorporated under a special Act?—*A.* It is.

Q. It has all the powers of a steam railway?—*A.* No, not all the powers.

Q. Now, what has it not got?—*A.* I do not think we are allowed to carry freight in the ordinary sense of the term.

Q. The road is to be a connecting link between Toronto and Buffalo?—*A.* But not specially; I think it would pay better to make it a connecting link in the system between Toronto and Buffalo.

Q. Arrangements have actually been made to make it so, have they not?—*A.* Yes, I believe so.

Q. And propose not only to carry passengers, but freight?—*A.* That is a matter to be arranged hereafter. As I have mentioned, I do not now understand we have the right to carry freight, but, however, I think they ought to have.

20 Q. Any other power that it has not got?

*His Lordship.*—We will have to have regard to its power and conditions at the time it made its importation. There is no use discussing what they are going to do. We will have to inquire as to the condition of powers at the time of the importation.

*Mr. Hodgins.*—Q. Can you tell me any other power that an ordinary railway has that this Niagara Falls Park Railway has not?—*A.* I do not know; I do not think we have power to carry mails, but I think that would be easily obtainable.

30 Q. You constructed that railway as an ordinary steam railway?—*A.* As an ordinary first-class road-bed, not especially for steam purposes; we did not construct it for steam purposes, but for electric purposes. It is similar in construction to ordinary first-class steam railways.

Q. Then I understand you to say that some part was run along the highway allowance?—*A.* Yes, sir.

Q. The road is intended to be a road giving a view of the river, and consequently has got to run as close to it as possible?—*A.* Primarily.

Q. Now, what about the road in Queenston? Is not the use of the road there for the purpose of ascending the mountain?—*A.* Yes.

Q. A very small portion of the road?—*A.* Small portion of two streets.

40 Q. And adopting that line is necessary on account of the tremendous grade you have to encounter?—*A.* That is why we adopted that route.

Q. Then where again does it strike the highway?—*A.* At the south side of the whirlpool the northern limit of Niagara Falls North I think they call it, or Niagara Falls.

Q. Would that be above Clifton?—*A.* It would be just at the whirlpool immediately to the south of the whirlpool.

## RECORD.

No. 5.  
Evidence—  
continued.

Q. You strike the highway?—A. The northerly limit of the municipality of Niagara Falls.

Q. And you are for how long upon the highway?—A. We extend from that point to the Clifton House.

Q. On the highway?—A. Yes.

Q. Now, that highway runs just upon the river brink?—A. Yes.

Q. Is that what you have spoken of as the military reserve?—A. Yes, I think that was called a military reserve.

Q. And have you constructed it next the river?—A. On the river side.

Q. Is it exactly on the level of the highway?—A. It will be when it is finally completed. We are doubling the track now and in constructing the first portion, the single track, we did not make up the embankment at one or two points.

Q. I suppose there is no means of running that road so as to give a view of the river excepting along the highway there?—A. No.

Q. And where else does it run upon the highway?—A. In the village of Chippawa.

Q. That is quite a short piece?—A. Yes, about 1,500 feet.

Q. And is that level with the street too?—A. Practically so.

Q. Now, I have a letter here—I suppose I had better put in the original— from you to Mr. Osler, describing this road, which was sent down; you may look at it and say if that is your signature; the statements are, no doubt, correct?—A. That is my signature.

Q. And that is the letter which, I understand, was sent down for the purpose of having the rails free of duty?—A. I do not remember writing it to Mr. Osler; I thought it was to Mr. McCarthy.

(Witness looks over letter.)

Mr. Osler.—Put in your whole file; we will admit it.

Mr. Hodgins.—I will put in this letter.

Mr. Osler.—Just put in the whole file connected with that; it had better all go in.

Mr. Hodgins.—It is file 714 and 714 A. (Exhibit D.)

Witness.—I should like to explain with reference to a portion of that. With reference to steam motors, it was contemplated to run up a certain steep grade and for construction purposes, and pending the development of electrical appliances it was suggested by somebody interested in this road that we use steam motors. I was always against that, and I pointed out and eventually carried my contention, that it was not economical to work it in that way, although we had permission from the Government to use one motor for construction purposes.

Mr. Hodgins.—Q. If you had to describe that road as between railway and tramway how would you describe the road we have just been speaking of?—A. I have never used the word "tramway" at all. I have never had anything to do with bush railways such as you call "tramways"; I never use the word "tramway"; I know that that is an old country expression.

Q. Would the word "tramway" describe this Niagara Falls Railroad?—A. Oh, no.

Q. Or would the word "railway" describe it?—A. Electric railway.

Q. Would the word "railway" describe it any better than the word "tramway"?—A. The name of the railway was suggested by myself.

Q. As an engineer, would you describe it as a railway or tramway, if you were stating what it was?—A. I have just said I gave it the name of a railway.

Q. As a matter of description, would you describe it as a railway?—A. Yes.

Q. Now, you say you have never heard the word "tramway" used in this country in connection with railroads?—A. Excepting in an occasional way, but I do not think it is a common appellation to use.

Q. Are you aware that it has been used in legislation for a number of years in Canada?—A. I think it has, I have heard that.

Q. Do you know that it has been used in Ontario?—A. Yes, in connection with some of these small back country lines.

Q. I do not quite understand that; tell me what you mean by that?—A. There is a tramway I have heard spoken of between Flos and some other place seven or eight miles in length that is termed a tramway.

Q. Do you know that road?—A. I do not know of that one, I have heard it mentioned, but I have never seen it, so far as I can remember.

Q. And it has been constructed for a great number of years?—A. I mentioned two other roads that I remember hearing spoken of as tramways and have travelled on, that is a road from Don Bridge eastward some four or five miles towards Scarboro Heights in Toronto, and the old horse railway from Queenston to Chippawa.

Q. The roads that you have spoken of now, that you have heard the word "tramway" applied to, do they run upon the roads?—A. On the sides of the highway.

Q. Take this Queenston and Chippawa Road, was that road on the level of the highway?—A. That road was laid to one side of the highway and built as a railway generally, excepting its form of construction which consisted of a wooden rail with an iron strap on it.

A. Are those the only three that you have heard mentioned as tramways? Have you ever heard of the use of the word in connection with any other railway?—A. I think I heard Mr. McKenzie mentioning it this morning, or else in connection with Winnipeg; I thought I did, at all events.

Q. Now, would that be all?—A. I cannot recall, at present, any other to my mind.

Q. And you think that "tramway" is unquestionably an English word, an imported word here?—A. According to all authorities that is where it was first used.

Q. Now, where did the tramway in the sense of a street railway first originate, do you know?—A. I think it was the growth of this original style of conveyance used in England for the conveyance of material from mines and so forth, and as time wore on matters advanced, and in that way it came to be called a tramway. I have read up a good deal about it in dictionaries and encyclopædias. You can follow it up pretty well in that way.

RECORD.

No. 5.  
Evidence—  
continued.*Mr. Osler.*—You can make use of all the dictionaries.*Mr. Hodgins.*—*Q.* Do you know a writer named Clarke on tramways?—*A.* I do not think so.*Q.* Do you know a writer called Clarke on Railways?—*A.* On street pavements.*Q.* Then you do not know anything about Mr. Clarke's work on tramways?*A.* I may or may not, I do not remember the name.*Q.* Would you be inclined to dispute any statement he makes as to the origin of tramways and the use of the word?—*A.* If it is of a late date I think I should prefer to go back to old encyclopædias and other works of that kind. 10*Q.* We are speaking of it in the modern sense?—*A.* You asked me where it originated.*Q.* I am asking, of course, if you know anything about Mr. Clarke who gave where it originated and also its modern signification?—*A.* It is possible I may have read it.*Q.* Would he be correct in stating that a tramway in the modern sense of the word is a street railway?—*A.* Well, that is just as you may wish to term it. I have works on pavements and so forth, showing sections of railways under construction and completed and they are called tramways. Simply because they are called tramways in that work it is not necessary to so term them; it is 20  
an old country name.*Q.* I will read this definition.*Mr. Osler.*—He does not know the author; you cannot read it.*His Lordship.*—I think he can read the definition and ask him if he agrees with it.*Mr. Hodgins.*—“A tramway in the modern sense of the word is a street railway or a road railway constituting with the carriage way a combination of railways and common thoroughfares such that the traffic of the street or the road, unaffected by the tramway, is free to circulate,” &c., &c. Do you agree with that definition?—*A.* I agree that that is the definition of it as used in the 30  
old country.*Q.* Is that the definition of it as used in the United States?—*A.* No, I think not; I do not think they use the word tramway there to any extent whatever.*Q.* Would this statement be correct: “The modern tramway was first employed in the United States.” (Interrupted).—*A.* It would all apply just in the same way. I think they had the modern tramway in the old country and called it a tramway, that was a street railway, before they had in the United States. I do not mean the old original thing with cast-iron bars, stone setting and wheels with the flange on the outside or a groove rail or a wheel without a 40  
flange, I mean a modern flange.*Q.* “The modern tramway was first employed in the United States”; I have given you the modern definition of it as he says. Do you think that statement is correct, that it was first used in the United States in 1832?—*A.* No, I think not, because at that time I do not think there was anything of a very modern nature anywhere, but it was modern in comparison with what they originally had, there is no doubt, but it is not what we would call modern now.

Q. Look at the section of the rail and say whether those sections used in the early road are not tramway rails?—A. Those are what are called tramway rails in the old country, England and Germany.

Q. Take the New York and Harlem, the earliest one ever used, according to this writer, that is very similar in construction, so far as the part above the road is concerned?—A. Yes.

Q. And that would be called tramway rail?—A. They might have so called it.

Q. Who? The authors or constructors of that date.

10 Q. It would be, according to this writer, 1832?—A. These rails are still used, and they are called tram rails wherever they are used in Germany and England.

Q. Well, is not that rail that we have a section of what is known as a tramway rail?—A. I do not think so; I think the common name of that rail is a girder rail.

Q. Is it not called the girder tramway rail?—A. In speaking of that rail with railway men I would call it by its number, "girder rail 65, Johnson's section"; that is what that was designed from, and made a little heavier or deeper.

20 Q. You do not seem to know about Mr. Clarke. Is that a work that you would think was entitled to any weight. The proceedings of the Institute of Civil Engineers, Volume 103?—A. Most decidedly.

Q. The rails given there at page 211, are very nearly that class?—A. Yes, about the same.

30 Q. And there I see the writer speaks of the girder rail system of tramway, permanent way, is the most modern, excepting the last mentioned, the only one in the author's knowledge that has given practically satisfactory results where locomotives have been used. Practically that is what is called the "girder tramway rail"?—A. It would be so called in the old country, and this book is published in the old country by the Institute, and it is natural they would use that expression.

Q. Is it not what is known as a girder tramway rail?—A. In England it is, undoubtedly.

Q. Then that rail we have before us would be known in England as a girder tramway rail?—A. Yes; they might not even term it a girder rail, they might call it just a tramway rail.

40 Q. Now, what is a tramway rail, what is there that distinguishes it from an ordinary railway rail?—A. I think I commenced by mentioning what I considered a tramway, that is some class of road used for developing a district or working mines, carrying goods to an auxiliary road, not a main road or a branch road. I have never used it in connection with street railways at all.

Q. What difference is there between a tramway rail and an ordinary railway rail?—A. So far as the rail is concerned, you can use, as his Lordship stated, I think, a tramway rail on a railway or the reverse, if you like. I think you will find there are a great many rails that were originally for many years on steam railways and are now on what I call tramways.

RECORD.

—  
No. 5.  
Evidence—  
continued.

## RECORD.

No. 5.  
Evidence—  
continued.

Q. There has been a development, has there not, in the direction of constructing such a rail as will become imbedded in the pavement and will be strong enough to sustain the weight and will not prevent the free circulation of ordinary traffic across it? There has been a development in that way in connection with what is known as street railways?—A. This section represents it, this very girder section you have before you.

Q. Can you say what the peculiar form of the rail has been designed to meet, and why it differs from the rails on the C.P.R. and Grand Trunk?—A. The chief reason for this rail being made of such a depth, and a girder rail, is to meet the requirements of the pavement, you have to have a certain surface 10 composed of concrete, and so on, or wood or asphalt. These grooves are made in many cases and accepted by corporations to suit the pavements they adopt on their streets, some are made even eight or ten inches. In the States they have not got girder rails deep enough to meet the requirements, and they set the rails on chairs about eight inches high.

Q. That would account for the depth of the web?—A. Yes. It is not required as a matter of strength to sustain the load, that is done to meet the requirements of the paving, the lip on the inside is also to meet the requirements of the roadway for two purposes, to keep the flanges of the wheels in their place with as little obstruction to the paving material as possible, and also to keep 20 vehicles from coming in contact with the edge.

Q. And also so that the flange-way can be easily cleaned out?—A. Yes, kept clean; with the section adopted in Toronto it was not contemplated or expected that vehicles would use the track to any extent.

Q. But still it gets filled up with dirt or dust wherever there is a groove beside the rail?—A. Not filled up. It would be a receptacle for dirt to a more or less extent.

Q. And, therefore, the rail as you see it, is so constructed that that can be easily cleaned out?—A. It can be cleaned.

Q. And is not the resistance caused by the filling up of the groove beside 30 the track a very important element in street railway travel?—A. It would not occur in every case.

Q. In what case?—A. Unless the groove were entirely filled with some substance, that would cause trouble.

Q. Would there be more resistance on this track than there would be on an ordinary railway track?—A. From that cause there would be.

Q. And if that lip was not there at all and that was a plain rail, leaving the unbroken pavement say an inch or an inch and a half from it, that depression would get filled up and would not be as easily cleaned as that?—A. It would depend on how it was made. If the pavement was made in a certain form that 40 lip would not be further required unless to prevent the cutting of a deep groove though vehicles using the track allowance and their wheels running in contact with the rail.

Q. And that, of course, could be done by the vehicles which are using the City streets in Toronto?—A. From my own knowledge in connection with this special matter, I made that form of rail with the idea that vehicles would not use it, to run along it; I wanted to see them run across it, and I



considered the construction of a first-class road in this City or any city was as much for the benefit of the people of Canada as any other portion of road.

Q. There is nothing to prevent the ordinary carriage running along your rail?—A. Nothing to prevent it.

Q. And it is done in Toronto?—A. Not with that object.

Q. They run along the rail?—A. Oh, yes, they do occasionally, but not frequently, I think.

10 Q. Would you say that that rail could be used in railways?—A. It could of you adopt a flange to suit, but you have to make everything in keeping. It would not do to put a quarter inch flange on that one and one-quarter groove, it would cut it.

Q. The ordinary steam railway of to-day could not use that rail upon its railway?—A. Not that section of rail, but that style of rail could be adopted. I have a patent for an attachment to an ordinary T rail that makes it precisely like that.

Q. But this particular rail could not be used on an ordinary steam railway with the present wheel and flange?—A. No; it could be used, but it would be in a very moderate way.

20 Q. You would not use that rail, I suppose, on an ordinary steam railroad?—A. Not that section, unless it might be in a city where there were streets paved.

Q. Would you use that section of rail even if the groove were made deeper, and it otherwise was the same, would you use them on a steam railway?—A. Yes. If I was allowed to use steam motors in the City I would use that rail, if it was necessary to comply with the paving regulations.

Q. Through the country would you use this rail, providing the grooves were deep enough?—A. I would not use that at all for several reasons.

30 Q. The one would be on account of the extreme depth of the web?—A. No, that would not be a difficulty, but in the first place the rail is unnecessarily weighty, it would be heavy and cost more per ton than an ordinary steam railway rail; there are many features unnecessary.

Q. You say that would not be suitable to put on a steam railroad at present in Canada?—A. It is not the section that is advisable or necessary, and it is expensive.

Q. I suppose this is your report as City Engineer for 1890?—A. Yes.

40 Q. Appendix "C." In that you were reporting respecting the paving of Yonge, King and Queen Streets. The report is dated 23rd July 1890. You speak there of the cost of the central or street car section, should not be a burden to the City at large, has an annual revenue per mile, should be attained from the service for which it was specially designed?—A. Precisely.

Q. Then in the last clause you say: "I am not yet fully satisfied as to the form of tram rail which should be adopted in this climate for the first-class pavements beyond the fact that it should be of such a section, etc., while being so formed as to afford the least possible obstruction to the passage of vehicles when crossing or turning out," and soon. "It is,

RECORD.

No. 5.

Evidence—  
continued.

RECORD.  
 —  
 No. 5.  
 Evidence—  
 continued.

“however, just possible that a modification of what is known as the “Manchester Section will meet the requirements.” That was your report to the Council?—*A.* Yes, and I had a copy of the Institute Reports with me at the time, and that is what I refer to. I am a member of the Institute, and get the reports, and I spoke from what I knew was then going on and with reference to some fixed thing, and that fixed matter was this report on rails, as set forth in that book.

*Q.* When you use the word tram rail?—*A.* I use it there where it could be applied and connected.

*Q.* Did you intend to mean by it one of the trams you have been speaking of this morning?—*A.* I was speaking of the English tramway rail as referred to in England. 10

*Q.* This was to the City Corporation of the City of Toronto?—*A.* But I was talking of the English matter, of an appliance constructed in England. You will see the price list and illustrated card. They refer to those rails as tram rails.

*Q.* You were using an English word?—*A.* No doubt, there I have used it, but I refer to it in an English sense in connection with an English production and not a Canadian production.

*Q.* But this was addressed to a Canadian Council?—*A.* Yes. 20

*Q.* How did you expect the Canadian Council would understand it?—*A.* I had those books with me in the office, and if they did not understand it they could come down and find out at my office.

*Q.* How did you expect them to understand it?—*A.* And moreover, I showed them blue prints of it. They knew as much of that matter as to what I intended as I did myself.

*Q.* Did you mean by that the street railway?—*A.* A railway for the streets of Toronto.

*Q.* The rail which Mr. Cuninghame afterwards fixed upon was the rail, the form of which you had in your mind and had in fact suggested to him?—*A.* I designed the rail first; I think they made some little change and then went back to it; it is practically the same rail. 30

*Q.* When you used that expression you had in your mind a rail such as is shown in Exhibit “A”?—*A.* I had not in my mind, but I submitted a section of rail; whether that is exactly the section or not I would not like to testify; it is practically the same section; a little flatter on the top.

*Mr. Hodgins.*—I will put in that book.

*His Lordship.*—If Mr. Osler does not object. A report he made to the City is not evidence.

*Mr. Hodgins.*—Very well.

*Mr. Osler.*—It is only evidence on cross-examination. 40

*Re-examined by Mr. Osler.*—*Question.* The Niagara Falls Road, had you power to run by horses?—*Answer.* No, sir.

*Q.* Now, take the term “railway tracks,” what do you say to that term being applicable to the tracks of the Toronto Railway on any of their streets?—*A.* I think it is quite applicable.

Q. Is that an appropriate term to describe their tracks?—A. Yes, RECORD.  
and I think I refer to it so in the specification in connection with that  
matter. No. 5.

Evidence—  
continued.

Q. Are railway rails used for purposes other than railway tracks?—  
A. Oh yes; they are used for many purposes.

Q. Industrial purposes?—A. Yes.

Q. And are they used in bridge building?—A. Yes.

*His Lordship.*—Q. They do not use the new rails for building bridges?—

A. Sometimes. It depends, your Lordship, I think, on the price at the time.  
10 I have known both new and old rails, and the nearest bridge to this point I can  
recall is one that you will see from the car windows on the way to Hamilton.  
It spans the Des Jardins canal. It is made almost entirely of old rails, and  
was built, I think, about 1876. Mr. Wassell, an engineer, had a patent for  
that work.

Q. And the Intercolonial Railway wherever they have had to make  
railway bridge over highway, they have used their old rails?—A. Yes.

Q. And probably the very gentleman you mention had an action against  
the Crown for using his patent?—A. Yes.

Q. You would say, generally, that they use the old rails?—A. Generally,  
20 they do, although I have seen new rails used.

*Mr. Osler.*—Q. And in industrial buildings?—A. Yes.

*His Lordship.*—Q. You would not think a man would use new rails for  
the purpose of constructing bridges?—A. It would depend on how he could  
use the section. I do not know of any case where the rails were absolutely  
imported for that purpose.

*Mr. Osler.*—Q. It is the cheapest form?—A. Yes, both scrap and new  
material. For instance, an eye-beam or a channel bar; bridge metal would  
cost perhaps \$1.85 per hundred, whereas you get this for one cent. or less;  
there would be that difference, and you could consequently use a much larger  
30 section at a much less cost than if using the regulation section.

*His Lordship.*—Q. No doubt they make a very good bridge?—A. Yes.  
The are used for stringers in culverts and area covers.

*Mr. Hodgins.*—Q. What are they then termed?—A. Iron beams in that  
case, or girders.

(Adjournment for one hour.)

Charles J. Myles, sworn.

Charles J.  
Myles.

*Examined by Mr. Osler.*—*Question.* You are President of the Hamilton,  
Grimsby, and Beamsville Street Railway; is that the name of it?—*Answer.*  
Electric railway.

40 Q. You have a charter by Act from the Ontario Legislature?—A. Yes.

Q. You are constructing your line?—A. Yes.

Q. Your line is to run from Beamsville in and through part of the City of  
Hamilton?—A. To the centre of the City of Hamilton.

Q. How is your line laid out with reference to street and road allowance?  
—A. In Hamilton we run on one street, east from Main Street to the City  
limits, and in East Hamilton we run on Maple Street.

## RECORD.

No. 5.  
Evidence—  
continued.

Q. What is your total length of road?—A. Not over four miles on the public street, the balance of it is outside the telegraph poles.

Q. What is your total length of road?—A. Twenty-two miles.

Q. How much of that is carried on on the public road?—A. Not over four miles.

Q. How much on public road allowance?—A. About four miles; it may be more than that, because we have not got the right to go from Grimsby to Beamsville yet.

Q. Apart from that, how do you construct your road?—A. We have moved the fences back another fourteen feet. 10

Q. And you widen the highway?—A. Yes.

Q. And you carry your road for the most of the way on that widened highway?—A. Yes.

Q. On the side?—A. On the side.

Q. But for four miles?—A. We carry it on on the main public road.

Q. As a street railway?—A. Yes. 1,200 tons is 50 pounds steel T rails, and the Hamilton section 69 pounds, this same pattern.

Q. And you, I believe, are allowed to import duty free?—A. I cannot say that yet, but the first 600 tons we brought in we paid the duty on it under protest. I went down along with our Member and explained our Charter and the business we were going to do, and they then allowed the 600 tons to pass through free. 20

Q. And are they refunding the other?—A. I have not got the cheque yet.

Q. But they allowed the second importation free?—A. Yes. There were four importations, two we paid the duty on and the other two we did not.

Q. And you expect the balance to be refunded?—A. I am led to believe so.

Q. Since you went to Ottawa they have allowed the rest in free?—A. Yes.

Q. That is a road which runs on the trolley system?—A. Yes. 30

Q. And you have the power to carry passengers, freight, mail and express?—A. Yes.

Q. Just as other roads do?—A. Ours is a regular railway charter allowed to expropriate land.

Q. Your charter speaks for itself?—A. Yes, sir.

Q. Then you come into the City on the highway under the by-law of the City?—A. Yes.

Q. And that by-law of the City regulates your method of carrying on your business?—A. Yes. They allow us to carry freight, express and passengers. 40

Q. You not only are the President of that Road, but you are also one of the firm leasing the Hamilton and Dundas Street Railway?—A. Yes.

Q. Which runs westward while your road runs eastward, and is, as it were, a continuation through the City?—A. On the same street.

Q. Now, what is the section of the Hamilton and Dundas Street Railway, the City portion?—A. It is the centre-bearing rail for a portion of it, and the balance a T rail.

Q. On the macadamized portion of the street a centre-bearing rail?—

A. Yes.

Q. A steel rail?—A. Yes, I believe so.

Q. We have not got a section of the centre-bearing rail?—A. It is like that flat rail only with another side to it.

Q. That is something the shape of a centre-bearing section?—A. Yes. (Referring to a little sketch.)

Q. That is laid upon a longitudinal wooden stringer underneath?—A. Yes, I think it is 6 × 8. The balance of it is a T rail.

10 Q. The ordinary T rail?—A. Yes, right out into the centre of Dundas.

Q. That T rail continues from the end of the centre-bearing rail, which is a mile or so in the City end, and the T rail is carried through the town of Dundas in the streets?—A. Right to the centre of it.

Q. That road runs through the streets of Hamilton, in the streets of Dundas and in the country on their own right of way?—A. There is a part of it on the public highway, on Concession Street, and in Dundas there is some on the public highway.

Q. And that road is operated by steam?—A. Yes, by little dummy engines.

20 Q. Or small locomotives?—A. Yes.

*Cross-examined by Mr. Hodgins.*—Q. The Beamsville Road uses ordinary railroad iron outside the cities?—A. The regular T rail; yes, sir, 50 pound T rail.

Q. In running out of the City of Hamilton you are on the public highway for a short distance?—A. Yes, sir, on the centre of the road, on Main Street.

Q. But out of the City you strike the highway again?—A. Yes, for a short distance on Maple Avenue, then in through the Village of Barton Beach, Stony Creek.

30 Q. And Winona?—A. No, sir, we are off the road there. We do not really go into the villages.

Q. You are only on the roads in passing through the villages?—A. That is right, and in the City of Hamilton.

Q. You have about fourteen miles of your road actually graded through the fields?—A. No, not that much done yet, not over ten miles graded.

Q. Are you to have small stations at each of the cross roads and larger stations at the villages?—A. Yes, we built a large building in Hamilton, 80 feet by 140, to have a regular freight station to run our cars in, and to receive milk, fruit and general freight.

40 Q. Have you ordered freight and express cars?—A. Yes, sir, we have ordered three regular express cars and one with half freight and half express, and the balance passengers.

Q. You claimed to be a regular Railway Company under your charter?—A. We intend to carry just the same as the Grand Trunk, everything except heavy coal and such things as that. Our by-laws compel us to build these stations at every cross road.

RECORD.

No. 5.  
Evidence—  
continued.

Q. Now, about the Hamilton and Dundas Road. You have spoken of its present construction. It has been reconstructed?—A. No, sir.

Q. Did what you have described take place under its old charter and before 1884?—A. It has always been the same in my recollection; there is no change; it has passenger and freight cars.

Q. Have you been connected with it long?—A. Only about three years, but it passes our office on Main Street, Hamilton, opposite the Court House, and we were there long before it was built.

Q. It has never been reconstructed so far as you know outside the City limits?—A. No. 10

Q. And has always been running so far as you know under its earliest charter?—A. Yes.

Q. In the Hamilton, Beamsville and Grimsby Road, when did you lay down rails in Hamilton?—A. We are laying tracks now. We have two gaugs laying tracks just outside of Hamilton.

Q. What are you laying?—A. 50 pound T rails.

Q. Is that all you have imported so far?—A. Yes, only 1,200 tons. The other ones have not arrived yet.

Mr. Osler.—Both roads you speak of are the standard gauge, four feet eight and one half?—A. Yes, sir. 20

Thomas C.  
Keefer.

Thomas C. Keefer sworn.

Examined by Mr. Osler.—Question. You are a Civil Engineer and have been for a great many years?—Answer. Yes.

Q. And you are now a Consulting Engineer?—Yes.

Q. What do you say to the term "tramway" as applicable to street railways in Ontario or America? Is that term applicable to them?—A. I think not.

Q. Is it not?—A. No.

Q. I use the term "Railway Tracks," how far is that term applicable to the tracks of the Toronto Railway as they appear in any of the public streets of the City here?—A. They are undoubtedly railway tracks. 30

Cross-examined by Mr. Hodgins.—Q. I suppose the word "railway" is a well understood term?—A. Well it is understood as applicable to a great many kinds of railways, I presume; you are not confined to any one particular road or class of roads. There is an electric railway.

Q. Would you not say that the word "railway" was a well known term, that it would be ordinarily understood by people in a particular way?—A. It would be understood as applicable to any railway, I should say.

Q. Has it not a recognised meaning as meaning one of the ordinary steam railroads, commercial railroads in Canada or the United States?—A. It is that, 40 more than any other, because there are more of them.

Q. Is not that what people would ordinarily understand the word "railway" to mean?—A. Yes, sir; when you speak of a railway it is supposed to be a long railway.

Q. Now, would these words be equivalent: "rails for railways;" "rails for use in railway tracks?"—A. Yes. Every railway has a railway track.

Q. Would the words "tram or street rails" mean the same thing?—A. I think not. I think a tram rail is not always a street rail.

Q. Now what is the difference?

*His Lordship.*—A street railway may be a tram, but a tramway is not always a street railway.

*Witness.*—A street railway may be a tram and it may not. A case in point, the Ottawa Street Railway had no tram, the Toronto Road had.

10 *Mr. Hodgins.*—Explain what you mean, what is the distinction between tram or street rails?—A. You are speaking of the tram alone. The tram would be a portion of the rail provided for ordinary wheel traffic independent of the cars; that is what I understand is a tram, the flat part of the rail inside of the car track.

Q. And what is the street rail?—A. A street rail may be a tram rail or it may not, if there is no provision for the public traffic.

Q. In what does the distinction consist between a tram rail and a street rail?—A. In that respect that a tram rail is the rail on which ordinary waggons can run, and there may be a street rail on which they cannot run, as is the  
20 case in Ottawa.

Q. As applying to this rail, what would you call it, a tram or a street rail, the new one?—A. I would call that a girder rail; I would not call it the tram rail.

Q. Would you call it a street rail?—A. If laid in the street I would.

Q. Why would you not call it a tram rail?—A. Because it has no tram.

Q. Is this other piece of rail a tram?—A. Yes, the flat portion the lower part there.

Q. Why?—A. Because the ordinary waggon wheels of the City can travel on that. The original tram was a road exclusively for ordinary waggon wheels  
30 and carts.

Q. Then if there was a provision excluding, or rather making free, certain rails, excluding tram or street rails, would you think they meant different things, meant to exclude two classes of rail or the one general class which might be laid down for a tramway or in the street?—A. If it were excluding street railways I would say it would exclude all rails laid in the street but if it were excluding the tram rails only, I should say it would not exclude street rails.

Q. Street rails would include tram rails if laid in a street?—A. Not unless it had a tram.

40 Q. Then the tram, as I understand you, is something upon which all vehicles can travel?—A. Yes, put there specially under contract for that purpose.

Q. Then, I suppose, the effort of late years has been to make such a rail for these electric railways and street railways as can be laid down in the streets according to the modern construction of the streets, so as to allow the traffic to circulate across it and along it?—A. Electric street rails vary; they use all

RECORD.  
 No. 5.  
 Evidence—  
 continued.

kinds of rails; that is the rail for a paved street; the common railroad rail is used also in the City of Ottawa for the electric railway, the ordinary, "T" rail.

Q. That rail together with the pavement would make up the roadbed?—

A. Make the roadbed but it would not make a tram.

Q. But at all events, this particular rail and the concrete, and so forth, would make up the ordinary roadbed?—A. Yes.

Q. And this would be on the level with the crown, or at all events, flush with the level of the street?—A. Slightly above it, not enough to interfere with traffic.

Q. That would depend on the charter?—A. Yes. 10

Q. And there is nothing to prevent the ordinary wheel travelling along that rail, if they were laid down on the street?—A. I think it would be very bad if an ordinary wheel got into that groove there; if the wide tire was narrow enough, I think, if it got in there it could not get out.

Q. What is the width of that groove?—A. I have not measured it, but it looks to me as if it would admit the tires of light buggies.

Q. They could not get down very far into it?—A. They could get so far that they could not get out without breaking.

Q. You think so?—A. Yes.

Q. Have you ever seen that occur?—A. Oh yes, not in that groove. 20

Q. In a groove of this class?—A. No, because since the introduction of those rails ordinary vehicles take care to keep clear of the track altogether; the electric railway does not admit of their trying to follow on the rails as they did in the old days; it is dangerous to be there.

Q. So that the idea now is, to construct such a rail that they cross over without any inconvenience?—A. As far as that is concerned, it is to construct a rail that will admit of the street being paved, and where you have a paved street you have not the same need of a tram.

Q. Now, does the word "tramway" include a street railway?—A. I think not, except in England. Neither here nor in the United States is it applied to street railways by natives. 30

Q. But is it not in common use as including street railways as we understand it?—A. Not in common use. The only people I have heard using it are generally English people.

Q. But still it is a term that is understood out here as including a street railway, though, you think, imported from England?—A. It may be.

Q. And if the words in the Act were "railway and tramway vehicles," would that convey to your mind the idea that it meant what are known as the ordinary railway coaches or carriages, the street railway cars?—A. Oh, my idea is that a tramway is something very different from a modern street railway. 40

Q. I am speaking of it now as an adjective not as a noun. Would the phrase railway and tramway vehicles convey to your mind the difference between the ordinary railway coaches and the street railway coaches?—A. Yes, if it were used in this country. You are speaking of passenger vehicles, I suppose.



Q. Would tramway as applied to rails be a word that might fairly be used in such an Act as we are construing, a Customs Act, where the rails are manufactured in Europe?—A. Not as a tram.

*His Lordship.*—I do not know as you can ask the witness to construe the Customs Act. I will have to construe the Customs Act.

*Mr. Hodgins.*—Q. With anyone, however, engaged in the buying of rails for street railways, would the word "tramway" be a suitable word to use in making purchases in Europe?—A. Very probably.

Q. Would it include such a rail as one sees here, this girder rail?—  
10 A. Probably in Europe they call them all tramways.

Q. Are you familiar with the English tramway system?—A. Not particularly.

Q. You know it?—A. Some parts of it.

Q. Is it similar in general appearance to what we call street railways here?—A. When I knew it it was the horse railway altogether, and the rails were different to what we use in this country. We use a tram rail and they did not in many cases.

Q. But still they were laid flush with the road?—A. Yes.

Q. And traffic was able to get along?—A. Yes, their streets generally  
20 being paved, there was not the necessity for the wide tram as in our case.

Q. If you were describing our street railway system in Toronto in England, you would describe it as a tramway system so that the people would understand you?—A. No, I would call it a street railway, what we have always called it.

Q. But tramway would mean the same thing over there as street railway does here?—A. Oh, yes; in England they are all called tramways.

Q. Now, in 1887 were there any electric railways or tramways in operation in this country?—A. I think there was one at Windsor; I am not certain as to the date, but I think the Windsor road was in operation at that time.

30 Q. I am advised that there were none at all in 1887 operated by electricity?—A. My recollection is, that the road from Windsor to Walkerville, the Vandypool system, was in operation before 1887.

Q. In 1887 did you know of any street railway using steel rails?—Oh, yes, I laid steel rails myself in 1885 in Ottawa.

Q. On what?—A. On the street railway there.

Q. On the Ottawa City Passenger Railway?—A. Yes.

Q. What sort of rails?—A. Tram rails. The original was not a tram rail, but when I had to lay new rails the Corporation insisted on a tram rail.

Q. And it was a rail like this rail, No. 3, that we have here?—A. Very  
40 similar to that.

Q. What is called a strap rail?—A. No.

Q. A step rail?—A. No. A strap rail is the old rail the early railroads all used; the steam roads were strap railroads fifty years ago. They are only strap in the sense that they are fastened down through holes in the top, but these were wide rails, three inches wide with flanges to slip down.

Q. In 1887 was there a standard rail for steam railways?—I hardly think there has ever been a standard rail for them. Every engineer has his own

RECORD.

No. 5.

Evidence—  
continued.

RECORD.

No. 5.  
Evidence—  
continued.

ideas, and they have been very steadily increased. There is a special rail for heavy grades.

Q. Then there was not a standard, so far as you know?—A. No.

Q. Now, would you agree with this, as a definition: "Originally a tramway signified a wheel track laid with timbers and afterwards with iron plates having a flange on the inner edge by which wheels of the ordinary sort were kept on the track. Although the name is sometimes given to a light railway, by a tramway is now generally understood a street railway constructed so as to interfere but little with the ordinary traffic, on which vehicles having flanged wheels are propelled by animal or mechanical power. Tramways in this sense originated in the United States." Would that be a correct statement, do you think?—A. It would in England, from an English standpoint, but street railways are not street tramways here. 10

Q. What experience have you had in reference to the United States?—

A. I have been an officer of the American Street Railway Association, and I have seen and ridden over a great many street railways in the United States. I have seen the rails and systems and I know the charters; our charters were borrowed from the United States, from Philadelphia, and they are called street railways; City Passenger Railways is the designation of the Ottawa Road, and the first road ever built, the Harlem Road, was not called a tramway; I think it was called the Fourth Avenue Railway. 20

Q. That was a tramway, though?—A. No, it was a street railway.

Q. It was a railway using what is called the tram rail?—A. I doubt that even, because I do not know but what it was paved. The tram rail I speak of is the Philadelphia pattern which was adopted here in Canada, but in New York I know that pattern was not adopted generally; it may be in many parts.

Q. You say that the tram rail was not used in the earliest American roads, the New York and Harlem?—A. I do not think it was.

Q. Was that because it had a groove in it?—A. No, I do not know that it had a groove at all, but I think it was paved up to the rail; it was a wooden rail with an iron strap on top. 30

Q. You would not admit anything was a tram rail that was not perfectly flat?—A. It would have to have a flat portion.

Q. This rail has a flat portion?—A. But that is not for the tram, that flat portion is for the car, and that has a wider gauge than the ordinary vehicle; the ordinary vehicle goes between the car tracks.

Q. Now, are you sure that the word tramway has never been used to mean a street railway in this country?—A. Oh, no; I am not sure, only I know that I have no instance of it in any charter designation, nor in general conversation is the word tramway applied to any street railway I know of. 40

Q. Do you know the Hamilton and Dundas Street Railway?—A. Yes, I know the Hamilton and Dundas Railway; I do not know what it is called.

Q. It is called the Hamilton and Dundas Street Railway.—A. I know the road from Hamilton to Dundas.

Q. Did you know it in 1884?—A. Very likely; I have seen it as long as that.

Q. When was it constructed?—A. It was constructed after 1875.

Mr. Osler.—Opened in 1879.

Mr. Hodgins.—Q. Do you remember the road as it was in 1884?—A. No, I could not place any date; I only know the road where it is, generally; it was a steam road, from my recollection of it.

Q. Probably ten years ago you knew that?—A. Oh, no doubt, I have seen it frequently since it was constructed.

Q. Would you be surprised to find that that is spoken of in 1884 in the Act as a tramway?—A. I would not; it may be called that; I know nothing to the  
10 contrary.

Q. Then that certainly would show that in 1884 “tramway” had some meaning in this country?—A. Yes.

Q. And it, no doubt had the meaning that it meant the Hamilton and Dundas Street Railway as it was before that Act was passed; that, no doubt would be correct, would it not? Now, in 1886 would you say that tramway was not in use in this country—I mean the word tramway?—A. As a street railway?

Q. Yes.—A. I could not say; I have no recollection of it.

Q. Now, in 1892 in the Criminal Code there is this section: “Every one  
20 “is guilty of an indictable offence and liable to two years’ imprisonment who “steals any tramway, railway or steamboat ticket;” what would be the meaning of tramway there, in your opinion?—A. A road on which tickets were given.

Q. That might be a railway; tickets are given on a railway?—A. I mean a tramway on which tickets would be given. If there were any tramways doing business as passenger roads in the country, and giving tickets.

Q. You do not know any tramways in this country, do you?—A. No, I do not know of any doing a passenger business.

Q. Then this would not have meant anything, so far as you make it out?—A. I should suppose it was intended to cover something.

Q. But you cannot remember now any tramway to which it would have  
20 applied?—A. No.

*Re-examined by Mr. Osler.*—Q. The section of the Ottawa City Passenger Railway as first laid down, will you tell me what it was?—A. It was what was called the “U” rail.

Q. The old railway “U” rail?—A. Yes, that is as to pattern and shape.

Q. Then in that road as it was first constructed, you ran your street cars upon it, and did you also use it for the connecting railway for freight cars?—A. The reason for which that particular form of rail was adopted without the  
4, the deep flanges of steam cars that tram would have been so deep that it would have formed a pan there from which vehicles could not get out, and we were dependent upon the St. Lawrence and Ottawa Railway for the means to build our road and we were connected by Act of Parliament with them with power to exchange cars, at least they could run their cars over our track.

RECORD.

No. 5.

Evidence—  
continued.

RECORD.

No. 5.  
Evidence—  
continued.

Q. And did they run their cars over your track for a short time?—  
A. Yes, they ran cars over the track, but they never made use of it practically, they tested it.

Q. They ran both horse cars and steam cars?—A. Yes.

Q. You spoke of the early horse railway in this country being constructed with strap rails?—A. Yes, sir.

Q. Do you remember the first section on the New York Central?—A. Yes, I travelled over the New York Central from Albany to Buffalo over fifty years ago, and it was what was called the strap rail, the snake fence.

Q. A strap rail on a longitudinal tie?—A. Yes, it was just like the old street railways here, except that it had not as good a rail on top of it, not as good an iron. 10

Q. That was the day of the rail curving up through the bottom of the car and striking and killing a man on his seat?—A. Yes, the steam roads; all the early steam roads in this country before they could afford the "T" rail were built in that cheap way.

Q. First you had the strap rail for the steam, then the "U" rail and then the "T"?—A. Yes.

Q. Now, as I understand, Exhibit 3 is what you know as a tram rail?—  
A. Yes. 20

Q. Because that is constructed both as to gauge and form of rail so that the waggon wheel engages with the flat?—A. Yes, that is the object of it.

Q. And that is the origin of the term tram?—A. We always termed that portion of the rail the tram.

Q. That is the tread and that is the tram?—A. Yes.

Q. And you call this section a girder rail; you do not call that the tram rail?—A. No, because this rail requires continuous setting-bearing of wood and that does not.

Q. And is not this rail constructed so as to avoid the tram, to avoid the street traffic by this furrow?—A. I suppose that lip is put there to meet the paving requirements, but the effect of it is to make it impossible for any vehicles that are narrow enough in the tire to slip in there to venture on it, but the whole question of ordinary vehicles travelling on the tracks in the centre part of the City is practically done away with by the frequency of cars; it will not pay a man to try to get on the track; every time he has to haul out he wrenches his axles and wheels. 30

Mr. Hodgins.—Q. You are speaking of the Ottawa Street Railway Company?—A. In the Ottawa Railway they have abandoned the tram.

Mr. Osler.—Q. For how many years were you connected with the American Association of Street Railways?—A. About ten years, probably. 40

Q. And what office did you hold?—A. I was a director at one time.

Q. And they met annually in conventions?—A. They had an annual convention in different parts of the country.

Q. And you, therefore, were familiar with the condition of the street railway growth on this continent in that way?—A. Oh, yes. I have been for over twenty years president of a street railway continuously, and I, of course, made it my business to follow up the street railway question.

Q. And so far as your experience and knowledge goes, the term tramway in the popular sense is not made use of in reference to American Street Railways?—A. Oh, no, and when the association was formed it was not called the Tramway Association, it was the Association of American Street Railways.

RECORD.  
—  
No. 5.  
Evidence—  
continued.

*His Lordship.*—Q. Number 3 is so made as to invite traffic to use it, that is the object?—A. Yes, my Lord, and I think that that was the stipulation of the municipality who required to deal with it.

Q. And in number 2 the lip is made, not for the traffic but for the pavement?—Q. I think number 2 is also planned by the City with a view to  
10 pavement, because when pavement comes in there is not the same necessity for travelling on the tracks; the road is good outside of the track.

Q. And the form of curve would suggest the idea they wished to discourage the use of the track?—A. I think the form of the curve is for preserving their flange way. The electric road has brought in a new feature; with their sweeper they could keep the groove clear. We considered a few years ago that the great objection to a grooved rail of any kind which had then been in use in England and Scotland for some time was our climate. With horse railways we could not keep clear and could not afford the expense, but electric railways with their sweepers going constantly over it they can keep the groove  
20 clear.

Q. But if you wished a wheel to run in them you would not advise a groove of that shape?—A. Oh, no; I think that is dangerous for any wheel. The great protection is, that the bulk of the wheels are of a wider tread than that and therefore do not get in it; they travel on the outer edge of that lip and perhaps partly on the rail, if they are in on the track, but I think in important parts of the city they do not go there at all.

John Waldie sworn.

John Waldie.

*Examined by Mr. Osler.*—Question. You were Vice-President of the Hamilton Street Railway?—Answer. I was.

Q. And you have had occasion to study somewhat that subject. Did you  
30 ever know a street railway in this country popularly called a tramway?—A. Never knew it. Never heard that name applied to a street railway in this country.

Q. You have given the matter a little attention in the old country?—A. Yes. When I visited the old country I was struck at once with their use of trams; it struck me as something new; they would say, "We take a tram to such a place."

Q. And that was entirely new to you?—A. Yes.

Q. Then what do you understand a tramway is in this country?—A. Being  
40 a lumberman we apply the word tramways to all our trams that we built to push the lumber out from the mills, either by hand-power or horse-power; no matter what kind of rails we use there we call it a tramway.

Q. Whether it is the strap or the "T"?—A. We use both.

*His Lordship.*—Q. Have you been through the Chaudiere section of Ottawa, where the lumber is all piled?—A. Yes, sir, where they use carts.

RECORD.

No. 5.  
Evidence—  
continued.

*Q.* Would those be called tramways?—*A.* Those would be trams.

*Q.* You would call those tramways?—*A.* Yes, elevated; some of them are, and some not, and we also call them tramways when we lay the rails over a portage in carrying supplies up the rivers.

*Mr. Osler.—Q.* Where you are going into the lumber camp?—*A.* Going into the woods.

*Q.* And there are some trams through the country, old Hudson Bay trams, making portages?—*A.* At portages; we have one in use at French River. There would have been difficulty to blast and make a waggon road, but we made trams, laid rails and ran cars; where we came to a hole over rocks we bridged it and then blasted the rocks and used it for forwarding supplies; that is a tramway. 10

*Q.* When was it you were in the old country?—*A.* 1876, and spent three or four months, and I was there in 1892.

*Cross-examined by Mr. Hodgins.—Q.* You were Vice-President of the Hamilton Street Railway?—*A.* For a time.

*Q.* How long ago?—*A.* It is seven years ago, I should say; before it was an electric road.

*Q.* Then the word tramway, you think, is a word that is known in this country?—*A.* No, it was not known in this country in connection with street railways. 20

*Q.* But is it a word that is known at all?—*A.* Oh yes, certainly, among lumbermen.

*Q.* You would use it in connection with pushing the lumber out? What you call trams for pushing the lumber out?—*A.* We use that name "tramway," we call it a tramway.

*Q.* How is that tram constructed?—*A.* Well, it is either by being laid on the ground sometimes with ties laid down, and then a longitudinal piece, then iron put on top.

*Q.* A flat strap of iron?—*A.* Yes, and then we use the "T" rail, a small light "T" rail also; we build frames, wooden trams and lay rails on. 30

*Q.* And that is used for lumber?—*A.* Yes, at the mills. In the woods or portages we use it for forwarding supplies.

*Q.* And among lumbermen it has that meaning?—*A.* It always has that meaning.

*Q.* And therefore it struck you as very odd when you went to England that what you used to call a tramway in the lumber camp was called street railway there?—*A.* I was not a lumberman when I first went to England.

*Q.* But when you were struck with surprise?—*A.* I was struck with surprise because I had been connected with street railways at that time. 40

*Q.* Do you mean to say that your connection with street railways had not taught you that at that time trams in England were street railways?—*A.* I never heard of the expression until I visited England.

*Q.* You never heard of the expression?—*A.* No, not in connection with street railways.

Q. How long were you connected with street railways out here?—I daresay ten years. RECORD.

Q. Never heard the word tramway used?—A. Not to my recollection. No. 5.

Q. Are you an Englishman?—A. No, sir, I was born in Scotland, but I was caught very young. Evidence—  
continued.

Q. To what parts of this country did you come?—A. To Halton, nine miles from Hamilton.

Q. A great many years ago?—A. 1842.

10 Q. Have you never heard the word tramway used in connection with any other sort of a tramway than lumber?—A. No, with the exception of in Europe, not in this country.

Q. You must have kept yourself pretty close to your own business?—A. I attend to my own business.

Q. You are not aware that the word tram and tramway has been used in this country for years in connection with street railways?—A. No, sir, I was not aware of it.

Q. Those things that you call tramways, why do you call them tramways?—A. From usage.

20 Q. You have no idea what the word tramway means?—A. I am not a specialist on that matter.

Q. You simply say there is a thing called a tramway used in the way you speak of?—A. Yes.

Q. Then you would not call a tramway a railway at all?—A. No, I would not.

Q. Did you ever import any tramway vehicles for your tramways?—A. No, we are National Policy.

Q. Did you ever import any rails for your tramways?—A. No, sir; buy them here.

30 Q. Never tried to get back the duty on them?—A. Never enquired about the duty.

Q. You would not consider the tramway included a railway in any sense?—A. No, I would not consider it was a railway, nor a street railway.

Q. You would confine it entirely to the lumber camps?—A. To operations of that kind.

Q. What do you think a railway is?—A. Well, it is a more substantial structure than a tramway, in my mind, although a tramway might be built as strong as a railway, but railways for the conveyance of passengers and freight.

40 Q. What would, in ordinary phraseology, be meant by the word "railway" in your mind?—A. Well, a road with rails and on which they ran carriages and carried passengers and freight.

Q. Give us an illustration?—A. In what way?

Q. What do you mean by a railway?—A. I have tried to explain.

Q. The Canadian Pacific?—A. Certainly, or the Grand Trunk.

Q. You would not call this here a railway?—A. Yes, sir, a street railway.

Q. A street railway?—A. A railway as much as the other; I would call it a railway.

RECORD.

No. 5.  
Evidence—  
continued.

Q. Of course, that is what you are here to do?—A. I was not aware that; I am glad to be informed of it.

Q. Do you think if you were talking to somebody about a railway that they would think you meant a street railway?—A. If I wanted to designate a particular railroad I would particularize it by saying, the Grand Trunk Railway, the Pacific Railway, or the Midland Railway, or the street railway.

Q. They would be all the same class of railway?—A. Not necessarily; I would speak of the particular railway.

Q. You would never use the word railway to denominate a street railway?—A. Yes, if I were speaking with street railway people who were conversant about City matters and about their railway in their City I would say the London Railway, I would mean the London Street Railway.

Q. That is a bad habit you old street railway men fall into?—A. I am not an old street railway man, I am not interested in street railways.

Q. You never thought of calling your Hamilton road the Hamilton Railway Company?—A. Oh, we did; we called it the Hamilton Railway, the Hamilton Street Railway.

Q. You did not get a charter that way?—A. I do not think we did.

Q. What rails did the Hamilton Street Railway Company use, iron or steel?—A. I could not answer; I do not know whether they were iron or steel, 20 I think they used both.

Q. And you were Vice-President?—A. Yes, sir, but I am not an expert; they might have sold us iron and charged us for steel. I am not an expert about that.

Q. Have you ever driven in the City of Toronto on these tracks?—A. I have been driven.

Q. So that it is quite possible to drive on these tracks?—A. Oh, yes. I beg your pardon.

Q. It is quite possible to drive on these tracks in the City of Toronto?—A. It is quite easy to drive over them. 30

Q. And quite easy to drive along them?—A. I do not know.

Q. It may be dangerous because of the tremendous speed at which the cars are run, but you have done it?—A. I have been driven along the rails and I never liked it.

Q. You are accustomed to the old Hamilton style of street railways?—A. I am accustomed to get off the rails when I am driven by horse power.

Granville C.)  
Cunningham.

Granville C. Cunningham sworn.

*Examined by Mr. Osler.—Question.* You were City Engineer after Mr. Jennings left?—*Answer.* Yes, sir.

Q. And you are now an engineer living in Montreal and having to do with 40 the Montreal City Passenger Railway?—A. Yes, I am now manager of the Passenger Railway.

Q. And I think you had something to do with the designing of the girder rail we have here, the exhibit before you?—A. Yes.

Q. Do you call that a tram rail?—A. I call it a grooved girder rail.



Q. That is its proper name?—A. Yes, that is the name I gave it here.

Q. What do you understand by the term tramway in this country?—

A. Well, I do not understand tramway as being applied to street railways in this country.

Q. Have you ever known it applied as a general term to street-railways in this country?—A. Not in this country.

Q. What would you say as to the words "railway tracks" having reference to the line of railway here in Toronto on Yonge Street or King Street?—A. I should say that that applies to Toronto, to any street railway track in this country.

Q. Then the object of the form of this rail as to the length of web and lip, have those any function with reference to the railway and its necessities or to the street pavement and its necessities?—A. The lip here is primarily designed for the purpose of placing the pavement firmly up against the lip so as not to offer obstruction to wheels of waggons, and the depth and width of the lip was designed so as to suit the flange of the wheels of the street railway cars running on it.

Q. And the depth of the web?—A. The depth of the web is mainly fixed by the depth of the paving blocks that have to go in alongside the rail.

20 Q. That would be either for paving blocks of cedar or stone sets?—  
A. Yes.

Q. Or having reference to the depth of concrete and asphalt?—A. Yes, precisely, more especially with reference to the depth of the stone blocks or the cedar blocks, six inches deep, and the rails allowed to stand up a little above the stone blocks.

Q. Then so far as the railway part is concerned, what you want is the tread, web and chair seat to be spiked to the ties?—A. Precisely.

Q. The rest is pavement?—A. The rest is for the pavement.

30 *Cross-examined by Mr. Hodgins.*—Q. What is your position now?—A. I am manager and chief engineer of the Montreal Street Railway.

Q. That is the railway with which Mr. McKenzie is connected, the president of this road?—A. Mr. McKenzie was contractor for construction of part of that road.

Q. But Mr. McKenzie is one of the large stockholders of the road?—  
A. I am not sure that he is.

Q. Is it not a fact that those very rails were imported by Mr. Ross and Mr. McKenzie for that road?—A. As contractors.

Q. Do you say that you do not know that he is a large stockholder in that road?—A. I do not know it, he may be, but I do not know it.

40 Q. Has he any position on the directorate?—A. None at all.

Q. Is it the Montreal Street Railway Company?—A. The Montreal Street Railway Company.

Q. That Company is interested in the result of this action?—A. Similar rails have been imported for the Montreal Street Railway by the contractors.

Q. More than that. They are contributing to the expense of the contest?  
—A. I am not certain that they are; I do not think so. Of course we are

RECORD:  
—  
No. 5.  
Evidence—  
continued.

RECORD.  
 ———  
 No. 5.  
 Evidence—  
 continued.

interested in the result of this action because it would affect the same question with regard to ours.

Q. And you will make your claim at once?—A. I presume we would.

Q. When were you City Engineer in Toronto?—A. From October 1891 until May 1892.

Q. And you selected and suggested this rail?—A. Yes.

Q. This is Exhibit A?—A. Yes.

Q. Now, where did you get that form of rail from, that is a very accurately drawn one; I suppose you did not conceive it out of your own head?—A. Oh, no. In the office I had a man who is designing rails, Williams, and he submitted the various designs to me, and we went over them together and altered them. Of course a similar type to this has been used in English roads. 10

Q. And what is it known as?—A. In England of course they speak of all street railways there as tram railways.

Q. Did you know it by that designation?—A. I had seen the design in various Canadian books, the general design.

Q. Did you know it by that designation?—A. In England I know it was spoken of as that.

Q. Is not that the name of the trade?—A. It may be a trade name in 20 England. In England they speak of all street railways as tramways.

Q. They would not change the trade name for selling it in Canada?—A. I don't know that they would.

Q. Probably described by buyers and sellers in the same way?—A. Probably.

Q. You call it a street railway rail?—A. Yes, sir.

Q. You were then acting for the City of Toronto?—A. Yes.

Q. You were aware of the provisions of the Charter for the Toronto Railway Company?—A. In what respect?

Q. As to the construction of pavements and design of rail?—A. Yes, my 30 design was to make a rail that would interfere as little as possible with street traffic.

Q. And you made some investigation to find out what would be the most suitable rail, I suppose?—A. Yes. I had considerable experience before the time that this track was taken over, I think two years before, I had recommended to the Board of Works to adopt a similar rail to that for use in the street railways here without any reference to the conversion of the system into electricity.

Q. And you selected a rail, not to drive the traffic off the street, but to promote the traffic, and to make it safe?—A. Not to promote the traffic, but 40 to interfere with it as little as possible.

Q. You thought such a rail should be suggested and adopted?—A. That would interfere as little as possible with wheel traffic.

Q. And it was not adopted for the benefit of the Toronto Railway Company?—A. Not merely for their benefit, except that they required a rail of a certain size of head, and that would carry their traffic as well.

Q. Is that rail exactly as you designed it?—A. Not exactly, the height of the rail as I designed it there is 6 inches high, and it was first made  $6\frac{1}{2}$ , and then it was 6 9-16, a little higher. The lip is the same.

Q. It doesn't look like it?—A. It is practically the same, there may be a little difference in rolling.

Q. It is not narrower?—A. There was no intention of making it narrower.

Q. Is it a narrower groove that you had recommended?—A. I don't think so. I think it is the same. It can be very easily applied on this paper.

His Lordship.—You can apply it if you care to. (Witness applies sketch  
10 to section.)

Witness.—I think it is identical, as close as you can get anything. The lip seems to come a little bit higher, but the groove of the lip is exactly the same.

Mr. Hodgins.—Q. The groove is a little bit deeper?—A. Perhaps about 1-16 of an inch.

Q. That would make a considerable difference in wheel traffic?—A. No, it would make a very slight difference.

Q. And any difference that it would make would be against the traffic?—  
20 It would tend to pry the tire off a wheel, I am not sure that it is even a sixteenth; it is very slight; it is almost exact.

Q. Is it wide at the mouth? Is not the inclination inward instead of outward by fully more than a sixteenth of an inch?—A. Oh, no.

Q. You have shown in pencil the difference?—A. Yes.

Q. The lip is closer to the head of the rail?—A. By about the thirty-second part of inch.

Q. It is shown in the pencil mark you have put on here where the tip of that lip would come?—A. Slightly closer.

Q. And whatever difference there would be would be against the traffic?—A. It was so trifling it is hardly possible to estimate.

30 Q. You say "The rail that will be used will be of a grooved pattern similar " to that used in English and Continental towns in place of the flat strap rail " hitherto used. I give a full-sized drawing showing the exact section of this " rail as adopted. The adoption of this grooved rail will be of enormous " benefit to the general street traffic of the City?"—A. Yes.

Q. "And it will not be more troublesome to keep clean in winter than the " present rail, as experience of it in the northern part of Sherbourne Street, " where it is now laid down, has shown." So this rail was to be of enormous benefit to the general street traffic of the City?—A. Yes.

Q. And that was your intention?—A. Yes.

40 His Lordship.—In what way?—A. By preventing the wheels of the vehicles from being caught by the rail. With the old strap rail that used to be laid in the City the vehicles would drag along the strap rail and they would be caught by it, and when the vehicle tried to turn out it would skid along for some distance before it would get off the rail. This rail had the groove so narrow the wheels could not get in. The only wheel that would get in to any appreciable depth would be the very light racing buggy. The ordinary cab or waggon wheel could not get into it at all.

RECORD,  
No. 5.  
Evidence—  
continued.

*Mr. Osler.*—*Q.* There is the angle at which the wheel approaches now ; here is the angle at which the other would approach ?—*A.* Yes, and when the wheels were driven straight along they would be caught by this flange.

*His Lordship.*—He meant it would be useful to traffic in keeping them out of the groove ?—*A.* Yes, my lord.

*Q.* And not allowing them to go into it ?—*A.* That is it.

*Mr. Hodgins.*—*Q.* Did I understand you to give a definition of the word railway ?—*A.* I do not know that I gave a definition of the word railway.

*Q.* Perhaps you will give me a definition of the word railway as understood generally, as ordinarily understood ? I do not mean as an engineer.—*A.* As 10 ordinarily understood ; it is more or less difficult to get a definition that is absolutely unassailable at all points.

*Q.* I want the general meaning of the word ; how it is ordinarily understood.

*His Lordship.*—I suppose it depends a great deal upon what you are speaking of ; if speaking of railways in the larger sense, generic, it is large enough to include all kinds of railways. There is no doubt the term railway is large enough to include all railways, and if you divide them again you might perhaps speak of a railway meaning only the steam railways. To distinguish 20 it from a street railway you might say railway proper and using the adjective always for the street railway.

*Mr. Hodgins.*—*Q.* Have you ever been in Manitoba or Nova Scotia ?—*A.* Yes.

*Q.* During what years ? Have you lived or resided there at any time ?—

*A.* I resided in Prince Edward for some time and have been in Nova Scotia backwards and forward passing through.

*Q.* How long ago ?—*A.* 1875 to 1879.

*Q.* Do you know Halifax at all ?—*A.* I have been in Halifax.

*Q.* Do you know the system they have in use there ?—*A.* I know they have a system, but I never examined it with any particularity. 30

*Q.* You know they have a street railway there ?—*A.* Yes.

*Q.* What do they call it there ?—*A.* I do not know ; I presume it is called a street railway. I do not know whether they use any other name.

*Q.* Do you know what they call the vehicles that run on the street railway ?—*A.* No.

*Q.* Now, take the expression "tram" or "street rails," are those equivalent expressions ?—*A.* No, I do not think they are equivalent expressions.

*Q.* Do not mean the same thing ?—*A.* Not in this country.

*Q.* Do they not include the same thing ?—*A.* No, I do not think so. The expression "tramway" is not used in this country at all with reference to 40 street railways.

*Q.* "Tram or street railways," what would you understand as classified by that phrase ?—*A.* A tram.

*Q.* Tram or street railways ?—*A.* A tram does not mean a street railway ; a tram is applied to a great many things.

*His Lordship.*—Is not this what the witness means, and what all the witnesses mean, that in England in the place of production, they speak of a tramway or a tramway rail as including one for a street railway?

*Mr. Hodgins.*—I was not on that point. In dealing with rails where spoken of as tram or street rails, what does that expression mean?—*A.* Do you mean as tram rails or street rails?

*Q.* “Tram or street rails”?—*A.* Tram by itself does not mean a rail, you must couple the word rail with it.

*Q.* I said tram or street rails?—*A.* Tram by itself does not mean a rail.  
10 Tram rail would in England certainly be understood to be—(interrupted).

*Q.* Never mind that. I had better read it to you, and perhaps you will understand it: “Steel railway bars or rails not including tram or street rails.”—*A.* Well, of course, if there is the hyphen there after tram—(interrupted).

*Q.* There is no hyphen there?—*A.* Then you must supply something, because tram by itself does not mean a rail.

*Q.* If you cannot answer the question I will leave it alone?—*A.* I will say tram does not mean a rail.

*Q.* That is your explanation.

20 *His Lordship.*—That is intended to supply the word rail?—*A.* If the word rail is supposed to be understood there, I would recognize that as meaning the English use of the word to the street railway rail.

*Mr. Hodgins.*—*Q.* Do you recognize any difference between railway and tramway vehicles used in this country?—*A.* Well, the broad difference as I understand it between railway and tramway—(interrupted).

*Q.* Never mind that, get to the difference between railway vehicles and tramway vehicles?—*A.* There is not necessarily any difference at all, because a vehicle that would travel on a tramway would also travel on a railway, provided the gauges were the same. Tramways were originally constructed  
30 purely for wheel vehicles, I mean for vehicles without flanges on their wheels. The first use of tramways was in England and Scotland for vehicles that had no flanges on the wheels at all.

*Q.* You say that that expression would not necessarily be in distinction?—*A.* Not now, unless you go back a great many years. After tramways were first heard of wheel vehicles travelled on the tramways because it did not require any special kind of vehicle to travel on them.

*Q.* In 1887 street railways used heavier rails than 25 pounds?—*A.* I think that in Montreal they use 40 pounds.

40 *Q.* And was it not generally known that they used heavier rails than that in 1887 all over the world?—*A.* I could not say.

*Q.* Are you not familiar enough with the history of this tramway girder rail to know what weights were being used as far back as 1878?—*A.* In this country I do not think they had introduced any of the girder rails for street railways.

*Q.* Do you know Clarke on Tramways?—*A.* No, I do not know him at all.

RECORD.

No. 5.  
Evidence—  
continued.

*Q.* You know the name of the work?—*A.* I do not think I know the name. If he is an English author he would write of tramways as street rails.

*Q.* Could you use a rail lighter than 25 pounds on a railway?—*A.* Hardly. It would be a very small railway that would use a lighter rail than 25 pounds. It might be used for a railway for running into some mine or ballast pit.

*Q.* Was the Toronto Street Railway Company using a lighter rail than 25 pounds when you were City Engineer?—*A.* I do not know; I do not think it was as light as 25 pounds.

*Q.* Is there anything in your report about it?—*A.* I do not think it; I never went into the weight of rails.

Sanford  
Fleming.

Sanford Fleming sworn.

*Examined by Mr. Osler.—Question.* You are Consulting Engineer?—*Answer.* Yes.

*Q.* And you have been an Engineer, as we all know, for a very long time?—*A.* I have.

*Q.* You understand the word "tramway" as applied to constructions in this country?—*A.* The word is scarcely in use in this country.

*Q.* Do you say that the word "tramway" in a popular and ordinary sense, is a proper term to apply to a street railway construction in this country, or in the United States?—*A.* It is not usually applied in this country.

*Q.* I use the term, "railway track," would that be appropriate to suggest the construction as the double track on Yonge Street in this City?—*A.* Surely.

*Q.* What use is made of the word "tramway"?—*A.* The word "tramway" is confined to England chiefly. Probably it is in use in Australia, but it is not in use commonly in this country.

*His Lordship.—*If you saw the words "tramway rail" or "tram rail" in an English invoice of rails, you would understand it to be a description of a rail that might be used in streets?—*A.* Surely, yes.

*Q.* That would be its ordinary acceptance in such an invoice?—*A.* I fancy it would; a tram as I understand it is very much lighter than what we have been accustomed to in this country. Anything approaching a tram is a small railway into a mining district, or perhaps what the street railways were at one time, a timber, with a flat bit of iron on top, to protect the wearing surface.

*Cross-examined by Mr. Hodgins.—Q.* You say that the word "tramway" is scarcely in use in this country?—*A.* I do, as far as my knowledge goes.

*Q.* It is in very common use in the old country?—*A.* Yes.

*Q.* And you think is sufficiently well-known to make the word "tramway" quite intelligible in this country?—*A.* Only to those who know of its use in England.

*Q.* But you have no doubt that the meaning of the word "tramway" as used in England is well understood in this country?—*A.* Well, I am not sure that it is; the word, as I said before, is not commonly used here at all.

*Q.* But if used at all it would be used in the English sense?—*A.* Yes, it might be used in the English sense by Englishmen; Englishmen who come out to this country use the word "tramway" in speaking of the street railway.

*Q.* And you have no difficulty in understanding what he meant?—*A.* No, because I have travelled very much in England.

*Q.* Do you think that any one would have any difficulty in understanding the use of the word as meaning a street railway?—*A.* Yes, I think they would consider the person using it as using a wrong expression.

*Q.* If you found in a Canadian Statute the word "railway" and "tramway" contrasted?—*A.* I think it would be a very confusing word, a word that ought not to be in the Statute.

*Q.* Of course you may be quite right?—*A.* I would judge it got in there probably by being copied from some English Statute.

*Q.* Can you give any explanation of why steel rails, weighing not less than 25 pounds per lineal yard, for use in railway tracks should be admitted free of duty in this country, or should have been in 1887?—*A.* I can give no explanation.

*Q.* Have you no idea?—*A.* I can form a theory, but I am not responsible for that.

*Q.* You don't know as a matter of positive fact, but from your experience as an Engineer—

*His Lordship.*—I think that is something you must argue from the Statutes.

*Mr. Oster.*—My learned friend will know the reason. We will give you a witness to show the reason.

*Mr. Hodgins.*—Perhaps he will be quite satisfactory.

*His Lordship.*—We must gather the intention of Parliament from Statutes as we find them.

*Mr. Hodgins.*—You say that railway tracks would be a correct expression to use in reference to the track on Yonge Street here?—*A.* Yes.

*Q.* You don't mean to say by that that there is no difference in construction of the two classes of tracks, street tracks and ordinary railway tracks?—*A.* Yes, there is a difference; the ordinary street is now converted into a railway; it is a combination of a railway and a street.

*Q.* So that the ordinary traffic can circulate along?—*A.* Do whatever railways do. Yonge Street to-day is a double-tracked railway as well as a street.

*Q.* But it is nevertheless a street railway. If you will distinguish between railway and street railway you would call it a street railway?—*A.* Of course.

RECORD.  
 No. 5.  
 Evidence—  
 continued.

Q. And the distinction is well understood, between a railway and a street railway?—A. Many ordinary railways go through streets; we have it so in Ottawa.

Q. But it does not make the ordinary railway a street railway, because it runs through a street, does it?—A. It does, certainly.

Q. What?—A. Certainly it does.

Q. You think it does?—A. The construction of a railway in Ottawa is precisely the same—(interrupted)

*His Lordship.*—Suppose the C. P. R. runs on a street through a town or city, it does not become a street railway, *quod* that part that is in the city?— 10  
 A. I beg your pardon, my Lord.

*His Lordship.*—The C. P. R. does not cease to be an ordinary railway, and become a street railway, because it uses a piece of a street of the city.

*Witness.*—I did not quite understand the question.

*Mr. Hodgins.*—I was asking you whether you would not draw a distinction between the railway tracks as ordinarily understood, and the street railway tracks in the city?—A. There is a difference.

Q. And the ordinary way of presenting that difference is by saying that the one is a railway track, and the other a street railway track; that would convey, would it not, fairly, the meaning you intended to give?—A. Yes. 20

Q. And because an ordinary steam railway runs through a city it does not become a street railway?—A. It is not used for the purposes that a street railway is ordinarily used for.

Q. And would not fall within the definition of a street railway although running along a street?—A. It might or it might not.

Q. What would that depend upon?—A. It would depend upon the nature of the traffic, and the arrangement made with the corporation; the corporation might not allow an ordinary railway, as you describe it, to do street railway traffic.

Q. Well, if a railway company ran through the streets of a city, how would 30  
 it be described, providing all the precautions required by the street railway company were taken with the portion that ran through the city, but is extended out further, and ran through the country, just as an ordinary railway would, how would you describe it? A railway, or a tramway, or a street railway?—A. I would describe it as a railway.

Q. Then the distinction to your mind would be that a street railway is one using the streets or highways?—A. I will give an illustration.

Q. Would my definition be right?—A. In Ottawa where I live the rails were laid down for two purposes, for the purpose of a street railway, and also for carrying on ordinary railway traffic, designed to carry lumber from one end 40  
 of the city to the other on the railway tracks laid down in the streets, not during the day, but during the night.

Q. And that was called the Ottawa City Passenger Railway?—A. I am not sure whether it was. It was the Street Railway of Ottawa.

Q. How would you define a tramway in this country?—A. There is no tramway in this country, so far as I know, unless it be some small mining railway, going into a mining district, or a lumber establishment.



Q. Are you a railway engineer?—A. I am.

Q. Do you know whether iron rails only were used in street railways up to 1887?—A. They were only used in all railways up to a certain date, what that date is I cannot charge my memory.

Q. This rail I take it is beyond question would be unsuitable in railway tracks?—A. I don't think it is; I see no reason why a train driven by steam could not go over that.

Q. Do you think that an ordinary wheel such as is used on any of the steam railroads now—the flange of the wheel—would fit into that groove?—A. Yes, I think it could.

Q. And do you think that the web is strong enough to support the train?—A. Quite strong enough.

Q. You notice that it is not under where the tread of the wheel would come?—A. The web is directly under it, if my eyes are right.

Q. Under the centre of it?—A. Under the part where the weight of the wheel comes; the weight comes on this part of the rail.

Q. How far would it extend?—A. It would depend upon the shape of the wheel; in an ordinary wheel it would be precisely over the web of the rail.

Q. How far would the tread of the wheel extend from this groove?—A. It depends on the form of the wheel; take an ordinary wheel it would come very nearly over this.

Q. This is bevelled at the mouth of the groove, and therefore the tread of the wheel would not take it until it got very nearly over the web, the tread of the wheel would not take the top of this rail until it got about over one edge of the web, would it?—A. I think it would; I think it would rest immediately over it.

Q. It would commence just where the rail commenced to widen?—A. Yes.

Q. And how far would it extend in from the groove?—A. Not very far. It is impossible to tell you.

Q. Taking the ordinary standard wheel?—A. There are not many wheels alike; they change as they are used.

Q. You think a standard wheel would go on that?—A. I see nothing to prevent an ordinary railway carriage going over this rail.

Q. Then would that be strong enough on curves at a high rate of speed?—A. Perfectly strong enough; the rate of speed of course is an element; at an ordinary rate of speed it would be perfectly strong enough.

Q. Supposing an ordinary rate of speed such as is common on the C. P. R. and Grand Trunk; what do you call an ordinary rate of speed?—A. Twenty and 25 miles an hour, to 30 miles.

Q. Would you go 30 or 40 miles on that?—A. Sometimes they go 40 or 60. If you travel over this at a much higher rate of speed than 20 or 30 miles I should prefer the rail of another form.

Q. But taking the form as it is, without altering it, would it take a train at a high rate of speed?—A. I don't think you would be warranted in running a train at a high rate of speed.

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 Evidence—  
 continued.

Q. What would the difficulty be?—A. There might be some danger of the train going off the track.

Q. Why?—A. The wheel might mount the rail.

Q. What meaning do you attach to the words "surface railway"?—A. A railway built on the surface of the ground.

Q. Would you give it as broad a definition as that?—A. I think so.

Q. Well, do you know the Hamilton and Dundas road?—A. No, I never saw it.

Q. Do you know the Niagara Falls and River Road?—A. I never saw it. 10

Q. Can you give me an instance of what you would call a surface road?—A. On the flat prairie.

Q. Or on a flat street?—A. On a flat street, where the rails are laid on the surface, without cuttings or embankments.

Q. A surface railroad would hardly mean what we know as a steam railroad, running between certain points?—A. Oh, yes; there are hundreds of miles of surface railway over which steam railways run.

Q. You say it would be without cuttings and fills and embankments?—A. That is what I would call a surface railway.

Q. The ordinary steam railroad running for hundreds of miles through the country, but not all those three, cuts and fills and embankments?—A. Not at all. 20

Q. Do you know of any steam railroad in Canada that does not possess those three?—A. Yes.

Q. What one?—A. Portions of the Pacific Railway.

Q. I am speaking of a railway, any railway, which would come up to your definition of a surface railway?—A. I cannot give you an immediate answer. I have no doubt there are railways, long stretches, pretty nearly on a level.

Q. But could you apply the words "surface railway" to the Canadian Pacific?—A. No, because there are heavy cuttings on some other parts. 30

Q. Have you been in Nova Scotia?—A. I have.

Q. Do you know Halifax?—A. I do.

Q. Do you know the use of the word "tram" in Halifax in connection with the street railway?—A. I have never heard it used.

Q. You are not familiar with the Act of Parliament incorporating it?—A. I have never read it. I know the word "tram" is not used by the people of Halifax as applied to the railway through the streets, except a rare Englishman coming out, he might use it, but the citizens do not use it.

Q. The Legislature is not composed of rare Englishmen coming out?—A. I don't think it is. 40

*His Lordship.*—Just get at the point of your evidence; would this be about what you would say: That in 1887, at the place of production, and from which, in the ordinary course of business, a rail such as Number 2 would be imported, it would be known as a rail for a tramway?—A. It is not improbable, but I have not been in practice since early in the year 1870, and I am not familiar with the terms given.

Q. But in an English invoice, you would understand the word rail for a tramway, or a tramway rail, to mean a rail like that for a street railway?—

A. Well, it might or might not; instance the Ottawa Railway.

Q. But at the place of production?—A. Oh, that is very likely.

Q. But then you would say also that at Toronto where it was to be used, the railway in which it was to be used would not be called a tramway, but a street railway?—A. Yes; the form of the rail does not signify very much; the rail is always changing form, ever since its first introduction, and it is changing to-day.

RECORD.

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No. 5.  
Evidence—  
continued.

10 Mr. Jennings (re-called).

Mr. Jennings  
re-called.

By Mr. Osler.—*Question.* You are already sworn. Is it possible, and is there a design for a rail with the result that we have there part of the element of which is the ordinary T rail?—A. Yes, sir.

Q. Have you an invention for which you have letters patent, showing that?—A. Yes.

Q. And is this your invention?—A. That covers my patents in the States.

Q. You have obtained in both the States and Canada patents for that?—A. Yes.

20 Q. And that then takes the ordinary form of a T rail, and you combine the fish plate and lip, and so make the section that we have here. I will put this patent in. It is just for the purpose of giving the sketch. (Exhibit No. 5.)

Q. You have looked up that Clark book since your evidence. You find that you did not know of it?—A. I wish to correct my statement in that respect; I have known it for a long time.

Q. It is a standard old country work?—A. Yes.

30 Mr. Hodgins.—Q. The ordinary T-headed rail is known as a rail everywhere?—A. Not specially; it is known as a tramway rail also, for light rails.

Q. I see they use in this the rails of steam railways?—A. There are no iron rails now; steel is the common appellation.

Q. In your patent what is the width of the groove?—A. That is variable; I am not tied down to any width, but the width shown there is I think as full as that, that is applicable to either steam or street railway; in fact wherever that rail is used if it is necessary to put the attachment on.

Q. That would have all the advantages and all the defects of this rail?—A. It is as you like; it is attachable or detachable. May I put in the small book with reference to the tram or light rails?

40 A. Yes.

Mr. Hodgins.—I warn my learned friend, if he puts in books.

His Lordship.—I do not think I will accept that.

Q. Since you were here there have been two or three questions raised. It seems to me the question will eventually turn upon whether Parliament has

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 Evidence—  
 continued.

used this word in the sense in which it is used at the place of production, or at the place where the thing is consumed or used. Is that class of rail imported from any other place except England, in the ordinary course of business?—

*A.* Oh yes, sir, it is made in the States very largely.

*Q.* But in the course of trade do they import much from the States to this country?—*A.* I do not think many rails have been imported here, because the English market is cheaper.

*Q.* Our trade in that class of rail is with England?—*A.* So far I think.

*Q.* And in England the use of the words "tramway rail" or "tram rail" would include that class of rail for street railways?—*A.* Yes, sir, that is as they understand it in England; in the States we would call that a certain numbered section, street railway rails, section of street railway rail. If I was ordering so many tons, I would say, send me a thousand tons, number so and so, street rails. As regards the use of light rails, I would like to reinforce my replies to Mr. Hodgins by stating that the Carnegie Company in their catalogue refer to rails of the T section up to 25 pounds as being tram rails, as distinguishing them from heavy railway metal for steam railways, and in their book they refer to it in that way; that is where I think the distinction comes in the Act in those clauses. 10

*Mr. Osler.*—This is the Carnegie book?—*A.* Yes. 20

*Q.* And they give the three tramway rails, up to 25 pounds?—*A.* 20, 16, and 12, and they call those tram rails.

*Q.* And that is the only tram rail in their book?—*A.* Yes.

*Q.* A book full of sections?—*A.* Yes.

*Mr. Hodgins.*—If you were telegraphing to England for these rails you would describe them as tram rails?

*His Lordship.*—It is not so much a question what he would describe, but what they would invoice them as. What would they invoice them as?

*Witness.*—I think they might use the word "tramway."

*Mr. Hodgins.*—In the United States they would invoice them what?—*A.* Street railway rails. Further, if you take another Company's catalogue, outside of Carnegie, take the Bowling as compared with the Carnegie, or the Johnston, you will find they give a flat grooved rail as a tramway rail. 30

*Q.* So that they understand what is meant by a tram rail in the United States?—*A.* There are two meanings in England; I can show you a book with diagrams representing flat grooved rails such as used in Berlin and other places on the Continent that they call tram rails.

*Q.* Do you know that that is a Belgian section?—*A.* Yes, I think so. I think the Hamilton Company got that same section from the States.

*His Lordship.*—In Belgium they would understand it as a tram rail?—*A.* In ordering them from any of the makers you would send a section of the rail. 40

*Q.* In England they would invoice it to this country, if they were exporting it to this country, making out their invoice for it here, they would describe it a rail like that as a tramway rail?—*A.* Yes.

Q. And they would do so in Germany?—A. Yes, they would use their own expression. RECORD.

Q. The German equivalent?—A. Yes, it is something the same. No. 5.

Q. But when you come to apply it here to our street railways here, they are not known in this country as tramways?—A. I have never known them as such, sir. Evidence—  
continued.

Mr. McKenzie (re-called).

Mr. McKenzie re-called.

By Mr. Osler.—Question. You are already sworn. Are these rails constantly invoiced over the whole country as tram rails, or do they use other names?—Answer. They use “girder rails” in a good many of them.

Q. Is this the invoice of some of the rails of this pattern?—A. That is from Sanders.

Q. And is that an invoice of rails of this pattern?—A. The same pattern.

Q. This is from Sanders in the old country, and he invoices them as steel grooved rails?—A. Yes.

Mr. Hodgins.—Is that a copy or an original?

Mr. Osler.—An original invoice. (Read by Mr. Osler).

Witness.—All these rails have been shipped from Antwerp.

Q. They were made by various makers?—A. Made by two makers in Belgium.

Q. And the maker calls them?—A. It is not the maker, it is the men in London, the agent.

His Lordship.—They come through England?—A. No, they came direct, but they were purchased in London.

Q. But you bought them from London houses?—A. Exactly.

Q. English houses?

Mr. Osler.—And this maker who made a large quantity of them, invoiced them as steel grooved rails?—A. Yes. We bought one lot from the Johnston Company.

Mr. Hodgins.—That is not claimed in this action?—A. Yes, we ask to have it refunded.

Mr. Osler.—You bought almost the same section from American makers?—A. Yes.

Q. The American invoices, of course, are not “trams”?—A. No, not “trams.”

Cross-examined by Mr. Hodgins.—Q. There are very few of Sanders’ rails in this claim?—A. A good many.

Q. How many?—A. About 2,500 or 3,000 tons.

Q. And your claim is in respect to how many?—A. What is the amount of the claim?

Q. \$50,000?—A. That will be \$6 a ton. I don’t know the quantity.

Q. Where is the contract that was made with Sanders and Company for these rails?—A. Never any formal contract.

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No. 5.  
Evidence—  
continued.

Q. How was the contract made?—A. Well, we asked the prices, and he telegraphed—I was on the Mediterranean at the time, and we accepted it from Athens.

Q. Did you refer him to Dick, Kerr, and Company for the section of the rail?—A. I cabled I would give him the section myself; I was on my way home to London at the time.

Q. If you approached Sanders and Company for a price for these rails they would want to see the section?—A. Certainly.

Q. How did they get the section?—A. It was sent to them from Montreal.

Q. By whom?—A. By, I expect, Mr. Porteous. 10

Q. And when they got that section was the telegraphing in reference to the order done on the basis of that?—A. Asked for tenders from different people.

Q. And these are precisely the same rails as the original?—A. Precisely, in fact probably that section you have there is of the Sanders' lot.

Q. These are more of the Sanders' papers, "\$3,913," "\$3,633," "\$5,834," those are three other lots of the grooved rails?—A. Yes.

Mr. Hodgins.—What did you ask for in telegraphing?—A. Girder rails.

Q. Didn't you tell him whether for a railway or a tramway?—A. We did not tell them; we sent the section we wanted. 20

Edmund  
Wragge.

Edmund Wragge sworn.

Examined by Mr. Osler.—Question. You are an Engineer?—Answer. Yes.

Q. And have had experience in both England and Canada?—A. Yes.

Q. And you are one of the managers of the Grand Trunk?—A. Yes.

Q. Does the word "tramway," or did it in 1887 properly describe a street railway as it exists in Canada, or as it existed in Canada?—A. I don't think it was known generally by that name in the same way that it was in England. I think there were other tramways here that were better known as tramways than any street railway was.

Q. You say there were railways, the steam railways, and the street 30 railways, and a class of road called tramways?—A. Yes.

Q. And as far back as 1887 you know there were electric roads? Do you remember the St. Catharines and Thorold?—A. Yes, and the Windsor.

Q. A short road at the Exhibition grounds in Toronto?—A. Yes.

Q. Now do you know railway tracks in common use by street cars and locomotives? Do you know of such a thing? For instance, the track approaching the International Bridge at Fort Erie and Buffalo?—A. I know that we have a little street railway car that runs across the International Bridge at Buffalo, but that has a small steam motor.

Q. That is used for street car service?—A. Yes, that is used for street 40 car service.

Q. And that runs through part of the streets of Fort Erie, and then joins your railway track, and crosses the International Bridge, and continues a little while on your railway track, and then takes to a street?—A. Yes.

Q. And giving in that way a service. The one track serves for street work as well as for railway work. Has it been in contemplation, the working of any part of the road now, worked as a steam railway, to work it by a trolley system?—A. We talked of converting a short railway from Peterborough north into an electric railway; there was a proposal for that a short time ago.

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—  
No. 5.  
Evidence—  
continued.

Q. And is that a feasible proposition?—A. Oh, yes.

Q. Then what have you known of tramways in this country, tramways called such and known as such?—A. I know the Flos Tramway and the Medonte Tramway.

10 Q. Those two roads were in existence for a limited time?—A. The Flos Tramway is still in existence; we took up the rails of the Medonte Tramway last November.

Q. Each of them had a right to take up their rails after a service of eight years?—A. Yes.

Q. Those roads were laid with "T" section?—A. Yes.

Q. Old railway rails?—A. Old Midland rails in the one case, and old Northern rails in the other.

Q. And were used for getting out lumber?—A. Yes, various products of all kinds.

20 Q. And no regular service upon them?—A. No passenger service.

Q. But to run to the mills and take in empties and take out full cars?—A. Yes.

Q. Are there tracks on the streets of Montreal used either for street service or railway service? Do you know of such?—A. I don't know of them. Our tracks run through some of the streets for freight service, going down to the docks, but I don't think they are used for passenger service.

30 Q. Now, I take the words "railway tracks," and what do you say to those words being applicable to such tracks as we have operated by the Toronto Railway Company? Do you think that is the proper expression?—A. Yes, I think so. I think any line of two or more rails constitutes a railway track.

Q. As an engineer, do you know that there were light rails manufactured before 1887 in Canada?—A. I do not know for certain of any that were.

Q. You only know it by heresy?—A. I have only heard so.

Q. Now do you know of anything more permanent in its construction as a railway than the track of the Toronto Street Railway?—A. No, it is quite as permanent as nearly any railway I know; more permanent than a good many ordinary steam railways.

Q. The foundation is the ordinary railway tie?—A. And its bed is sand underneath that, and the tie, and then it has the heavy rail and joint.

40 Q. And the residue is street construction?—A. Yes.

*Cross-examined by Mr. Hodgins.*—Q. What is your profession?—A. Civil Engineer.

Q. You have been connected lately, in fact for some years, with railways?—A. Yes.

Q. And spent most of your time in connection with railways?—A. Railway work, yes.

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Evidence—  
continued.

Q. I suppose of every kind?—A. Yes, except freight and passenger work.

Q. What position have you held in connection with railways in this country?—A. I was Chief Engineer of the Toronto, Grey and Bruce, and Toronto and Nipissing, and constructed them both; then I was General Manager for some years of the Toronto, Grey and Bruce after it was built; since that I have been the local manager of the Grand Trunk at Toronto for ten years.

Q. So that a great deal of your time has been passed in connection with railway work?—A. Yes.

Q. Are you familiar with the subject of railways?—A. Yes. 10

Q. Not only with railway construction, but with railway operation?—A. Yes.

Q. Now, what meanings have you attached to the word "railway" in the evidence you have been giving for the last few minutes? When you speak of railway work, and construction, and operation, what were you referring to?—A. I was asked what was a railway track.

Q. Oh, no; the last few minutes you say you have been connected with railways, and that you have done a great deal of work in connection with railways, and construction, and operation; what were you referring to? What sort of railways?—A. In reply to you those that I mentioned, the Toronto, 20 Grey Bruce, and Nipissing, and Grand Trunk.

Q. Were steam railways?—A. Yes.

Q. Now do you think, as a railway man, that a railway wheel would run on that track?—A. A locomotive wheel?

Q. Yes.—A. No, I do not think that is a proper groove for a locomotive tire.

Q. It would not fit into it?—A. No.

Q. Would you use that rail on the Grand Trunk?—A. For ordinary railway purposes?

Q. Yes.—A. No, not exactly like that. 30

Q. You say anything that has two rails on which anything runs is a railway?—A. Yes.

Q. One might almost concede that?—A. One rail will make a railway now-a-days.

Q. Is there any difficulty in distinguishing between the railway system and the street railway system?—A. The street railway system, I think, is confined pretty nearly altogether to the streets of cities and towns.

Q. You would have no difficulty in distinguishing between the two systems of railways, the ordinary railway, and the street railways, would you?—A. Not if I am told one is an ordinary railway, and the other is a street railway. 40

Q. But dealing with the subject generally, you would have no difficulty in distinguishing between a railway and a street railway?—A. Not what is usually spoken of in ordinary conversation as a railway, and a street railway.

Q. Now what would be the best word to use in describing a rail like that, in buying it in London, or in any place in Europe, so as to acquaint them with just what sort of rails you wanted, if you were going to lay it down on the Toronto Railway Company's tracks?—A. I think if you sent a drawing of it



home you would simply say it was a rail similar to the one enclosed. If you were ordering it of a particular section, which is what you would usually do, you would refer to it by its number; they generally have sheets of sections of different kinds of rails.

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Evidence—  
continued.

*Q.* But if you were compelled to describe it, would you use the words tramway rails, in writing for it, or would they use the word tramway in indicating in reference to that?—*A.* You order a rail such as that by description only.

*Q.* It would be difficult, but supposing you wanted to describe that class of rail in England?—*A.* They would certainly understand it as a tramway  
10 rail.

*Q.* No doubt about that. And that I suppose is naturally the way it would be invoiced, if bought over there?—*A.* That is the way they would speak of it.

*Q.* Have you travelled on the continent?—*A.* I have just been over to Paris.

*Q.* The word tramway is used there, or an equivalent of it?—*A.* I am not enough of a French scholar to know whether it is an exact equivalent.

*Q.* What are street railways, as we know them, called in England and Scotland?—*A.* They are called tramways, ever since George Francis Train came over and started the Birkenhead Street Railway, I think that was the  
20 first.

*Q.* Could you use rails of less than 25 pounds per yard on your railway?—*A.* Not on those with heavy engines like the Grand Trunk, but in three feet gauge railways they use them as small as that.

*Q.* How would you define a tramway?—*A.* I think a tramway in this country is better understood by a railway that is only just started, it is hardly as good as what you would call a railway; it has to be constructed for use without any regular schedule of either rates or fares, or a time table; it is used for such purposes as that.

*Q.* Then that would mean a railway which did not come up to the standard of what is known as a railway under the Railway Act?—*A.* Yes.  
30

*Q.* Would that be your understanding of the word tramway?—*A.* To a very great extent.

*His Lordship.*—I suppose undoubtedly it includes all those ways from quarries to the place of shipment, and from mills to the place of shipment, through their own land, and for carrying away the refuse from mills?—*A.* Yes, I know tramways on the Island of Vancouver; they have tramways there.

*Q.* And where they cannot burn their sawdust at the tail of the mill they have to carry it away, and those are called tramways, I think?—*A.* Yes.

*Mr. Osler.*—One would get some comfort from that, except that the  
40 Government has been letting in such rails free to mining places.

*His Lordship.*—As part of the machinery for mining?

*Mr. Osler.*—No, just a method of getting material to the nearest railway.

*Mr. Hodgins.*—You were connected with the Medonte Tramway Company?  
—*A.* Yes.

*Q.* So that there was in Canada in 1882 a Tramway Company?—*A.* Yes, sir, I suppose it was about 1882.

## RECORD.

No. 5.  
Evidence—  
continued.

Q. Would that come within the definition of tramway that you have given us?—A. Yes.

Q. As being something less than a railway?—A. It was not constructed I think in a substantial way to be used as an ordinary railway; there was no schedule of trains, and it was not used, except for carrying freight.

Q. But a great number of the clauses of the Railway Act of Ontario did apply to it?—A. Yes, it was simply a sort of feeder for freight and various products.

Q. Then I suppose you will not say that the word tramway was not known in this country, and had not a meaning, and that meaning being something less than an ordinary steam railroad?—A. Yes. 10

*His Lordship.*—As I recollect the Joggins' Mines are about a mile from the point of shipment, and they have a railway laid from that point to the point of shipment, over which their little cars carry coal constantly, brought back by horses, but running down the incline; undoubtedly, that is a tramway.

*Mr. Hodgins.*—This tramway you speak of practically was constructed as a railway, but not subject to the powers of the Railway Committee, apparently the Act does not go that far; it was not up to the class which would have passed the inspection of the Railway Act?—A. I think under the later Act it is subject to the control of the Railway Committee, making connection with the Grand Trunk brings it under that head now. 20

Q. What was the gauge of that road?—A. 4 feet 8½.

Q. Did you ever hear of any other tramway Company?—A. I mentioned the Flos Tramway; that runs off the Northern to Hillsdale.

Q. Did you ever hear of the Toronto, High Park and Western Tramway Company?—A. I never remember any such tramway.

Q. Did you ever hear of street railway companies being incorporated with precisely similar powers to the Medonte Tramway Company?—A. No.

Q. Did you ever hear of the Dawn Tramway Company?—A. The Kingston Road Tramway Company. 30

Q. The Dawn Tramway Company?—A. I think there was a charter for such a Company, but I do not think the line was ever built.

Q. Or the Amherstburg Tramway Company?—A. I don't know where that is.

Q. Are you aware that in British Columbia the term is very extensively used, and has been so for years, to mean a tramway, such as the Medonte Tramway Company?—A. I know that when I was at the Wellington Mines with Mr. Dunsmuir he called his a railway, down from the Mines to Departure Bay; that was in 1886, on Vancouver Island, and I do not think the Nanaimo Coal Company call theirs a tramway; theirs was a railway. 40

*His Lordship.*—Do you mean the Esquimalt and Nanaimo?—A. No, that is a railway. The Nanaimo Coal Company, or Vancouver Coal Company, they have a road.

*Mr. Hodgins.*—When was that?—A. In 1886 I was there.

Q. Do you remember the word "tramway" being used in British Columbia?—A. No, I think Mr. Dunsmuir called it a railway.

Q. Do you remember the word "tram" in Victoria in connection with the Victoria Tramway Company?—A. I do not think there was anything there; I don't remember.

Q. It was not running then?—A. No.

Q. Was the Vancouver Street Railway running when you were there?—A. No, it was not running when I was there in 1888.

Q. They have in British Columbia a class of road which you would not class as a railway under the Railway Act, but which has very large powers, and which runs through the country and along the road?—A. I know nothing more  
10 about it than I have heard mentioned here to-day.

Q. There is the National and Electric Tramway Company, and the Kootenay Power Company. You know the Hamilton and Dundas Road?—A. I have never travelled on it.

Q. You have seen it; you know something about it?—A. I have seen the steam motor come into Hamilton.

Q. Would you describe that as a railway or a tramway?—A. It is a street railway, with a steam motor on it. Of course they have steam motors on the English tramways that correspond with street railways here.

Q. Would it be possible to use that rail on a railway, even if otherwise  
20 suitable, on account of the difference in the gauge of the wheels, in interchanging traffic?—A. I do not think the groove would be quite deep enough to let a freight car go over it.

Q. But supposing it was, could you use it as a rail on the Grand Trunk, seeing that you take over a number of cars from other roads, and transport them over your road; the gauge of all the roads is not precisely the same to a sixteenth of an inch?—A. Yes, all that come to us are 4.8½; the Pennsylvania I think is 4 feet 9 inches; we always allow  $\frac{3}{8}$  of an inch play.

Q. But that would not be possible with a grooved rail?—A. Well, it depends upon the wear of the wheel a good deal.

Q. What weight of rails were you using on the Medonte Tramway  
30 Company?—A. I think the old 56-pound rails were used there.

Edward Lusher sworn.

*Examined by Mr. Osler.—Question.* You are Secretary-Treasurer of the Montreal Street Railway?—*Answer.* I am.

Q. And have held that position since 1878?—A. Yes.

Q. And can you tell me anything about the use of the word tramway in Canada? Has it ever been applied to street railways?—A. Never to my knowledge.

Q. Street railway is the word?—A. Street railway is the word.

Q. Now, in the importation of rails from England, you have known of the  
40 importation for many years?—A. I have.

Q. And also from the United States?—A. I do.

Q. Do you get your sections sometimes from one and sometimes from the other?—A. We had it once from the United States, and some ten or twelve times from England.

RECORD.  
—  
No. 5.  
Evidence—  
continued.

Edward  
Lusher.

RECORD.  
 No. 5.  
 Evidence—  
 continued.

*Q.* Now, is there any definite name for your sections as they come to you, from a country of production?—*A.* None whatever; no name mentioned in the invoices beyond rails, steel rails, or iron rails, as the case may have been years ago.

*Q.* They are generally referred to by the section?—*A.* We send them the section and they make the rails.

*Q.* It is not then an article which you go into the market and buy?—*A.* No.

*Q.* But it is an article that is designed here and forwarded to the mills to be manufactured specially?—*A.* The same. 10

*Q.* Not an article of going into the market to buy, but always the ordering of a section?—*A.* That is it.

*Q.* Which section is designed here?—*A.* Ordering the steel through the section which we send.

*Q.* Is there a journal published in the interests of street railways in the United States?—*A.* Yes, there are one or two.

*Q.* Are they called Tramway Journals, or Street Railway Journals?—*A.* Street Railway Journal is the principal one; there is no journal that I know of called a tramway journal.

*Q.* Is there a construction in any street in Montreal which is conjointly used by steam and street railway?—*A.* Yes. 20

*Q.* Which street is that on?—*A.* St. Patrick Street; the Grand Trunk crosses our track there, and also at St. Henri; they cross our track, and it is made exactly the same as our own track.

*Q.* That is only a crossing. Is there any part of the track of the one used for running along by the cars of the other?

*His Lordship.*—One road running over the other?—*A.* We have power to run across.

*Q.* But run along?—*A.* No, I am not aware.

*Mr. Oster.*—Do you know of the Grand Trunk tracks and your tracks being built precisely the same way in a street in Montreal?—*A.* Precisely the same way; paved exactly the same. 30

*Q.* So that the construction is interchangeable, but not used?—*A.* Not used.

*Cross-examined by Mr. Hodgins.*—*Q.* I suppose you do not dispute that that rail is what would be known in England as a tramway rail, number 2?—*A.* I do not know what they know in England; we know it as a street railway rail, a rail for the street railway.

*Q.* You know it as a street rail?—*A.* A rail which is used for running railways in the streets. 43

*Q.* Do you know it as a street rail?—*A.* No, a rail which is used for the streets.

*Q.* Have you ever ordered any of these rails from England?—*A.* Oh, yes, a good many, but not of this particular pattern.

*Q.* You cannot speak as a matter of experience what you have done in ordering?—*A.* Not of that pattern.

Q. I suppose you do not deny, or are not prepared to deny, that that is known as a tramway rail in England? Your position is that you do not know?  
—A. Of course they may call it some other name in China or Japan; in this country we call it a street railway rail.

RECORD.  
—  
No. 5.  
Evidence—  
continued.

*His Lordship.*—They are not produced in China or Japan?—A. They are sent there a good deal.

*Mr Hodgins.*—Q. How long have you lived in Montreal?—A. Fifty-seven years.

Q. In connection with the street railway?—A. Eighteen years.

10 Q. Do you know of any tramway company down there?—A. No, sir.

Q. Do you know anything about the Island Belt and Park Company?  
A. Never heard of any tramway company in Canada.

Q. Do you know of the Montreal Island and Belt Line Railway Company?  
—A. No.

Q. Never heard of it?—A. No.

Q. Did you ever hear of the Montreal Park and Island Railway Company?  
—A. Yes.

Q. Are you connected with that?—A. No.

20 Q. What sort of a road do they run?—A. Well, they run a pretty good road.

Q. What sort of a road?—A. They run a railroad.

Q. What do you call it?—A. We call it a street railway.

Q. Does that run through the streets of Montreal?—A. Yes.

Q. Is it an opposition line to yours?—A. No.

Q. It does not operate in the same district?—A. Partly.

Q. Is the construction of its road-bed the same as yours?—A. The same in some parts, not altogether the same rail.

Q. The modern part?—A. Part of the road is constructed with what they call T rails.

30 Q. But is the modern part of that road constructed with what we call tramway rails, with a groove?—A. It is all modern; it has only just been started.

Q. How much of it is laid with those rails?—A. Which kind?

Q. The one in front of you?—A. They run over these rails probably for over a mile.

Q. Then they have a mile of the road constructed with these rails?  
A. There is a mile over which those cars run.

Q. You understand the difference between constructing a road and running cars?  
—A. They did not construct the road.

40 Q. Is it your road?—A. Yes.

Q. Then how is their road constructed?—A. Outside of the City limits.

Q. They run on your tracks inside the City limits?—A. Yes.

Q. Altogether?—A. Yes.

Q. They have no road inside the City?—A. No.

Q. And how is their road constructed outside?—A. I believe they have the T rails in the country.

Q. Have you ever been over it?—A. No.

RECORD.

No. 5.  
Evidence—  
continued.

Q. Now we will take this portion of the road that you say the railway company uses, did I understand you to say that they had constructed it precisely as your road is constructed?—A. They did not construct it at all.

Q. Who did?—A. The Montreal Street Railway Company.

Q. Your company?—A. Yes.

Q. And did they construct it with this rail?—A. Yes. (Exhibit No. 2.)

Q. And what railway company runs over it?—A. Our own railway company, the Montreal Street Railway Company, and the Park and Island run over a portion of it.

Q. Then you call the Park and Island Railway Company a railway 10 company?—A. Yes, sir.

Q. Or a Street Railway Company?—A. Or a Street Railway Company.

Q. So that that portion of the road that you were referring to a little while ago is used only by street railways?—A. That is all.

Q. And that is why the construction is exactly similar?—A. That is on that portion in the City.

*Re-examined by Mr. Osler.*—Q. Then after running upon this section for so long, the cars leave that class of construction and go on to the ordinary T rail?—A. They do.

Q. In the Montreal City Railway that you represent here have you any 20 T rail construction?—A. We have none.

Q. You are on the girder?—A. Yes.

Q. Then do your cars run on to suburban tracts?—A. No, they do not. Well, there are suburban tracts belonging to the Street Railway Company outside of the City.

Q. Adjoining yours?—A. Yes, our own tracks.

Q. How are they constructed?—A. On the old system, some of the tracks.

Q. T rails?—A. No, flat rails.

Q. No T's?—A. No.

Q. But the other Company my learned friend speaks of runs from the girder to the T?—A. Yes, sir. 30

Mr. Cuning-  
ham re-  
called.

Mr. Cuningham (re-called).

*By Mr. Osler.*—*Question.* Do you confirm the last witness' statement; have you all girder rails, or have you any "T" rails?—*Answer.* We have some "T" rails on the system.

Q. You know that as an engineer?—A. Yes.

Q. To what extent have you an ordinary "T" rail section on your street railway system?—A. There is about ten miles of it altogether.

Q. You would know of it?—A. Yes. 40

*Cross-examined by Mr. Hodgins.*—Q. In the City?—A. Yes, in the suburbs; that is in the City limits.

Q. And is that flush with the road?—A. Flush with the road in the macadam streets.

Q. And what do you do instead of the lip?—A. We do not do anything; we just fill in the macadam right to the rail, and the groove of the wheel itself cuts its own groove.

Q. Then the wheel runs a groove?—A. The wheel runs a slight groove half an inch deep in the macadam.

Q. That is cheaper?—A. It is more suitable in a macadam road than this lip.

Q. It is only a makeshift, if you were constructing what are known as permanent pavements?—A. When we construct the permanent pavements on a concrete foundation, and with asphalt, then we put in the lip rail, but in the macadam road we have used the plain "T" rail, 56-pound section, with just the macadam filled in about it.

Q. With the consent of the municipality?—A. Oh, yes; in some places we also laid a plank alongside the rail on either side of it so as to facilitate the traffic. The municipal authorities decided to have it done.

Q. These are all expedients to make it flush with the rail?—A. Yes.

*Re-examined by Mr. Osler.*—Q. Do you know that that rail is used also with macadam and ballast in Toronto?—A. Oh, yes, we have used this rail also when we macadam in Montreal.

20 John James Gartshore sworn.

*Examined by Mr. Osler.*—*Question.* What is your business?—*Answer.* I deal in railway supplies.

Q. In the course of your business do you know whether there has been manufactured in Canada a rail, and if so, up to what weight?—A. The only steel rails I know of being manufactured in Canada are made by the Nova Scotia Steel and Iron Company, or Steel and Forge Company, New Glasgow; they make a twelve and eighteen-pound rail.

Q. Those are known in the trade how long?—A. They have been making them to my knowledge for eight or nine years.

30 Q. And what is the section?—A. "T" rail.

Q. And what were they used for?—A. Just for light tramways.

Q. And what do you know as a "tramway" in Canada?—A. Well, such rails are used for lumber yards, in conveying material out from saw mills, or any mines, etc. Regarding any other rails, you asked me about rails in general, there have been some iron rails made in the country, in Hamilton, and in St. John, New Brunswick.

Q. But those are the only steel rails?—A. Yes.

*His Lordship.*—Q. Who manufactured the rails in St. John, Harris?—A. Either Harris or Burpy, I am not sure which; I think it was Harris.

40 *Mr. Osler.*—Q. Do you know the Emery Lumber Company?—A. Yes.

Q. Where did they operate?—A. They operated at Wanhata, on the C. P. R.

Q. Do you know what the weight of their rail was?—A. Thirty pounds.

Q. What kind of a road was that?—A. For the conveyance of logs principally.

RECORD.

No. 5.

Evidence—  
continued.

J. J. Gart-  
shore.

RECORD.  
No. 5.  
Evidence--  
continued.

Q. Do you know of your own knowledge that they got their duty repaid?  
—A. Yes, I do.

Q. They imported the rails from where?—A. From England.

Q. "T" section, thirty pounds, and that is a log railway connecting with the main line of the Canadian Pacific?—A. No, they come to the mouth of the river, but they dump the logs into the river, and float them across.

Q. And do you know of your own knowledge that they got all the duty they paid on those rails from the Department?—A. Yes, sir.

*Cross-examined by Mr. Hodgins.*—Q. What kind of rails were being 10  
manufactured in Canada, say eight or nine years ago? What weight?—A. I don't know the exact weight; it was a rail similar to this in Hamilton. (Referring to the flat rail.) They made some in Hamilton of iron similar to this. (Referring to Exhibit 3.)

Q. Were iron railway rails manufactured in Hamilton?—A. I don't know of any since the rolling mills at the east end of the City ceased operation.

Q. What was being manufactured by that rolling mill in the east end of the City?—A. It was before my time; I don't remember what kind of rails.

Q. The only iron work you know of was similar to that strap rail?—  
A. Yes. 20

Q. That strap rail runs over twenty-five pounds as a rule?—A. As a rule it does. I should correct myself. I did hear that the Londonderry Company made some iron rails, but I think they were all light.

Q. What started this Company that you speak of in Nova Scotia manufacturing these steel rails eight or nine years ago?—A. I don't know.

Q. Was it something quite new?—A. I don't know, I think it was new.

Q. You say that this light rail was used in light railways; you don't say, of course, that that is the only meaning of the word "tramway," a light tramway such as you have described?—A. No, I do not say so.

Q. Would you call the Emery Lumber Company a tramway?—A. I 30  
suppose you could call it a tramway.

Q. Could you call it a railway?—A. Some call it a logging railway, or a logging tramway.

*His Lordship.*—And what motive power did they use?—A. They used locomotives.

*Mr. Hodgins.*—That is an ordinary railway, standard gauge and all?—  
A. No, I think it is a three-foot gauge.

Q. The gauge is being changed?—A. I have not heard so.

Q. And their rails were thirty pound rails? Are you an Englishman?—  
A. No. 40

Q. What countryman?—A. Canadian.

Q. Have you lived in Toronto all your life?—A. I was born in Dundas, and lived in Toronto most of my life.

Q. Do you know the Hamilton and Dundas road?—A. Yes.

Q. What would you describe that as?—A. Well, we usually call it a dummy.



Q. How would you describe that?—A. I think I would describe it as a railway. RECORD.

Q. It is called the Hamilton and Dundas Street Railway Company under its charter?—A. Yes.

No. 5.  
Evidence—  
continued.

Q. But you would call it a railway, you wouldn't call it a tramway?—A. No, I do not think I would.

Mr. Osler.—Do you know whether the Glasgow Company are increasing the weight of their section lately?—A. No, only make the two sections.

Frank Turner, sworn.

Frank  
Turner.

10 *Examined by Mr. Osler.—Question.* You are an engineer?—*Answer.* Yes.

Q. Your experience mostly in railways?—A. Yes.

Q. And you have been concerned in the construction of railways in Canada?—A. Yes.

Q. In South America and elsewhere?—A. And in England.

Q. And you are familiar with the engineering literature in America and Europe?—A. Fairly well.

Q. Speaking of Canada, what do you say to the word "tramway" as applicable to such a railway as the Toronto Railway?—A. "Tramway," as far as I understand it in Canada, does not give you an idea that it is a street railway, but on the contrary that it would be an auxiliary to another railway, or in some industrial works, such as mines, or quarries, or lumbering operations, or industrial works, around shops for instance, or even in warehouses.

Q. Auxiliary to other system of transportation?—A. Yes.

Q. But it does not give you the idea of a street railway?—A. No, certainly not here.

Q. I find four rails running up Yonge Street on which they use cars, or trains, running at 15 miles an hour, how would you describe those four rails?—A. Street railway tracks.

30 Q. Would you understand them as railway tracks?—A. Well, up Yonge Street, in the City, I would call them street railway tracks.

Q. And do you understand a different signification between the word tramway as used in England, and used here?—A. Oh, yes, very distinct.

Q. And well recognized in your profession?—A. Yes.

*Cross-examined by Mr. Hodgins.—Q.* How would you define a tramway?—A. I define a tramway as an auxiliary to move material from one place to another, where you have not got the complete railway.

Q. Would you give that name to a road that had powers of expropriation, that ran through the country and along the streets as well into a city, and ran along the streets of a city?—A. No, not here I would not.

40 Q. Would you give that name to a three-foot gauge road laid with railroad iron and run as a logging road by a locomotive?—A. I would, I would call it a tramway.

## RECORD.

No. 5.  
Evidence—  
continued.

*Q.* Why?—*A.* Because it is used for industrial purposes in lumbering operations, where a road would not necessarily be chartered, and does not run under the supervision of the engineer of the Government.

*Q.* Exactly. That would form the standard then, would it, for defining what a railway was?—*A.* I would call that a tramway.

*Q.* Would the absence of the jurisdiction of the railway Government inspection form a standard for determining the difference between a railway and a tramway?—*A.* It would in a great measure, in certain parts.

*Q.* The ordinary railways under the Railway Act of the Dominion, or the Railway Act of Ontario, is a well-known system or institution?—*A.* It is governed entirely by the Government and the Government officers. They cannot open a road for instance to carry passengers unless it receives the certificate of the Government Engineer. 10

*Q.* And, therefore, the word "tramway" would necessarily mean something quite different from the word railway?—*A.* It does in my view.

*Q.* Then the only thing that seems to be doubtful is what is the meaning of the word "tramway." Now, the Street Railway Company here is known as a street railway?—*A.* Yes.

*Q.* You quite understand the English system which is called a "tramway" system?—*A.* Yes. 20

*Q.* You understand the Act which governs the tramways in England?—*A.* I am not very well posted on that, but I have a general idea.

*Q.* You know that there is a Tramway Act over there?—*A.* I believe there may be a recent one.

*Q.* And the system you describe here as the Street Railway system, and the system there described as a tramway system, are identical?—*A.* The system we have here and the system they have in England are pretty nearly the same, except that they use different power at some places; some places they use horse power and other places they use steam power, and we use the electrical power, and sometimes it is the overhead system, or trolley system, 30 and sometimes the storage system.

*His Lordship.*—Is this it, that the word "tramway" in England had a well-understood meaning originally, and was quite distinct from a railway, that later in England it came to include a street railway?—*A.* Yes.

*Q.* And that in this country it originally had the same meaning as in England, but it has never, in this country, been applied to the street railway?—*A.* No.

*Q.* They have changed the meaning to include street railway, and we have adhered to the original meaning?—*A.* The street railway here is similar to the tramway in London, we will say. 40

*Mr. Hodgins.*—*Q.* Don't you think that the word "tramway" as understood in England is well understood out here in the same sense?—*A.* Oh, no; many people would not know what you meant if you were to say, I am going to take the tramway, they would not know what you meant; if you said you were going to take the street car they would say all right, take the trolley car; but they would not know what you meant if you said tramway.

*His Lordship.*—If you saw in an English invoice the word “tramway,” or if you heard an Englishman use it, you would know what he meant, and that he meant an ordinary street railway like this?—*A.* In England.

RECORD.  
—  
No. 5.  
Evidence—  
continued.

*Mr. Hodgins.*—And I suppose if you imported a rail, even if you saw the word “tramway” rail, you would have no doubt that that would be chargeable with duty?

*His Lordship.*—I do not think that is evidence.

*Mr. Hodgins.*—What word would you use if you were ordering a rail of that kind in England, or from England?—*A.* I would call that a girder rail.

10 *Q.* Or a girder tramway rail?—*A.* Or a girder tramway rail.

*Q.* That rail is used, I understand, exclusively on what are known as tramways in England?—*A.* That is not the only kind of rail they use in tramways.

*Q.* But that is the kind of rail in use?—*A.* From its section I would say that is a tramway rail, as understood in England.

*His Lordship.*—So then if in an invoice it was necessary for an exporter to give a description of the goods, he would describe them as tramway rails?—*A.* An Englishman would. The English exporter would.

20 *Mr. Hodgins.*—And you, living in Canada, would have no doubt on seeing that invoice, what it meant by that, viz., that it was for a street railway?—*A.* I would know it was a street railway: I would not know it was that particular kind of rail, because there so many varieties.

*Q.* But the word would not be a meaningless word?—*A.* Not to me, it would not.

*Q.* I suppose you will say that that rail is not a suitable rail for a railway?—*A.* It is not in ordinary use for a railway, and it is not suitable, and it is not necessary, because you do not require to pave between your tracks, as they do in a street.

30 *Q.* What is the common characteristic of the street railways here, and the tramways in England? Is it not the keeping of the rails flush with the street, and allowing the traffic to circulate over them?—*A.* Yes; that is the object they have in view, to keep it as level with the surface of the street as they can.

*Q.* Are there many tramways in Canada?—*A.* I cannot tell you; I daresay there may be.

*Q.* Do you know anything about those roads incorporated as tramway companies?—*A.* I know nothing about them.

40 *His Lordship.*—The word “tramway” used in the connection Mr. Hodgins just speaks of it now, suggests to your mind the incorporation of a company to run an inferior class of railway?—*A.* Yes, for industrial work, a road for instance that would not pass muster under the Government inspection.

*Q.* A cheap sort of a railway?—*A.* Yes; it may be different gauges, just as a man may have a thousand acres and he has a quarry at one end, and he will build a railway or a tramway from that quarry to bring out to the railway station, or to the railway siding, the products, up and down the incline.

RECORD.

No. 5.  
Evidence—  
continued.

*Mr. Hodgins.*—What would you understand by the expression “tram” or “street” rails?—*A.* A “tram” rail or a “street” rail, I would call that a street rail. (Referring to Exhibit 2).

*Q.* Would that mean the same as a “tram” rail?—*A.* No, the tram rail may be an ordinary railway rail in shape, may be a U, a V, or a T rail.

*Q.* If used in a tramway?—*A.* Yes.

*Q.* You think the rail might be the same?—*A.* I say it might be a different shape; I do not think it would be necessary in my interpretation of the word “tramway” to have this lip on it at all.

*His Lordship.*—You might have a tramway, and perhaps in the majority 10 of cases it might never go near a street, except to cross it?—*A.* It might not.

*Q.* That is in the sense in which it is used in this country?—*A.* The sense in which I use it in this country.

*Mr. Hodgins.*—The expression I was referring to is found in this way in the free list “Steel railway bars or rails, not including tram or street rails.” What would you understand was excluded by those words?

*Mr. Osler.*—I object.

*His Lordship.*—That is construing the Statute. You will have to ask him the meaning of the words.

*Mr. Hodgins.*—This is the phrase used. 20

*His Lordship.*—Ask him what he would understand by the phrase.

*Mr. Hodgins.*—What would you understand by the phrase?—*A.* I should say that those were what I would call railway iron.

*Q.* What would you understand by tram or street rails?—*A.* It would not include this number 2, that is in England, I understand, but here I call that a street railway rail, and it is equal in weight to perhaps a good many, or more than a good many of the rails used by railways here now. I understand that weighs 69 pounds to the yard.

*Q.* What do you understand by that expression, tram or street rails?—*A.* I call that a street rail here. A tram rail may not necessarily be that 30 shape. It may be a T, or a V, or a U rail.

*Q.* Would these words be equivalent, “rails for railways,” and “rails for use in railway tracks”?—*A.* I call that a railway track. (Referring to Exhibit No. 2.)

*Q.* Would the expression mean the same thing, “rails for railways,” and “rails for use in railway tracks”?—*A.* I should say that they would be the same.

*Mr. Osler.*—Perhaps it is covered by the admission, but having regard to the form of legislation with reference to this Company, I put in the assignment of the 18th June 1892, from George W. Keily and others to The Toronto 40 Railway Company. (Exhibit 7.)

I put in the contract of substitution, the Toronto Railway Company, and the Corporation of the City of Toronto and George W. Keily, William McKenzie, and others. The first legislation is in regard to the syndicate, and they have power of substitution. These documents put in formally show the position of the Toronto Railway Company. (Exhibit 8.)

Then I put in certain papers from the Customs. I call on Mr. Watters to produce, and he produces on his subpoena. RECORD.

I put in a reference to the Tables of Trade and Navigation for the year 1893, and refer at page 318 to the item of imports of steel rails weighing not less than 25 pounds per lineal yard for use in railway tracks, showing the importation from Great Britain, Belgium, and the United States. That they come from those three countries. The last item on page 311, "steel rails not weighing less than 25 pounds per lineal yard," &c.

No. 5.  
Evidence—  
continued.

*His Lordship.*—That is not evidence of itself. There is no objection, 10 Mr. Hodgins.

*Mr. Hodgins.*—I just intimated to my learned friend that I would object, unless he proposed to give some further evidence.

*His Lordship.*—That is not evidence of itself.

*Mr. Osler.*—Yes, my Lord, I think it is.

*Mr. Hodgins.*—I object.

*Mr. Osler.*—Then I put in, and perhaps my learned friend also objects, entry showing the free importation under the Trade and Navigation returns. This is not evidence any more than showing that there is importation from these three countries. These are entries in other cases.

20 *Mr. Hodgins.*—I object to those.

*His Lordship.*—I think they are not admissible.

*Mr. Osler.*—I tender, and we will take a description of one or two, so that the general nature of the evidence may be known. I tender an entry for duty by the General Mining Association of steel railway rails, imported by a mining association. The General Mining Association of North Sydney. That is a free entry. I tender also the free entry of the Wentworth Gypsum Company; a free entry of the date 5th July 1893.

Inter-colonial Coal Company, 28th May 1887, steel rails for use in railway tracks, weighing over 25 pounds.

30 Acadia Coal Company, 17th May 1888, "steel rails weighing over 25 pounds."

Cato Coal Company, "steel rails over 25 pounds," 8th November 1889.

Inter-colonial Coal Company, 18th September 1890; steel rails.

*His Lordship.*—Perhaps if you have one ruled out there is no need of tendering them all.

*Mr. Osler.*—Very well.

*His Lordship.*—I understand from you, Mr. Osler, that they have nothing to do with the transaction in question?

*Mr. Osler.*—No, my Lord.

40 *His Lordship.*—Merely tendering to show former transactions in the Customs in which certain goods were admitted free of duty?

*Mr. Osler.*—Yes, my Lord.

*His Lordship.*—You object to them?

*Mr. Hodgins.*—Yes.

*His Lordship.*—Then I rule them out.

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 ———  
 No. 5.  
 Evidence—  
 continued.

*Mr. Osler.*—I tender the files showing the transaction, by which the rails of the Niagara Park Railway Company were admitted free, or a rebate of duty paid.

*His Lordship.*—In regard to that I fear that the evidence is not in such a shape that I can rule it out, because we have had evidence in regard to that. The evidence is not objected to that I have already taken so far, so I would admit that.

*Mr. Osler.*—I put in the regular file showing the proceedings before the Department of Justice.

*His Lordship.*—You will have to have the papers separated. The opinion 10 of the Department of Justice may be separated.

*Mr. Osler.*—I will put them in in a moment, all in one file.

*His Lordship.*—I wish to rule on individual papers. I cannot rule on a file of papers wholesale.

*Mr. Osler.*—I did not understand your Lordship.

*Mr. Hodgins.*—I would like to say a word. It is quite true my learned friend asked the question of some of the witnesses whether they got the rails in free, and perhaps I should have objected then.

*His Lordship.*—If you had objected I would not have allowed the evidence, but as we have part of the transaction, I shall allow it to be completed. 20

*Mr. Hodgins.*—It was quite true the rails did come in free.

*His Lordship.*—I will admit it subject to the objection.

*Mr. Hodgins.*—I wish to point out this, the fact that the rails had been admitted free may be an admissible fact against us.

*His Lordship.*—It is not a relevant fact against you, because the Crown is never bound by the lapse of its officers or servants, and they might admit goods free of duty, every day of the year, and the next year they could stop it. But in regard to the opinion of the Minister, it is objectionable on another ground, if objected to, and that is that it is a confidential communication; you can produce it if you like. 30

*Mr. Hodgins.*—I object to it.

*His Lordship.*—No report like that is admissible in evidence unless the Minister consents to its being produced.

*Mr. Osler.*—The Minister has consented by making it a public document. It has been sent, as a public document, to the solicitors in this case.

*His Lordship.*—If they have communicated the document to the solicitors, then I would admit it.

*Mr. Hodgins.*—Not this particular file. It is the Sandwich, Windsor and Amherstburg.

*Mr. Osler.*—Yes, this Sandwich, Windsor and Amherstburg. As I under- 40 stand it, my Lord, the question came up in the Sandwich, Windsor and Amherstburg Railway, the opinion of the Department of Justice, which I have, and this opinion was applied to the Niagara case, and the reasonings of it apply.

*His Lordship.*—In these two cases in which we have taken evidence I will allow the evidence to be completed, subject to objection, Mr. Hodgins.

*Mr. Hodgins.*—I do not think that should go in, because that does not refer to the Niagara case at all.

*His Lordship.*—There were two cases in which it was proved they came in free.

*Mr. Hodgins.*—The Emery Company and the Niagara Company; and the Sandwich and Windsor being adverse to the admission of the rails.

*Mr. Osler.*—The Sandwich opinion acted upon and distinguished in the Niagara case.

*His Lordship.*—What case is this I have?

10 *Mr. Osler.*—The Sandwich, Windsor and Amherstburg.

*His Lordship.*—And have we had any evidence in regard to it at all?

*Mr. Osler.*—No.

*His Lordship.*—Then that is open to the same objection as the other; it is not evidence in this case.

*Mr. Osler.*—Then I ask my learned friend for the opinion of the Department of Justice in the Niagara Falls Park and River Railway case, and for the opinion upon which the duties were remitted upon the Hamilton, Grimsby and Beamsville Road. My learned friend can produce them or not as he likes.

20 *Mr. Hodgins.*—The position the Crown takes with regard to the action of the Department is this, the action of the Department may be some evidence before your Lordship, dealing one way or the other, with the question as a practice which has become established.

*His Lordship.*—I do not know that a practice can become established; I would not even go that far; I do not think you can make Customs laws against the Crown by practice. The question is, what is the true duty in this case. The question is whether you produce these papers or not. You are called upon to produce two.

*Mr. Hodgins.*—Then I do not produce them.

30 *His Lordship.*—If you can prove they have been communicated to your parties, Mr. Osler, I will admit them.

*Mr. Osler.*—No, my Lord.

*His Lordship.*—Of course I would admit them only subject to the objection; I was not expressing an opinion myself that I thought they were good evidence.

*Mr. Osler.*—Then that is the case, my Lord.

(Adjournment 5.15 p.m. until 10 a.m.)

40 *Mr. Hodgins.*—My learned friend asked for two files last night which my clerk was engaged in looking up; one, it turns out, was put in on the cross-examination of Mr. Jennings, the other was the Hamilton, Grimsby and Beamsville Electric Railway, and I have now the file. I would just like to say that when I was declining to produce that, I was confining myself entirely to the paper my learned friend Mr. Osler had, viz., the opinion in the Sandwich and Amherstburg case. If your Lordship thinks that in these two cases the matter should be followed up, and if your Lordship says the evidence should be received of these files, they are now here.

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Evidence—  
continued.

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Evidence—  
continued.

*His Lordship.*—We have a reference to it, and it cannot hurt us to get the whole truth about it; it is not like as if the whole case was going to the jury. I will save you your objection, and I will admit it for what it is worth. I am certain I will not be misled by anything in it. Of course if you had been standing upon the strict rules of evidence in the first start, while there was a good deal of it which might be subject to proof as a fact, perhaps not a very relevant fact, I might have shut it out. If the opinion was offered it would be rejected. Opinion is not evidence of any fact. Speaking for myself, I should be very sorry to know that sitting in this Court my hands were tied, and I was bound by precedence of the opinion of the Deputy-Minister of Justice, at least between 1882 and 1887; I will not say anything more than that. 10

*Mr. Osler.*—I wish we could produce some evidence of it, my Lord.

*His Lordship.*—Then that file is produced and put in subject to the objection?

*Mr. Hodgins.*—Subject to all objections. There are some papers there that would not properly be produced. (Exhibit 9.)

*Mr. Osler.*—My learned friend, I think, will not object to an amendment I ask to make. It is discovered that one of the items of payment is out one shipment, which I ask to amend; that is a payment made on the 10th October 1891; I produce the cheque now; it is the very first item \$596. 37, 10th October '91. It should go at the head of the amount. 20

*His Lordship.*—I suppose there is no objection?

*Mr. Hodgins.*—Just in this way: Payment was made before this Company was incorporated, and it is not one that I have investigated. I submit that is one that might be left. If the decision is in their favour it may be recognized. No doubt the same rule would apply to this.

*His Lordship.*—I think I had better take it subject to your objection. Then, if it has been proved, there will be no need of anything further.

*Mr. Hodgins.*—I think Mr. McKenzie had better identify it.

*His Lordship.*—Then note, Mr. Butcher, it is objected to, and allowed, so as to save Mr. Hodgins any objection. 30

Mr. Mc  
Kenzie re-  
called.

Mr. McKenzie (re-called).

*Mr. Osler.*—*Question.* This was a payment on account of duties on rails imported for this railway?—*Answer.* Yes. (Exhibit 10.)

*Q.* That is the first lot?—*A.* That is the first lot bought.

*Q.* That was imported from the United States?—*A.* From the Johnston Company.

*Q.* The United States concern?—*A.* Yes.

*Q.* Pennsylvania. And these rails went into your road, and the money, although not then paid by the Company, has been since paid by the Company?—

*A.* How do you mean?

*Q.* They say the Company was not incorporated at this time?—*A.* Oh, I see. 40

*Q.* But it was in the hands of the syndicate?—*A.* Yes.

*Q.* Who were the preparatory organization to the Company?—*A.* Yes.

*Q.* And it formed an expenditure of the Company afterwards?—*A.* Yes.



*His Lordship.*—It was an expenditure by the promoters adopted by the Company subsequently?—*A.* Yes.

*Mr. Hodgins.*—And was it paid afterwards by the Company to the promoters?—*A.* How do you mean?

*Q.* Was the precise amount paid by The Toronto Railway Company to the promoters afterwards?—*A.* It is all one expenditure. There was no break in the expenditure through the incorporation.

*Q.* The Toronto Railway Company never actually paid this over?—*A.* They paid everything. The promoters were like trustees for the Company.

10 *Q.* It was actually paid by the Company?—*A.* Exactly.

*Q.* You do not produce any invoices of this?—*A.* We can, I suppose.

*Q.* I would like to see them. It is simply duty on rails Johnston and Company. You will produce the invoice?—*A.* Yes.

*Q.* Were they similar in section to that?—*A.* I will show the section in the Johnston book.

*Mr. Osler.*—It is Section Y-60, number 236 of the Johnston Company?—*A.* Yes.

*Q.* The invoice, I understand, has been lost?—*A.* We can get a duplicate of it.

20 *Q.* You paid the duty on it, and paid it under protest?—*A.* Yes.

*Mr. Hodgins.*—I put in the certified copies of the invoices. I put in the whole of them. (Exhibit E.) Then I propose putting in what occurred before the Railway Committee as I indicated yesterday. My learned friend, Mr. Osler, was good enough to let the stenographer who took down what actually took place go, and the stenographic report which I have can take his place, with your Lordship's permission, that is, if the evidence is properly receivable.

*His Lordship.*—What is it?

30 *Mr. Hodgins.*—The position is this: Mr. McKenzie, as representing the Company was present before the Railway Committee, and Mr. Osler, on behalf of the Company, presented the view that this Company took as their position, not as a railway company, but as a municipal user of the street, adopting in the address very largely a part of the argument which I hope to address to your Lordship. My contention is that the railway companies here are just as much bound by that as a party would be who was asserting one position one time and another another, where it becomes a question of what the Company is. If they deny at one time that they were a railway company for the purpose of getting a benefit before the Railway Committee, and escaping a liability which would otherwise be thrown upon them, I think it is fair I should be able to show  
40 they have taken that position.

*His Lordship.*—What you wish to prove is what Mr. Osler said in his argument?

*Mr. Hodgins.*—Yes, but I am showing that Mr. McKenzie was present.

*His Lordship.*—Do you object, Mr. Osler?

*Mr. Osler.*—Yes, my Lord, I object.

*His Lordship.*—I do not think you need argue it.

*Mr. Osler.*—I do not think it is arguable.

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continued.

*His Lordship.*—The business of Counsel before a Court such as a Committee of the Privy Council, is to present his argument, and to state the facts as he believes them to be. It is his business to present the argument, and whatever argument he sees fit, and it is for the Court to judge of the weight of the argument. You cannot prove his argument as an estoppel.

*Mr. Osler.*—My learned friend has it in his brief.

*His Lordship.*—I will listen to it with a good deal of consideration. I suppose it is on the contention that the Street Railway has the primary right to the street as against the crossing of an ordinary railway?

*Mr. Osler.*—Yes, my Lord.

*Mr. Hodgins.*—He said they were not a railway at all.

*Mr. Osler.*—No; we were claiming we had a prior right over the particular railway.

*His Lordship.*—I suppose the same question that arises with regard to telephones in streets, that the street has the prior use. I suppose he was arguing on the question of crossing that they had the primary right, and that the railway had to cross subject to their rights.

*His Lordship.*—No doubt Mr. Osler put the argument very forcibly.

*Mr. Hodgins.*—He did.

*Mr. Osler.*—The difficulty was, the Privy Council did not think there was 20 even enough in it to refer it to the Supreme Court for a conclusion.

*Mr. Hodgins.*—Then I propose to tender Mr. Watters, Acting Commissioner of Customs, for the purpose of proving to your Lordship the practice of the Customs Department throughout in reference to the classification of street railways under the heading of tramways.

*His Lordship.*—You can call Mr. Watters just in the same line as the other witnesses, if he knows what are tramways in this country, the definition of the word, which is equivocal, perhaps. I do not think you can prove to the prejudice of the claimants, their practice, if it should be to their prejudice. However, that ruling is a general one.

*Mr. Hodgins.*—Of course, I am not putting it that way, that the ruling of the Customs Department is conclusive upon your Lordship.

*His Lordship.*—Do you propose to offer Mr. Watters' opinion as a man who is experienced in Customs matters?

*Mr. Hodgins.*—Oh, no; he is the Acting Commissioner of Customs, and I intend to show the custom of the Department, to show that these matters that have been referred to here are merely exceptions to a general rule, and that that rule enures to the benefit of the Crown in this case.

*His Lordship.*—Call your witness and we will see as we come to it.

Thomas  
John  
Watters.

Thomas John Watters sworn.

*Examined by Mr. Hodgins.*—*Question.* You are the Acting Commissioner of Customs?—*Answer.* I am.

*Q.* How long have you occupied that position?—Some sixteen months.

*Q.* And before that you were connected with the Customs Department?

—*A.* Yes, I was the Assistant-Commissioner of Customs; I am now Assistant Commissioner of Customs by permanent appointment since March 1882.

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30

40

*Q.* Are you familiar with the practice of the Department in dealing with the classification of street railways under the tariff?

*His Lordship.*—May I be allowed to make a suggestion? You really want to know how the word “tramway” is used. If railway people understand it one way, and Custom House people understand it in a different way, Mr. Watters can speak as to how men experienced in Customs matters used the word; I do not see any objection to allowing him to so express himself. I will have to judge between the railway man and the Custom House man. But, I think what their practice is as to making free entries, or entries for duty  
10 in other cases, is not in issue here. The issue is what the word “tramway” means here, and if Mr. Watters can speak as to the meaning of “tramway” in any department of business, and Customs being a department of business, I think Mr. Watters can say so.

*Mr. Hodgins.*—The cases put it in somewhat this way: The practice of the Department established for years in classification, must be taken to be known to the trade.

*His Lordship.*—I would understand if there was a well-known and understood practice of the Department which had existed for years, and under which Statutes or amendments had been passed, that they would be  
20 incorporating in their statutes the interpretation given in earlier days, if they were well known or well understood. If you were going back before 1887 to see if there were any well understood practice, generally known to Customs authorities, and those who passed invoice, I would see no objection to it, because it might be Parliament intended to use the words in the sense in which they have been used in the Customs service.

*Mr. Hodgins.*—*Q.* When does the word “tramways” first appear in the “Customs Act”?

*Mr. Osler.*—That is a matter of Statute.

*Mr. Hodgins.*—He can state the year?—*A.* You mean in the Customs  
30 tariff.

*Q.* In the Customs tariff?

*His Lordship.*—Had it been used prior to 1887?—*A.* I think, sir, the first occurrence of the word “tramway” in the Customs tariff is in the tariff of 1882, which went into force on the 24th of February 1882. The item reads “iron rails or railway bars for railways or tramways bearing duty of 15%.”

*Mr. Osler.*—1879, Mr. Watters.

*Witness.*—Yes, in the tariff of 1879, taking effect on the 15th March 1879, “iron rails or railway bars for railways or tramways, 15%.”

*Mr. Robinson.*—42 Vict., chap. 15.

*Mr. Hodgins.*—That is the first use of the word tramways, so far as you know, in the Customs tariff?—*A.* Yes; the preceding tariff of 1877 does not include the word.

*Q.* What has been the practice of the Department since that date, if you know it?

*His Lordship.*—I ruled it out in Mr. Osler’s case, and I am not going to allow you to ask the question. I have prevented him from proving a lot of

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free entries. I will let you ask him if he knows the meaning of the word "tramway." You must conduct your examination within the same limits I fixed for Mr. Osler.

*Mr. Hodgins.*—So long as it is understood I tender the evidence as showing the practice of the Department within the cases. The question I put is as to whether they attach any meaning to the word tramways.

*Q.* In transacting the business of the Customs House has that word "tramways" any meaning, any established meaning?—*A.* The interpretation of the word "tramway" by the Department, so far as my knowledge goes, is to the effect that a tramway would be a road which was not governed by the same principles which applied to ordinary railways. For instance, an ordinary railway has been held by the Department to be a railway which has been treated under the tariff in a special manner, because of its opening up new countries, being often subsidized by Parliament, having the power of expropriating land, and being generally governed by the terms of the General Railway Act of the Dominion. Tramways have been held in our practice to apply to street railways, and to roads which are not in any way of a public character, and which might be entirely used for private purposes.

*Q.* Were you in the Customs Department in 1879?—*A.* Yes.

*Cross-examined by Mr. Osler.*—*Q.* Then, can you tell me what difference there is between a tram rail and a street rail, where we find the Legislature describing them both in one of the Customs Acts? Did you make any difference when you got the legislation of 48 and 49 Victoria, where street rails are specifically mentioned? Did your Department make any difference between tram rails and street rails?—*A.* In the tariff of 1886?

*Q.* In the tariff of 1885?—*A.* In the free list of the tariff of 1885 "Steel railway bars or rails not including tram or street rails."

*Q.* Did you make any difference between tram and street rails then? There seems to be a difference recognized by law, or by Statute?—*A.* I might state that in 1885 my duty did not bring me specially to consider the matter.

*Q.* When did your duty bring you specially to consider the matter?—*A.* Not until within the last two years.

*Q.* Since this question arose?—*A.* Quite so.

*Q.* And since that time there have been lots of free entries on what we may call hybrid roads?—*A.* There have been some free entries passed.

*Q.* A great many free entries passed?—*A.* A great many free entries passed for steel rails for different roads.

*Q.* For mining roads and logging roads, and roads that were not being run on schedule time, roads that there had been no grant for, roads not under the Railway Act; there have been lots of free entries, have there not?—*A.* I do not know that I can say there have been lots; there have been some which have been passed under special conditions. I think that in each of those cases where the Department have accepted free entries and allowed them to stand it has been after the full facts being submitted to the Department of Justice in connection with the particular road affected.

Q. And so with the mining trams of Nova Scotia, they have been admitted free?—A. I am not aware of it, sir.

Mr. Osler.—I do not think I will cross-examine the witness further. There is sufficient in to show what has been done.

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Evidence—  
continued.

James Gunn sworn.

James Gunn.

Examined by Mr. Hodgins.—Question. What is your position in the Plaintiff Company?—Answer. Superintendent.

Q. In charge of the operating department of the road?—A. Yes.

10 Q. Before this Company took over the road were you in the employ of the City as Superintendent when the City was running the Street Railway here?—A. Yes.

Q. And prior to that you were employed in the old Toronto Street Railway Company?—A. Yes.

Q. You were familiar with the business done by the old Toronto Street Railway Company with the City when the City was operating it, and with the present Company?—A. Yes.

Q. And I will just ask you if these answers are correct, and it will shorten your examination very much. This is from your examination for discovery:—

20 “ You are, I suppose, familiar with the business done by the Toronto Street Railway Company?—A. Yes, I knew something about it.

“ Q. And by the City after the City took it over?—A. Yes.

“ Q. It was entirely operated by horse power?—A. Yes.

“ Q. The electricity was introduced by the present Plaintiffs, the Toronto Railway Company?—A. Yes.

“ Q. After they had taken over the road?—A. Yes.

“ Q. Is the system that is employed in the road to-day, similar in your judgment, to what was used in the Toronto Street Railway Company, allowing for the substitution of electricity for horses—the method of running?—A. The only difference is that electricity is used instead of horses.

30 “ Q. You adopt that system of sending out cars on specified routes, and they are given a time on which they shall complete their run there and back?—A. Yes, but not necessarily the same cars.

“ Q. That same system which was applied to the old car system is still applied to this system when run by electricity?—A. Yes.

“ Q. Now, do you regulate the running of cars—in the way you have told me; by schedules fixing the time of departure and the arrival back again?—A. Yes.

“ Q. The men are expected to make the trip in a certain defined time?—A. Yes.

40 “ Q. And while making that the cars are in their charge?—A. Yes.

“ Q. You stop now, I believe, at certain specified streets and places in the city; not anywhere on the street?—A. Generally at cross streets. Sometimes between streets half way between a block. It all depends on the distances between streets.

“ Q. Are the old cars which were being used on the Toronto Street Railway Company's system in use now?—A. Some of them are used as trailers.

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continued.

- “ Q. You had to build new motor cars?—A. Yes.
- “ Q. You used a number of old cars as motor cars by putting them upon higher trucks?—A. Yes, for a short time, but we have done away with them.
- “ Q. You are building new and improved cars for that purpose?—A. Yes.
- “ Q. Are the old car wheels in use now upon your road?—A. They are with the cars which we call trailers.
- “ Q. Now, from your knowledge as a street railway man, would you describe the business carried on by the Toronto Railway Company as a street railway?—A. I think that is what we call it. At least it is not called, it is called the Toronto Railway Company.
- “ Q. But in describing the business that is carried on would it be properly described by saying it was a street railway?—A. I suppose so.
- “ Q. You don't know of any reason why it should not be?—A. No.”
- Q. Those answers are correct?—A. Pretty much; it is just as I say.
- Q. They are just as you gave them on your examination?—A. Yes, I think so.

10

Allan  
MacDougall.

Allan Macdougall sworn.

*Examined by Mr. Hodgins.*—Question. You are a Civil Engineer, and have a number of years experience?—Answer. Yes, sir.

Q. In connection with railways and other public works?—A. Yes, sir.

20

Q. For how long?—A. Over 25 years.

Q. Now, you know this form of rail, Exhibit No. 2. What would you say as to its suitability for railway tracks?—A. For a steam railway, such as the Canadian Pacific?

Q. Yes?—A. I would not use that form as it stands in the Exhibit for a steam railway.

Q. Why?—A. I would not like that lip on it, and also I think it is too deep a rail.

*His Lordship.*—I suppose there is a waste of material in it?—A. It is more the shape.

30

Q. Is it not a waste of material?—A. It is the length of the web, but so far as the weight of the rail is concerned, the 70-pound rail would be advisable, but I would not have it in that shape.

*Mr. Hodgins.*—In what way is it unsuitable?—A. I should be afraid of the web giving way under the stress of the traffic passing over it; I would be afraid it would buckle.

Q. Anything else?—A. No, that would be my principal objection to it, and using that lip, also, it would have to be made deeper, so that it would suit the flange of the wheel.

*His Lordship.*—I do not suppose you need to call witnesses as to this. Mr. Osler is not going to contend that an ordinary railway would use that rail.

*Mr. Osler.*—Oh no, we are not going to sell any of those rails to the Pacific or the Grand Trunk.

*Mr. Hodgins.*—It is not for use in railway tracks as we understand it.

*Mr. Osler.*—We do not think an ordinary steam railway would order that section. RECORD.

*Mr. Hodgins.*—But, not suitable for use. The words of the Act are, “for use in railway tracks.”

*His Lordship.*—I suppose in an invoice that rail would be well described as a tramway rail, or a rail for tramways, or a girder rail?

*Mr. Osler.*—Or a grooved steel rail, or a section number one, so and so.

*His Lordship.*—The result of all the evidence yesterday seemed to be this, and you might ask this witness the question, to see if he concurs in it; 10 that in an invoice of tramway rails weighing 69 pounds, or an invoice of rails for tramways weighing 69 pounds, or an invoice of girder rails, or grooved rails, weighing 69 pounds, they would not mean in Canada rails for a railway in what perhaps is the primary and ordinary acceptance of a steam railway, nor would they in Canada mean a tramway, but they would mean what we in Canada call a street railway, and what in England they call a tramway. They seemed to be the result of the evidence yesterday. That is what you say?—*A.* Yes, my Lord. I would answer yes, if the question were put to me that way.

*Mr. Hodgins.*—If you saw an invoice describing that as a tramway rail, or a grooved rail, or a girder rail, weighing 69 pounds, what would you understand 20 it to be describing?—*A.* Being an invoice coming from England I would understand that to refer to what in England they would call a tramway rail, and what here we would call a street railway rail.

*His Lordship.*—And it would not suggest to any one in Canada a rail for an ordinary railway, nor yet a rail for what we in Canada call a tramway?—*A.* It would not suggest the idea of the ordinary rail at all, my Lord, nor would it apply to the light tramways which are used around industrial establishments.

*Q.* It would not suggest to any Canadian mind a rail for a tramway, if it was 69 pounds?—*A.* No.

*Q.* It would not suggest a description of a rail that would be described in 30 Canada as a rail for a tramway, as used in Canada?—*A.* According to the definition of the witness yesterday of the word “tramway” it would not refer to that.

*Q.* Do you think that any man in Canada would think that a rail weighing 69 pounds was ordered for what we understand as a tramway in this country?—*A.* No, it would refer to the special item of the street railway.

*Mr. Hodgins.*—Now, does the word tramway, or did it in 1887, properly describe a street railway as it exists in Canada, or as it existed in Canada?—*A.* I think the word “tramway” was frequently used in ordinary conversation to refer to the street railway. People talked of taking trams, getting on the 40 tram; I very frequently make use of the expression, talk of the street railway cars as tram cars.

*Q.* How would that rail be described?—*A.* I would describe that rail as a grooved girder tramway rail.

*Q.* What is the characteristic of a tramway rail as you understand it; what is the characteristic of it as distinguished from an ordinary railway rail?—*A.* Well, there are the two classes of tramways; there would be the light tramway which would be used for industrial establishments, and another

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tramway which would be used for traffic in streets which we call street railways. Using that word tramway in that sense, and for that purpose, there are numbers of sections which would be available. In my opinion I think that a rail such as the street railway rail, as being laid down in Toronto, is the best shape.

*Q.* Why is it the best shape; what is its characteristic?—*A.* Because as that is designed, and with that lip in it, it saves the side of the road, it helps to keep up the pavement. There is no groove between the head of the rail and where the edge of the pavement is; it comes up tight to it.

*Q.* Why is the word tramway used in connection with a rail of that description?—*A.* Well, chiefly, I think, because it is an expression used in 10· England.

*Q.* Why used in England in that sense?—*A.* As meaning a construction of railway that is not rigidly constructed as a steam railway. As I understand street tramways, it is a mode of construction for the purpose of laying down tracks on streets for grooved vehicles to pass along.

*Q.* The word used is "tramway." What I wanted to ascertain from you was why that particular word is used in connection with a rail of that form?—*A.* Because that is the word that has been used in England for a great many years, and I noticed that that form has been used in England by engineers for a number of years. 20·

*Q.* Is it used in this country or the United States?—*A.* I have seen the word used in some of our professional journals.

*Q.* Can you give me any reference?—*A.* There was an article— (interrupted).

*Mr. Osler.*—That is not evidence-in-chief.

*Mr. Hodgins.*—You say you have seen it used in professional journals. Is it in use in any other department, the word "tramway" rails as applied to that?

*His Lordship.*—I do not suppose we will have much dispute that this is a word of limited use in Canada, just in the sense of a street railway. 30·

*Mr. Hodgins.*—More than that; it is in use in connection with a rail of that kind.

*His Lordship.*—I suppose any witness you would call would say, if he knew anything about it, that tramway is not a word in ordinary and common use in Canada to describe street railways, yet that there are people in Canada who do so use the word. Is that about the truth, that the word "tramway" is not in ordinary use in Canada, as meaning a street railway, but that there are in Canada a number of people who use it in that sense, so that if you know who is speaking you will not misunderstand them when they speak of a street railway as a tramway?—*A.* Yes, sir, that is the case, I think. 40·

*Mr. Hodgins.*—Now, apart from popular use or signification, is the word "tramway" used in this country in reference to a rail of that kind, or in the United States in the Department of Trade and Commerce?

*Mr. Osler.*—I object.

*His Lordship.*—First see if he is able to speak of the language of Trade and Commerce?



*Mr. Hodgins.*—Are you familiar with the terms used in connection with the importation of iron or steel rails?—*A.* No, I am not directly familiar with them.

*Q.* Have you consulted catalogues?

*Mr. Osler.*—I object.

*Witness.*—I get trade circulars sent to me from England in which tram rails are referred to, and those I understand to mean rails intended for street railway purposes here.

*Mr. Hodgins.*—*Q.* What do you understand by a surface railway?—

10 *A.* I understand it to be a railway of light construction, which might be worked by steam or other motive power, horse power, or such like; a railway on which there would not be very heavy work, and also that the object of it would be for some simple and light purpose, such, for instance, as a tramway going up to a large mill, or into some large work, branching off a main line of a railway, and also, I think, it would refer to a railway that might be laid down in a town or village along the streets of a road for any purpose.

*Q.* I want you to look at this letter of Dick, Kerr and Company, and tell me what you understand by it. This is one of the Exhibits forming part of the contract. Not looking at the section or anything else, but looking at the  
20 description, “steel girder tramway rails,” what would you understand that to mean, as being imported into this country, weighing 69 pounds per yard? What would you understand the description of that meant, without looking at the section?—*A.* I would understand that to mean a rail very much like the exhibit.

*His Lordship.*—Would you understand it to mean a rail for an ordinary railway, or a tramway, or a street rail?—*A.* I would understand this rail being imported into Toronto here was being imported for the purposes of a street railway.

*Q.* Seeing it weighed 69 pounds, and was described as a girder tramway rail?—*A.* It is described here very much in the way I would describe it myself,  
30 a steel girder tramway rail, if I were writing to England.

*Q.* Weighing 69 pounds, and that would mean a rail imported for a street railway, you think?—*A.* Yes, my Lord.

*Mr. Hodgins.*—What do you say as to the suitability of that rail for what we have been calling here a street railway?

*His Lordship.*—Is it not proved beyond all question it is a very convenient form for a street railway?

*Mr. Hodgins.*—If that is established, that is all I need.

*Q.* What do you understand by the expression tram or street rail?—*A.* So  
40 far as I understand them I think they are synonymous.

*His Lordship.*—Is not “tram” the larger term? Taking tram, and street railways, even admitting that the street railways are tram railways, would not the word tram include a class that would not be street railways? Would it not include all those industrial railways?—*A.* Yes, my Lord.

*Q.* Then they would not be equivalent?—*A.* Not equivalent, but it could be used.

RECORD.

No. 5.

Evidence—  
continued

RECORD.

No. 5.  
Evidence—  
continued.

Q. But if you found forms using two words, "tram and street," would you think they were used for a purpose? Even if it is admitted that the street railway is a tram rail, that the tram is a larger term, and includes a class that the "street" would not?—A. Yes, my Lord, there is an ambiguity there. They might import light rails. Where no weight is given they might import the lighter rails for the tramway, and if it came up to a certain weight he would have to see what the rail was for.

Q. Any person who takes the English view of the word "tramway" would say that all street railways were tramways, but no one would say that all tramways were street railways?—A. No.

Mr. Hodgins.—Q. What do you understand by the word "street" rails as used in the phrase?

His Lordship.—We know that street railway means a street railway. It would mean a rail for a street railway.

Cross-examined by Mr. Osler.—Q. Do you know of such a construction as a ship railway?—A. No, sir, I have not seen the Chignecto Ship Railway.

Q. You know of it as an engineer?—A. Yes.

Q. You know that there is such a matter under construction now somewhat slowly in Canada?—A. Yes.

Q. A proposed method of conveying ships by rail. You would call that a railway?—A. I understand it is called the Chignecto Ship Railway.

Q. You would call it a railway?—A. Yes, sir, so far as I understand it.

Q. You would not call that a tramway?—A. No.

Q. As an engineer you would call it a railway?—A. Oh, it is a railway.

Q. Now that road would require a special section of rail, would it not?—A. I think not; I think we are going to use the T rail.

Q. But don't you know that they get a special section?—A. They probably would get a specially designed section.

Q. Whenever you are building any railway for any purpose, the engineer sits down and designs his section to suit the road, does he not? For instance, you are building the Sarnia Tunnel, you lay your tracks specially, and you have 100 ton engines to operate; you want a special section, do you not?—A. Yes, you would in that case. Of course the Chief Engineer of every railway designs the rail for his system.

Q. The Chief Engineer sits down and designs his rail section, and there are thousands of them?—A. Yes, a very large number.

Q. Nearly every engineer has his own ideas about the head, and web, and chair and so on, and there are slight alterations in the different rails?—A. Every railway system, I think, has its own rail it calls its standard.

Q. Then, in a street railway you design a section which serves the purpose of the railway, and does the least possible harm to the street?—A. Certainly.

Q. And that is the sole reason why you have it specially designed?—A. Yes. The design as it is now given has been designed for the purpose of making the street, as well as for the purposes of the railway.

Q. And you define a surface railway. Will you say that a surface railway, or that the term surface is anything more than a distinction which has grown up in the neighbourhood of metropolitan cities to distinguish railways that run along the surface and those that are elevated or those underground? Have you not the three classes of railway, the elevated, the underground, and the surface?—A. Yes, I believe that is so.

RECORD.  
—  
No. 5.  
Evidence—  
continued.

Q. Is not that the origin of the term "surface" railway?—A. I do not know about the origin, but I could apply it that way.

Q. That would be the reason for the existence of the term surface railway?—A. Yes, that would be the description of it; that would define the purpose.

Q. I understand it originated in New York about the time the elevated roads were being built there?

*His Lordship.*—If you met the engineer of the Chignecto Ship Railway, and you met the engineer of the Toronto Railway, and you asked how is your railway getting on, they would understand you, you would not have to say anything more?—A. I think I would have to say how is your road or railway getting on, we would all understand that.

Q. And then there might be certain times you would have to be more particular in the use of the term?—A. Yes.

Henry Crewe sworn.

Henry  
Crewe.

*Examined by Mr. Hodgins.*—*Question.* What is your business?—*Answer.* Civil Engineer.

Q. And how long have you been an Engineer, what is your experience?—A. Twenty years odd.

Q. And you have lived in this country that long?—A. Yes, I was born in Toronto.

Q. Would the word "tramway," or would it in 1887, describe a street railway as it exists in Canada or as it existed in Canada?—A. I have always understood it to describe a street railway.

Q. Have you been connected with street railways?—A. The only connection I have ever had with them was being retained by the City to give evidence for the City as against the old Street Railway Company.

Q. You at that time, I believe, went into the matter somewhat?—A. Went to England and examined a great number of the roads there, and got the latest designs of street railway rails, or tramway rails as they called them there, and got books about them which I have in Court now.

*Cross-examined by Mr. Oster.*—Q. And you have an English burr on your Canadian pronunciation when you make use of the word "tram"?—A. No, I have heard it used here for a good many years.

Q. Occasionally?—A. No, not occasionally, very often.

Q. But the chief term is street railway?—A. Yes.

Q. That is the American term?—A. Yes, although I have heard it used in the States too, but very seldom.

RECORD.  
 —  
 No. 5.  
 Evidence—  
 continued.

Q. The United States and Canada. There are such things as trams in the United States, which are not street railways?—*A.* Not that I know of. There may be small roads in particular places.

Q. You don't know anything of trams that are not street railways?—*A.* No, I have not had anything to do with them.

John C.  
 Bailey.

John C. Bailey sworn.

*Examined by Mr. Hodgins.*—*Question.* You are a railway engineer?—*Answer.* Yes, sir.

Q. Of a very large number of years' experience?—*A.* Yes, been at it a few years.

Q. You are familiar also with the street railway system in Toronto and Canada?—*A.* Oh, yes, I have seen it; I never built any.

Q. Would the word "tramway," or would it in 1887, describe street railway as it exists in Canada?—*A.* I would understand that they both meant the same thing.

Q. Would the word "tramway" have any wider signification?—*A.* I have heard them called tramways and street railways in the United States quite commonly, and in this country, too.

*His Lordship.*—Mr. Hodgins is directing your attention rather to this, whether the word "tramway" does not include something that the term "street railway" does not?—*A.* Well, I do not know.

Q. All horses may be animals, but every animal may not be a horse?—*A.* Of course tramways or street railways—(interrupted).

Q. What do you call these small railways running into quarries and running into industrial places?—*A.* I call them tramways and light railways.

Q. You call them tramways?—*A.* Yes.

Q. Then it does include more than street railways?—*A.* We generally call them light railways.

Q. Is not that the very origin of the word tram? When we speak of it in that way, are we not using it in the very place in which the word originated?—*A.* Yes, it originated that way in England.

*Mr. Hodgins.* What do you understand by a surface railway?—*A.* We call a street railway a surface railway.

Q. Why? What is the signification of the word?—*A.* There are supposed to be no cuttings or fillings on the street railway; they run on the surface of the road.

Q. Do you know the Emery Lumber Company's road referred to yesterday?—*A.* Yes, I was up there two years ago.

Q. Familiar with it?—*A.* Yes.

Q. How would you classify that?—*A.* Well, that was a railway, a bush railway.

Q. You are speaking as a railway engineer?—*A.* I would call that a railway.

*Cross-examined by Mr. Osler.*—*Q.* You know the Emery railroad has 30-pound rails and is narrow gauge?—*A.* Yes.

Q. Runs no regular passenger service or freight service?—A. It is intended to run up—(interrupted). RECORD.

Q. It is a log railway?—A. It is for taking out logs.

Q. Solely for taking out logs?—A. Yes.

Q. And your idea is that it is a railway?—A. Yes.

Q. Because it is run by a locomotive?—A. Not only that but it connects with the C. P. R.

Q. Oh, but it is a different gauge?—A. Yes.

Q. It does not therefore connect; it comes up to it?—A. Yes.

10 Q. And your idea is that although that has no duty to perform to the public at all, nevertheless, that is a railway?—A. They were building it like a common railway.

Q. They were laying two rails?—A. Yes.

Q. Upon ties?—A. Yes.

Q. And that is the way you would distinguish a railway from a tramway?—A. Not exactly.

Q. How?—A. There is a big difference between a street railway and a railway.

20 Q. Give me the construction, the difference in construction?—A. Between that railway and a railway?

Q. Yes?—A. Well, that is to go away up 50 or 60 miles further.

Q. We have 70 miles of railway connected with this City, the length does not seem to make any difference, does it?—A. It depends on how it is done. You might make 5,000 miles of railway if you counted all the streets.

Q. Tell me why the Emery construction is a railway?—A. Because it is built like a common railway.

Q. On ties?—A. Yes.

Q. With rails, 30 pound weight?—A. Yes.

30 Q. Then if this was a T section you would call this a railway?—A. No, I would call it a street railway.

Q. That is because the right of way is on the public streets?—A. Running on the public streets.

Q. That is the difference, is it?—A. And a great many other differences.

Q. Then if the Emery road ran along a public highway, you would call it a street railway?—A. No.

Q. Notwithstanding its construction, notwithstanding its use?—A. If it was running through a city or a town.

40 Q. It is the houses along side that makes the difference?—A. Yes, it makes a big difference.

Q. That finally is a difference?—A. Yes.

Q. That is the difference, that there are houses on each side?—A. Towns.

Q. Then if we have pine trees on each side, and logs, it is a railway, and if we have houses it is a street railway. Then the street railway is the ordinary term here?—A. Yes, more commonly used.

Q. The tram is very exceptionally used?—A. It is not used so often.

RECORD.  
 No. 5.  
 Evidence—  
 continued.

*Q.* It is an exception to find a person saying tram?—*A.* I hear a good many people using it.

*Q.* Lately? There have been a lot of tram talkers in the country here using no other term?—*A.* I have heard it on both sides.

*Mr Hodgins.*—With reference to this Emery Road, you said it was built on ties, and that the rails were laid down; have you been over the road?—*A.* I was just at it; I did not go over it.

*Q.* What does it run through?—*A.* It runs through a timber country; it is for timber.

*Q.* How is it constructed so far as location goes?—*A.* It was laid out very well. The proprietor told me it was to connect some 80 or 90 miles farther up; in fact they were going to make a regular railway up to the mines.

*Q.* Does it run through the streets?—*A.* There is no street there; it is like the C. P. R. in the Rockies. It is a road for opening up the country like railways; it is not for the benefit of the villages, for the Indians or the fishermen; it is to open up the country.

*Q.* It is built as an ordinary steam railway?—*A.* Yes.

*His Lordship.*—Has the Company a charter and a right to acquire land?—*A.* I think they run through their own land, their limit. 20

*Mr. Osler.*—You know the classification by Mr. Poor?—*A.* I have heard of him.

*Q.* Have you not seen it as a railway engineer?—*A.* Yes.

*Q.* Do you know how he classifies railways in the United States? You know that he does not classify trams at all?—*A.* No.

*Q.* He calls them railways, street railways, and private railways?—*A.* Yes.

Henry A. S.  
 McLeod.

Henry A. S. McLeod sworn.

*Examined by Mr. Hodgins.*—*Question.* You are a railway engineer with a good deal of experience?—*Answer.* Yes, I have had some experience. 30

*Q.* You have taken part in the construction of the Canadian Pacific out west?—*A.* Yes.

*Q.* And how long experience have you had?—*A.* Since 1851.

*Q.* You are familiar then with the railroad system of Canada, and the street railway system?—*A.* Yes.

*Q.* Now, would the word "tramway," or would it in 1887, generally speaking, include what has been spoken of as street railways?—*A.* I think it would; it is a very improved form of tramway; it is the highest development of tramways, as far as I understand it.

*Q.* What do you understand by a surface railway?—*A.* I should say it was a street railway, or might perhaps be used to designate rails laid upon the surface of the ground without excavation or embankment.

*Q.* You have been over the Niagara Falls River Road?—*A.* I have been over a portion of it.

*Q.* That is the only portion that is running now?—*A.* I was not down as far as Queenston.

Q. How would you classify that?—A. I should say that was a railway.

Q. Have you examined the rails and the wheels and so forth used on it?  
—A. Yes.

Q. And to what do they correspond?—A. They correspond very much with ordinary railways.

Q. You also know the Ottawa Street Railway Company, the city passenger railway?—A. Yes.

Q. Is this rail in use there?—A. It is on the curves.

Q. Anywhere else?—A. No, not generally through the streets.

10 *Cross-examined by Mr. Osler.*—Q. Have you had experience as an engineer in any construction except the ordinary steam railways?—A. None whatever.

Q. Have you gone into hybrids or trams?—A. No, Grand Trunk, Intercolonial, and C. P. R. are my experience.

Q. And I suppose you will agree that the term made use of in America, including Canada, is street railway?—A. Street railway is the general term, although tramways is often used.

Q. When you say that a street railway is a higher development of a tram, is not the ordinary steam railway a higher development of the tram?—

20 A. Certainly.

Q. They both have the same mother?—A. Yes.

Q. And why do you say the Niagara Falls Railway is a railway?—A. Because it is ballasted as ordinary railways are, just up to the ties, and it is also described in the statistics of railways as a railway.

Q. Now we have a lot of this track ballasted with broken stones, laid on ties, and why should not we be a railway?—A. It is ballasted up to the top of the rail the other is not.

Q. So is the other?—A. No, I think not, sir.

30 Q. Then it is the amount of ballast that makes the difference?—A. No, it is not a surface railway in that sense.

Q. Does the ballast make any difference?—A. Waggon cannot drive over it.

Q. Then the difference will be this, that this being ballasted for a waggon to drive over, this would be a tram, and the other being ballasted below the surface of the road, ballasted even with the ties, would be a railway?—A. There are more distinctions than that.

Q. That is one?—A. Yes.

40 Q. Give me another one?—A. The rail of course is just like an ordinary railway, it is the same in fact, and I saw two cars of the Grand Trunk on it.

Q. Give me another distinction between a railway and a street railway. Take the one at Niagara?—A. Well, I cannot say that there is any other distinction.

Q. Now, take the construction between Hamilton and Dundas, what would you say as to that, whether that is a railway or a tramway, or a street railway?—A. I have not been over it. I know the part in the town.

RECORD.  
 No. 5.  
 Evidence—  
*continued.*

*Q.* It runs through the streets of the city, and through the streets of the town, over its own right of way in the country, is operated by steam, has a T rail section through the town, and through the country, and a centre bearing section in the city. What do you say to that?—*A.* It has its own right of way?

*Q.* In the country?—*A.* Is it called a railway in the Statute?

*Q.* Would that make any difference? Taking it as an engineer, not as a legislator?—*A.* I should say if it was not ballasted up even that it would be a railway.

*Q.* The ballast is the distinction?—*A.* No, the ballast makes it more of 10 a tramway, so that waggons can pass over at any point.

*Q.* Then your idea of the difference between a tramway and a railway is that the one is built so that waggons can pass over it at any point?—*A.* That is one of the distinctions. Another is that tramways are generally grooved; that is the best form.

*Q.* I thought they were not grooved; I thought the very inception of a tramway was a flat surface?—*A.* A strap.

*Q.* A flat surface on which a wheel runs, and the flange was on the rail and not on the wheel?—*A.* No doubt that is so.

*Q.* This rail that we have here is a tram rail? (Exhibit 3.) That will be 20 something in the nature of a tram rail?—*A.* Yes, that would be more adaptable for waggons to run over.

*Q.* Now this is not adapted for waggons to run at all? (Exhibit 2)?—*A.* Not very well, although they do run on it.

*Q.* The essential features of the tram, as I understand it, is having the flange so to speak upon the rail itself, to keep the wheel in place?—*A.* That is the origin.

*Q.* That was the mother tram.

*Mr. Hodgins.*—That is the case my Lord.

*Mr. Osler.*—No reply. We would like to show that the Chignecto 30 Ship Railway rails were imported free of duty. No doubt that will be admitted.

*Mr. Hodgins.*—That is not reply.

*His Lordship.*—I do not think you need press it at this stage of the case, if it is objected to.

*Mr. Osler.*—Very well, there will be no reply.

(Evidence closed.)

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PLAINTIFF'S EXHIBITS.

RECORD.

No. 6.  
Plaintiff's  
Exhibits.

Exhibit 1.

Exhibit 1.  
Admissions.

Admissions.

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.

10 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.

Dated 12th April 1894.

FRANK E. HODGINS,  
For Defendants.

Exhibit 2.

Section of steel rail of the kind imported by Plaintiff.

(This Exhibit produced at the trial will be produced in Court on the appeal.)

Exhibit 2.  
Section of  
Steel Rail (to  
be produced  
in Court).

Exhibit 3.

20 Section of flat iron rail.

(This Exhibit produced at the trial will be produced in Court on the appeal.)

Exhibit 3.  
Section of  
Iron Rail (to  
be produced  
in Court).

Part of Exhibit 5.

United States Patent Office.

William T. Jennings, of Toronto, Canada.

Rail for Street Railways.

Exhibit 5.  
Specification  
of Jennings'  
Patent Rail.

Specification forming part of Letters Patent No. 494,144, dated 28th March 1893.

30 Application filed 7th March 1892, Serial No. 424,082. (No model.)  
Patented in Canada 9th April 1892, No. 38,694.

To all whom it may concern :

Be it known that I, William Tynedale Jennings, of the City of Toronto, in the County of York, in the Province of Ontario, Canada, have invented a

RECORD. certain new and improved rail for street railways (for which I have obtained  
 No. 5. Letters Patent of the Dominion of Canada, dated 9th April 1892, and numbered  
 Plaintiff's 38,694), of which the following is a specification:

Exhibits—  
 continued.

The object of the invention is to provide an attachment by which an ordinary T-headed rail may be adapted for street railway purposes, and it consists in the peculiar construction, arrangement and combinations of parts hereinafter more particularly described and then definitely claimed.

In the accompanying drawings, Fig. 1 is a perspective view on a reduced scale, of a T-headed rail provided with my detachable plate and sunk in the pavement. Fig. 2 is a cross-section of the rail provided with my detachable 10 plate.

In the drawings, A represents a plate shaped as indicated to butt against the stem D, of the rail and extending outwardly to form a channel B, running parallel with the side of the rail head C. It will be observed that the top edge of the plate A extends up substantially flush with the top surface of the pavement E, which pavement butts against the plate A, which holds the said pavement clear of the head C, leaving a channel B parallel with the said head and sufficiently large to permit the free passage of flange of the car wheel.

In order to keep the water out of the joint between the plate A and the stem D, I fill the bottom of the channel B with asphalt or other suitable water- 20 proof material.

The plate A may be bolted or otherwise detachably connected to the rail.

From this description it will be seen that by attaching a plate A to a T-headed rail, as described, an ordinary T-headed rail can be readily and cheaply adapted for street railway purposes, and at street crossings the rails of steam railways may be sunk flush with the road bed.

What I claim as my invention is:

A rail sunk so that its face shall be substantially flush with the surface of the road bed, a plate A detachably secured to the stem of the rail, having its bottom edge resting on the foot of said rail and its upper end extending 30 outwardly and upwardly to a point substantially flush with the surface of the road bed, thereby leaving a channel or groove for the flange of the car wheel, and a filling of concrete or other waterproof material in the bottom of the groove, preventing the passage of water through the joint substantially as described.

Niagara Falls, Ontario, 3rd March 1892.

WILLIAM T. JENNINGS. (L.S.)

In presence of—

ALFRED R. POPER,  
 GEORGE H. RICHARDSON. 40

No. 5A.  
 Sketch of  
 rail.

Sketch of Rail.

[See Book of Exhibits.]

## Exhibit 6.

(This Exhibit consists of invoices of rails bought and shipped as follows:—

		£	s.	d.
1.	From Dick, Kerr & Co., 19th June 1893, 284 tons -	1,548	7	2
2.	„ Sanders & Co., 20th June 1893, 202 tons -	1,002	4	7
3.	„ „ 29th June 1893, 405 tons -	2,004	9	4
4.	„ „ 4th July 1893, 365 tons -	1,826	10	4
5.	„ „ 3rd Oct. 1893, 160 tons -	786	14	2
10 6.	„ „ 11th Oct. 1893, 517 tons -	2,556	10	0
7.	„ „ 14th Oct. 1893, 346 tons -	1,698	3	7

which invoices are all included in those printed in Defendant's Exhibit E. *post*, and are not therefore printed at length here.)

RECORD.

No. 6.  
Plaintiff's  
Exhibits—  
*continued.*

Exhibit 6.  
Invoices of  
Rails bought  
of Sanders  
& Co.

\* *Vide* page  
110, that see  
and follow-  
ing.

## Exhibit 7.

“The Contract of Assignment,” being an indenture dated 18th June 1892, made between G. W. Kiely, Wm. McKenzie, H. A. Everett and C. C. Woodworth, therein called “the purchasers,” and the Toronto Railway Co., whereby the purchasers assigned to the Company all the rights of the purchasers in the Indenture of 1st September 1891, and the properties, rights and franchises therein embraced, and all benefits and advantages of whatever description to be derived therefrom.

Exhibit 7.  
Assignment.  
Kiely *et al.*  
to Toronto  
Railway  
Company.

## Exhibit 8.

“The Agreement of Substitution,” being an agreement dated 24th June 1892, between the Toronto Railway Co., of the first part; the Corporation of the City of Toronto, of the second part; and G. W. Kiely, William McKenzie, H. A. Everett and C. C. Woodworth, of the third part, whereby the Company agreed with the Corporation to perform for and in place of the purchasers all the covenants, &c., of the purchasers in the agreement of the 1st of September 1891. And the Corporation agrees to accept the Company in lieu of the purchasers, and releases the purchasers from all liability incurred by them under the agreement of 1st of September 1891.

Exhibit 8.  
Contract of  
Substitution,  
Toronto  
Railway  
Company,  
Corporation  
of City of  
Toronto and  
Kiely and  
others.

[*Note.*—These Exhibits 7 and 8 are not printed in full in the Transcript Record.]

RECORD.

## Part of Exhibit 9.

Papers in File No. 6948, 1894, of Customs Department.

Letter from Hamilton, Grimsby and Beamsville Electric Railway Company,  
to Hon. N. Clarke Wallace, Controller of Customs, Ottawa.

No. 6.  
Plaintiff's  
Exhibits—  
*continued.*  
Exhibit 9.  
Papers, "De-  
partmental  
File," re-  
lating to  
Hamilton,  
Grimsby, and  
Beamsville  
Electric  
Railway.

Hon. Clarke Wallace,  
Controller of Customs, Ottawa, Ont.

Hamilton,

10th February 1894.

Dear Sir,

We are building an electric railway from this city to the village of Beamsville, a distance of about twenty-two miles. We have obtained from the Legislative Assembly a Bill of Incorporation the same as the General Railway Act with exception, or more properly speaking, with the addition of privileges allowing us to run to the centre of our city on one street. We are using, and have ordered, 1,200 tons steel Tee rails, 50 lbs. to the yard, and are expecting a shipment here now daily and would be greatly obliged if you would instruct the Customs authorities here as to how they are to pass them. We claim that there should not be any duty on them as we are not a Street Railway. Item 966 of the Tariff reads as follows: "Steel rails weighing not less than 25 lbs. per lineal yard for use in railway tracks are on the free list." We are aware that street railways have made application to your department to have the duty on rails over 25 pounds to the yard struck off. Our road is the first long road of this kind that has been built and is intended to carry passengers, the mails, freight, fruit, etc. Our road has been bonused by the municipalities through which we run and is different from other electric roads. We also have a different charter and claim to come under that item in the free list which we have quoted. We would be pleased to have an early reply from you.

Yours respectfully,

Hamilton, Grimsby and Beamsville Elec. Ry. Co.,  
ADAM RUTHERFORD, Sec.-Treas.

P.S.—We refer you to the Statutes of Ontario, 1893, Ch. 95, 55 Vic., page 824, for a copy of our Bill of Incorporation.

ADAM RUTHERFORD, Sec.-Treas.

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Letter in reply from Hon. N. Clarke Wallace to Adam Rutherford.

Adam Rutherford, Esq.,  
Sec.-Treas., Hamilton, Grimsby and Beamsville  
Electric Ry. Co., Hamilton, Ont.

Ottawa,

14th February 1894.

My Dear Sir,

I am in receipt of your letter of the 10th instant, in which you ask whether any duty will be exigible on steel rails weighing over fifty pounds per lineal yard that are being imported for use in the construction of the Hamilton, Grimsby and Beamsville Electric Railway, a proposed road connecting the City

of Hamilton with the Village of Beamsville, which latter place is some 22 miles from your city.

In reply, I would say that under the existing tariff, street railways, tramways, and all railways except such as are usually subsidized by the Government, are required to pay duty on steel rails used in construction of their roads. I shall submit the question brought up in your letter to the Department of Justice for an opinion, and when I have a statement from them upon the matter I shall communicate with you definitely as to the tariff status of the rails you refer to.

RECORD.  
No. 6.  
Plaintiff's  
Exhibits—  
continued.

10

I am, faithfully yours,  
N. CLARKE WALLACE.

---

Letter from F. E. Kilvert, Collector of Customs at Hamilton, to  
Hon. N. Clarke Wallace, Controller of Customs, Ottawa.

Hon. N. Clarke Wallace,  
Controller of Customs, Ottawa.

Hamilton,

17th February 1894.

Dear Sir,

The Hamilton, Grimsby and Beamsville Electric Railway are importing steel rails weighing over twenty-five pounds per lineal yard for the track of their railway, and these rails are represented to be "T" rails, such as are used on ordinary railroads. According to my interpretation of the law I would regard them as being entitled to free entry under Item No. 996 of the Tariff, but as I understand there has been some correspondence between the Company and you on the subject, I would be obliged if you would advise me at once whether there is any ruling on this question, and whether there is any objection or reason why a free entry should not be accepted.

I have the honour to be, Sir,  
Your obedient Servant,  
F. E. KILVERT, Collector.

---

Letter from the Hamilton, Grimsby and Beamsville Electric Railway Company to F. J. Watters, Commissioner of Customs.

30

F. J. Watters, Esq.,  
Commissioner of Customs, at Ottawa.

Hamilton,

21st February 1894.

Dear Sir,

We are building an electric railway from this City to the Village of Beamsville, a distance of twenty-two miles. We are using steel Tee rails, 50 lbs. to the lineal yard. We are incorporated under the Railway Act of Ontario, in fact have the same kind of a charter as the Niagara Falls Park and River Railway Company with which our friend, Mr. John B. Rose, of Montreal, informs us you had something to do.

We claim as they did that our rails weigh more than 25 lbs. to the lineal yard and are for use on railway (not tramway) tracks. We claim that we are  
p. 4514. N

40

RECORD.  
 ———  
 No. 6.  
 Plaintiff's  
 Exhibits—  
*continued.*

entitled to have them brought in free, claiming at the same time that a railway must not necessarily be operated by steam locomotives. Some of our rails are here now and we are desirous of having them distributed along the line of our track and would feel greatly obliged if you would help us in this matter.

Yours truly,  
 Hamilton, Grimsby and Beamsville Elec. Ry. Co.,  
 ADAM RUTHERFORD, Sec.-Treas.

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Telegram, F. E. Kilvert, Collector of Customs at Hamilton, to Hon. N. Clarke Wallace, Controller of Customs, Ottawa.

“ From Hamilton, Ont. 10  
 “ To Hon. N. Clarke Wallace, Ottawa. 21st February 1894.  
 “ The Hamilton, Grimsby and Beamsville Electric Railway request an answer to my letter to you of seventeenth instant *re* steel rails, as rails have arrived and they want to enter and unload same at once to prevent demurrage.

“ F. E. KILVERT.”

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Telegram in reply.

“ To F. E. Kilvert, Esq.,  
 “ Collector of Customs, Hamilton. 21st February 1894.  
 “ Rails for Hamilton, Grimsby and Beamsville Electric Railroad dutiable. 20  
 Letter going forward to-night.

“ N. CLARKE WALLACE.”

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Adam Rutherford, Esq.,  
 Sec.-Treas. Hamilton, Grimsby, and Beamsville  
 Electric Ry., Hamilton, Ont.

My Dear Sir,

Ottawa,  
 21st February 1894.

Referring to your letter of the 10th instant and my reply of the 14th, relative to your inquiry as to the proper tariff status of steel rails weighing over fifty pounds per lineal yard that are being imported for use in the construction of the Hamilton, Grimsby and Beamsville Electric Railway. 30

As intimated to you in my letter of the above mentioned date I submitted the question to the Department of Justice and now have to hand a reply stating that duty should be paid on steel rails brought in for the purpose named.

I am, faithfully yours,  
 N. CLARKE WALLACE.

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F. E. Kilvert, Esq.,  
Collector of Customs, Hamilton, Ont.  
My Dear Sir,

Ottawa,  
21st February 1894.

No. 6.  
Plaintiff's  
Exhibits—  
*continued.*

I have to hand your letter of the 17th instant, relative to the proper tariff status of steel rails weighing over twenty-five pounds per lineal yard that are being brought in through your port for use in the construction of the Hamilton, Grimsby and Beamsville Railway. I carefully note what you say on the subject, and in reply to your request for information as to the proper course to take, would state that under date of the 10th February instant, 10 Mr. Adam Rutherford, sec.-treas. of the company constructing this railway, forwarded a letter to me in which the same inquiry was submitted to this Department. Upon its receipt I referred the question to the Department of Justice for an opinion as to the dutiable status of such rails, and am now advised by Mr. E. L. Newcombe, Deputy Minister, that duty should be exacted in respect of steel rails brought in for the construction of such road.

Your action therefore must necessarily be guided by this advice.

I am, faithfully yours,  
N. CLARKE WALLACE.

20 Letter from Hamilton, Grimsby and Beamsville Electric Railway Co.  
to Hon. N. Clarke Wallace, Controller of Customs, Ottawa.

The Hon. N. Clarke Wallace,  
Controller of Customs, Ottawa, Ont.  
Honourable Sir,

Hamilton,  
24th February 1894.

In accordance with your request we give you full and detailed particulars regarding our road, and herewith enclose you a copy of our Bill of Incorporation, which will show you that we are to conform to the Railway Act of Ontario, not the Street Railway Act. Our road is being built from the City of Hamilton to Beamsville, a village about 22 miles distant, and running through East Hamilton, Bartonville, Stoney Creek, Winona, Grimsby and 30 Grimsby Park to the centre of the village of Beamsville. Our entrance to and departure from this city is on one street (Main St. to James Street, the centre of the city). We are not on the public highway any part of the way between Hamilton and Beamsville, except in going through the villages above named. About 14 miles of our road is already graded, near, and in some cases alongside, of the public highway. We are using a 50-pound steel Tee rail, and will have small stations at each of the cross roads and larger stations at the villages, where we will have station masters. Our ties and trolley poles are distributed along the line of our track, so that we can push on the construction in the spring. We expect to do a large business in carrying 40 express and freight matter, and have ordered freight and express cars from Messrs. Ahearn and Soper, car builders of Ottawa. We have also purchased a large brick building 80×140, on the corner of Main and Catharine Streets in this city, into which we can run our cars and receive, deliver and store

RECORD.  
 No. 6.  
 Plaintiff's  
 Exhibits—  
*continued.*

freight. We will also have express waggons for the delivery of freight in the city. We believe we are the only electric road having made these provisions for carrying and handling freight in Canada. We are in every way the same as the Grand Trunk R. R. Co., with this difference, they use steam while we use electricity as a propelling power. Our power house is being built at the Village of Stoney Creek, seven miles from Hamilton.

We trust you will put us in the same position as the Niagara Electric Road, for we really are more of a general railroad than that line. In our charter we are allowed to charge three cents per mile for passengers, same as the G. T. R. Hoping you will reconsider this matter. 10

Yours respectfully,  
 Hamilton, Grimsby and Beamsville Elec. Ry. Co.,  
 CHAS. J. MYLES, President.

To the best of my knowledge and belief the representations made above are correct.

26th Feb. 1894.

F. E. KILVERT,  
 Collector of Customs.

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Letter from Alex. McKay, Esq., to Hon. N. Clarke Wallace,  
 Controller of Customs, Ottawa.

The Hon. N. Clarke Wallace,  
 Controller of Customs, Ottawa.  
 My Dear Sir,

Hamilton,  
 24th February 1894.

I have read the statement of the Hamilton, Grimsby and Beamsville Electric Railway Co. and endorse what has been said by that Company in their letter to you of the 24th inst. *in re* claim that the rails to be used by them are entitled to be admitted free of duty, the same as any steam railway. This Co. is almost identically the same as the old Hamilton and Lake Erie Railway, and Hamilton and Nor-Western Ry., now parts of the Grand Trunk system, both of which received bonuses from Hamilton; those roads were built to connect outlying towns and villages with the city, this railway is the same, 30 they were chartered and worked under the Ontario Railway Act—this is, also they received from the corporation the right to use for a long distance one of our streets, so does this Co. The Hamilton and Dundas R'y, 5 miles in length, a Steam R'y connecting Hamilton and Dundas, is more of a street railway than this, and I have no doubt but that Co. got any steel rails used by it admitted free, and would now, if importing any. I cannot see any difference between this railway and another of an equal length except the power used, one steam and the other electricity.

Yours faithfully,  
 ALEX. MCKAY. 40

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Charles T. Wiley, Esq. (? Myles), President, Hamilton, Grimsby and  
Beamsville Electric Ry. Co., Hamilton, Ont.

RECORD.

No. 6.  
Plaintiff's  
Exhibits—  
*continued.*

Ottawa,  
1st March 1894.

My Dear Sir,

I have to hand your letter of the 24th ultimo, further with reference to the question of the duty on street rails weighing over 25 pounds per lineal yard, that are being imported by your Company for use in the construction of the Hamilton, Grimsby and Beamsville Electric Railway. I shall again submit the question to the Department of Justice in the light of the information now  
10 furnished, and particularly in view of the explanation given me personally as the result of an interview which your representatives had with Mr. Newcombe, Deputy Minister of Justice, with reference to the subject.

I am, faithfully yours,  
N. CLARKE WALLACE.

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Bill to Incorporate the Hamilton, Grimsby and Beamsville Electric Railway Company (now found in 55 Vic. (Ont.) Cap. 95).

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Letter Hon. N. Clarke Wallace, Controller of Customs, Ottawa, to  
F. E. Kilvert, Collector of Customs at Hamilton.

20

My Dear Sir,

Ottawa,  
10th March 1894.

I enclose you Customs File No. 6948 of the current year relative to the application of the Hamilton, Grimsby and Beamsville Electric Railway Company for permission to enter free of duty steel rails weighing over twenty-five pounds per lineal yard that they are importing for the construction of such road. I would call your attention to the letter of the Deputy Minister of Justice, dated the 5th inst., in which he states: "That it appears to the  
30 "Minister of Justice that if your Department, upon due enquiry, is satisfied "that the rails are to be used for a railway such as that described in the "Company's letter, you would be justified in admitting the rails free of "duty." Kindly refer to the Company's letter to which Mr. Newcombe refers, and act in accordance with the opinion when any entries of steel rails may be presented at the Customs by the Hamilton, Grimsby and Beamsville Electric Railway Co.

I am, faithfully yours,  
N. CLARKE WALLACE.

F. E. Kilvert, Esq.,  
Collector of Customs, Hamilton, Ont.

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RECORD.

Letter from F. E. Kilvert, Collector of Customs, Hamilton, to  
Hon. N. Clarke Wallace, Collector of Customs, Ottawa.

No. 6.  
Plaintiff's  
Exhibits—  
*continued.*

Hon. N. Clarke Wallace,  
Controller of Customs, Ottawa, Ont.

Hamilton,  
14th March 1894.

Dear Sir,

I beg to acknowledge the receipt of your letter of the 10th instant, with file No. 6948 of 1894, *in re* the application of the Hamilton, Grimsby and Beamsville Electric Railway Co. for permission to enter, free of duty, steel rails weighing 50 lbs. per lineal yard and intended to be used in the construction of said railway, and in reply would say that having carefully read over all the correspondence attached to said file and being satisfied the rails in question are to be used for said railway I have permitted free entry to be made by said company of 1,268 steel rails weighing 50 lbs. per lineal yard on the 12th instant, No. 12,532, and have also forwarded to the Department to-day claim papers for refund of the duty paid by said company on two former shipments of rails upon which duty was collected at this port under instructions. 10

I have the honour to be, Sir,

Your obedient servant,

F. E. KILVERT, Collector.

File enclosed.

Exhibit 10.

20

Exhibit 10.  
Cheque in  
Payment of  
Duty on  
Rails im-  
ported from  
the Johnston  
Company.

*Toronto, 10th Oct., 1891.*

*No. <sup>B</sup>/<sub>A</sub> 30994.*

*Imperial Bank of Canada.*

PAY TO THE ORDER OF

*Collector of Customs, \$596 <sup>37</sup>/<sub>100</sub>*

*Five Hundred and Ninety-Six <sup>37</sup>/<sub>100</sub> Dollars.*

(*Sic.*)

**C. C. WOODWORTH, Treas.,**

TORONTO STREET RAILWAY,  
THE TORONTO RAILWAY.

Countersigned by G. W. KIELY.

Endorsed on back,

For deposit only in the Bank of Montreal to the credit of the  
Receiver General, on account of Customs Duties.

30

JOHN SMALL,  
Collector.

DEFENDANT'S EXHIBITS.

Exhibit "A."

Lithograph Copy of Street Railway Rail, Cuningham's Design.

[See Book of Exhibits.]

RECORD.

No. 7.  
Defendant's  
Exhibits.

Exhibit A.  
Litho-  
graph  
copy of  
Street Rail-  
way Rail,  
Cuning-  
ham's  
Design.

Exhibit "B."

Copy of Letter dated 10, St. Charles' Square, Notting Hill, 7th March 1892,  
Wm. McKenzie (per T. G. Holt) to Dick, Kerr & Co., 101, Leadenhall  
Street, E.C.

Exhibit B.  
Corre-  
spondence  
with Dick,  
Kerr & Co.,  
re Purchase  
of Rails.

Dear r

10 On behalf of Mr. McKenzie, Vice-President of the Toronto Railway,  
whose power of attorney I hold, I beg to confirm the purchase from you of  
3,000 tons of rails as per your letter of contract of even date.

Yours truly,  
WM. MCKENZIE,  
p. T. G. Holt.

Copy of Letter dated London E.C., 3rd December 1892, Dick, Kerr & Co., to  
Wm. McKenzie, President Toronto Railway Company, Toronto.

Dear Sir,

30 We are in receipt of your favour of 19th ult., and in reply beg to say  
that we have gone very carefully into weights of rails supplied under your valued  
contracts.

We find that on the first contract of 3,000 tons the		
weight per yard works out at	-	69·52 lbs. per yd.
On 2nd contract for 1,500 tons the weight works		
out at	-	69·49 " "
And on 3rd contract, as far as it has been delivered,		
the weight is	-	69·3 " "
The average of the whole being	-	69·44 " "

40 This we think you will agree with us is very satisfactory indeed, as in  
every case the works are always allowed a margin of at least 1 per cent. either  
way.

RECORD. We trust this information will enable you to settle your accounts satisfactorily.

No. 7.

Defendant's  
Exhibits—  
*continued.*

P.S.—You might kindly advise us when next writing whether you received the half-dozen electro-plated cuttings sent you some three months ago.

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Letter dated London, E.C., 7th March 1892, Dick, Kerr & Co., Limited (per G. Flett, Asst. Managing Director), to W. McKenzie, Vice President Toronto Railway, Toronto.

Dear Sir,

We beg to confirm having sold you this day 3,000 *tons of new perfect steel girder tramway rails*, as per section approved by you weighing 69 lbs. per yard (with the usual allowance of one per cent. over or under). The rails to be in standard lengths of 30 ft., with five per cent. shorts. To be rolled, free from flaws, cracks or other imperfections, and to be made of specially hard steel of our best quality for tramway work. To be punched for fish-plates and the necessary quantity of fish-plates with 5 per cent. extra supplied, and to be inspected at the works during the course of manufacture by Messrs. Bodmer and Jones, of London, and their certificate to be sent with each shipment, the price to be 5*l.* 13*s.* 9*d.* per ton of 2,240 lbs. (say five pounds thirteen shillings and ninepence sterling), delivered c.i.f., Toronto, exclusive of duties, and payment to be made in London, net cash against shipping and insurance documents. Shipment to be made by steamer, 1,000 tons in April, May and June. 10 20

Thanking you, and soliciting a continuance of your commands.

We are, dear Sir, yours faithfully,

DICK, KERR & Co., Limited,  
G. Flett, Asst. Managing Director.

(Annexed is a sketch of section of the rail substantially similar to the one shown in Exhibit A, and therefore not lithographed for the "case.")

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Exhibit "C."

30

Exhibit C.  
Entries of  
Plaintiff's  
Rails at  
Customs  
House,  
Toronto.

Original entries of Plaintiff's steel rails in question in this action, at the Custom House, with affidavits attached to each under S.S. 35 and 42 of the Customs Act, R. S. C., c. 32.

(*Note.*—The entries are all upon the same form given below, and each separate entry is described below).

The form of entry is as follows :

Form No. B. I.

For Duty.

RECORD.

No. 7.  
Defendant's  
Exhibits—  
*continued.*

Report No. \_\_\_\_\_  
 Port of \_\_\_\_\_ 189 . Entry No. \_\_\_\_\_  
 Imported by \_\_\_\_\_ Per \_\_\_\_\_  
 \_\_\_\_\_ Master, from \_\_\_\_\_ to \_\_\_\_\_

Marks and Numbers.	No. of Pkgs.	Description of Goods.	Amount in Currency of Invoice.	Value for Duty in Dollars.	Quantity.	Rate of Duty.	Duty.

10 Goods purchased in \_\_\_\_\_

(Endorsed on back.)

Declaration of the Owner, Consignee or Importer, required when the entry is made by any person other than such Owner, Consignee or Importer.

I, the undersigned \_\_\_\_\_ a member of the firm trading under the name of \_\_\_\_\_ hereby solemnly declare that the within Bill of Entry contains a true account of the goods imported as therein stated, and whereof \_\_\_\_\_ the owner; that the invoice herewith produced is the true and only invoice which \_\_\_\_\_ have received or expect to receive of the said goods, and that 20 the prices of the goods as mentioned in the said invoice, exhibit the fair market value thereof, at the time and place of their exportation to Canada, that the said goods are properly described in the said invoice, and that no discounts or deductions for cash, or because of the exportation thereof, or for any other special consideration, have been made in the said invoice prices, and that to the best of my knowledge and belief the prices so exhibited were the prices of said goods for consumption at such time and place.

Signed at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_  
 in the presence of \_\_\_\_\_  
 p. 4514. O

**RECORD.** Oath or Affirmation of an Agent or Attorney of the Owner, Consignee or Importer.

No. 7.  
Defendant's  
Exhibits—  
continued.

I \_\_\_\_\_ do solemnly and truly swear that I am the duly authorised agent and attorney of \_\_\_\_\_ and that I have the means of knowing, and do know, that the invoice now presented to me of the goods mentioned in this Bill of Entry is the true and only invoice received by the said \_\_\_\_\_ of all the goods imported as within stated for \_\_\_\_\_ account; that the said goods are properly described in the said invoice and entry and that the said invoice and entry exhibit the fair market value of the said goods at the time and place of their exportation to Canada without any deduction or discount for cash, or because of the exportation thereof, or for any other cause, whatsoever, and that nothing has been on my part, nor to my knowledge on the part of any other person done, concealed, or suppressed, whereby Her Majesty the Queen may be defrauded of any part of the duty lawfully due on the said goods; and I do further solemnly and truly swear that to the best of my knowledge and belief the said \_\_\_\_\_ are the \_\_\_\_\_ of the goods mentioned in this Bill of Entry and that the prices of said goods as shown therein, and in the said invoice, were the prices thereof for consumption at the time and place of their exportation to Canada. So help me God. 10

Sworn before me this \_\_\_\_\_ day of \_\_\_\_\_ 189 \_\_\_\_\_

\_\_\_\_\_  
Collector.

**The following are the details of each entry :—**

Entry No. 17,329, dated 10th October 1891, from Johnstown, Pa.  
Described as "Steel Rails."

Name of importer—The Toronto Railway Co.

Declaration made by James Gunn.

Oath taken by John Maitland Smith as agent for the Toronto Railway Company. 30

Duty on rails \$433. 57. Paid under protest.

Entry No. 63,531, dated 21st June 1892.

From Great Britain.

Described as "Steel Rails."

Other details same as 17,329.

Duty on rails \$3,041. 50. Paid under protest.

Entry No. 63,718, dated 22nd June 1892, from Great Britain.

Described as "Steel Rails."

Other details same as 17,329.

Duty on rails \$2,430. 62. Paid under protest. 40

Entry No. 2,648, dated 18th July 1892, from Great Britain.  
 Described as "Steel Rails."  
 Other details same as 17,329.  
 Duty on rails \$3,104. 98. Paid under protest.

RECORD.  
 No. 7.  
 Defendant's  
 Exhibits—  
*continued.*

Entry No. 1,011, dated 7th July 1892, from Great Britain.  
 Described as "Steel Rails."  
 Other details same as 17,329.  
 Duty on rails \$4,941. 24. Paid under protest.

10

Entry No. 12,621, dated 12th September 1892.  
 From United States.  
 Imported by Toronto Railway Co.  
 Described as "Steel Rails."  
 Other details same as 17,329 except that oath is made by Albert  
 C. Rae as agent for the Toronto Railway Co.  
 Duty on rails \$46. 44. Paid under protest.

20

Entry No. 13,086, dated 14th September 1892.  
 From Great Britain.  
 Described as "Steel Rails."  
 Other details same as 12,621.  
 Duty on rails \$1,759. 37. Paid under protest.

Entry No. 15,929, dated 27th September 1892.  
 From Great Britain.  
 Described as "Steel Rails."  
 Other details same as 12,621.  
 Duty on rails \$3,648. 67. Paid under protest.

Entry No. 26,153, dated 15th November 1892, from Great Britain.  
 Described as "Steel Railway Rails."  
 Other details same as 12,621.  
 Duty on rails \$6,377. 21. Paid under protest.

30

Entry No. 68,685, dated 21st June 1893, from the United States.  
 Described as "Tramway Rails."  
 Other details same as 12,621.  
 Duty paid on rails \$1,114. 40.

Entry No. 69,566, dated 26th June 1893.  
 From Great Britain.  
 Described as "Tramway Rails."  
 Details same as in 12,621.  
 Duty on rails \$2,743. 89. Paid under protest.

## RECORD.

No. 7.  
Defendant's  
Exhibits—  
*continued.*

Entry No. 299, dated 30th June 1893.  
From Great Britain.  
Described as "Tramway Rails."  
Other details same as in 12,621.  
Duty paid on rails \$3,004. 83. Paid under protest.

Entry No. 2,109, dated 13th July 1893.  
From Great Britain.  
Imported by Ross and McKenzie.  
Described as "Steel Tramway Rails."  
Declaration made by Wm. McKenzie. 19  
Oath made by Albert C. Rae as Agent for Ross and McKenzie.  
Duty on rails \$3,273. 24. Paid under protest.

Entry No. 4,318, dated 26th July 1893.  
From Great Britain.  
Described as "Steel Railway Rails."  
Other details same as 2,109.  
Duty on rails \$5,185. 24. Paid under protest.

Entry No. 6,809, dated 9th August 1893.  
From Great Britain.  
Described as "Tramway Rails." 0  
Other details same as 2,109.  
Duty paid on rails \$3,706. 83.

Entry No. 19,312, dated 11th October 1893, from Great Britain.  
Imported by Ross and McKenzie.  
Described as "Steel Railway Rails."  
Declaration made by Albert C. Rae as agent for Ross and McKenzie.  
Oath made by same.  
Duty on rails \$985. 73. Paid under protest.

Entry No. 22,875, dated 27th October 1893, from Great Britain. 30  
Imported by Ross and McKenzie.  
Described as "Tramway Rails."  
Other details same as 19,312.  
Duty on rails \$1,076. 43. Paid under protest.

Entry No. 24,932, dated 7th November 1893.  
From Great Britain.  
Imported by Ross and McKenzie.  
Described as "Steel Railway Rails."  
Declaration made by Wm. McKenzie.  
Oath made by Albert C. Rae, Agent for Ross and McKenzie.  
Duty on rails \$3,479. 00. Paid under protest. 40



Entry No. 27,815, dated 20th November 1893, from Great Britain.  
 Described as "Steel Railway Rails."  
 Details same as 24,932.  
 Duty on rails \$2,326. 32. Paid under protest.

RECORD.  
 No. 7.  
 Defendant's  
 Exhibits—  
*continued.*

Entry No. 4,162, dated 20th July 1892.  
 Port of Montreal from Great Britain.  
 Described as "Steel Rails."  
 Name of importers—Toronto Street Railway Co.  
 Declaration made by Wm. McKenzie.  
 Oath made by J. Kiely.  
 Duty on rails \$3,364. 12. Paid under protest.

10

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Part of Exhibit "D."

Letter extracted from Files Nos. 714 and 714A of 1892, of Customs Department, relative to the Niagara Falls Park and River Railway Company.

Letter W. T. Jennings, Engineer of Niagara Falls Park and River R. R. Co., to E. B. Osler, Esq., Toronto.

Exhibit D.  
 Letter from  
 W. T. Jen-  
 nings to  
 to E. B.  
 Osler, 4th  
 April 1892.

E. B. Osler, Esq., Toronto.

Toronto,

Dear Sir,

4th April 1892.

Concerning the Niagara Falls Park and River Railway location,  
 20 construction, &c., I beg to report as follows:—The river line, as now projected  
 by us, is [to extend from Niagara on the lake at the north, *viâ* Queenston,  
 Niagara Falls Park and Chippawa to Fort Erie opposite Buffalo, a distance of  
 say 33 miles. In the meantime I have entered into contracts for the con-  
 struction of that section, 12 miles in length, lying between Queenston to the  
 north and Chippawa to the south, these points being the terminus of steamboat  
 navigation on each, the northern and southern portions of the Niagara  
 River.

It is also our intention to connect with the Michigan Central Railway at  
 Chippawa and the Grand Trunk at Niagara Falls, Ont., also with steamboats  
 30 plying on Lake Ontario, and Lake Erie, thus making a through connection  
 from Buffalo on the south, to Toronto, Hamilton and other Canadian points on  
 the north.

The mode of construction adopted is similar to that of the Dominion  
 Government when constructing the Canadian Pacific Railway, the same weight  
 and section of steel rails; the same number of ties, &c., to the mile being not  
 only adopted, but now on the ground. The structures, such as bridges and  
 culverts, are to be first-class of their kind—masonry, steel and iron.

To carry out this work, as above set forth, means an expenditure of a sum  
 of money in advance of the average rate per mile of railways in Ontario, as the  
 40 country in places is exceedingly rough and the grades steep. In fact, on that

RECORD.  
 No. 7.  
 Defendant's  
 Exhibits—  
 continued.

portion of the line from Wintergreen to Queenston *via* the river bank, the cost will be in the vicinity of \$35,000 per mile, not including rolling stock or motive power. I am now negotiating for the purchase of heavy steam motors which will be sufficient to meet the requirements of our business over the five per cent. gradients which we have to encounter. The section of the line passing through the Queen Victoria Niagara Falls Park will in the meantime be operated by electricity, which we are arranging for at a very great cost, purely to meet the wishes of the Government, and those living in the neighbourhood, who, I am inclined to think, have too strong sentimental ideas for a speedy development of this country.

10

I was surprised to learn that the Dominion Government contemplated charging duty on the steel rails; why, I cannot understand, as this railway is as much a steam railway, and a railway for the benefit of the country, as any other section that I am aware of, and moreover, the class of rail which we have adopted (indeed have now lying on the ground) is similar in weight and section to that adopted by the Government for the Canadian Pacific Railway.

Yours truly,  
 W. T. JENNINGS, Engineer.

P.S.—Plans of location enclosed.

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Part of Exhibit "E."

20

Exhibit E.  
 Copies of  
 Invoices of  
 Rails.

Certified copies of Invoices of the rails in question in this action. (Extracts therefrom.)

(N.B.—These invoices appear to be of only those rails imported from Europe.)

Leadenhall House, 101, Leadenhall Street,  
 London, 6th May 1892.

Messrs. The Toronto Street Railway Co.,  
 Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 1,345 Steel Girder Tramway Rails,

30

	69 lbs. per yard,			
	punched for Fishplates	- 30'	418 17 2 23	
75	Do.	- 28'	21 16 0 3	
22	Do.	- 26'	5 18 3 2	
24	Do.	- 24'	5 19 2 10	
<hr/>			<hr/>	
1,466			452 12 0 10	
<hr/>			<hr/>	

Leadenhall House, 101, Leadenhall Street,  
London, 26th May 1892.

Messrs. The Toronto Street Railway Co.,

Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 1,096 Steel Girder Tramway Rails,  
69 lbs. per yard,

		punched for Fishplates - 30'	340	7	0	8
10	52	Do. -	15	1	1	22
	15	Do. -	4	0	3	0
	9	Do. -	2	4	2	24
	<u>1,172</u>		<u>361</u>	<u>13</u>	<u>3</u>	<u>26</u>

Leadenhall House, 101, Leadenhall Street,  
London, 13th June 1892.

Messrs. The Toronto Street Railway Co.,

Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 2,222 Steel Girder Tramway Rails,  
69 lbs. per yard,

		punched for Fishplates - 30'	688	9	3	10
20	84	Do. - 28'	24	5	3	14
	58	Do. - 26'	15	11	2	4
	28	Do. - 24'	6	18	3	8
	<u>2,392</u>		<u>735</u>	<u>6</u>	<u>0</u>	<u>8</u>

Leadenhall House, 101, Leadenhall Street,  
London, 24th June 1892.

Messrs. The Toronto Street Railway Co.,

Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 1,380 Steel Girder Tramway Rails,  
69 lbs. per yard,

		punched for Fishplates - 30'	429	15	2	23
30	68	Do. - 28'	19	15	1	7
	26	Do. - 26'	7	0	1	13
	22	Do. - 24'	5	9	2	15
	<u>1,496</u>		<u>462</u>	<u>1</u>	<u>0</u>	<u>2</u>

RECORD.

No. 7.  
Defendant's  
Exhibits—  
*continued.*

RECORD.  
 No. 7.  
 Defendant's  
 Exhibits—  
 continued.

Leadenhall House, 101, Leadenhall Street,  
 London, 30th June 1892.

Messrs. The Toronto Street Railway Co.,  
 Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 1,373 Steel Girder Tramway Rails,  
 69 lbs. per yard,  
 punched for

	Fishplates	30'	426	0	3	3	
32	Do.	28'	9	5	1	16	
23	Do.	26'	6	3	3	13	
25	Do.	24'	6	4	0	22	
1,580	prs. Fishplates in						
	395 bundles	-	25	19	3	20	

10

473 14 0 18 5/13/9 2,694 4 4

Ends red.

122	Steel Girder Tramway						
	Rails (Toronto Wide						
	Groove Section for						
	curves) - -	30'	47	0	1	6	
10	Do.	28'	3	11	3	24	
5	Do.	26'	1	13	1	19	
2	Do.	24'	0	12	1	10	
144	prs. Fishplates in	36					
	bundles	- -	2	7	0	11	

20

55 5 0 14 5/13/9 314 5 5

£3008 9 9

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Leadenhall House, 101, Leadenhall Street,  
 London, 30th July 1892.

Messrs. The Toronto Street Railway Co.,  
 Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 18 Steel Girder Tramway Rails  
 (Toronto Section for

Curves) - - 30' 6 18 0 24

5/13/9 39 6 2

40

£39 6 2

Leadenhall House, 101, Leadenhall Street,  
London, 12th Aug. 1892.

Messrs. The Toronto Street Railway Co.,  
Bought of Dick, Kerr & Co., Ltd.

RECORD.  
No. 7.  
Defendant's  
Exhibits—  
*continued.*

Terms, net cash against shipping documents.

To 800 Steel Girder Tramway Rails					
	69 lbs. per yard	- 30'	248	10	1 1
18	Do.	- 28'	5	4	1 15
18	Do.	- 26'	4	16	3 22
13	Do.	- 24'	3	4	2 15

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Leadenhall House, 101, Leadenhall Street,  
London, 12th Aug. 1892.

Messrs. The Toronto Street Railway Co.,  
Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 150 Steel Girder Tramway Rails					
	69 lbs. per yard	- 30 ft.	46	8	0 10

Leadenhall House, 101, Leadenhall Street,  
London, E.C., 22nd Aug. 1892.

20 Messrs. The Toronto Street Railway Co.,  
Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 13 Steel Girder Tramway Rails								
	69 lbs. per yard,							
	30 feet long	-	4	0	3	3	5/5/9	21 7 0

RECORD.

No. 7.  
Defendant's  
Exhibits—  
*continued.*

Leadenhall House, 101, Leadenhall Street,  
London, 23rd August 1892.

Messrs. The Toronto Street Railway Co.,  
Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 1,541 Steel Girder Tramway Rails					
	69 lbs. per yard	-	30 ft. long	477	18 3 1
25	Do.	-		7	4 2 26
19	Do.	-		5	2 0 14
9	Do.	-		2	4 2 17
<hr/>					
	1,594				
<hr/>					

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Leadenhall House, 101, Leadenhall Street,  
London, 15th October 1892.

Messrs. Ross and McKenzie,  
Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 2,892 Steel Girder Tramway Rails					
	69 lbs. per yard	-	30'	894	13 1 20
52	Do.	-	28'	15	0 1 6
42	Do.	-	26'	11	5 0 26
26	Do.	-	24'	6	8 2 22

20

Leadenhall House, 101, Leadenhall Street,  
London, 15th October 1892.

Messrs. Ross and McKenzie,  
Bought of Dick, Kerr & Co., Ltd.

Terms, net cash against shipping documents.

To 49 Steel Girder Tramway Rails					
	(Toronto wide groove section for curves)	-	30'	18	16 1 7
5	Do.	-	28'	1	15 3 13
3	Do.	-	26'	19	3 24

30

Leadenhall House, Leadenhall Street,  
London, 30th May 1893.

RECORD,  
—  
No. 7.  
Defendant's  
Exhibits—  
*continued.*

Messrs. Ross and McKenzie,

Bought of Dick, Kerr & Co., Ltd.

Terms, Bill at three day sight.

To 440 Steel Girder Tramway Rails

	73 lbs. per yard	- 30'	143	14	2	5
49	Do.	- 28'	14	18	3	6
17	Do.	- 26'	4	16	1	4
9	Do.	- 24'	2	7	0	4

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Leadenhall House, 101, Leadenhall Street,  
London, 30th May 1893.

Messrs. Ross and McKenzie,

Bought of Dick, Kerr & Co., Ltd.

Terms, Bill at three days' sight.

To 1,250 Steel Girder Tramway Rails

73 lbs. per yard	- 30'	408	6	1	11	5/3/6	2,113	0	10
							<u>£2,113</u>	<u>0</u>	<u>10</u>

Leadenhall House, 101, Leadenhall Street,  
London, 31st May 1893.

20

Messrs. Ross and McKenzie,

Bought of Dick, Kerr & Co., Ltd.

Terms, Bill at three days' sight.

To 1,312 Steel Girder Tramway Rails

	73 lbs. per yard	- 30'	429	19	3	19
40	Do.	- 28'	12	4	2	23
9	Do.	- 26'	2	11	0	15
9	Do.	- 24'	2	7	0	22

Leadenhall House, 101, Leadenhall Street,  
London, 19th June 1893.

30

Messrs. Ross and McKenzie,

Bought of Dick, Kerr & Co., Ltd.

Terms, Bill at four months' date.

To 870 Steel Girder Tramway Rails

73 lbs. per yard	- 30'	284	3	0	7
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RECORD.  
 ———  
 No. 7.  
 Defendant's  
 Exhibits—  
*continued.*

Invoice of a quantity of Steel Grooved Rails and Fishplates shipped per S.S. *Stubbenhuk* from Antwerp to Montreal, thence by rail to Toronto, by order and for account of Jas. Ross, Esq., Montreal.

Contract 16,392. 21st March 1893.

Bought of Sanders & Co.

Steel Grooved Rails.				
600 Rails, 30' wg.	-	-	-	202 18 2 25

Invoice dated 20th June 1893.

Invoice of a quantity of Steel Grooved Rails and Fishplates shipped S.S. *Grimm* from Antwerp to Montreal, thence by rail to Toronto, by order and for account of Jas. Ross, Esq., Montreal.

Contract 16,392. 21st March 1893.

Steel Grooved Rails.				Tons.
1,200 Rails, 30 feet wg.	-	-	-	405 17 1 21

29th June 1893. SANDERS & Co.

Invoice of a quantity of Steel Grooved Rails and Fishplates shipped per S.S. "*Baumwell*" from Antwerp to Montreal, thence by rail to Toronto, by order and for account of Jas. Ross, Esq., Montreal.

Contract 16,392. 21st March 1893.

Steel Grooved Rails.				Tons.
884 Rails, 30 feet	-	-	-	298 19 3 21
114 " 28 "	-	-	-	35 19 3 0
68 " 26 "	-	-	-	19 18 2 18
40 " 24 "	-	-	-	10 16 1 25
<u>1,106</u>				<u>365 14 3 8</u>

4th July 1893.

SANDERS & Co.



Leadenhall House, 101, Leadenhall Street,  
London, 18th July 1893.

Messrs. Ross and McKenzie.

Bought of Dick, Kerr & Co.

Terms—Bill at four months, adding stamp and interest.

	To 739 Steel Girder Tramway Rails						
	73 lbs. per yard -	-	30 feet	241	7	2	5
	4 Do.	-	28 „	1	4	1	17
	1 Do.	-	26 „		5	2	17
10	16 Do.	-	24 „	4	3	2	12

Leadenhall House, 101, Leadenhall Street,  
London, 2nd August 1893.

Messrs. Ross and Mackenzie, Montreal.

Bought of Dick, Kerr & Co., Ltd.

Terms.—Bill at four months date, adding stamp and interest.

	To 450 Steel Girder Tramway Rails, 73 lbs.						
	per yard, 30 feet long	-	-	146	13	2	26

20 Invoice of a quantity of Steel Grooved Rails and Fishplates shipped per  
S.S. *Grimm* from Antwerp to Montreal, thence by rail to Toronto, by  
order and for account of Jas. Ross, Esq., Montreal.

Contract 16,392. 21st March 1893.

	Steel Grooved Rails.			Tons.			
	384 Rails 36' wg. -	-	-	160	3	2	18
	3rd October 1893.						SANDERS & Co.

RECORD.  
—  
No. 7.  
Defendant's  
Exhibits—  
*continued.*

RECORD.  
No. 7.  
Defendant's  
Exhibits—  
continued.

Invoice of a quantity of Steel Grooved Rails and Fishplates shipped per S.S. *Baumwall* from Antwerp to Montreal, thence by rail to Toronto, by order and for account of Jas. Ross, Esq., Montreal.

Contract 16,392. 11th March 1893.

Bought of Sanders & Co.

Steel Grooved Rails.	Tons.
912 Rails, 36' wg. - - - -	375 5 2 22
300 do. 30' „ - - - -	102 15 3 12
57 do. 28' „ - - - -	18 4 1 12
38 do. 26' „ - - - -	11 5 2 6
37 do. 24' „ - - - -	10 2 2 24
1,344	517 14 0 20

10

11th October 1893.

Invoice of a quantity of Steel Grooved Rails and Fishplates shipped per S.S. *European* from Antwerp to Montreal, thence by rail to Toronto, by order for account of Jas. Ross, Esq., Montreal.

Contract 16,392. 21st March 1893.

Steel Grooved Rails.	Tons.
840 Rails, 36' wg. - - - -	346 3 2 9

14th October 1893.

SANDERS & Co. 20

Judgment of Mr. Justice Burbidge.

No. 8.  
Judgment of  
Mr. Justice  
Burbidge,  
29th Oct.  
1894.

The Plaintiff Company operates a street railway in the City of Toronto. At different times in the years 1891, 1892 and 1893 it imported steel rails, weighing sixty-nine pounds per lineal yard, to be used in relaying and extending the tracks of its railway there. On such rails there were paid under protest by the Company Customs duties amounting to some fifty-six thousand dollars, which it now seeks to recover from the Crown. During the years mentioned the Duties of Customs Amendment Act, 50-51 Victoria, Chapter 39, was in force. By the 88th item in the first section of that Act a duty of six dollars per ton was imposed upon "iron or steel railway bars and rails for railways and tramways, of any form, punched or not punched, not elsewhere specified." By the second section of the Act (Item 173) "steel rails, weighing not less than twenty-five pounds per lineal yard, for use in railway tracks" were made free of duty, and the question to be answered is: Does the term "railway" in this clause include a street railway or not? 30

The first Act by which duties of Custom were imposed, passed after the Union, came into force on the 13th of December 1867. From that date to March 1879, "railway bars" were not dutiable (31 Vic. c. 7, Schedule C., and c. 44, Schedule C.). In the latter year an Act was passed to alter the duties of Customs and Excise (42 Vic. c. 15), one object of which was, as every one knows, to afford a measure of protection to Canadian products and manufactures. By this Act a duty of fifteen per centum *ad valorem* was imposed upon "iron rails or railway bars for railways or tramways," and ten per centum *ad valorem* on steel "railway bars or rails," to be levied on and after the 1st of January 1881. (Acts of 1879, pp. 127, 133, and 141). The date upon which the duty would be leviable on steel railway bars or rails was extended from time to time (Acts of 1880, pp. 64 and 66; 1881, pp. 67 and 69; 1882, pp. 69 and 70) until 1883 when they were placed upon the free list. (Acts of 1883, p. 156.) The only other change which it is material to notice occurs in the Act of 1885, when the item under which steel railway rails were admitted free of duty was so amended as to read as follows: "Steel railway bars or rails, not including tram or street rails." (Acts of 1885, p. 148. See also R. S. C. c. 33, items 217 and 770.)

Now, it is clear that the expression "railways and tramways" in the 88th item of 50-51 Vic. Chap 39, Section 1, by which, as we have seen, a duty of six dollars per ton was imposed on "iron and steel railway bars and rails not elsewhere specified," included street railways. There may be a difference of opinion as to whether they were so included by force of the word "railways," or of the word "tramways"; but that they were covered by the language used was conceded by Mr. Robinson, and does not, I think, admit of any doubt. Steel rails for street railways were dutiable then at the rate of six dollars per ton unless they were in the Act elsewhere specified. It is contended for the Plaintiff Company that they were so specified in item 173 which makes free "steel rails," of not less than a given weight "for use in railway tracks." It is obvious that under the amendment of 1885 rails for street railways were dutiable; but it is pointed out that apt words were then used to indicate the intention of the Legislature. Steel railway bars or rails in the Schedule of free goods were not, it was then provided, to include "tram or street rails." In the Act 1887 these words were omitted, and it is argued that the change of language must be taken to import a change of intention on the part of the Legislature, and that the only fair conclusion is that the word "railway" in item 173 of the Act of 1887 was used to denote railways generally, including of course street railways.

The terms "railway" and "railways" in their largest sense include no doubt all classes of railways. Commonly, however, they have a narrower signification, and if anyone desired to refer to a tramway or to a marine, ship, electric, street, or other railway, he would, I think, ordinarily use the word tramway or prefix the appropriate qualifying term. If he should use the word railway without any qualifying words or circumstances, he would, I think, 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. Not that the use of steam as a motive power is an

RECORD.

No. 8.  
 Judgment of  
 Mr. Justice  
 Burbidge,  
 29th Oct.  
 1894—  
*continued.*

essential incident. Such railways would, I think, be railways in the same sense of the word, if electricity were substituted for steam. In the same way a street railway would be none the less a street railway although it should be operated by locomotive engines.

Confining the attention for the moment to the words used in the 88th and 173rd items of the Act of 1887, and reading the two items together, it would appear that the words "railways" and "railway" are not therein used in a sense large enough to include tramways. The use of the latter word in the 88th item would seem to make that tolerably clear. But what are the tramways that are not to be understood as being railways within the meaning of the clauses that have been cited? In England, the word "tramway" includes and is generally used to denote a street railway. It is of course a larger term. There are tramways which are not street railways, but all street railways are tramways within the meaning of that term as commonly used in that country. The word has also found its way into the French language, with, I think, substantially the same meaning. "Dictionnaire de Littra, vo. Tramway; Dictionnaire de l'Academie Francaise, 7ième Edn., vo. Tramway; Dictionnaire de Becherelle, vo. Tramway." In Canada the word is sometimes, though not generally, used to designate a street railway. When so used no one has, I think, any difficulty in knowing what is meant, and among importers of rails there are, I should think, few if any persons who do not know that tramway rails include rails for street railways. It will have been observed, however, 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 was clearly superfluous if the term "tram rails" included "street rails." But for that circumstance I should 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. As the matter stands, however, and 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, I should think the question to be, to say the least, so involved in doubt that the Plaintiff should succeed in this action.

But there are other considerations that lead, it seems to me, to an opposite conclusion. Among such considerations I do not include, and I do not rely upon, what was said by the Minister of Finance, when in 1887 he moved the House into Committee of Ways and Means, or in the debates that occurred when the resolutions on which the Tariff Act of that year was founded, were before the Committee. I do not agree with Mr. Hodgins that that is permissible except perhaps so far as the resolutions and the debate show, what may, I think, be gathered from the Act itself, that one object which the Legislature had then in view was to give a larger measure of protection to the production and manufacture in Canada of iron, and the products of iron. In construing a statute relating to the revenue, one must, I think, have regard to the general fiscal policy of the country at the time when the statute was enacted. That may be a matter of common knowledge, or of history; and if of history, he who seeks to know the truth must go to the sources of history, and they, so far as

the fiscal policy of a country is concerned, are to be found not only in Acts of Parliament, but in the proceedings of Parliament and in the debates and discussions that take place there and elsewhere. But that is a different matter to construing a particular clause, or provision, of a statute by reference to the intention of the mover or promoter of it expressed while the Bill or the resolution on which it is founded was before the House. The latter course is one which under the rules governing the construction of English statutes one may not adopt.

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—  
No. 8.  
Judgment of  
Mr. Justice  
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1894—  
*continued.*

The primary object of an Act imposing duties of Customs is ordinarily, of course, to raise a revenue. But that was not, I think, the end which the Legislature had principally in view in imposing a duty on railway rails whether of iron or steel. Its main object was apparently to encourage the production and manufacture in Canada of iron and steel. But a protective tariff is of necessity a complex affair. The finished product of one man's labour is the raw material which another uses in the industry in which he is engaged. A tariff in which the protection of the labour of the country is an element, must consist of a series of adjustments. To ascertain the particular adjustment aimed at will often afford a key to the construction of the language used in such a tariff. That is one thing. Then it happens sometimes that there are other interests to be guarded or promoted, and here again there must be a compromise or an adjustment. For instance during the time when what was called the National Policy was being developed, there was in Canada great activity in the construction of railways, and that activity was stimulated by Parliament by large subsidies in money or grants of land, or by both. I do not refer especially to the Canadian Pacific Railway, but to a great number of other railways. In the Act of 1882, authorising such subsidies, we find the names of four lines of railways (45 Vic., c. 14); in the Act of 1883 eleven (46 Vic., c. 25); in the Act of 1884 twenty-five (47 Vic., c. 8); in the Act of 1885 seventeen (48-49 Vic., c. 59); in the Act of 1886 thirty-one (49 Vic., c. 10); and in the Act of 1887 thirty-eight (50-51 Vic. c. 24). An examination of the several Acts will show, too, that the bounty of Parliament and the aids granted by it during the years mentioned, were not limited to railways and railway undertakings within its legislative authority. Railway companies incorporated by Acts of the several provinces were also the object of that bounty, and received such aids in prosecuting the enterprises for which they were created. But it will be observed, and I think it is important to observe, that in no case was any aid given by Parliament to any street railway.

Coming back then to the 173rd item of the Act of 1887 respecting duties of Customs, let us see if in the light of what has been said it is possible to discover the intention of Parliament. In the first place rails to have been free of duty must have been made of steel. Iron rails were and had since 1879 been dutiable. Then in the second place they must have weighed not less than twenty-five pounds per lineal yard. Why? Because steel rails of a light weight were then being made in Canada, and Parliament desired to protect and foster that industry. But why make steel rails free at all? Why not as proposed in 1879, put a duty on them and encourage their manufacture in

RECORD.  
 No. 8.  
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 1894.  
*continued.*

Canada? Because at this point two policies came into conflict and Parliament did not wish to impose any such burdens upon those who were with its aid constructing new railways, or without it maintaining or extending lines of railway already built. That consideration did not, however, apply to tramways or street railways. In the Act of 1885 they had been expressly excepted from the benefits arising from the importation of rails free of duty. The amendment of that year was intended, I think, to remove doubts that may have arisen as to the proper construction of the Act of 1883. I do not think that words "steel railway bars or rails" on the free list in the latter Act were intended to include steel rails for tramways or street railways. But doubts may have arisen and the Act of 1885 quieted them. I admit that when we come to the Act of 1887 a difficulty is created, and some doubt, by not continuing the very explicit and clear language of the Act of 1885. That under the circumstances, does not appear to me to be conclusive, and I see no other indication of an intention on the part of Parliament in 1887 to alter its policy in the direction of enlarging the free list; and of making rails for us in street railway tracks free. On the contrary the railways referred to in item 173 of the Act of that year were, it seems to me, railways of the same class as those which had hitherto been the objects of the care and bounty of Parliament; and street railways were not, it is clear, of that class. 10

I have been referred to a considerable number of authorities, which I have examined with some care, but there is nothing in any of them, I think, which stands in the way of arriving at the conclusion that I have stated. Possibly I should except the case of *Ex parte Zebley*, 30 N. B. R. 130. A majority of the Supreme Court of New Brunswick in that case (Allen, C. J. Wetmore, Palmer and Fraser, J. J., Tuck, J., dissenting, and King, J., taking no part) held that the St. John City Railway Company, which operates a street railway in that city, is a railway company within the meaning of the Act of the Assembly of that Province, 33 Vict. c. 46, and exempt from Municipal taxation under the provisions of that Act. That was not, I think, a stronger case than this, and it is the decision of a Court to which every one, whether bound by its decisions or not, is ready to accord the highest respect and consideration. It is therefore with great deference to the opinion of the majority that I add that I think that Mr. Justice Tuck, who dissented, presented the true view of the case. I do not see that any sufficient answer was given, or can be given, to the reason stated by him for the conclusion to which he came. 20

There will be judgment for the Defendant with costs.

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In the Exchequer Court of Canada.

Present: The Honourable Mr. Justice Burbidge.

Monday, the twenty-ninth day of October A.D. 1894.

Between

The Toronto Railway Company - - - Plaintiffs,

and

Her Majesty the Queen - - - Defendant.

This action having come on for trial at the City of Toronto, on the nineteenth and twentieth days of April 1894, in presence of counsel for the Plaintiffs and Defendant, and upon hearing read the admission signed by the solicitor for the Defendant, and upon hearing the evidence adduced and what was alleged by counsel aforesaid, and this Court having been pleased to direct that the matter should stand over for judgment, and the same coming on this day for judgment.

This Court doth order and adjudge that the Plaintiffs recover nothing against the Defendant, and that the Defendant recover against the Plaintiffs her costs of this action to be taxed.

By the Court,

L. A. AUDETTE, Registrar.

RECORD.

No. 9.  
Formal  
Judgment of  
Court,  
29th Oct.  
1894.

“ B.”

In the Supreme Court of Canada.

On Appeal from the Exchequer Court of Canada.

Between

The Toronto Railway Company - - Plaintiff (Appellant),

and

Her Majesty the Queen - - Defendant (Respondent).

Factum of Appellant.

This appeal is brought by the Toronto Railway Company from the judgment of the Exchequer Court, dated the 29th day of October 1894, which dismissed with costs the action of the Toronto Railway Company to recover \$56,044. 17, paid by the Appellant Company under protest to the Collector of Customs at Toronto, in respect of duties upon certain steel rails imported by the Appellant for use in its railway tracks.

The question of the liability of the imported steel rails to the payment of duty depends upon two items of the Customs Tariff in the Act of 1887 (50 & 51 Vic. cap. 39), one in the section of the Act imposing duties, the other in the section exempting from duty.

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*continued.*

Section 1 of the Act of 1887 imposes certain duties upon certain specified articles, and by Item 88 a duty is imposed 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.”

Section 2 of the 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, 10 that is to say : \* \* \* \* \*

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

The Appellant Company's contention, that the rails in question should be admitted free of duty is shortly set out in paragraph 6 of the Statement of Claim as follows :

“ 6. Under the provisions of ‘ The Act Respecting the Duties of Customs,’ Chapter 39 of the Statutes of 1887, and the amendment thereto, steel rails weighing not less than 25 lbs. per lineal yard, for use in railway tracks, can be imported and used free of duty, the item being No. 173 in the said Act, and 20 No. 996 of the Department Tariff of 1890, and is in the words and figures following, *i.e.* : ‘ Steel rails weighing not less than twenty-five pounds per lineal yard, for use in railway tracks.’ ”

The Respondent's denial of the Appellant's claim to enter said rails free of duty is thus pleaded in paragraphs 4 and 5 of the Statement in Defence (as amended) :

“ 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 30 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*.

“ 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 40 and paid thereon.”

The amendment to paragraph 4 of the Statement of Defence, which sets up Item 89 of the Schedule to the Act of 1887, does not plead the exact words of that Item, which are :



“ 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*.”

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The Appellant admits that the steel rails imported for use in its railway tracks came within the expression “rails for railways” in Item 88, which imposes the duty of \$6.00 per ton; but contends that the rails are exempt from duty by Item 173 as being covered by the description therein of “Steel rails, weighing not less than 25 lbs. per lineal yard, for use in railway tracks.”

10 Before dealing with the judgment of the learned Judge and the reasons upon which the Appellant asks for a reversal of the judgment, it will be necessary to state shortly some of the material facts :

The Appellant Company was incorporated by an Act of the Legislature of the Province of Ontario of 1892 (55 Vic. cap. 99) with the powers therein specified, including (amongst others) those set out in the Statement of Claim. The name under which the Appellant Company was incorporated is “The Toronto Railway Company” and nowhere in the Act is it called a “Street Railway Company.”

20 By Sections 16 and 18 of the Special Act certain of the sections of the Railway Act of Ontario are incorporated into the Special Act.

The Appellant Company built a new railway under their powers in lieu of the street railway theretofore operated by horses, the rail adopted being a steel rail weighing somewhat over 69 pounds to the lineal yard.

The mode of construction of the road-bed is explained in the evidence of Wm. McKenzie, and the description of the rails in question is given by Wm. McKenzie, and the shape of the rail is shewn by the section Exhibit “A.”

Steel rails weighing as much as 69 pounds to the lineal yard cannot be, nor have they ever been, rolled in Canada.

30 A few of the rails imported by the Appellant Company were obtained from a firm in the United States, the Johnston Company of Pennsylvania, but by far the greater part of the rails were purchased from English houses, although the rails were manufactured in Belgium. One of these English firms to whom a contract for the supply of rails was let was Sanders & Co., who invoiced all the rails shipped by them as “Steel grooved rails” (Exhibit “E”); the other English shipping firm was Dick, Kerr & Co., who invoiced all the rails shipped by them as “Steel Girder Tramway Rails” (Exhibit “E”).

40 In the Customs Act (R.S.C. cap. 32) it is provided by Section 35 and following sections, that the invoice of any goods imported must describe the goods in detail, and the bill of entry of such goods is based upon the invoice (S. 41 as amended by 51 Vic. cap. 14, S. 9).

The descriptions of the rails shipped by the English dealers were in each case given by the exporters, and were not the descriptions of the officers or agents of the Appellant Company, who had no choice but to adopt in the bills

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of entry prepared by them the descriptions of the goods as given by the English dealers. (Evidence of Wm. McKenzie).

This is a complete answer to the Respondent's contention that the rails in question were entered on behalf of the Appellant Company as "tramway rails." The evidence shows that only some of them were so entered, and in any event the Respondent admits that the duty on all the rails was paid under protest. (See admissions, Exhibit 1.) So that the Appellant should not be prejudiced by having made the entries in the only way in which they would be accepted by the Government, especially when a concurrent protest was made against the imposition of the duties. 10

The learned Judge of the Exchequer Court has held that the steel rails in question were not covered by the exemption in item 173, and are therefore liable to the duty imposed by item 88.

The Appellant contends that the learned Judge erred in so finding, and that the judgment of the Exchequer Court should be reversed, and the prayer in the Statement of Claim granted, for the following amongst other

#### Reasons.

1. Due weight was not given to the principle governing the construction of statutes imposing duties or taxes, viz., that the tax or duty must be imposed by clear and distinct words, otherwise the subject is not liable to its payment. 20

2. The learned Judge proceeded upon wrong principles in dealing with the construction of Item 173 of the Act of 1887, and his conclusion in reference to the meaning of that item is erroneous, in that,—

- (a) Due regard was not given to the course of tariff legislation, and the manifest intention of Parliament to be gathered therefrom.
- (b) Sufficient consideration was not given to the general and known fiscal policy of the Government in passing the Customs Duties Acts, and the reasons for making the weight of steel rails the test of their liability to duty, and for imposing a tax upon those below a certain weight and exempting those above such weight. 30
- (c) Consideration was erroneously or unduly given to the policy of the Government in granting bonuses to steam railways, and an intention imputed to Parliament by the learned Judge in favour of steam railways on that account, which should have no weight in determining the meaning of the words "railway tracks" in an Act respecting customs.

3. The learned Judge also erred in finding upon the evidence adduced that the word "tramways" in Item 88 included street railways.

4. The judgment of the learned Judge that "the railways referred to in Item 173 of the Act of 1887, were railways of the same class as those which had hitherto been the objects of the care and bounty of Parliament, and that street railways were not of that class," and that, consequently, the Appellant 40

company is not a "railway" within the meaning of that item, is wrong in law, and is against evidence and the weight of evidence. **RECORD.**

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1. *Due weight was not given by the learned Judge to the principle governing the construction of statutes imposing duties or taxes, viz.: that the tax or duty must be imposed by clear and distinct words, otherwise the subject is not liable to their payment.*

Customs duties are taxes, and the rules relating to the construction of statutes imposing taxes apply to the Customs Acts.

10 "Every contribution to a public purpose imposed by superior authority is a 'tax' and nothing less."

Per Strong, J., in *Les Écclesiastiques de St. Sulpice, &c., vs. Montreal*, 16 S. C. R. 399 at p. 403.

Revenue laws are always construed in favour of the subject, in case of ambiguity or doubt, and the duty is not to be imposed unless such was manifestly the intention of the legislature.

20 "It is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favour of the public, because it is a general rule, that where the public are to be charged with a burden, the intention of the Legislature to impose that burden must be explicitly and distinctly shown."

*Dwarris* on Statutes, 646.

*Hardcastle* on Statutes, 2nd edition, 131-2.

See also—

Per Lord Ellenborough in *Williams vs. Sanger*—10 East 66 at page 69.

Per Bayley, J., in *Denn vs. Diamond*—4 B. & C. 243 at 245.

30 Per Lord Tenterden, C. J. in *Tomkins vs. Ashby*—6 B. & C. 541 at page 542.

Per Tindal, C. J., and the other members of the Court, in *Doe d. Scruton vs. Snaith*—8 Bing. 147 at 152.

Per Parke, B., in *Wroughton vs. Turtle*—11 M. & W., 561 at page 567.

Per Pollock, C. B., when delivering the judgment of the Full Court, in *Marq. of Chandos vs. Comm'rs of Inland Revenue*, 6 Exch. 464 at 479.

And in *Gurr vs. Scudds*—11 Exch. 190 at page 192.

40 And per Lord Cairns, L. C., in *Cox vs. Rabbits*—3 App. Cases, 473 at 478.

And per Ritchie, C. J., in *Grinnell vs. The Queen*—16 C.S.R. 119 at page 136. "The intention of the Legislature in the imposition of duties must be clearly expressed, and in case of doubtful interpretation the construction should be in favour of the importer."

And see *The Queen vs. The J. C. Ayer Co.*—1 Ex. R. 232 and at page 270.

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2. *The learned Judge proceeded upon wrong principles in dealing with the construction of Item 173 of the Act of 1887, and his conclusion in reference to the meaning of that Item is erroneous, in that,—*

(a) *Due weight was not given to the course of tariff legislation, and the manifest intention of Parliament to be gathered therefrom.*

Rails were first enumerated in the Customs Tariff of 1879.

It is to be noted that the tariff of that year had two distinct items mentioning rails, one (p. 127) for "*iron rails or railway bars for railways or tramways,*" and the other (p. 133) for "*steel . . . railway bars or rails*" (not mentioning tramways), and the duty on the steel rails was not to be imposed until a subsequent date. 10

The tariff legislation is traced by the learned Judge in his judgment until the Act of 1885.

"Steel railway bars or rails" it is seen were placed on the free list in 1883. (46 Vic., Cap. 13, S. 1.)

In 1885 (by 48-49 Vic., Cap. 61, S. 1, item 7, page 148), the free list item in the Act of 1883, relating to steel rails, was amended so as to read "*steel railway bars or rails, not including tram or street rails,*" and this provision was taken unchanged into the Consolidated Statutes (R.S.C., c. 33, Schedule "C," item 770). 20

It is evident, therefore, that Parliament, when it desired to compel the payment of duty upon street rails, knew how to use apt words to express its intention. The words are clear and admit of no doubt as to their meaning.

In 1885 and 1886 steel rails for use in street railways, clearly could not be imported without the payment of duty.

In 1887, however, those items were repealed, and Parliament in the amendments made in that year (and being items 88 and 173 now under consideration) adopted an entirely different principle.

For the first time weight was (by item 173) introduced as the test whether duty was or was not to be imposed, and "*steel rails weighing not less than 25 lbs. per lineal yard for use in railway tracks,*" were admitted free of duty. 30

If Parliament had intended to continue to exclude all rails imported for street railways from the free list, why did it not continue to use the same words as had previously been employed in the Statutes of 1885 and the revision of 1886, and which words were clear and explicit?

We find not only a change in the wording of the Statute, not only the significant omission of the words "*not including tram or street rails,*" but also the application of the test of weight for the first time.

Why was this different principle adopted in imposing duties on steel rails, unless Parliament intended to exempt all steel rail to be used in railway tracks if above the minimum weight of 25 lbs. 40

"If we find that the particular language employed by the Legislature in the earlier Statutes on a particular subject has been departed from in a subsequent Statute relating to the same subject, it is generally a fair

presumption that the alteration in the language used in the subsequent Statute was intentional."

*Hardcastle* on Statute Law, p. 156.

And see the judgment of Brett, J., in *Dickenson v. Fletcher*, L.R. 9, C. P. 8, at page 7 and 8.

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The words in Item 88 "rails for railways and tramways of any form," show that the style or design has no bearing upon the question of their liability to Customs duty, and supports the Appellant's contention that the provision in Item 173, that steel rails weighing not less than 25 lbs. per lineal yard shall be admitted free of duty, *made the weight of the rails the only test to be applied in determining the liability of steel rails imported for use in railway tracks to the payment of duty.*

The test then adopted by Parliament being the weight of the rail, upon what principle can it be maintained that steel rails exceeding 25 lbs. per yard in weight, imported for use in the ordinary steam railway tracks, should be exempt from duty, and that the same rails, if imported for use in electric railways, should be subject to duty?

The principle of construction that change of language imports change of intention must be given effect to, and Parliament must be supposed to have intended the change which the words import.

It is a significant fact that in the Session of 1894 Parliament by its Act 57-58 Vict., Cap. 33, repealed the two items now under consideration and substituted two new sections, Items numbers 250 and 703, which read as follows:

Item 250—

"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.*"

And Item 703 reads as follows:

"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 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 either of goods or passengers, nor shall this Item extend to rails for use in the tracks of street railways or tramways."

These new clauses are amplifications of the items 86 and 173 in the tariff of 1887.

The word "railways" in the taxing clause 250, used in the same connection as in the corresponding clause (Item 86) of the tariff of 1887, is declared to include "street railways" and in the exempting clause corresponding to Item 173 of the tariff of 1887, we have a declaration that the expression "railway tracks" is not meant to extend to tracks of street railways or tramways.

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Parliament has here construed its own legislation, firstly, by declaring "railways" to include "street railways," which the Appellant always contended for; and secondly, by expressly excepting rails for street railways from the benefit of the exempting clause, again supporting the Appellant's contention that without these express words rails for use in street railways were "for use in railway tracks."

The present manifest intention of Parliament to tax steel rails imported for street railway purposes cannot be urged against the Appellant, for it cannot relate back to the Session of 1887.

In a few words the course of legislation with regard to steel rails may be summed up as follows:—

In 1879 it was declared that "steel railway bars or rails" were to be subject to 10 per cent. *ad valorem* duty after the 1st of January 1881.

By the Acts of 1880, 1881, and 1882 the time limit was extended to the close of the Session of Parliament of 1883.

In 1883 "steel railway bars or rails" were placed on the free list.

In 1885 for the first time duty was imposed upon "tram or street rails" by the declaration that they were not to be included in the expression "steel railway bars or rails," which were declared free.

In 1887 the provision of 1885 was repealed and street rails are not mentioned at all; "steel railway bars for railways and tramways" are subject to duty, but "steel rails weighing not less than 25 lbs. for use in railway tracks" are exempt.

In 1894 the provisions of 1887 are repealed; the term "railways" in the taxing clause is declared to include "street railways" and tramways; and the exempting clause is declared not to extend to rails for use in street railways or tramways.

Why should not the words in Item 173 of the tariff of 1887 "for use in railway tracks," be given their full and legitimate meaning? There is no context to narrow it. The evidence shows that the tracks of the Toronto Railway are beyond question "railway tracks." See the evidence of Messrs. Jennings, Keefer, Cuninghame, Sanford Fleming, and Wragge, and the Crown made no attempt to give evidence to the contrary.

The expression, as used here, includes all kinds of "railway tracks," whether of steam railways, street railways, electric railways, or tramways. Steel rails of over 25 lbs. to the lineal yard to be used in railway tracks, of whatever kind, were, it is submitted, intended to be admitted free of duty.

The words "for use in railway tracks," are introduced in not only an inclusive, but an exclusive sense. They mean that steel rails are to be admitted free of duty so long as imported for use in railway tracks, but further that such rails if imported for any other purpose are liable to duty.

That steel rails are used for many other purposes is shown by the evidence of Mr. Jennings.

The expression "railway tracks" in Item 173 is used in a broader sense than the word "railways" in Item 88. RECORD.

In Item 88, the word "railways" has evidently a narrower meaning, because the word "tramways" follows it, and the expression "railways" would not, perhaps, as there used, be deemed to include tramways. No. 10.  
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10 But even as so used, it is large enough to cover the Appellant Company, and the Appellant admits that its rails would be dutiable as "steel rails for railways," under Item 88. The expression "railway tracks," in Item 173 should not receive a narrower construction, and be limited, as the Respondent seeks to limit it, to railway tracks of steam railways.

*(b) Sufficient consideration was not given to the general and known fiscal policy of the Government in passing the Customs Duties Acts, and the reasons for making the weight of steel rails the test of their liability to duty, and for imposing a tax upon those below a certain weight and exempting those above such weight.*

The general fiscal policy of the Government which led to the passing of the Customs Act of 1879 (42 Vic. cap. 15) is a matter of public knowledge, of which the Courts are bound to take cognizance.

20 The principle of protection to the industries of the country has been preserved through the amendments to the Customs Act since its introduction in 1879, and the recognition of this principle makes clear the intention of Parliament in the items of the Act of 1887 now under consideration.

The evidence of Mr. Gartshore, a dealer in railway supplies, shows that light steel rails, weighing 12 and 18 lbs. to the lineal yard, were being manufactured in Canada but that steel rails of more than 25 lbs. to the lineal yard had never been manufactured in this country.

There was, therefore, a manufacturing industry in the light rails to be protected; there was no manufacturing at all in the heavier rails.

30 The Appellant Company's rails, weighing over 69 lbs. to the lineal yard, could not be obtained in this country; their importation could not interfere with any home manufacturer.

The reason for the adoption of the weight test in levying duty on steel rails is apparent; the reason is intelligible and in harmony with the spirit of the Customs Acts.

40 *Dwarris* at p. 556 says:—"In applying rules for interpreting Statutes "to questions on the effect of an enactment, we can never, says *Vatell*, "safely lose sight of its object. That must be the truest exposition of a "law which best harmonises with its design, its objects, and its general "structure."

No plausible reason can be suggested on the other hand, why rails of over 25 lbs., for use in steam railways, should be free, and rails of the same weight, for use in an electric railway, should be dutiable.

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(c) *Consideration was erroneously or unduly given to the policy of the Government in granting bonuses to steam railways, and an intention imputed to Parliament by the learned Judge in favour of steam railways on that account, which should have no weight in determining the meaning of the words "railway tracks" in an item in an Act respecting Customs.*

The Government has never granted bonuses to railways indiscriminately, nor is the policy of granting such bonuses peculiar to the Dominion Government, but is equally the policy of the Legislatures of several of the Provinces.

The grant to each railway applying for Government assistance in this way 10 depends upon the merits of each application, in determining which a number of circumstances, such as, (amongst others,) the character of the country through which the proposed road is to run, the connections it will make with other roads, the supposed benefit to the community, and the time limited for its construction are taken into consideration.

The favour of the Dominion Government towards the development of railway construction is certainly evidenced by the Bonusing Acts referred to by the learned Judge, as is the favour of the various Provincial Legislatures by like enactments, but those Acts can only speak for themselves, and cannot be 20 invoked as a declaration in favour of all that appertains to steam railways, so as to limit the meaning of general words in the Custom tariff, with which the bonusing of railways has nothing whatever to do. But (arguing *ad absurdum*), if the bonusing policy of the Government is to be allowed to determine the meaning of the Customs tariff, then the exemption from duty should depend upon whether the road for which the rails are being imported has been bonused by the Government.

It is true, as stated by the learned Judge, that he finds no bonus to have been granted by the Dominion Government to a street railway; but no bonus was granted to the Niagara Electric Railway, nor to the Hamilton, Grimsby and Beamsville Railway, the Emery Lumber Company, nor to the other 30 electric mining and lumber companies whose rails have been admitted free by the Government.

See evidence of C. J. Myles.

J. J. Gartshore.

T. J. Watters.

Admissions of Defendants' Counsel.

It is against all principles on which statutes are construed that the meaning of the word "railways" in the Railway Bonusing Acts should be imported into the Customs Duties Acts to ascertain the meaning in the latter Acts of the expression "railway tracks." 40

The Statutes which grant bonuses to different railway enterprises and the Customs Acts are not *in pari materia*; nor does the expression "railway tracks" occur in any of the former class of Statutes.



They cannot be "taken together as forming one system, and as interpreting and enforcing one another," according to the rule laid down in *Palmer's case*—1 Leach's Crown Law Cases, 3rd Ed. 393 (4th Ed., 355).

As was said by Hosmer, C. J., in the case of *United Society v. Eagle Bank*, 7 Conn., 457 at 469 (cited by Mr. Hardcastle in his work on Statute Law at p. 151); "Statutes are *in pari materia* which relate to the same person or thing, "or to the same class of persons or things. The word *par* must not be "confounded with the word *similis*."

10 It is begging the question, therefore, to refer to the Railway Bonus Acts for a meaning of the words "railway tracks" in the Customs Duties Act, without showing first, that the latter expression in the latter Act means no more than "railways" in the former class of Acts.

3. *The learned Judge erred in finding, upon the evidence adduced, that the word "tramways" in item 88 included street railways.*

This finding was not necessary in order to bring the rails of the Appellant Company within item 88, so as to make them subject to the duty of \$6.00 per ton, for the rails in question are taxable under the words "rails for railways" used in that item.

20 But it is the Crown's interest to have the word "tramway" construed to include the Appellant Company, as in that case it will be more difficult for the Appellant to show that the exempting item 173 applies, as the word "tramway" does not occur in it.

The word "tramway" in its primary and proper sense "signifies a wheel track laid with timbers and afterwards with iron plates, having a flange on the upper edge by which wheels of the ordinary sort were kept in the track."

Encyclopædia Britannica, 9th edition, vol. 23, page 506.

See also evidence of Jennings,  
Cunningham, and  
McLeod.

30 On the introduction of street railways, the term "tramway" was applied to them in England, where it is still the ordinary and accepted term; but the term has never been generally introduced in this country in this connection, and although sometimes applied to street railways in Canada, it is generally by persons of English education or training.

The expression might have some applicability to the tracks of street railways worked by horses, and which were generally laid with a flat or "strap" rail, on which the cars ran, and on which ordinary vehicles could also run. But the term "tramway" is entirely inapplicable to the rails used by modern electric railways such as those in question in this action.

40 Evidence of Mr. Keefer, and of  
Mr. Cunningham.

The most desirable rail for electric railway purposes is what is known as the ordinary "T" rail used by all the steam railways in this country, and

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which are used in some electric railways, as for instance in Ottawa and in Winnipeg. The rails in question are a modification of the "T" rail, having a grooved lip on the inner side of the rail, which is of no use so far as the working of the railway is concerned, but is generally insisted upon by the Municipalities for the preservation of the pavement. (See evidence of Mr. McKenzie, of Mr. Keefer, and of Mr. Jennings.)

The word "tramway" is used in Canada in a generally understood and well defined sense to mean a light railway for the transportation of the produce of mills, mines, or quarries, or timber from timber limits, or other like commodities, and not for passenger service. 10

Evidence of Waldie.  
 Sanford Fleming.  
 Wragge.  
 Gartshore.  
 Turner.

And this meaning, too, it is admitted by the Customs Department, the word "tramway" bears, although they claim also that it is applicable to a street railway.

Evidence of Mr. Watters.

This is the meaning of the word "tramway" where it occurs in Statutes 20 passed by the Dominion Parliament. The word is not often found in Dominion Legislation, tramways being of necessity works within the jurisdiction of the Provincial Legislatures; but the meaning of the word where it does occur is plainly that given above, and is not, and does not include, a street railway.

*See* Con. Stats. of Canada (1859), Cap. 64, S. 1. "An Act respecting Mining Companies."

This Statute has been repealed by R. S. C. (1886), Schedule A., page 2248, but the enactment may be looked to as explanatory of the meaning in which the word "tramway" is there used. 30

And *see* 56 Vic. Cap. 27, S. 1. "An Act to further amend the Railway Act."

(Amending Sec. 173 of the Railway Act, 51 Vic. Cap. 29.)

The use of the word "tramway" in the Statutes of the various Provincial Legislatures can hardly be invoked as evidence of its meaning in the Customs Acts, which are passed by the Dominion Parliament. But Provincial Statutes may be looked upon as some evidence of the meaning of the word in the provinces in whose legislation the word is found.

We find in several of the provinces a distinct class of Acts known as Tramway Acts, which show the various tramway companies thereby incorporated 40 to be something essentially different from railway companies.

For example :—

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In Ontario :

An Act to incorporate the Rama Timber Transport Co., 31 Vic. (1868)  
Cap. 66, S. 4.

An Act to incorporate the Toronto Gravel Road and Concrete Co.,  
37 Vic. (1874) Cap. 90, SS. 1 and 2.

An Act to incorporate the Flos Tramway Co., 43 Vic. (1880) Cap. 73.

An Act to incorporate the Toronto, High Park and Western Tramway  
Co., 45 Vic. (1882) Cap. 66.

10 An Act to incorporate the Dawn Tramway Co., 47 Vic. (1884) Cap. 66.  
An Act to incorporate the Silverbrook Tramway Co., 47 Vic. (1884)  
Cap. 74.

An Act to incorporate the Thames Valley Tramway Co., 50 Vic. (1887)  
Cap. 82.

In Quebec :

An Act to empower the Huntingdon Mining Co. to work a certain  
tramway, &c., 34 Vic. (1870) Cap. 29.

In Manitoba :

20 An Act to incorporate the Manitoba Tramway Co., 44 Vic. (1881)  
Cap. 38.

In New Brunswick :

An Act to authorize the construction of a tramway on Lower Water  
Street in the Town of Chatham, 48 Vic. (1885) Cap. 41.

There are besides in all the Provinces powers to construct tramways  
commonly given in all Acts incorporating lumber, manufacturing, warehousing  
and mining companies.

30 These Acts are so numerous that space would not permit of detailed  
references to them. There are, for example, in the Statutes of Nova Scotia  
for the year 1894 eight mining companies incorporated, having powers to  
construct tramways granted to each by its special Act of incorporation.

Again, in the Public Acts of the different Provinces the word "tramway"  
when it occurs has almost invariably the meaning of a railway constructed in a  
different manner, and for a purpose distinct from a street railway.

For example :—

In Ontario :

An Act to amend the Street Railway Act (R. S. O. 175), 53 Vic. (1890)  
Cap. 47, S. 2, amending the Street Railway Act, R. S. O., Cap. 171.  
S. 4, S.S. 5.

40 The Consolidated Municipal Act (1892), 55 Vic. C. 42, S. 636.  
With which is contrasted the provisions as to Street Railways, S. 504,  
S.S. 14, 15 and 16.

See also the argument in :—

*McFarlane vs. Gilmour*, 5 O. R., 302 at 306.

And *obiter dicta* at p. 312.

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Factum of  
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*continued.*

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Factum of  
Appellant—  
continued.

The fact that street and electric railways in England are called tramways is no reason why in our Statutes the meaning of the word "tramway" should be extended to such railways.

The language used by the Legislature must be construed in its natural and ordinary sense. "The sense must be that which they ordinarily bear in *this country*; and the words must be construed according to the meaning "which they bore at the time when the Statute was passed."

*Hardcastle* on Statutes (2nd Ed.), p. 93.

*Two hundred chests of tea—Smith, Claimant.* 9 Wheat, 430.

The Appellant contends that the debates which took place in Parliament and in Committee when the Customs Act and these items of the tariff were under consideration, are not admissible in the construction of the items now in question.

*Hardcastle*, page 143.

*Reg. vs. Hertford College*—3 Q.B.D. 693 at p. 707.

*The Alexandria Case*—2 H. & C. 521.

*Smiles vs. Belford*—1 A.R. 436. Per Burton J. A. at 445; and Moss J. A. at 450.

But inasmuch as it was contended on behalf of the Defendant at the trial, and will perhaps be contended by the Respondent on this appeal, that such debates in Parliament and in Committee may be looked at, it may be advisable to refer shortly to these debates and discussions :

In 1879, when Mr. Tilley, the Finance Minister, introduced the Customs Tariff, on the item in the free list being taken up in Committee of Ways and Means, Mr. Cartwright (Debates 1879, Vol. 2, p. 1531) asked for an explanation as to why the limitation (1st January 1881) was made. The Finance Minister in reply said :

"There was a proposition to establish a steel manufactory in the country, and it was left in that manner, and it was left as a declaration of the policy of the Government if the manufacture was undertaken in the meantime."

In 1880 no discussion took place upon these tariff items.

In 1881 upon the "free list" coming up in Committee Mr. Anglin (Hansard, Official Reports, p. 1151) said :

"I desire to ask for an explanation why steel is made free for another year? Is there any probability that we will have steel works established, or does some railway company want to get in their rails?"

In reply to this Sir Leonard Tilley said :

It is because there is no industry of the kind established in the country. Parties are, "however contemplating the establishment of works in the Ottawa Valley. Whether they will do so or not remains to be seen, and the declaration of Parliament is that, if they establish works, a duty will be imposed on imported steel after the expiration of this term."

In 1882 and 1883 there was no discussion upon these items.

In 1884 Sir Leonard Tilley in his Budget speech (Hansard (official), RECORD. page 573) said :

“I know it has been said we have since 1879 made a good many changes every year, and I think they were wise and judicious, but we all felt at the time that it was desirable to do as little in that way as possible, unless the public interest demanded them. But in the present year, the changes are not important, and they are in this direction—they are in the direction of giving to the manufacturer articles that are now unenumerated and pay 20% at a reduced rate of duty of 10% and place them on the ‘Free List.’ This is still recognizing  
10 the principle of maintaining and encouraging the industries of Canada.  
. . . . Fish plates, steel, to be struck out of the Free List, and they will come in under iron and steel plates at the same rate of duty.”

No. 10.  
Factum of  
Appellant—  
*continued.*

In 1885, in introducing the tariff, Sir Leonard Tilley said (Hansard, 1885, (official) page 327) :

“Steel railway bars or rails not including tram or street rails. The Customs Department have for years decided that tram or street rails are subject to duty; they have ruled to that effect; but we ask for a declaration by Parliament on the point, so that no question can arise in the future.”

And Mr. Bowell, the Minister of Customs, in the Committee of Ways and  
20 Means (Hansard, 1885, page 810), when discussing the item “Steel railway bars or rails not including tram or street railway rails” said :

“It has been contended by those who have imported this particular kind of rails for the purpose of constructing street railways, that that class was included in the Free List of steel rails when imported for railway purposes proper. That has given a great deal of difficulty, although the Department has always ruled that it did not include tram or street rails.”

The items were not again referred to in Parliament, or Committee, until 1887 when Sir Charles Tupper, the Minister of Finance, in introducing the  
30 Tariff (Hansard page 402) in speaking of the general policy of the Government in protecting industries, said : “Twenty years ago iron rails were made in  
“Toronto and Hamilton, and within the next twenty years we will make all our  
“own rails.”

“I do not propose to ask this House to adopt the policy. The Government does not propose at this moment, regarding the increased railway development of the country as one of the vital essentials of progress and prosperity, to include in this arrangement what the United States has done, and done with success, and that is to apply it to steel rails. We propose that they shall come in free as they have done in the past, because we consider that they should be made an exception. I do not hesitate to say that the adoption of this policy will, in  
40 my judgment, place Canada in a position where she will be able to provide her own rails, and that at no distant period, at as reasonable a rate as any country in the world.”

And in the Committee of Ways and Means (Hansard, page 502) on discussion of the proposed item : “Iron railway bars, steel T rails weighing not  
“over 25 lbs. per lineal yard, iron or steel flat rails punched, and iron or steel  
p. 4514. S

RECORD. "railway fish plates \$9.00 per ton," Sir Charles Tupper is again quoted as follows:

No. 10.  
Factum of  
Appellant—  
continued.

"I propose to strike out everything except railway fish plates and to make the duty \$12 a ton, and I will bring in the other items in another place. All railway fish plates whether iron or steel, it is proposed shall pay that duty. Railway fish plates are manufactured in this country, and can all be manufactured in this country," etc., etc.

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," being taken up (p. 507) Sir Charles Tupper again said: 10

"I propose to substitute iron or steel railway bars and rails for railway tramways of any form, punched or not punched, not elsewhere specified, \$6.00 per ton."

Mr. Mitchell says—"Does that include street railways?"  
Sir Charles Tupper replied "Yes."

It was urged by the Respondent that this remark of the Finance Minister and subsequent question and answer, showed that it was the intention of the Government to except street railway rails from the Free List, but the Appellant contends that no such intention can be gathered from the passage. The meaning appears to be that rails for street railways are taxed if imported for purposes other than Railway tracks, which has never been disputed by the Appellant, but there is nothing in the observations which fell from Sir Charles Tupper to indicate that it was the intention of the Government to tax street railway rails imported for use in railway tracks on any different principle than other rails were taxed, or that if the weight of street railway rails exceeded 25 pounds per lineal yard they should not be admitted free." 20

In the session of 1888, Sir Charles Tupper said in his Budget speech (p. 1043):

"I have been pressed, and strongly pressed, to take another step in that direction, for the purpose of having steel rails manufactured in our country. I mentioned to the House a year ago that Canada was the only country in the world possessing 12,000 miles of railway within its borders, that did not manufacture its own steel rails, and I had the evidence presented to me that, by giving proper protection, such protection as we gave the other branches of the iron industry, we might succeed in establishing rolling mills for steel rails. But we had to take into consideration the fact of the enormous importance of the railway development of a country like Canada, and under those circumstances we have, although we considered it a subject worthy of attention, whenever it can be properly taken up,—but considering the great and vital importance of railway extension to the prosperity of this country, we felt that we must postpone, at all events for this year, making such a change as would lead to the establishment of rolling mills in this country for the manufacture of our own rails." 30 40

From all these references the main thing to be gathered as to the intention of Parliament is the desire to encourage the manufacture in this country of steel rails. Into this consideration, of course the railway development of the country entered very largely, but there is nowhere to be found any indication of an intention that Parliament should impose upon rails imported for street railway purposes, if weighing over 25 pounds to the lineal yard, a duty from which rails for steam railways should be exempt.

RECORD.

No. 10.  
Factum of  
Appellant—  
*continued.*

4. *The judgment of the learned Judge that the railways referred to in Item 173 of the Act of 1887 "were railways of the same class as those which had hitherto been the objects of the care and bounty of Parliament, and that street railways were not of that class," and that consequently the Appellant Company is not a "railway" within the meaning of that item, is wrong in law and is against evidence and the weight of evidence.*

This conclusion of the learned Judge is not supported by the evidence for there was none upon the point. On the other hand the evidence of the expert witnesses called for the Appellant proved beyond question, as has been pointed out, that the words "railway tracks" are applicable to, and a correct description of the tracks of the Appellant Company.

Evidence of Jennings,  
Keefer,  
Cunningham,  
Sanford Fleming, and  
Wragge.

*Primâ facie* the expression "railways" must include all kinds of railways unless it is clear from the language of the Statute or its import, that it was intended to exclude any particular class of railway.

See *Doughty vs. Fairbank*—10 Q.B.D. 358.

And see *Hestonville Passenger R.R. Co. vs. City of Philadelphia*—89 Penn, St. R. at 219.

And in Canada we have the decision of the Supreme Court of New Brunswick:—

*Ex parte Zebley*—30 N.B.R. p. 130,

where a railway company very similar to the Appellant Company was held to be a "railway" within the meaning of an Act of that Province, 33 Vic. c. 46, exempting railways from Municipal taxation.

The Appellant submits that the learned Judge should have followed that decision.

See also *Citizens Passenger Railway Co. vs. Pittsburg*, 104 Pa. St. R. 533 at p. 537, 539 and 541, and

*The International Coal Co. (Lim.) vs. The Municipality of the County of Cape Breton*, 22 S. C. R. 305.

C. ROBINSON.  
B. B. OSLER.

"C."

In the Supreme Court of Canada.

Between

The Toronto Railway Company - - Appellants (Plaintiffs),  
 and  
 Her Majesty the Queen - - Respondent (Defendant).

Respondent's Factum.

The items of the Customs Tariff Act (50 and 51 Vic., 1887, c. 39) on this Appeal are:—

The Taxing Item.—Item 88, p. 138.

10

"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."

The Exemption.—Item 173, p. 144.

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

The General Item.—Item 89, p. 138.

If neither of the foregoing cover the case, it is contended that the rails fall as enumerated under.

"Manufactures, articles or wares, not specially enumerated or provided for, composed wholly or in part of iron or steel, and whether partly or wholly 20 manufactured, thirty per cent. *ad valorem*."

Appellants' Admission.

It is clear, and was unequivocally admitted by counsel for the Appellants at the trial of this action that the rails in question in this action came within the taxing item number 88, quoted above. Starting then with that admission, the Plaintiffs cannot succeed in this action without showing that they come clearly within the exempting item of the tariff (No. 173, above). This exception the Appellants point to as entitling them to the rebate of duty. The Appellants are, however, forced into this position, that the doubt arises under item 173, so that while the rails in question fall to be taxed under item 88, it is an arguable 30 point, whether item 173 takes them out of the admitted liability to duty. The Respondent contends that, granting a clearly imposed tax, the onus is upon the Appellants to make out the exception unquestionably and unmistakably. The rails are "for tramways," both in their construction and in their use.

If the exception is doubtful, the Tax remains.

The following rule is laid down by Lord Young in *Hogg v. Parochial Board* [1880], 7 Rottie (Scotch), p. 986: "The duty of the Courts is to reject "any construction of a modern statute, which implied the extension of a



“ class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation.”

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This principle has been recognized in this Court. *See* Dame Mary Wylie *v.* City of Montreal, 12 S. C. R. 384. “ I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language, that taxation is the rule and exemption the exception, and therefore to be strictly construed.”—*Per* Ritchie, C. J., at p. 386.

No. 11,  
Respondent's  
Factum—  
*continued.*

And in the latest text writer, Hardcastle on Statutes, 2nd ed. (1892), at p. 131, where he refers to *Mersey Docks v. Lucas*, [1883] L. R. 8 App. 10 Cas. 902.

The Supreme Court of the United States in *Bailey v. Maguire*, 22 Wall. 215, said (p. 226): “ It is manifest, that legislation which, it is claimed, relieves any species of property from its due proportion of the general burdens of government, should be so clear that there can be neither reasonable doubt nor controversy about its terms \* \* . If, however, on any fair construction of the legislation, there is a reasonable doubt whether the contract ” (*i.e.*, the statutory contract of exemption), “ is made out, this doubt must be solved in favour of the State. In other words, the language used must be of such a character as, fairly interpreted, leaves no 20 “ room for controversy.”

*See* Cooley on Taxation, 2nd ed., p. 70 : “ It is also a very just rule that when an exemption is found to exist, it shall not be enlarged by construction. On the contrary it ought to receive a strict construction.”

Page 204 : “ As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms : and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or “ uncertain.”

Page 205 : “ It is also a very just rule that, when an exemption is found 30 “ to exist, it shall not be enlarged by construction. On the contrary it ought “ to receive a strict construction.”

Page 207 : “ The most striking illustration of the rule of strict construction of exemptions is seen in the case of special assessments for local improvements, such as paving and repair of streets, etc. It is almost “ universally held that a general exemption from taxation will not extend to “ such assessments.”

The decisions which hold that Acts imposing a tax require a strict construction do not apply here where it is admitted that the duty is clearly imposed.

40 This is most strikingly enforced by the terms of the Canadian Customs Acts. In the Customs Act, 1886, R. S. C. c. 33, schedule A, item 486, it is enacted : “ All goods not enumerated in this Act as charged with any duty of customs, and not declared free of duty by this Act, shall be charged with a “ duty of 20 per cent. *ad valorem* when imported into Canada, or taken out of

RECORD. "warehouse for consumption therein." This section was in force in 1887, and is still in force.

No. 11.  
Respondent's  
Factum—  
continued.

The case of *Warrington v. Furbor*, 8 East. 242, relied on by the Appellants at the trial as being in point, was not a revenue case and Defendant was endeavouring to escape liability on a guarantee because it was not stamped.

It is not in accord with the later decisions in Revenue Cases. See *Attorney-General v. Gilpin*, L. R. 6 Ex. 193, where the words of exceptions "draft or order" were limited to those drawn by an officer of the society for its purposes, or by a member upon the society, payable to himself only, and were held not to include those drawn by a member of the society at a distance upon it in accordance with their practice payable to bearer, nor to the society's drafts to bearer, sent out in payment of interest, as these latter were not clearly exempt. 10

#### Construction of Revenue Acts.

It is to be borne in mind that this Act is a Revenue Act and must be dealt with as one, the object of which, is to raise a revenue and, to use the words of Mr. Justice Willes in *Lord Colchester v. Kewney*, L. R. 2 Ex., at p. 256: "The purpose and provisions of the Act are all in favour of general taxation and not in favour of particular exceptions." By a provision in the Customs Act, R. S. C., (1886), c. 32, sec. 2, sub-sec. M., the expressions and provisions of this Act, "or of any such law as aforesaid" (this refers to any other laws relating to the Customs, by the first line of said section 2), "shall receive such fair and liberal construction and interpretation as will best insure the protection of the revenue and the attainment of the purpose for which this Act or such law was made according to its true intent, meaning and spirit." 20

See also the provision just quoted from the Customs Act, R. S. C., c. 33, schedule A, item 486.

The framing of that Act leads to the conclusion that the burden of proof should in this action lie upon the claimants. See sections 16 and 233. 30

These citations show that if there is a doubt as to whether the exemption covers the rails in question, the construction and interpretation of the Statute shall lean towards a protection of the revenue.

#### Further canon of construction as to Items.

In dealing with the proper canon of construction to be applied to these two items, it must not be forgotten, that where a provision for a special object occurs, the special object or article is taken out of the category of any general provision or class that might ordinarily include it.

It thus follows, that if an article is provided for by name in a duty law, no general provision for duties on a class to which it belongs will embrace it or even take it out of another and previous enactment. This conclusion will apply just as strongly where the general provision is for an exemption. See *Elmes on Customs Laws* (1887) sec. 869, p. 385. See also *Attorney-* 40

General *v. Lamplough*, L. R. 3 Ex. D. 214; *Homer v. The Collector*, 1 Wall. 486 Where it was held that duty on Almonds *eo nomine* is not effected by subsequent legislation as to dried fruits, although in proper language they come within that description. See also *Reiche v. Smith*, 13 Wall. 162; *Morris v. Arthur*, 96 U. S. 144.

It follows from this that where "steel rails for tramways" are specially provided for and taxed, the subsequent and general provision allowing rails for use in railway tracks to come in free, will not embrace the rails for tramways, as a distinction is pointedly made in the statute, and rails for  
10 tramways are specially provided for.

#### As to Construction of Words themselves.

It is said that the word "tramways" in the taxing item does not include street railways, but that they fall under the category of railways, and that where rails for use in railway tracks, is the phrase used that expression takes in rails for tramways. Now the two expressions are used twice in the Customs Act; once in the item under consideration; and once in item 65, where "railway vehicles" and "tramway vehicles" are referred to as separate classes.

It is fair, therefore, to assume that there is some difference. Does then  
20 the contrast point to a difference, and is that difference one that can be readily appreciated. In construing the words, a reasonable construction is to be given to them and a practical meaning elicited if possible. On this point, reference may be made to the case of *South-Eastern Railway Co. v. Railway Commissioners*, L. R. 6 Q. B. D. 586, where on page 601, Lord Justice Brett says: "But the terms 'railway' and 'railway station' are not mere legal terms; they are "descriptions in ordinary phraseology of well understood things of an ordinary "kind. The terms as used in the statute are therefore to be construed as such "descriptions. If there is an omission of some reasonable facility within the "Act in the working of the railway, which omission can be reasonably supplied  
30 "without altering the railway, using the term 'railway' as a description of that "which is ordinarily understood by people of ordinary sense to be a railway, "there is nothing in the Act which says that it would be an answer on the part "of the company to an order to supply the omission, that it could not be "supplied without some structural alteration or addition."

And in the case of the *Governors of the Charterhouse School v. Lamarque*, L.R. 25 Q. B. D. 121, Pollock, B., says at p. 127: "We can only deal with "this part of the case in the way in which all questions of degree in which the "Court is challenged to point out the dividing line ought to be dealt with, "namely, by saying we must look at the matters substantially and ask ourselves  
40 "whether taken as a whole, the modern School of Charterhouse is a charity "school."

It is not necessary for the Crown to shew the exact line of difference between railways and tramways: it is sufficient if there be a substantial difference, and if the specification of "tramways" may reasonably and properly include street railways and is the word which has been used in contrast to

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Factum—  
continued.

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*continued.*

what is known in ordinary language as a railway. It is evident from the case already cited [*S.-E. R. W. Co. v. Railway Commissioners*, L. R. 6 Q. B. D. 586] that the words "railway" and "tramway" are not mere legal terms; they are descriptions in ordinary phraseology of things that are known to exist in this country. See further *Mayor of Southport v. Morris*, L. R., [1893] 1 Q. B. 359, where, in discussing the question of whether a small launch used to carry passengers around an artificial lake is included in the term "ship,"—that expression being defined as the description of "every vessel used in navigation not propelled by oars."—Lord Coleridge, at page 361, says: "Navigation is a term which in common parlance would never be used in connection with a sheet of water half a mile long. The Attorney-General has asked where we are to draw the line. The answer is: It is not necessary to draw it at any particular point. It is enough for us to say that the present case is on the right side of any reasonable line that should be drawn." 10

In *Woodward v. L. & N.-W. R. W. Co.*, L. R. 3 Ex. D. 121, Mr. Justice Hawkins says the line of definition is shifted according to circumstances, "but the question we have to answer is not where to draw the line, but whether this is within the line. I think, for all practical purposes wherever the line may be and leaving the line in a state of doubt (which is a doubt that belongs to every line attempted to be drawn either in nature or in the social exigencies of life), that this is within the line." 20

The Act in question being a Customs Act it is fair to contend that the words in it must have such a meaning as would be, in the language of Brett, L. J., in *Attorney-General v. Lamplough*, 3 Ex. D. 216, at p. 229, "understood by all ordinary commercial people dealing in such things, both vendors and purchasers."

The same Judge in the *Dunelm*, L. R. 9 P. D. 171, expresses himself thus: "My view of an Act of Parliament \* \* which is made applicable to a large trade or business is, that it should be construed, not according to the strictest and nicest interpretation of language, but according to the reasonable and business interpretation of it, with regard to the trade and business with which it is dealing." 30

See also *Clerical, etc., Assurance Co. v. Carter*, L. R. 22 Q. B. D., page 448, where it is said, that in dealing with the provisions of the Income Tax Acts, the words should be looked at in "their ordinary meaning of the English language as applied to such a subject matter."

As an illustration of this see the case of *Hickman v. Birch*, L. R. 24 Q. B. D. 172. In that case the Customs and Inland Revenue Act (Eng.), 1888, imposed a duty on every hackney carriage and defined hackney carriage as "any carriage standing or plying for hire." 40

Held, that an omnibus running along a fixed route was taxable under that. It was argued that a person does not hire an omnibus but only pays a fixed sum for being allowed to ride in it.

Mathew, J., states, p. 173, that "if the Legislature had intended to tax such a well-known thing as an omnibus on a different scale, it is reasonable that they would have mentioned it by name. It is not expressly mentioned, but does, come within the definition of a hackney carriage."

## Result of Appellants' Construction.

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Factum—  
continued.

It is further to be borne in mind that where two constructions are open, and one will lead to a reasonable and the other to an unreasonable result, the former is preferred. In the case in hand the result of a construction which would allow rails for tramways to come in free would be, as will hereafter appear, that although no tramway company had the right until 1891 to lay a steel railway track, but were limited to iron railway tracks, steel tramway rails would have come in free since 1879, while the iron would be dutiable.

Reference is made to the language of Lord Justice Bowen in *Wadsworth Local Board v. United Telephone Co.*, L. R. 13 Q. B. D. p. 920: "If a word in its popular sense and read in the ordinary way is capable of two constructions, it is wise to adopt such a construction that is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act, and not to give unnecessary powers." See also *ex parte*, *Walton*, L. R. 17 C. D. 746: "A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention."

*Donne v. Martyr*, 8 B. & C. 62, where Bayley, J., at p. 69, considers there is great weight in the argument drawn from the different language used in the two clauses of the Act, the one which imposes the rate, and the other which authorizes the appointment of a collector.

## Rails for Tramways are not elsewhere specified.

Applying the foregoing principles it is worthy of notice that rails for tramways are not "elsewhere specified," consequently if the rails in question are rails for tramways the free entry item 173 is not applicable. It is a general rule in the construction of Revenue Statutes that special provision for duties on a particular article are not repealed or affected by the general words of a subsequent statute, although the language is sufficiently broad to cover that article, and this is even clearer where it is sought to affect the special provisions for duties on a particular article by the general words of a subsequent clause. This is *a fortiori*, where the attempt is made to read a general and doubtful expression as if it were the specification elsewhere of the item taxed in exact language in a previous clause.

See *Elmes on Custom Laws*, p. 27, sec. 62, and the cases there cited. The onus is, therefore, entirely on the Plaintiffs to bring themselves within the words "for use in railway tracks." Unless these words are taken to mean any two rails upon which any carriage may run, which distinction would include even what the Plaintiffs admit to be a tramway, no reasonable construction can be given to them except in contradistinction to "rails for use in tramways."

## Abstract Classification unreasonable.

What possible reason can be suggested for the use by the Legislature of a word which has an ordinary business, commercial and popular meaning, in a p. 4514.

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 Factum—  
*continued.*

sense which is entirely foreign to the subject matter in hand, and which exhibits not a dealing with a business or commercial subject but a mere academic distinction of the compound word "railway." The contrasted words in the taxing clause "railway and tramway" evinces an intention to divide into two classes the carrying and passenger companies then in operation in the country. A fair test of the legislative meanings of the words is to be found in the expressions used in the Statutes which have been passed from time to time by the Legislatures of the old Province of Canada, by the different Provinces since Confederation, and by the Parliament of Canada. In that way a course of legislation may be displayed which will show what was in the mind of the Legislature of Canada in dealing with this very subject. So far from a tramway being a word that is not known in Canada or known in the Provinces, it will be found that from 1865 down to the present time the incorporation of street railway companies and tramway companies has gone on contemporaneously, and in the incorporating Statutes the powers of a tramway company and the powers of a street railway company are identical, and the street railway company and the tramway company are, in their powers, construction and operation the same, and so far as definitions or terms are used in the various Acts the terms are convertible. As a matter of fact the companies so incorporated under the two descriptions have been built, and are operated precisely in the same way. In this legislation will be found a clear recognition of the fact that the word "tramway" covers not only what the Plaintiffs admit it covers, namely, light railways for mills, mines, etc., but also street railway companies and road companies.

#### Impossibility of construing "Railway" as including "Street Railway."

It is, however, argued for the Appellants that in the taxing item the word "railway" and not "tramway" includes "street railway" and that consequently the same word "railway" in the free list exempts their tracks.

There is in the first place no instance in Dominion Legislation of the word "railway" having been applied to a street railway or tramway. 30

The following Statutes show this:

Railway Amendment Act 1892, 55-6 Vic. ch. 27 (Dom.) sec. 1:

The word "railway" is defined as including a railway bridge, but does not mention tramway.

Criminal Code, 1892, sec. 203:

A copy of the section against gambling must be posted up in every *railway* car.

Criminal Code, 1892, sec. 330:

Everyone is guilty of a punishable offence who steals any railway, *tramway* or steamboat ticket. 40

*Note.*—The word "tramway" did not appear in the Bill as introduced in 1891. See sec. 328 of Bill, but did appear in the Bill as introduced in 1892. See sec. 330 of Bill.

Criminal Code, 1892, sec. 423, sub-sec. C. (m) :

Everyone is guilty, etc., who forges any carriage, *tramway* or railway ticket.

*Note.*—The word “tramway” does not appear in the Bill as introduced in 1891. See sec. 421, sub-sec. C. (m) but appears in 1892 Bill. See sec. 423, sub-sec. C. (m). It is not in the English statute. See *Regina v. Gooden*, 11 Cox C. C. 672.

Criminal Code, 1892, sec. 362 :

Everyone is guilty of an indictable offence, etc., who \* \* obtains passage \* \* on “any carriage, *tramway* or railway by false ticket.”

*Note.*—The word “tramway” does not appear in the Bill of 1892. See sec. 362. This provision is not in English Act. See *Roscoe Criminal Evidence*, 11th ed., 482; *Regina v. Boulton*, Den. C. C. R. 508.

Dominion Railway Act of 1888, sec. 90, sub-sec. G. :

By which power is given to cross any “railway, *tramway*, river,” etc. This is new. See in 1886, R. S. C. ch. 109, sec. 6, sub-sec. 4. This is not found in the Nova Scotia General Railway Acts.

This Act is extremely important, as it is a recognition by the Dominion House of Commons in 1888 of the fact that there is a difference between a railway and a tramway.

Customs Act under consideration, 50-51 Vic. ch. 39, item 65, page 137 :

The word “tramway” is contrasted with “railway” as to vehicles.

The following legislation in England shows the distinction between railways and tramways :

Railway Companies Security Act, 1886, sec. 2.

Regulations and Railways Act, 1868, sec. 2.

Regulations and Railways Act, 1868, sec. 71.

Regulations of Forces Act, 1871, sec. 16.

But if the word “railway” in the taxing item is construed as including “street railway” it can only be because in fact a street railway is a railway. To adopt that view would lead to consequences so extraordinary as to fairly warrant invoking the rule in *ex parte Walton*, L. R. 17 C. D. 746, that a construction which would result in an absurdity is to be avoided.

Examples of impossibility of construing Railway as including Tramway.

1. Ontario Railway Act, R. S. O. 1887, ch. 170, sec. 76 :

By this \$10 per mile towards the railway inspection fund is to be paid. This does not apply to street railways.

2. Ontario Railway Act, R. S. O., ch. 170, sec. 30, sub-secs. 5 and 6 :

By this section people are excluded from the railway right of way. In street railways they are invited and entitled to travel on it.

RECORD.

No. 11.  
Respondent's  
Factum—  
continued.

3. Ontario Street Railway Act, 1887, R. S. O., ch. 171, sec. 23 :

By this section power is given to private individuals to operate street railways. See and compare Dominion Railway Act, 1888, ch. 29, secs. 278, 279, and 280, under which a railway is acquired by a private individual, a notice is to be given to the Minister of Railways and an Act of incorporation for a company got at the next session.

4. Dominion Railway Act, 1888, ch. 29, sec. 242 :

Requires express companies to be given equal facilities on railways. This cannot apply to street railways.

5. Dominion Railway Act, 1888, ch. 29, sec. 306 :

Makes any railway crossing the G. T. R. and C. P. R. and other railways a railway for the general advantage of Canada. The Appellant Company crosses both these roads. Is the Appellant Company a railway within this clause? 10

6. 56 Vic. ch. 3, 1889 (Quebec) :

Contains important provisions as to subsidized railways. See sec. 5, and see also 50 & 51 Vic. ch. 24 (Dom.), sec. 3, and the Acts referred to in the judgment of Mr. Justice Burbidge at p. 119, for similar provisions. *No subsidies have ever been granted to street railways.*

7. By the Street Railway Act of Ontario, R. S. O. (1887), ch. 171, sec. 18, 20 power is given to the municipality to assume the ownership of the road on certain terms. This power is also found in the Plaintiff's charter, 55 Vic. (Ont.) ch. 99, sec. 4, which is only for thirty years, while no municipality has a right to acquire *in invitum* a railway company.

8. A street railway company is a municipal user of a highway and railroad is a general servitude: Booth on Street Railways, sec. 75; Wood on Railways, pp. 744, 748, 791, 792; Detroit City Railway Co. v. Mills, 85 Mich. 634; 46 Am. and Eng. Railroad Cas. 76.

9. Instead of bonusing street railways, they are charged mileage. See The Toronto Railway Company Act, 55 Vic. (Ont.) ch. 99, p. 902, where \$800 30 per mile and a percentage on the profits is to be paid. See also Hamilton Street Railway Act, 56 Vic. (Ont.) ch. 90, p. 419.

Stuyvesant v. Pearsall, 15 Barb. N. Y. 244. Per Roosevelt, J., p. 246: "The exclusive privilege of laying a rail track and running cars, and receiving pecuniary emolument therefrom, like the franchise of a bridge or ferry or other incorporeal hereditament is as much the subject of property as the park, or the city hall, or the moneyed contents of the city treasury."

10. Street railway companies are exempt from taxation on their rails, while railway companies are not.

Toronto Street Railway v. Fleming, 37 U. C. R. 116. Per Burton, J., 40 p. 123: "The rails and sleepers by being affixed to the reality become part of that reality, but this cannot have the effect of making that reality taxable which the law has declared to be exempt" (as being a public road). 2



Per Patterson, J., p. 127: "The property of these Defendants is only land  
 " as being part of a public street." Page 128: "Then if the soil of the street  
 " is exempt, I find nothing in the Act to say that that portion of it is not  
 " exempt which is occupied by the Plaintiff Railway while still being a part of  
 " the public road."

RECORD.

No. 11.  
 Respondent's  
 Factum—  
 continued.

Street railway companies may run on streets without compensation to  
 adjoining owners and are subject to municipal regulations: G. R. and J. R. R.  
 Co. v. Heisel, 38 Mich. 62; 47 Id. 393. Per Mr. Justice Cooley: "A street  
 " railway for local purposes, so far from constituting a new burden, is supposed  
 10 " to be permitted because it constitutes a relief to the street; it is in  
 " furtherance of the purpose for which the street is established and relieves the  
 " pressure instead of constituting an embarrasment. But we cannot say the  
 " same in the case of an ordinary railroad. \* \* . In such a case it cannot  
 " be questioned, that the laying of a railway track in the highway without first  
 " legally appropriating the land for the purpose and without making compensation,  
 " is a legal wrong to the adjacent owner; the track as to him is wrongfully laid."

12. Street railway companies may be wound up under the Ontario  
 Winding-up Act, R. S. O. (1887), ch. 183, sec. 2. Ordinary railways cannot,  
 even under the Dominion Winding-up Act. See 52 Vic. (Dom.) ch. 32, sec. 3,  
 20 sub-sec. 2.

"Tramway" does mean and include "Street Railway."

No such difficulties present themselves in adopting the reading contended  
 for on behalf of the Respondent, namely, that "tramway" and not "railway"  
 (in either item) includes street railway.

The following list of Statutes shows the course of legislation referred to  
 and they may be looked at as showing the use of the word "tramway" and that  
 it had been for many years used as a convertible term with the word "street  
 railway." An examination of these Acts will demonstrate that the powers,  
 construction and operation of street railways and tramways are identical and  
 30 that the use of either form of words describes a corporation of but one sort and  
 that one clearly distinguished from the ordinary railway. In the Statutes  
 quoted the powers of operation outside the city, town, or village streets and  
 along country roads are given indiscriminately to tramway companies and  
 street railway companies and are subject to the same provisions and regulations.  
 It will be found from a reading of the following Statutes that the word  
 "tramway" has been in use in the Dominion and in the legislation of Ontario,  
 Quebec, Manitoba, British Columbia and Nova Scotia, before and since 1887,  
 to describe a street railway and its extensions:—

Windsor and Sandwich Street Railway Company, 1865, 29 Vic. ch. 84  
 40 (Canada):  
 (See secs. 4, 5, 14, and 15.)

Orangeville Tramway Co., 1866, 29 & 30 Vic. ch. 105 (Canada).

RECORD. Ottawa City Passenger Railway Co., 1866, 29 & 30 Vic. ch. 10  
(Canada).

No. 11.  
Respondent's  
Factum—  
*continued.*

*Note.*—This Company has power to operate street railways in the city of Ottawa and in the adjoining municipalities, and has power to make arrangements with railway companies and to interchange cars contemplating a joint user with another company.

*See* 31 Vic. ch. 45, 1868 (Ont.).

By 55-6 Vic. ch. 53 (Canada), 1892, it has been declared a railway for the general advantage of Canada. *See* particularly section 6, where the distinction is clearly made between "street railway" and "railway." 10

Peoples Street Railway Co., 1860, 30 Vic. ch. 35 (N. B.):  
(*See* provisions in secs. 20 and 27).

Municipal Amendment Act, 1869, 33 Vic. ch. 26, sec. 12 (Ont.):  
Power given to pass by-laws to construct "tram and other railways."

Sandwich and Windsor Passenger Railway Co., 1871-2, 35 Vic. ch. 64 (Ont.):  
(*See* sec. 4, latter part, and 13).

Toronto, High Park and Mimico Tramway Co., 1874, 38 Vic. ch. 60 (Ont.):  
(*See* sec. 7, last few lines, and Street Railway provisions in secs. 14 and 20 18.)

St. Catharines Street Railway Co., 1874, 38 Vic. ch. 63 (Ont.):  
(This Street Railway Company was incorporated in same session as the Toronto, High Park and Mimico Tramway Co. (*ante*), and has larger powers. *See* sec. 17. This company has power to run through the country, and can carry freight. *See* secs. 7 and 16. It had the right to run to Port Dalhousie, Merriton, and Thorold.)

Hamilton and Dundas Street Railway Co., 1875-6, 39 Vic. ch. 87 (Ont.):  
This Company has power to run through the country, and can carry freight, passengers, etc. *See* sec 7. 30

The Guelph Street Railway Co., 1877, 40 Vic. ch. 83 (Ont.):  
(Power to operate in adjoining municipalities, and to carry freight, and with extended powers. *See* sec. 18.)

Metropolitan Street Railway Co., 1877, 40 Vic. ch. 84 (Ont.):  
This Company had the right to operate in adjoining municipalities, and to carry freight, and was afterwards given the right to run long distances in the country towards Lake Simcoe. *See* 56 Vic. ch. 94 (Ont.), and these powers are only to be given outside of Toronto in which it is to be strictly a Street Railway Company. The work referred to in the preamble of the Act as a Street Railway is mentioned as a tramway in the schedule thereto. 40

Assessment Act, 1880, 43 Vic. ch. 27 (Ont.), sec. 1, sub-sec. 2 :  
Assesses on income company's investing in whole in "railway and tramroads."

RECORD.  
—  
No. 11.  
Respondent's  
Factum—  
*continued.*

Floss Tramway Co., 1880, 43 Vic. ch. 73 (Ont.) :  
(See provisions as in Street Railway Acts, sec. 2.)

Hamilton and Dundas Street Railway Co., 1881, 44 Vic. ch. 65 (Ont.) :  
(See powers in sec. 5.) :

Toronto Gravel Road Co., 1881, 44 Vic. ch. 57 (Ont.) :  
This undertaking is recognised as a street railway for the carriage of  
10 passengers and parcels and called a tramway. See sec. 3 (middle).

Medonte Tramway Co., 1882, 45 Vic. ch. 55 (Ont.) :  
(See provisions as in Street Railway Acts in sec. 2.)

Toronto, High Park and Western Tramway Co., 1882, 45 Vic. ch. 66  
(Ont.) :  
This incorporation is practically that of a street railway company in the  
city, etc. See secs. 4, 51-6.

Hamilton and Dundas Street Railway Co., 1884, 47 Vic. ch. 68 :  
(In this Act the present undertaking incorporated by 1875-6, 39 Vic.  
ch. 87 (Ont.), is spoken of as a *tramway or street railway* in secs. 1, 4, 15, 16,  
20 18 and 23, and power is given to extend through country to Lake Ontario, etc.)

Ontario Street Railway Act, 1883, 47 Vic. ch. 16 (Ont.) :  
(The general provisions of this Act are practically the same as appear in  
the Street Railway Act and Tramway Acts above cited.)

Victoria Transfer Co., 1883, 46 Vic. ch. 33 (B.C.) :  
(In this Act the preamble recites petition to construct street railways, and  
by sec. 11 power is given to run through the country.)

Dawn Tramway Co., 1884, 47 Vic. ch. 66 (Ont.) :  
(See sec. 2.)

Silverbrooke Tramway Co., 1884, 47 Vic. ch. 74 (Ont.) :  
30 (See sec. 2.)

Montreal Park and Island Tramway Co., 1885, 48 Vic. ch. 74 (Que.) :  
The right is given to construct either railways (*i.e.*, street railways) or  
tramways to this Company, and power is given to them to use the rails, station,  
cars, etc., of the Montreal City Passenger Railway Co. See sec. 12. See  
Luster's evidence, p. 64, lines 35 to 40, and p. 65, lines 1 to 8.

Halifax Street Railway Co., 1886, 49 Vic. ch. 124 (N.S.) :  
This is a street railway, and in sec. 7 the word "tram" is used to indicate  
the cars.

Vancouver Street Railway Co., 1886, 49 Vic. ch. 31 (B.C.) :  
40 The heading at the top of the page (155) in this volume, which contains  
this statute, is "Tramways Company (Vancouver)." It is strictly a street  
railway.

**RECORD.**

No. 11.  
Respondent's  
Factum—  
*continued.*

Yarmouth Street Railway Co., 1887, 50 Vic. ch. 93 (N.S.):

Thames Valley Tramway Co., 1887, 50 Vic. ch. 82 (Ont.):  
(*See* sec. 7.)

An Act respecting Fort George Assembly, 1887, 50 Vic. ch. 90 (Ont.):  
Power given to construct a tramway along the streets under the Street Railway Act of 1893. (This was before the amendment to that Act, which was made in 1890.)

St. Stephen and Miltown Street Railway Co., 1887, 50 Vic. ch. 38 (N.B.):

Terminal City Co., 1888, 51 Vic. ch. 115 (N. S.):

*Note.*—Powers given to construct railways and tramroads. Compare the 10 next Act The Terminal City Railroad Co., 1888, 51 Vic. ch. 116 (N.S.), which incorporates a regular railway company, and distinguishes "railway" and "tramway" in secs. 1 and 2.

National and Electric Tramway Co., 1889, 52 Vic. ch. 39 (B. C.):

This company is to connect with the street railway system in Victoria, and runs through the country.

National and Electrical Tramway Co., 1890, 53 Vic. ch. 52:

Speaks of street railways. *See* preamble.

Moncton Electric Tramway Co., 1890, 53 Vic. ch. 74 (N. B.):

*See* its provisions and the enactment in 1893, 56 Vic. ch. 71, of the section 20 found in all Street Railway Companies Acts. This is an ordinary street railway company.

Electric Tramway and Lighting Co., 1890, 53 Vic. ch. 52 (B. C.):

The undertaking described as a "street tramway."

Westminster and Vancouver Tramway Co., 1890, 53 Vic. ch. 67 (B. C.):

Toronto and Mimico Electric Railway and Light Co., 1891, 54 Vic. ch. 96 (Ont.):

This is called a street railway, but has the powers of those companies incorporated as tramway or street railway companies running through the country. This is the first street railway with power to build steel tracks. *See* 30 Schedule C., par. 1.

Nanaimo Electric Tramway Co., 1891, 54 Vic. ch. 69 (B. C.):

This company by sec. 6 has power to construct and operate a street railway.

Toronto and Mimico Electric Railway Co., 1892, 55 Vic. ch. 98 (Ont.):

This shows the necessity of legislation to apply the Railway Act to street railways. This is called a street railway in sec. 1 on page 875, 2nd line.

Toronto Railway Co., 1892, 55 Vic. ch. 99 (Ont.).

Hamilton Radial Electric Street Railway Co., 1893, 56 Vic. ch. 89 (Ont.):

Called throughout a street railway, though with powers to run to Guelph, Berlin, Elmira, Burlington and Oakville (sec. 2). 40

New Glasgow Iron Coal Co. and Railway Co., 1892, 55 Vic. ch. 174 (N. S.):

*Note.*—Powers are given sec. 7, sub-sec. (b), to construct railroads, tramways, aerial electric tramways, etc.

RECORD.  
No. 11.  
Respondent's  
Factum—  
*continued.*

Kootenay Power Co., 1892, 55 Vic. ch. 53 (B. C.):

Power given to construct tramways for passengers, freight and ores, and see the use of the word "tramway" in the limitation clause sec. 35.

Kalso and Slogan Tramway Co., 1893, 56 Vic. ch. 52 (B. C.):

This Act, by sec. 12, uses the words "tramway" and "street railway," as  
10 equivalent expressions.

Montreal Island Belt Line Co., 1893, 56 Vic. ch. 70:

This Act gives power to construct an "elevated or surface railway or tramway," thus defining the latter word.

Toronto Scarboro Electric Railway Co., 56 Vic. ch. 102 (Ont.):

This is a street railway (*see* sec. 3) and is referred to in the schedules as having been incorporated pursuant to the Street Railway Act (Ont.), and as a tramway. *See* preamble and par. 3, etc.

Street Railway Act Amended, 53 Vic. ch. 47, 1890 (Ont.):

By this both railway and street railway include a tramway, thus  
20 recognizing its status as not that of an ordinary railway. Section 2 is important section. It allows companies incorporated to construct and work a tramway to lay down what corresponds to a mill or mine tramplate way, and to disable itself from carrying passengers. As it thus requires legislative sanction to a degradation in the way and powers of the company it follows that tramways before that were bound to be constructed and worked like street railway companies.

Ontario Municipal Act, 1892, sec. 636:

By this the council may pass by-laws to authorize "companies or  
30 individuals" to construct tramways or other railways on any highway. It is under this that the incorporated street railways and tramways are able to make arrangements with urban municipalities. By the previous part of the section "any railway company" is empowered to build a branch railway under the Railway Act. The distinction is thus emphasized.

Workmen's Compensation for Injury Act, 1892, 55 Vic. ch. 30 (Ont.):

*See* sec. 2, 5; sec. 3, sub-sec. 5, these words being used to cover all possible incorporations and not as distinguishing between the two as would also appear from the Railway Amendment Act, 1892, 55 & 56 Vic. ch. 27, sec. 5 (Dom.), where the words "street railway, electric railways or tramway" are used are alternative expressions. *See* also the Railway Amendment Act,  
40 1893 (Dom.), 56 Vic. ch. 27, sec. 1, using same words.

Revised Statutes of Manitoba, ch. 131, sec. 13, sub-sec. b:

Gives power to the Railway Commissioner to construct roads, etc., over and across "railway or tramroads."

p. 4514.

U

RECORD.

No. 11.  
Respondent's  
Factum—  
*continued.*

The Expropriation Act, ch. 56 (R. S. Man.), sec. 4, sub-sec. D.:

Uses the same language.

Municipal Amendment Act, 1888, 51 Vic. ch. 27 Man. sec. 27:

Every "railway, tramway and other incorporated company," is bound to make a return of its property yearly.

Municipal Act 1886, 49 Vic. ch. 52 (Man.), sec. 349, sub-sec. 68:

Power is given to the council to pass by-laws for the construction of "any street railway or tramway." This is repeated in the Act of 1888, 53 Vic. ch. 51 (Man.), sec. 376, sub-sec. 41.

#### Tramway as defined in Evidence.

10

The evidence of several of the witnesses called for the Plaintiffs speak of the word tramway as being a sort of lesser railway; one, the powers and responsibilities of which are less than what is ordinarily known as a railway. It will be found that it has not the powers and responsibilities which in the Railway Act are summed up in the sub-heads of "tolls," "working of the railway," "powers of railway committee," and "traffic arrangements." For the word "railway" is reserved to describe such a commercial enterprise as is usually known as a steam railway, subject to the general Railway Act and to the powers of the railway committee. The control of that body is a check for the benefit of the public, whether in fixing tolls, inspecting the road before it is opened, requiring alterations to the road, condemning the road if it is out of order or not safe, regulating crossings, etc. Its authority is exercised because the roads it controls are public roads and because public money is expended upon them. In the Provinces, where similar railways are incorporated, powers like those given to the railway committee are vested (as in Ontario and elsewhere) in a Commissioner of Public Works or other officer, and the same difference in powers has been adopted. The above legislative classification follows in the main, not only the popular, but the literary, mechanical and actual differences between the two species of roads. A radical distinction is found in this, that a railway, having put down its rails may be compelled to operate its road for the benefit of the public, and they cannot remove their rails. A street railway or tramway is not so bound, or if it is, there is a limit of time given after which it may do so. See *The Floss Tramway Company, ante*; *The Medonte Tramway Company, ante*. In the case of the Appellant Company, the City of Toronto have the right at the end of thirty years to acquire the undertaking, and this is a characteristic of tramways generally. See *Edinburgh Street Tramway Co. v. Lord Provost* [1894] L. R. A. C. 456.

20

30

The witnesses examined for the Appellants agree in this definition of a tramway.

See W. T. Jennings.  
T. C. Keefer, C. E.  
Edmund Wragge.  
Frank Turner, C. E.

40

The evidence of Mr. Jennings is very important, as showing that in 1890, while he was City Engineer in Toronto, he reported to the Council in favour of the form of rail imported by the Appellants, calling it in that report a "tram rail." The witnesses for the Respondent also coincide with this view and speak of the word tramway as in popular use in Canada to include a street railway.

RECORD.

No. 11.  
Respondent's  
Yactum—  
*continued.*

Alan Macdougall, C. E.

Henry Crewe.

J. C. Bailey.

10 Henry S. McLeod.

#### Commercial Difference.

The commercial appreciation of the difference is shown by the contract for the purchase of the rails in question (Exhibit B.) where they are described as Steel Girder Tramway Rails, by the Customs' Entries (Exhibit C.), and by the invoices (Exhibit E.), where the leading description in both is Tramway Rails.

This is a fair test of meaning. *See United States v. Sarchet, Gilpin's* (Penn.) Rep. 273, where the learned Judge calls attention to the invoice and (p. 284) says that it is safer to take the vocabulary of importer, of the counting house and of the merchant as to the true meaning to be attached to the word "iron chain links," in a duty item. *See also* to same effect *Ross v. Fuller* (Collector of Customs), 17 Fed. Reporter 224.

This is further strengthened by the evidence of T. J. Watters, Acting Commissioner of Customs, in which he establishes the practice of the Department of Customs, while the witnesses for the Appellant agree with the result.

*See* T. C. Keefer.

G. C. Cunningham.

W. T. Jennings.

30 Frank Turner.

The word "tram" or "tramway" to describe street railways is used in the United States. *See Foote and Everett's Incorporated Companies* at pp. 1111, 1123, 1126; Michigan Laws of 1891, secs. 3497, 3527, 3530, also at pp. 1428 and 1438; New York Laws of 1890, ch. 566, sec. 30.

#### Recognized meaning of Tramway.

The exact similarity of tramways to street railways may be seen by examining the definitions given in writers on the subject.

*See Phillips on the Tramway Act* (Eng.), 1870, p. 2. "It will be observed " that there is no definition of a tramway" [*i. e.*, in the Tramways' Act]. "I 40 " have taken the following one from D. K. Clark's book on tramways, their " construction and working, published in 1878. A tramway in the modern " sense of the word is a street railway or a road railway, constituting with the " carriage way a combination of railways and common thoroughfares such that

RECORD. "the traffic of the street or the roads unaffected by the tramway, is free to circulate."

No. 11.  
Respondent's  
Factum—  
*continued.*

Compare with that the definition given by an American writer, Booth on Street Railway Law, section 1. "Street railway defined. Street railways are those which are constructed in streets, whether on, below or above the surface, along and over which cars are propelled by animal or other power, on fixed tracks, as common carriers of passengers for the convenience and accommodation of the people living upon or near such highways and to facilitate the transportation of travellers thereon. When a railway is laid in a street to facilitate its use by the public, it is a street railway whatever the means used to propel its cars." 10

Compare also Wharton's Law Lexicon, page 733, which defines a "tramway" as being rails for conveyance of traffic along a road not owned as a railway is by those who lay down the rails and convey the traffic.

Black's Law Dictionary (American), p. 1182, copies this definition, and the Century Dictionary (New York), p. 6425, which gives the definition as the "earliest form of railroad." "The term is now applied to all kinds of street railways, whether using engines, horses, cables, or electricity," and defines "tram car," p. 6424, as "a tramway car," "a horse car on a street railway."

Compare also Encyclopedia Brit., 9th Edinburgh edition, 1888, p. 506. 20  
"Originally a tramway signified a wheel track laid with timbers and afterwards with iron plates, having a flange on the inner edge by which wheels of the ordinary sort were kept on the track. Although the name is sometimes given to a light railway, by a tramway is now generally understood a street railway constructed so as to interfere but little with the ordinary traffic, on which vehicles having flanged wheels are propelled by animal or mechanical power. Tramway in this sense originated in the United States."

"A modern tramway was first employed in the United States where it was urgently wanted in consequence of the inferior condition of the streets and roads in the large cities. The first American tramway was the New York 30  
and Harlem line, of which the first section laid in the main thoroughfares, was opened in 1832. Tramways have been widely extended in the chief cities of the Union. In the State of New York alone in 1875, there were eighty-seven street railroad companies comprising an aggregate length of 433 miles of tramway open for traffic."

Roberts and Wallace on Employers, page 289. "Later on the words railway and tramway came to be used synonymously to indicate any roadway upon which a prepared wheel-track generally formed by two parallel lines of iron rails was laid down. At the present time, however, there can be no doubt that 'tramway' and 'railway' are not generally used 40  
as convertible terms although it is somewhat hard to account for the distinction which has grown up, or even to say in what it lies."

The difference between "Railways" and "Tramways" appear from the following considerations.

Wood on Railways, 1894 edition, sec. 1. "Railroads, What are? The word railroad has been variously defined; its popular signification is well



“ understood, but its meaning as used in legislative Acts can only be  
 “ determined by reference to the context and to the manifest intention of the  
 “ Legislature. Thus it has often been made a question whether the term  
 “ would include a street railway. The answer must depend upon the character  
 “ of the statute and the purpose for which it was provided.”

Booth, *Street Railway Law* (Preface). “ In developing the system of  
 “ street railway law as it exists to-day, and in establishing numerous  
 “ principles now well settled which are embraced within it, the Courts have  
 “ been aided but little by analogies derived from the rules applicable to  
 10 “ general traffic railroads. Obviously these two systems of transportation  
 “ are as unlike in the legal questions involved as in matters of location,  
 “ construction, operation, business methods and the respective purposes  
 “ which they are designed to subserve. This distinction, which is made by  
 “ the Courts, has been recognized by text writers on the law of so-called  
 “ steam railroads.”

Roberts and Wallace on *Employers*, 3rd ed., p. 291. “ From this and

\* *Tramways Act*, 1870, 33 and 34 Vic.  
 (Impl.), c. 78. See secs. 62 and 4, 8, 9,  
 26—36, 46.

20 “ from the provisions of the Act,\* it is  
 “ plain that what the Legislature was  
 “ there dealing with was the construction  
 “ of lines of rails to be principally laid  
 “ upon public roads, the right of using which for all ordinary traffic was still  
 “ to remain in the public, as distinguished from the lines of railway companies  
 “ which are not open to ordinary public traffic. Probably this coincides with  
 “ the popular use of the word ‘ tramway ’ and ‘ railway ’ at the present day,  
 “ when it is intended to mark a distinction.”

The following definitions are to be found in the books.

*Re Brentford and Isleworth Tramways Co.*, L. R. 26 Ch. D. 527.  
 Creditors petition under *Companies Act*, 1862 and 1877. The company was  
 an unregistered tramway company incorporated by the *The Brentford, etc.*,  
 30 Act, 1879. A winding-up order asked under sec. 199 of *Companies Act*,  
 1862. Held, *per Bacon*, V.C., that this was not a “ railway company,” and  
 order refused.

*Swansea, etc., Co. v. Swansea Suburban, etc.*, [1892] 1 Q. B. 357.  
 Question of assessment. Plaintiffs occupied and worked a railway or tramway  
 known as the *Oystermouth Railway*, constructed under 44 Geo. III. ch. 55,  
 and also certain tramways constructed under local Acts. Defendants assessed  
 Plaintiffs on net annual value of all their property including the *Oystermouth*  
 Railway and tramways. Under *Public Health Act*, 1875, the occupier of any  
 40 land *used only* as a canal or towing path for same, or *as a railway* constructed  
 under powers of any Act of Parliament for public conveyance was assessable  
 on one-fourth part only of net annual value. The question was whether the  
 tramways were assessable on all or only on one-fourth value under the Act  
 of 1875.

Wills, J., construes the Act of 1875 as meaning “ used only as a railway,”  
 but says it is immaterial, because the objection is that tramways are something

RECORD.

No. 11.  
Respondent's  
Factum—  
continued.

essentially different from railways, and that in Act of 1875, where railways are spoken of, tramways cannot be meant. By that time (he says) "tramways were so completely a part of ordinary communication made use of in this country that in 1870 a Tramway Act was passed applying to all tramways. The Legislature had not defined tramways, but no ordinary person had any difficulty in distinguishing between the two." He adds that it had never been contended that tramways are subject to the jurisdiction of Railway and Canals Commissioners, of which he was the chairman. (The same remarks may be made as to Canada with regard to the jurisdiction of the Railway Committee until the Dominion Railway Act of 1888, sec. 90, sub-sec. G.) 10

Louisville, etc., Railway Co. v. Louisville City Railway Co., 2 Duval 175. In its decision the Court said "a railroad" and a "street railroad" or "way" are in both their technical and popular import as distinct and different things as a "road" and a "street" or as a "bridge" and a "railroad bridge." A street railway is not in either the popular or legislative sense a railroad.

Williams v. City Electric Street Railway Co., 41 Federal Reporter, p. 556. P. 557: "The difference between street railroads and railroads for general traffic is well understood. The difference consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed compared to the speed of traffic railroads; which carries no freight, but only passengers from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at street crossings to receive and discharge its passengers is a street railroad whether the cars are propelled by animal or mechanical power." See also Beach on Private Corporations, vol. 2, sec. 403. 20

Matson v. Baird, L. R. 3 App. Cas. 1082, Lord Blackburn speaks of meaning of "railroad" in 5 & 6 Wm. IV. ch. 50, sec. 71 (Highway Act). He remarks that long before that Act was passed it was a common thing to have roads for coal pits, but that in 1826—7, locomotives were introduced and incorporating Acts followed to enable such railroads to be worked. Then the Highway Act was passed using word "railroad," and Legislature must have meant railroads in the new sense, *i.e.*, incorporated by Act of Parliament for carrying locomotives and working by means thereof, and therefore that when 2 & 3 Vic. ch. 45 passed it must mean so too. 40

Gyger v. Railway Company, 136 Penn. St. Rep. 96. The Court held that where the words "railroad" and "street passenger railway" are both used, although one may include the other, the inference is that they are distinguished. It also arrives at this conclusion by going through the different provisions, and pointing out that they are not applicable to street railways, as *e.g.*, "competing lines," does not refer to street railways as lines on different streets do not compete, having different termini, etc.

This case follows *Shipley v. Continental R. W. Co.*, 13 Phila. 128, [though not cited in it]. Reference may also be had to the dissenting judgments in the *Birmingham Mineral R. W. Co. v. Jacobs*, 92 Alabama Reports, p. 187, which contain a very full and important discussion as to the difference between railways and tramways. Page 194. "If street railways whose cars are drawn by dummy-engines, are thereby constituted railroads under our general statutory system, then they must be brought under all the legislative enactment for the government of railroads. This will subject them not alone to the legislative provisions noted above. Its influence has

10 "a much wider sweep. They would cease to be taxable as the great bulk of property is taxed, but must be assessed under section 494 of the Code by the State Board of Assessment with all the formality required in that section. Does the reason which caused that enactment apply to street railways and dummy lines? Again, if they are railroads under our statutes they are under the power and jurisdiction of the Railroad Commission. (Code sec. 1129.) They would be required to pay a license tax and their share of the expenses of the Railroad Commission to be ascertained by the auditor. (Code sec. 1128.) It would subject their tracks to supervision by the Railroad Commissioners, and require them to transport the commissioners

20 "free of charge (sec. 1129). Their tariff would be subject to revision by the commissioners (sec. 1130). Can it be possible that dummy lines are subject to the provisions requiring railroads to have 'at each of the passenger stations along the line of its railroad sufficient sitting or waiting rooms for passengers waiting for trains having regard to sex and race, which shall be suitably heated in cold weather, and supplied with sufficient fresh drinking water when passengers waiting for trains are present, and with sufficient and comfortable seats?' (Sec. 1154.) Confining the legislation we are discussing to railroads proper, every clause in the fifty-four sections 1120 to 1173 inclusive, is germane and proper. Extending it so as to take in street railway

30 "service no matter how propelled, we are forced to declare that many of the more important provisions of the statute are wholly unsuited to the new service assigned them. We are on safe ground when we give to the statutes such operation as the Legislature had and could only have had in contemplation, when the statutes were enacted. We should hesitate before extending them to conditions essentially dissimilar. Page 198. We have traced this legislative history for purpose of shewing that from the inception two systems have been declared; one for the regulation of railroads proper, and the other for the regulation of street railways. That there is a natural inherent or organic difference in the two systems and their wants, we

40 "need scarcely assert."—Extracts from dissenting judgment of Stone and Clopton, JJ.

In a case cited by the Appellants *Doughty v. Firbank*, L. R. 10 Q. B. D. 358, the Court were of opinion that the word "railroad" was used in a popular sense, *i.e.*, a way on which trains pass by means of rails. For a fuller report of this case see 48 L. T. 530, from which it appears that the way was a temporary track used during construction.

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Factum—  
*continued.*

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 Respondent's  
 Factum—  
*continued.*

This case, however, has not been considered by text writers as good law : See *Sym Employers Liability Act, 1880, 2nd ed.*, as quoted in *Spens and Younger Employers and Employees*, at page 248. The case, however, is not applicable to this country. See *Ontario Employers Liability Act, 55 Vic. ch. 30, sec. 3, sub-sec. 5*. Mr. Justice Burbidge has given a decision (not yet reported) in which such a temporary track has been held to fall under the classification "tramway." *Exch. Ct., Sinclair v. The Queen, November 1894.*

See also *Clark on Tramways, vol. 2, pp. 55-59 and 144* : "It appears from the above that there is a decided difference between 'railways' and 'tramways' as understood in a popular and commercial sense. Is there any doubt, therefore, that the Legislature in dealing with the subject was aware of and recognized these differences." 10

#### Appellants carry on a Street Railway Business.

It is clear that the Appellant Company carry on purely a street railway business. This Company is in no sense a railway, it is a street railway. It is to be noted that of all of the statutes which have incorporated street railway companies, or tramway companies, or railway companies, this particular charter is the one which excludes most of the powers given to similar companies. There is no other charter in which there are such limited powers given and where the company is so strictly tied down to the doing of a street railway business, pure and simple, as this charter. There are two points in it to be referred to. One is their right to operate a surface street railway. That is the only power that they have ; and the words "surface railway" have been defined in the evidence as a railway which conforms to the surface of the country and does not use the ordinary means of railway construction, by cutting, etc., of making a perfectly level line. That is the only power that this Company has outside of its actual street railway traffic in the city of Toronto and that is a power, which, in itself, by the word "surface," is more limited than in any other similar charter. The power that they claim to have to carry on an express or mail business is not to be found in their charter at all ; in the agreement with the city of Toronto it is provided they shall pay \$800 per mile for their tracks and also that they shall pay the city a percentage upon their receipts, and in the agreement are found the words (at p. 902 of 55 Vic. (Ont.) ch. 99) "percentages of their gross receipts from passenger fares, freight, express and mail rates and all other sources of revenue derived from the traffic." That is all. If they become carriers of express and freight and obtain the power to carry in that way, the city of Toronto gets the benefit of it. Although that agreement is confirmed as to the power of making it, by the Act cited, in no sense is that power given to them ; so that this Company is in the position of being limited in the strictest possible way as a street railway company and without the powers that are given to a great many others. 20 30 40

The evidence of James Gunn shews the operations of the Company very clearly. Mr. Gunn is Superintendent of the Appellant Company, was Superintendent when the city of Toronto was running the old street

railway in Toronto, [which was sold to the Appellant Company] and prior to that he was employed in the old Toronto Street Railway Co., and alleges that he is familiar with the business done by all three companies. His evidence is as follows :

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Factum—  
*continued.*

“ Q. Is the system that is employed in the road to-day similar in your judgment to what was used in the Toronto Street Railway Company, allowing for the substitution of electricity for horses, the method of running?—A. The only difference is that electricity is used instead of horses.”

10 “ Q. That same system which was applied to the old car system is still applied to this system when run by electricity?—A. Yes.”

“ Q. Are the old cars which were being used on the Toronto Street Railway Company's system in use now?—A. Some of them are used as trailers.

“ Q. You had to build new motor cars?—A. Yes.

“ Q. You used a number of old cars as motor cars by putting them upon higher trucks?—A. Yes, for a short time, but we have done away with them.

“ Q. You are building new and improved cars for that purpose?—A. Yes.

20 “ Q. Are the old car wheels in use now upon your road?—A. They are with the cars which we call trailers.

“ Q. Now, from your knowledge as a street railway man, would you describe the business carried on by the Toronto Railway Company as a street railway?—A. I think that is what we call it. At least it is not called,—it is called the The Toronto Railway Company.

“ Q. But in describing the business that is carried on, would it be properly described by saying it was a street railway?—A. I suppose so.

“ Q. You don't know of any reason why it should not be?—A. No.”

#### Practice of Customs Department.

30 The practice of the Customs Department was evidenced at the trial, and is in favour of the view taken by the Crown with regard to the classification of railways and tramways.

Mr. T. J. Watters was in the Customs Department in 1879, and is now Acting Commissioner of Customs, and he was previously and since March 1882, Assistant Commissioner of Customs, and his evidence is as follows :

40 “ A. -The interpretation of the word ‘ tramway ’ by the department, so far as my own knowledge goes, is to the effect that a tramway would be a road which was not governed by the same principles which applied to ordinary railways. For instance, an ordinary railway has been held by the department to be a railway which has been treated under the tariff in a special manner, because of its opening up new countries, being often subsidized by Parliament, having the power of expropriating land, and being generally governed by the terms of the General Railway Act of the Dominion. Tramways have been

RECORD. held in our practice to apply to street railways, and to roads which are not in any way of the public character, and which might be entirely used for private purposes.”

No. 11.  
Respondent's  
Factum—  
continued.

This practice is persuasive in arriving at a conclusion as to the definition of the word “tramways,” and it may be looked at by the Court.

In this connection reference may be had to Elmes on Customs Laws, at p. 387, as follows: “Where ambiguity exists it will be proper to enquire as to “ what object or purposes were intended to be accomplished by the Legislature, “ and the contemporaneous history at or preceding the time of the enactment, “ as well as the practice of the proper executive department of the Govern- 10  
“ ment at the time may be availed of to explain the Act and to aid in its “ construction.”

United States *v.* Graham, 110 U. S. 219, *per* C. J. Waite, p. 221. “It “ matters not what the practice of the departments may have been, or how “ long continued, for it can only be resorted to in aid of interpretation, and “ it is not allowed to interpret what has no need of interpretation. If there “ were ambiguity or doubt, then such a practice, begun so early and continued “ so long, would be in the highest degree persuasive, if not absolutely controlling “ in its effect.”

See also, *per* Brown, J., in Schell's Executors *v.* Fauche, [1890] 138 U. S. 20  
562, at p. 572; Merritt *v.* Cameron, [1890] 137 U. S. 542, at p. 552; Income Tax Commissioners *v.* Pemsel, [1891] A. C. 531, at p. 591.

#### Intention of Parliament.

It is clear that this practice of the department is consistent with the important fiscal change in the policy of the Dominion in 1887. Perhaps the most forcible argument as to the construction of these items may be drawn from a consideration of the changes in tariff policy established in that year. The state of affairs before 1887 was that the iron duties were not such as would protect the iron industry, and it was proposed in 1887, by what is known as “The National Policy,” to give protection to all the industries of the country. 30  
The reasons and causes which led to that change of policy are a matter of history, and are well known, and reference may be made to the state of things before 1887, and to the debates and proceedings in Parliament where they are enunciated. The effect of that policy, so far as the iron and steel industries are concerned, may be noted by a comparison of the tariffs in force in 1886, and those which came into force in 1887.

*E.g.*, Pig iron which in 1886 paid a duty of \$2 per ton, in 1887 paid a duty of \$4 per ton; iron rails and railway bars for railways or tramways which in 1886 paid 15 per cent. *ad valorem*, in 1887 paid \$6 per ton; iron fish plates which in 1886 paid a duty of 17½ per cent., in 1887 paid \$12 per ton; axes, etc., 40  
which in 1886 paid 25 per cent. in 1887, paid \$30 per ton, or not less than 35 per cent. And all the other manufactures of iron were very considerably increased.

While this policy of increasing the iron duties was being carried out there was one point which Parliament determined should not be lost sight of in the general rise of duties. This was the encouragement of the railway development of the country. The exact incidence of the iron and steel legislation and the desire to foster the construction of railways for the purpose of opening up the country will appear in the following remarks of Sir Charles Tupper, the Finance Minister, in Hansard, 1887, p. 202:—"Well, Mr. Speaker, twenty years ago iron rails were made in Toronto and Hamilton, and within the next twenty years we will make all our own rails. I do not propose to ask this House to adopt the policy, the Government does not propose at this moment—

10 "regarding the increased railway development of the country as one of the vital essentials of progress and prosperity—to include in this arrangement what the United States has done and done with such success, and that is, to apply it to steel rails. We propose that they shall come in free as they have done in the past, because we consider that should be made an exception."

Page 403. "The duty on boiler plate and locomotive tubes remains for obvious reasons unchanged, as we wish to do all we can to develop the manufacture of engines in our own country, and to furnish all the aid we can

20 "to railways." Making the increased tariff bear thus lightly upon railways was in pursuance of a settled policy for assisting them which has been pursued in the Dominion for many years as is shewn by the liberal grants of money and land to the various railway companies *as well as putting on the free list or subject to light duties the articles they consume or use.*

This mode of dealing with railways to open up and develop the whole country is progressive and constitutional as appears from the following quotations:—

Wood on Railways, p. 170.

30 "If the making of a railroad is a public duty which the State may either do entirely at the public expense or cause to be done entirely by a private corporation, it follows that such a work may be made partly by the State and partly by a corporation, and the people may be taxed for a share of it as rightfully as for the whole. The corporation may be aided by an exertion of the taxing power as well as with the right of eminent domain."

An apt illustration may be found in the legislation relating to the Canadian Pacific Railway Company, which in addition to large grants of money and land was allowed to import its steel rails free by special Act for several years.

#### Definition of Tramway by Parliament.

40 The matter in hand was, however, dealt with directly by Parliament, and the word "tramway" was defined during the debates as expressly including street railways. The following quotations from Hansard are, it is submitted, admissible in argument for the reasons given below:

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The item of taxation as originally introduced was item 86. *See Hansard, 1887, p. 406.*

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Respondent's  
Factum—  
*continued.*

Sir Charles Tupper substitutes "iron or steel railway bars for railways, "tramways of any form, punched or not punched, not elsewhere specified \$6 "per ton."

Mr. Mitchell asks, "Does that include street railways?" to which Sir Charles Tupper replies "Yes."

This statement it is submitted is admissible, for the following reasons :

The intention of Parliament may afford a good guide as collected from the Parliamentary history of the Act. 10

*See Elms on Custom Laws, p. 387 :* "The Supreme Court states the rule "to be that a thing which is within the intention of the makers of the statute is "as much within the statute as if it were within the letter."

It is admissible to refer to this under the cases given below as well as upon the principle that evidence as to the meaning of a word or term of art used in a contract can be given.

In *Best on Evidence, p. 231, 7th edition*, there is quoted, with approval, from 2 *Phillimore on Evidence 415-16, 10th ed.*, the following passage : "Evidence "of usage has been admitted in contracts relating to transactions of commerce, "trade, farming and other business, for the purpose of defining what would 20 "otherwise be indefinite, or to interpret a particular term, or to explain what "was obscure, or to ascertain what was equivocal, or to annex particulars and "incidents, which, although not mentioned in contracts were connected with "them or with the relations growing out of them and the evidence in such "cases is admitted with a view of giving effect, as far as can be done, to the "presumed intention of the parties."

This is applied to Acts of Parliament, for in *Taylor on Evidence, p. 61 (Blackstone edition, from 8th Eng. ed.)*, he says (sec. 43) : "the construction "of all written documents, which term it is presumed necessarily includes Acts "of Parliament, judicial records, deeds, wills, etc., belongs to the Court alone, 30 "whose duty it is to construe all such instruments as soon as the true meaning "of the words in which they are couched and the surrounding circumstances, if "any, have been ascertained as facts by the jury, and it is the duty of the jury to "take the construction from the Court either absolutely, if there be no words to "be construed as words of art or phrases used in commerce, and no surrounding "circumstances to be ascertained, or conditionally, when those words and "circumstances are necessarily referred to them."

*Powell on Evidence, 4th ed., p. 20*, is almost exactly in the same terms (including Acts of Parliament), and says that the question of whether an article is of a certain description mentioned in an Act of Parliament *is for the 40 jury*, citing *Brunt v. Midland R. W. Co., 2 H. & C. Ex. 889*, where the words "Elastic silk webbing" in the Carriers Act, 11 Geo. IV. and 1 Wm. IV. ch. 98. *See also Woodward v. L. & N. W. R. W. Co., L. R. 3 Ex. D. 123*, where the word "paintings" was construed. *See Smiles v. Belford, 1 Ont. A. R. 436*, where the language of the Secretary of State for the Colonies introducing the copyright bill is referred to, though the practice was doubtful.



Hill v. E. and W. India Dock Co., 9 App. Cas. 448, where Lord Bramwell quotes Lord Wensleydale's rule for the construction of "wills, statutes and all written instruments" as being approved by the late Master of the Rolls in *ex parte* Walton, 17 Ch. D. 756. See also *Roots v. Snelling*, 48 L. T. 216, where freehold equities in a contract were construed according to a document which had been written by one of the parties and handed to the other with the definition therein of freehold equities, it being construed as a representation that that was the meaning of it.

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Respondent's  
Factum—  
*continued.*

10 The latest expressions on the subject are quoted in Hardcastle "Construction of Statutes," 2nd ed., p. 143: "But there is one matter which, *until very recently*, it was never allowable to refer to in discussing the meaning of an "enactment, and that is what is sometimes called 'the parliamentary history' of a statute, that is to say, the debates which took place in Parliament when "the statute was under consideration." Reference is then made by him to the decision of Bramwell and Baggallay, L.JJ., in *Regina v. Bishop of Oxford*, [1879] L. R. 4 Q. B. D 525, allowing a speech of the Lord Chancellor in the House of Lords to be used as an authority on the construction of the statute, and in S. E. Railway v. Railway Commissioners, [1880] L. R. 5 Q. B. D. 236, where  
20 Cockburn, C. J., said: "Where the meaning of an Act is doubtful, we are, I "think, at liberty to recur to the circumstances under which it passed into law "as a means of solving the difficulty," and he accordingly proceeded to quote the speech made by Mr. Cardwell, on the introduction of the Bill into the House of Commons, and a speech made by the Lord Chancellor on introducing it into the House of Lords.

It is fair to observe, however, that the first case was in this respect disapproved during the argument by Earls Cairns and Selborne, in *Julius v. Bishop of Oxford*, [1880] 49 L. J. Q. B. 578, though no reasons were given. But the question may now be treated as an open question. See *Smiles v. Belford*, 1 Ap. Rep. (Ont.) 436. The action of the House of Commons on a  
30 money bill is final (*Bourinot*, 2nd ed., p. 501), and if they adopt a clause after its meaning is pointed out, it is a case of definition by Parliament.

The cases which till recently have limited the power of the Court to resort to legislative definition in the sense above given, do not touch the specific point. Alterations proposed by a member of Parliament or reports of commissioners are not as important, or as relevant as the definition by a Finance Minister (see B. N. A. Act secs. 53 and 54; *Bourinot*, 2nd ed., pp. 471, 472, 473) adopted by the House, and no good reason can be given against it being referred to.

40 But whether or not the debates in the House can be referred to, the central fact remains that the bounty of Parliament was intended to be confined to those railways which, assisting in the development of the country at large, could be aided by making rails for use in their railway tracks free. The weight of the rails in item 173 speaks of the great railways, and though in late years the rails for tramways grew heavier, in 1887 they were light. See the Schedule to the charter of the Appellant company, 1892, 55 Vic. (Ont.) ch. 99, p. 921, where rails as light as 22 lbs. per yard were part of its equipment. See also evidence of J. J. Gartshore, and W. T. Jennings.

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Respondent's  
Factum—  
continued.

No reason can be suggested why Parliament should free the rails of street railways. Every consideration points the other way. They do not aid in the development of the Dominion. There is no instance where they have been subsidized by any Legislature. They are spoken of as a means of municipal user of the highway, local and circumscribed in their operations and benefit. In fact so far from being a public benefit in a wide sense, the very cities where they operate require them to contribute out of their earnings, as in the case of the Appellant Company, to the extent of \$800 per mile of their track per annum for the right to use the streets, as well as to pay over a large percentage of their profits to the municipality. So jealously are their franchises regarded that they terminate at the end of a fixed period, and they are then only entitled to be paid for the actual value of their rails and equipment. [See 55 Vic. (Ont.) ch. 99, sec. 4, sub-secs. 3 and 4.] 10

Can it be possible that Parliament intended to free their rails and then allow them to sell them at the end of the franchise and make a profit to the extent of the duty which the Crown had foregone?

Rails for street railways would be brought in, whether free or not, on account of the money-making franchise which these railways can obtain, and the fact that for their own benefit the street railways have begun to use heavier rails can make no difference to the principle on which free rails for commercial railways are admitted free. 20

The rails for street railways cannot, as pointed out above, be used for ordinary railways, so that not even a remote benefit to the latter class of undertakings can be suggested in favour of the construction urged by the Appellants. The policy of the Legislature has been to open up the country and to assist railways which aid in its development. The legislation points, during a very long period, to a comprehensive system of bonusing, in which free rails were as important a factor as free lands and grants in money.

Reference on this point is made particularly to that part of the judgment of Mr. Justice Burbidge. 30

#### Appellants' Recognition of Rails being "for Tramways."

The contract with the manufacturer of the rails in question, and the invoices and customs entries are to be looked at in this action and affect the right of the Appellant Company to recover these duties.

The contract will be found to arrange for the manufacture of these rails as "steel girder tramway rails," while the invoices describe the majority of these rails in the same way.

It is clear, therefore, that both the officers of the Plaintiff Company who reside in this country, and the English agents of the manufacturers, understood "tramway" in the sense of street railway, and it is clear, from the evidence of Mr. Watters, quoted above, and from the action of the customs authorities in Toronto, that the words were so understood by them in the same way. We have, therefore, the vendor and purchaser agreeing in a description which falls literally within the item under consideration. We have the customs authorities acting under the same clause applying the same con- 40

struction to the word. Can it be doubted that the rails in question are both in construction, description, and use, actually "*for tramways?*" This is the phrase used in the taxing item—it is comprehensive of both construction and use, and Appellants cannot escape from that definition.

RECORD.

No. 11.  
Respondent's  
Factum—  
*continued.*

In entering these rails at the Cusom House, the Customs Act must be followed, and by that very great weight is given to the invoices.

10 Under the Customs Act, R. S. C. (1886), ch. 32, sec. 35, the invoices must show the place and date of purchase, the firm from whom purchased and *a full description in detail of the article in question*, as well as the quantity and value; and by section 4, the entry is not perfect until the invoice produced is certified as correct, and it must, by section 42, be attested on oath.

By section 63, the articles must be identified with the invoices; and by section 58, the valuation for duty shall be the value in the markets whence exported.

20 To quote Elmes on Customs Laws (section 421): "The Customs Revenue System begins with the theory, that the importer shall disclose the article and the true market value, and thus bind himself by the invoice produced as concluding him from charging any less than the value there expressed as a basis for estimating the *ad valorem* duty."

The Appellants, therefore, have recognized the description as being one understood in the department of trade and commerce as including street railway rails, and it would take a very strong case to enable them to recover in this action on the ground that their description was not correct.

3 This is the more important as the rails which the Plaintiffs allege are to be used in railway tracks are not, upon the evidence, suitable in any way, and *are, therefore, NOT FOR USE in what are generally known as railway tracks.* The following differences are established in the evidence: 1. The groove prevents ordinary railway wheels running over them, as the flange of a true railway wheel is too wide and big to fit in the groove. 2. The variation of gauge in railway wheels prevents their use on these rails, the groove allowing no play to the wheels. 3. They are not strong enough in the web to support railway tracks.

See Evidence of W. T. Jennings.

E. Wragge.

Alan McDougall.

Remark of Mr. Justice Burbidge.

40 They are, on the contrary, genuine tramway rails, *i.e.*, rails for tramways, so designated and constructed as to form a portion of the roadway and allow the free circulation of traffic along and across them.

See Remark of Mr. Justice Burbidge.

And also the evidence of W. T. Jennings (who designed it).

And G. C. Cuninghame (who adapted it to the Appellant Company's street railway).

See the identical rail in Clarke on Tramways, vol. 2, pp. 53, 54, 55, 59, p. 144; Encyc. Brit., 9th Edinburgh ed., p. 507, where the cut appears.

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 Factum—  
*continued.*

In all tramway and street car legislation, the laying of rails flush with the road so that they in reality form part of the highway is found. This is seen from the following quotation: Clarke on Tramways, vol. I. p. 2: "It follows as the principal condition of such free circulation, that the surface of the rails, whilst they are adapted for carrying flanged wheels, should be substantially at the general level of the carriage way": Roberts and Wallace on Employers, p. 289.

This view was very forcibly adopted in an argument made on behalf of the Appellant Company before the Railway Committee of the Privy Council, on Friday, 23rd February, 1894, when in the presentation of their case, Counsel urged the following: The position that the street railways take is this: "That they are merely in highway rights, that the device for carrying passengers by either an omnibus, or horse car, or an electric car, is merely a method by which the highway is operated, that it is not in the shape of a clash of easements between the railway and the electric road, but that it is merely a method of municipal user and that the only easement there is, is the railway easement which invades highway rights to the extent of its crossing."

"There was a power in the municipality to give the right to operate by electricity and there was a choice by any municipality to have their roads operated by animal or other power, including electricity. By our agreement with the city they furnish us with the right of way, we pay them so much per mile and we pay them such a percentage of our earnings. We paid for the easement, if it be an easement, we have paid for that method of using the street if it be a method of municipal user. We contend that the change from horse power to electricity is a mere change in the method of user of the highway."

#### Appellants' Argument from Change of Language.

In view of the fact that these rails are in reality tramway rails and are for use in tramways only, and not in what are usually known as railway tracks, much of the force of the argument for the Appellants, used at the trial and referred to in the judgment of Mr. Justice Burbidge as to the change of language in the Act of 1887, evaporates.

It was there contended that as in 1886 there were excluded from the free list "tram and street rails," the use in 1887 of the words "rails for tramways" indicated an abandonment of rails which might be tram or street rails. So far from that being the case it is submitted that the expression of 1887 is more comprehensive than its predecessor. If these rails were tram or street rails and the ordinary T rail was not, technically, so designated, yet if both were "rails for tramways," both would be taxed.

It is in evidence (*see ante*) that this rail is specially designed for tramways. It is also in evidence (*see Mr. Jennings' patent*) that the T rail can be adapted and used for street railways and is used for light tramways (*see evidence of J. J. Gartshore*). What then, in the circumstances of the year 1887, caused the change of language? It is important to glance at the legislation as to rails prior to that date.

In 1879, 42 Vic. ch. 15, the word "tramway" first appears and a duty of fifteen per cent. was charged on "iron rails or railway bars for railways or tramways" while on the free list were "steel railway bars or rails."

In 1879, therefore, iron rails for either railways or tramways were dutiable and not steel rails if they were railway rails.

No change appears to have been made in the duty during 1880 or 1881. In 1882 the free list item of steel railway bars or rails was unchanged, but free entry was limited to the close of the Session of Parliament next after the passing of the Act. In 1883 steel railway bars or rails were made free, but  
 10 iron rails or railway bars for railways or tramways were dutiable at fifteen per cent.

In 1885 the free admission of steel railway bars or rails was cut down or limited by a definition because the item of 1885 reads "steel railway bars or rails not including tram or street rails." This leaves in 1885 iron rails for railways and tramways dutiable and steel tram or street rails dutiable. This shows an intention on the part of the Legislature to limit freedom from duty to steel railway rails which were not to include tram or street rails. This is the first mention of steel in connection with tram or street rails. It is noticeable that all the companies incorporated as street railways or tramway  
 20 companies down to that time were by their charter limited to putting down iron rails, and those iron rails had always been dutiable. When, therefore, it was possible that steel might be used in the construction of these rails, the Legislature in 1885 excluded such rails from the free list. This indicated an unmistakable intention to collect duty upon rails which were not to be used on what were then well understood to be railways. This policy continued unchanged in 1886. See R. S. C., ch. 33, items 217 and 770. By the evidence given at the trial by the Appellants it was attempted to indicate a difference between "tram" and "street" rails, while it was conceded that those two words would cover the rail in question or any other rail which might be used  
 30 in the Plaintiffs' tracks.

The result is this, that at all events rails which could properly be designated "tram" or "street" rails, if made of steel were excluded from the free list, and the argument of the Appellants is that by the change of language in the following year 1887 rails fitting this description were not excluded. The words relied on in the Act of 1887 are those which described the use of the rail instead of the rail itself, *i.e.*, steel rails for tramways.

Having in view the wide meaning of the word "tramway" as indicated in the foregoing pages a complete answer may be found to any argument based on the change of language, because, at the time the Acts of 1885 and 1886 used  
 40 the words "not including tram or street rails," Parliament still continued to tax iron tramway rails, and in 1887 the language which heretofore covered iron rails (the only kind of tracks which the tramway companies had power to lay down) was broadened so as to cover steel rails for use in tramways. The steel rail therefore excluded was not a specific rail by description, but a rail of any form provided it was for a tramway. It spoke of the purpose for which it was to be used, and that was the end to be sought in the taxation, that is, in determining whether it should be taxed or not.

RECORD.

No. 11.  
Respondent's  
Factum—  
continued.

If the definition of tramway contended for by the Respondent is correct, "rails for tramways" and "tram or street rails" mean all the same thing. But assume that they had a different meaning, still they both relate to the same subject matter. They are both rails that are laid down in the streets. Whether the rails in question fall exactly in one or the other description the change of language in the legislation is that of amplification and may be very well explained by pointing to the change made in 1887 in the fiscal policy of the country taken in connection with the evidence as to the manufacture of rails in Canada. In Mr. Gartshore's evidence he points out that light rails weighing about twelve to eighteen pounds of steel were then being manu- 10  
factured in Canada, and that they were used for light tramways.

The wording in the statutes of 1885 and 1886 regarding iron rails for tramways would, according to Mr. Gartshore's definition, cover those rails had they been made of iron. As, however, they were commencing to manufacture in steel, it was important that the phraseology which excluded tram or street rails of steel should be changed from a description of the rail to a description of the use, as it might be said that there were T rails being manufactured and used for tramways which were neither tram nor street rails. These rails were of a section known as the "T" rail, which is the rail that appears in Mr. Jennings' patent as one that could be used both for a railway and for a 20  
street railway. To cover these rails, although T rails, provided they were used for tramways, the phraseology appears to have been altered, and the rail *for tramways*, whether of iron and steel and of whatever kind, was therefore taxed. The T rail was simply a lighter form of railway iron. This view is further emphasized by the fact that weight commenced to be a factor in ordinary railway rails. Heavy rails had, apparently, not been used in the street railways up to that time. The significance, therefore, of the change of phraseology is that all rails for tramways, of every shape, were taxable, and only those which could properly be used on what are known as commercial railways were exempt. 30

In fact the weight as a test as to tramway rails appears not to have been considered. Weight was introduced merely to protect a rail manufactured here, and it must lie on the Appellants to convince the Court that the policy, begun in 1879, of taxing rails for tramways, is as suddenly, and without apparent reason, reversed, and that in the face of the fact that *steel rails for tramways* were taxed by name by the same Act. The history of the legislation, the very fiscal policy propounded in 1887 and the Customs' Act of that year, point the other way, and it cannot be a satisfactory construction to free in this case these steel rails which are confessedly for tramways because of a verbal change in the language of the earlier Act. The whole of the legislation from 40  
1879 to the present day taxes rails for tramways. There is no departure from that policy, which was emphasized in 1885 by taxing steel tramway rails. That tax remains in 1887. What is there but speculative criticism to suggest a reversal of policy from the elimination of an ambiguous expression used only for two years and then giving place to the language which had prevailed from 1879.

In Endlich on Statutes, sec. 378, p. 527, it is said: "The presumption of

“ a change of intention from a change of language, of no great weight in the  
 “ construction of any documents, seem entitled to less weight in the construction  
 “ of statutes than in any other case.”

RECORD

No. 11.

Repondent's  
Factum—  
continued.

See also, as to change of expression, *Regina v. Payne*, L. R. 1 C. C. R. 27.  
 In that case the charge was that the prisoner conveyed a crowbar into the  
 prison and he was convicted under the Prison Act, 1865. The earlier statute  
 (4 Geo. IV. ch. 64, sec. 43) had after the words “ mark visor, or other  
 disguise ” the words “ or any instrument or arms.” The later statute (Prison  
 Act, 1865, sec. 37) repealed that section and substituted “ any mark, dress, or  
 10 other disguise, or any letter, or any other article or thing.” It was argued  
 for the prisoner that the omission of the words “ instrument or arms ” indicated  
 a change of intention. Held, the prisoner was rightly convicted.

*Thursby v. Churchwardens, etc.*, [1894] L. R. 1 Q. B. 567.

The Poor Relief Act, 1601 (43 Eliz. ch. 2), sec. 1, expressly imposes the  
 liability to poor rates, on “ lands, houses, \* \* coal mines, or saleable  
 underwoods.” The Appellants were owners of a coal mine and were rated to  
 a lighting rate under the Lighting and Watching Act, 1833 (3 & 4 Wm. IV.,  
 ch. 90), sec. 33, which made rateable “ owners and occupiers of houses,  
 buildings and *property (other than land)*,” to a higher rate than the Poor Relief  
 20 Act, 1601. It was held by the Court that the specific mention of coal mines in  
 the above enumeration excluded coal mines from the term lands, and  
 therefore they were “ property (other than lands),” and the rate was payable  
 on the higher scale.

#### Unenumerated Articles.

If, however, the Court holds that the rails in question fall neither under  
 item 88 nor item 173, it is submitted that the Crown are entitled to retain the  
 duty or at all events to collect duty at the rate of thirty per cent. *ad valorem*,  
 under item 189 and under sec. 13 of the Customs Act, R. S. C. ch. 32. That  
 section reads: “ On each and every unenumerated article which bears a  
 30 “ similitude, either in material or quality, or the use to 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.”

If therefore these rails are unenumerated, then under this section the duty  
 of \$6 per ton may be collected and retained. See decision Exch. Ct., Nov.,  
 1894, *Sinclair v. The Queen*, where it was held that under the section quoted,  
 rails the use of which for a tramway might be doubtful, were liable to pay the  
 \$6 per ton duty.

FRANK E. HODGINS.

## RECORD.

No. 12.  
Judgment of  
the Supreme  
Court of  
Canada, 26th  
June 1895.

"D."

In the Supreme Court of Canada.  
Wednesday, 26th day of June 1895.

Present :

The Honourable Sir Henry Strong, Knight, Chief Justice.  
" " Mr. Justice Taschereau.  
" " Mr. Justice Gwynne.

The Honourable Mr. Justice Fournier being absent, his judgment was announced by the Honourable Mr. Justice Taschereau, and the Honourable Mr. Justice King being absent his judgment was announced by the Honourable the Chief Justice, pursuant to the Statute in that behalf. 10

Between

The Toronto Railway Company - - - Appellants,  
and  
Her Majesty The Queen - - - Respondent.

The appeal of the above-named Appellant from the judgment of the Exchequer Court of Canada pronounced in the above cause on the 29th day of October in the year of our Lord 1894, having come on to be heard before this Court on the 30th day of March in the year of our Lord 1895, in the presence of Counsel as well for the Appellant as for the Respondent, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment the Court did order and adjudge that the said judgment of the Exchequer Court of Canada should be and the same was affirmed, and that the said appeal should be and the same was dismissed with costs to be paid by the said Appellant to the said Respondent. 20

Certified a true copy.

(Signed) ROBERT CASSELS, Registrar.

No. 13.  
Reasons for  
Judgment,  
certified by  
Registrar of  
Supreme  
Court, 5th  
July 1895.

In the Supreme Court of Canada.

Between

The Toronto Railway Company - - (Plaintiff) Appellant, 30  
and  
Her Majesty the Queen - - (Defendant) Respondent.

I, Robert Cassels, Registrar of the Supreme Court of Canada, hereby certify that the document annexed hereto is a copy of the reasons for judgment in this appeal, delivered by the Judges of this Court when rendering judgment, as certified by C. H. Masters, Esquire, the Reporter of this Court.

(Sgd.) ROBERT CASSELS, Registrar.

Dated at Ottawa, this 5th day of July, A.D. 1895.



## Judges' Reasons.

## The Toronto Railway Company v. The Queen.

RECORD.

No. 14.  
Judges'  
Reasons.The Chief  
Justice.

The Chief Justice :

The Appellant is a Railway Company, incorporated under an Act of the Legislature of the Province of Ontario, passed in 1892, which gave it power—

“ To acquire, construct, complete, maintain, and operate a double or single track street railway in the City of Toronto,” and . . . .

“ To acquire privileges to build and operate surface railways within the limits of any Municipal Corporation in the county of York over roads within  
10 the same.”

In exercise of these powers, the Appellant acquired an existing street railway worked by horse power, in the City of Toronto, and proceeded to make large extensions to the same, and to alter the motive power to electricity.

For the purpose of this railway and to be laid down in its tracks or permanent way, the Appellant imported a quantity of steel rails.

Upon these rails the Customs officers of the Dominion levied a duty of \$6 per ton.

This was done contrary to the protests of the Appellant who insisted that the rails which weighed 69 pounds per lineal yard ought under the Customs  
20 Act of 1887, in force at the date of importation, to have been admitted free of duty.

The duties so imposed were paid under protest, and the present proceeding has been taken to recover back the amount so paid.

The provisions of the Customs Tariff Act (50 & 51 Vict. (1887) C. 39) on which the decision of the question thus raised must depend, are as follows:—

Item 88, iron or steel railway bars and rails for railways and tramways of any form, punched or not punched, not elsewhere specified, \$6 per ton.

By Item 173, steel rails weighing not less than twenty-five pounds per lineal yard for use in railway tracks are exempted from duty.

30 The Appellant contends that the rails in question are covered by this exception of Item 173.

The learned Judge of the Exchequer Court says in his judgment that he would have held these rails to have been free but for a series of Acts by which Parliament has made grants of money in aid of certain lines of railway being long line railways connecting distant points within the Dominion, but confined to that class of railways, and in no case including street railways, which are local works confined to particular cities, towns or municipalities. The learned Judge thought that this indicated the policy of the Legislature underlying the provisions of the Tariff Act, to be to admit free, only rails designed for use in  
40 the same class of railways as that which had been favoured by Parliamentary grants of money. The Judge says :

As the matter stands, however, and if there were no legitimate aids to assist in discovering the intention of the Legislature other than the language

RECORD.

No. 14.  
Judges'  
Reasons—  
continued.

used in the Acts of 1885 and 1887, I should think the question to be, to say the least, so involved in doubt that the Plaintiff should succeed in his action.

The judgment then adverts to what are called the Bonus Acts and from the practice of subsidizing railways, other than street railways, by these grants it is inferred that proprietors of this class of railways were alone intended to be benefited by the exemption of steel rails of the prescribed weight for "use in railway tracks."

I am unable to assent to this as a sufficient reason for depriving the Appellant of the benefit of the exemption.

In construing an Act of Parliament, it is of course perfectly legitimate 10 and it is the constant practice of the Courts to call in aid the language and expressions used by the Legislature, and the intention indicated by other Statutes which are in *pari materia*. The Bonus Acts are, however, not in *pari materia* with the Customs Acts. Further, the circumstance that the Legislature had limited its subsidies to a particular class of railways does not in any way indicate an intention to confine the benefit of a custom exemption to the same class as that which had been thus favoured by money grants. At the utmost it warrants nothing but a conjecture of what may or may not have been the intention of the Legislature. Then a mere supposition of this kind ought to have no influence on the construction of a Legislative Act in either 20 widening the language imposing duties or in restricting that authorising exceptions. If we are to look outside the statute to ascertain the intention of the Legislature in exempting "steel rails above 25 pounds per lineal yard for use in railway tracks," I think, as was suggested by my brother King during the argument, that we find a key to that intention when we consider the general fiscal policy of the Dominion at the time this Act was passed to have been that which is stated in the factum of the Crown, and which is colloquially known as "The National Policy," in other words a system of duties imposed for the protection and encouragement of the manufactures of the Dominion. And this becomes still more apparent when we find it stated in the deposition 30 of Mr. Gartshore, that at the date of this legislation, steel rails a little under 25 pounds were being manufactured in the Dominion.

These considerations, however, are of little moment if the plain language of the Act itself does not exempt the rails now in question.

The argument for the Crown is that the Appellant's railway is a "tramway," that the rails are therefore subjected to the duty by Item 88 as rails for "tramways" and not as rails for "railways," and that the exemption of rails "for use in railway tracks" does not include rails for use in tramway tracks.

I am compelled to deny the correctness of these propositions. A great 40 deal of evidence has been given by engineers and other skilled witnesses to explain the meaning of the word "tramway" used in the 88th item, by which the duties are imposed. This evidence, taking the term to be a word of art, was, I take it, strictly admissible. At all events it was admitted without objection. The conclusion I draw from the depositions of the expert witnesses who have thus given their opinions is that the word "tramway" was not designed as a description of such railways as that of the Appellant. I take as a

fair type of the whole of this evidence, that of Mr. Keefer, an engineer of very long practice extending over some fifty years, of the highest professional reputation, and who had formerly conjoined to his professional experience, practical experience in the management of a street railway company in which he was formerly interested, and had been for a series of years the president of. He tells us moreover that he had been an officer of the American Street Railway Association and was familiar with the working of these lines of transit, not only in Canada but in the United States. This witness clearly and accurately points out the distinction between the terms "tramway" and "street railway" as those expressions are used on this side of the Atlantic where street railways were first constructed and used, and shows that this distinction is well understood, and in what it consists. A tramway is, as the witness describes it, a line of railway laid down upon the surface of a street or common road with a rail adapted for use by ordinary vehicles. An electric railway is not intended for such use and could not with safety be so used. The tramway is constructed with a rail of a peculiar design, having a flange to prevent the wheels of an ordinary vehicle slipping off, which these rails, a section of one of which was produced to the witness have not got. The witness says "a street railway may be a tram and it may not," and he says the railway he was formerly the president of had no tram, whilst the former horse railway in Toronto had. The whole of Mr. Keefer's deposition goes to show that according to the scientific meaning of the term as used and understood by railway engineers the Appellant's railway was not a tramway but a street railway in the strictest application of the term. And this evidence is corroborated by several other professional witnesses called by the Appellant. Then, the evidence also shows that in popular language the term "tramway" is not in Canada or in the United States ever applied to these street or surface railways used for rapid transit in cities and towns, but that they are always colloquially referred to as street railways. Further, the evidence shows that in this country there is a class of railways well known and in common use, to which the description tramway is applicable and to which it is always applied, namely, short lines of rails connected with mills, manufactories and mines, and used for lumbering operations.

In addition to this evidence the enactments of the same legislature which passed the Act under consideration, indicate that the difference between a street railway and a tramway was well understood, for in the Tariff Act of 1885, we find them expressly providing "that steel rails or bars not including tram or street rails" should be admitted free. Therefore, when I add to this my own common experience of the non-use of the term tramway, as applied to street railways, which it is impossible to exclude in a case like the present, I cannot hesitate in holding that if the word "tramways" had been wholly omitted from Item 88, and if that section had read "steel bars and rails for railways of any form" the duty of \$6 per ton would have been sufficiently laid upon the rails now in question. And if this is so the exemption in section 173 of steel rails weighing not less than 25 pounds for use in railway tracks, would in that case have included the rails in question and they would have been free.

RECORD.  
—  
No. 14.  
Judges'  
Reasons—  
continued.

## RECORD.

No. 14.  
Judges'  
Reasons—  
continued.

It follows that the duty in the present case must be taken to be imposed by the words "for railways" in Section 88 and not by the words "for tramways" and the exception of Item 173 must therefore apply to rails to be used in the tracks of a railway such as the Appellant's, provided they are not less than 25 pounds in weight. But even supposing that we must regard the duty as imposed by the word "tramways" and that the Appellant's lines are tramways, I should still think that the exemption applied in their favour. The word "railway" is a generic word including both long lines and streets and surface lines—tramways as the Crown insists they should be called; and there is no reason why the exemption may not be conferred by general words less specific than those imposing the duty. Then, finding the reason of the exemption to be that before indicated, viz., a policy of protection to domestic manufactures, a reason equally applicable to rails for street railways or tramways, if such street railways or tramways were intended to be included in the term "tramways" there is no reason why steel rails above the prescribed weight should not be relieved from duty by the term "for use in railway tracks." 10

This being a dissenting judgment I have not felt called upon to state at greater length the reasons which have led me to the conclusion that the Appellant is entitled to the relief prayed.

King, J.]

King, J., concurred in this judgment.

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A true Copy, C. H. Masters, Asst. Rep. S.C.C.

Taschereau,  
J.

Taschereau, J. :

I would dismiss this appeal. I agree with my brother Gwynne's reasoning. In my opinion the Appellant's contentions are untenable. They would call the Grand Trunk Railway or the Canadian Pacific Railway, tramways or call themselves a Railway Company in the sense that these Companies are so called. I would not have thought it possible to contend that when for instance one speaks of the system of railways of Canada or of the railways in Canada the City passenger railways or street railways or tramways are included. These tramways do certainly not fall under the general Railway Acts of the Dominion or of the Provinces, and if by Section 18 of the Appellant's own charter certain sections of the Ontario general Act are incorporated therein it is because in the opinion of the Legislature the Appellant would not without those special enactments fall under the general Railway Act. And the Federal Legislation does not give more assistance to the Appellant's case. For instance the railways generally are empowered to purchase lease and work other lines competing or connecting with them. Now could under that clause the Grand Trunk Railway or the Canadian Pacific Railway acquire and work the City passenger railway of Toronto, Winnipeg, Montreal, &c., &c. I should think it impossible to so contend. It would be *ultra vires* of these railway companies to hold and work a street railway or tramway yet that would be the result if the Appellant's contention prevailed. 30

Then by the course of legislation of the Dominion the difference between a tramway and a railway is constantly recognized; for instance the Criminal Code (Section 330) punishes the stealing of any tramway railway or steamboat 40

ticket, the forger (Section 423) of any carriage tramway or railway ticket and obtaining by false tickets (Section 362) of a passage on any carriage tramway or railway. By Section 90 of 51 Vict., D. (1888) power is given to cross any railway or tramway. And when by Section 203 of the Criminal Code it is enacted that a copy of the section against gambling must be posted in every railway car under a penalty of \$100. I would not think that such an enactment applies to a tramway car or that Section 499 punishing by imprisonment for life the damaging of a railway would apply to a street railway. Then upon the evidence on this record it is clear that street railways in common parlance are tramways. In fact by the modern meaning of the term tramway hardly anything else but a street railway is meant.

And how can this Company be entitled to claim an exemption which in its very terms is limited to rails for use on railway tracks when it appears by the evidence and found as a fact by the Exchequer Court their rails are not at all like those that are used for railway tracks. Moreover this Statute extends of course to all parts of the country and must receive the same construction all through the Dominion. Now if the Street Railway in Montreal had ever thought of raising this question they would have been met by the French version of the Statute which is as much law as the English version, and under that version, Items 79 and 178, there would not be the least room for doubt; "Chemin-de-Fer" could never be called "Un Tramway" or "Un Tramway" be called a "Chemin-de-Fer" and street railway is nothing else in French but "Un Tramway." That the Company Appellant is a tramway company or that their road is a tramway requires in fact no demonstration. They are in fact nothing else but a tramcar company; if not there are no tramways in Toronto, Montreal, London, Paris or New York, a proposition that need not be refuted. And their own contract for these rails is for "Steel Girder Tramway Rails."

I cannot see that the Appellant's case is at all aided by the fact insisted upon at the argument that they are called the Toronto Railway Company. They are clearly incorporated for the purpose of acquiring and working a surface street railway and nothing else as the Toronto Street Railway Company previously had been. It is in fact the Toronto Street Railway acquired by the City under 52 Vict. Chapter 73 Section 13 that the Appellants are the continuation of.

Then in this very Custom Act itself 50 and 51 Vict. Chapter 39 Parliament has made the distinction between railways and tramways; after taxing both railways and tramways in express terms in Item 88, it exempts by Item 173 rails (of not less than 25 lbs. per lineal yard) for use in railway tracks, omitting tramway tracks. Need we go further to find the clear intention of Parliament? To my mind it is not a matter of construction. There is no room for it. It says but the one thing, tax both in Item 88 exempt but one in Item 173. *Quod voluit dixit.*

A true copy, C. H. Masters, Asst. Rep. S.C.C.

Gwynne J. :

The point raised by this appeal is as to the construction of two items, viz. 88 and 173 of the duties of Customs Act 50 & 51 Vic. ch. 39. By the item p. 4514.

RECORD. 88, a duty of \$6 per ton is imposed upon "iron or steel, railway bars, and rails  
 No. 14. " for railways and tramways, of any form, punched or not punched not elsewhere  
 Judges " specified."

Reasons— By item 173 the Act authorises to be imported into Canada free of duty.  
 continued. " Steel rails weighing not less than twenty-five pounds per lineal yard for use  
 in railway tracks."

The suppliants are a Company incorporated by an Act of the Province of Ontario 55 Vic. ch. 99 for the purpose of acquiring and taking over from the petitioners for the Act a contract and agreement made by and between the City of Toronto and the petitioners, set out in full in the Act, for the purpose of the street railways and the properties and street railway privileges of and belonging to the City of Toronto, and for completing maintaining and operating a double or single track street railway upon or along any of the streets of the City of Toronto subject to certain exceptions and qualifications in the Act specified. 10

The Company is essentially a street railway company. In the month of December 1892 they entered into a contract with a firm in England to deliver to them in Toronto 3,000 tons of *new perfect, steel, girder tramway rails* for use upon the railways in the streets of the City of Toronto, this contract was fulfilled by the delivery to them at Toronto accompanied with invoices wherein they were described as in the contract for their purchase as "steel girder tramway rails." 20

The Company also imported from Antwerp certain other rails called in the invoices accompanying them "steel grooved rails and fish plates" also for use upon their railways in the streets of the City of Toronto. All these rails were respectively entered by the suppliants precisely as described in the above invoices and upon them was charged to the suppliants the sum of six dollars per ton in virtue of the above item 88 of the Statute.

The contention of the suppliants now is that this imposition of duty was unwarranted upon the ground that the rails having been as they in fact were of much greater weight than 25 lbs. per lineal yard they came within the item 173 and were therefore free of duty. The effect of this contention if successful must be that the Act as to the items 88 and 173 must be read together as follows: that is to say as imposing a duty of six dollars a ton upon iron or steel railway bars, and rails for railways and tramways, of any form, punched or not punched except upon steel rails weighing not less than 25 lbs. per lineal yard (which are declared to be free), for all "steel rails for railways" when laid upon the ground constitute the *railway tracks*. This construction thus limiting the duty upon steel rails for railways, to such as are under the weight of 25 lbs. per lineal yard must not be adopted if another construction can be put upon the Act which will give full effect and a reasonable construction to both items. This I think can very clearly be done. Parliament by item 88 intended I think to refer to all rails whether of iron or steel imported for railways and tramways, that is to say by using the word "railways" in such connection with "tramways" they meant railways *ejusden generis* with tramways which street railways I think undoubtedly are. They are very commonly, and not unfrequently even in Acts of Parliament authorising their construction, 30 40

spoken of indifferently as tramways or street railways and in commerce it is evident from the contract under which the peculiar rails in question were purchased and imported they are known as tramway rails. Now item 173 is not I think to be construed as exempting from duty some part of the particular things which by item 88 had been subjected to duty but as providing for a different article altogether from anything intended to be covered by item 88, namely for 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, and for the construction and management of which Acts have been passed for many years back both by the late Province of Canada and by the Parliament of the Dominion since confederation and by the legislatures of the several provinces of the Dominion under the title of "The Railway Act" of the Dominion, or of the Province passing the Act; the rails in question are proved to be of such a construction that they could not be used at all upon any of these latter railways but are constructed specially for use upon street railways or tramways. The rails were I think clearly liable to the duty charged and the appeal must therefore be dismissed with costs.

RECORD:  
 No. 14.  
 Judges'  
 Reasons—  
*continued.*

20 Fournier J. :

Fournier, J.

I concur with Mr. Justice Taschereau that this appeal should be dismissed.

A true copy, C. H. Masters, Asst. Rep. S.C.C.

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In the Supreme Court of Canada.

The Toronto Railway Company - - (Plaintiff) Appellant,  
 and  
 Her Majesty the Queen - - (Defendant) Respondent.

No. 15.  
 Certificate of  
 Registrar of  
 Supreme  
 Court of  
 Canada of  
 Record of  
 Appeal 27th  
 June 1895.

30 I, Robert Cassels, Registrar of the Supreme Court of Canada hereby certify that the printed document annexed hereto is a true copy of the original Case filed in my office in the above Appeal, that the printed documents also annexed hereto marked B. and C. are true copies of the factums of the Appellant and Respondent respectively deposited in said Appeal, and that the document marked D. also annexed hereto is a true copy of the formal judgment of this Court on the said Appeal.

ROBERT CASSELS, Registrar.

Dated at Ottawa, this 27th June 1895.

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IN THE PRIVY COUNCIL.

No. 49 of 1895.

ON APPEAL  
FROM THE SUPREME COURT OF CANADA.

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BETWEEN  
THE TORONTO RAILWAY COMPANY,  
*(Plaintiff) Appellant,*  
AND  
HER MAJESTY THE QUEEN - *(Defendant) Respondent*

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RECORD OF PROCEEDINGS.

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FRESHFIELDS AND WILLIAMS,  
5, Bank Buildings, E.C.,  
*for Appellant,*  
BOMPAS, BISCHOFF, DODGSON, & Co.,  
3, Great Winchester Street, E.C.,  
*for Respondent.*

p. 4514.