

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
The Toronto Railway Company v. Her
Majesty the Queen, from the Supreme
Court of Canada; delivered 31st July 1896.*

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD DAVEY.

SIR RICHARD COUCH.

[Delivered by Lord Hobhouse.]

The question in this appeal is whether the Appellants are bound to pay duty on steel rails imported by them for the purposes of their business. They have paid under protest the sum demanded by the Crown, and they seek to recover it in the present action which was brought in the Exchequer Court of Canada. The Act governing the case is that of 1887 (50 & 51 Vict., cap. 39). The Crown contends that duty is payable under item 88 of Section 1 which affects "iron or steel" railway bars and "rails for railways and tram ways." The Appellants contend that their rails are exempted by item 173 of Section 2 which applies to "steel rails for use in railway tracks."

Mr. Justice Burbidge who tried the case in the Exchequer Court decided in favour of the Crown. After subjecting the words to criticism, he concludes that if there were no legitimate aids to discovering the intention of the Legislature other than the language used in the Act of 1887 and previous Acts on the same subject, the question would be, to say the least, so

involved in doubt that the Appellants ought to succeed. But then he inquires into the policy of the Legislature; and finding that its policy was to protect Canadian manufactures, he decides that the doubtful words must be construed in accordance with that intention, and that duty must be paid.

On appeal to the Supreme Court the decision of the Exchequer Court was upheld; but there were differences among the learned Judges both in their conclusions, and in the reasoning on which identical conclusions were based. The Chief Justice, with whom Mr. Justice King concurred, examined the expressions "railway," "street-railway," and "tramway," and he was of opinion that the Appellants' road falls under the head of "railway" and not of "tramway" in item 88, and is a "railway track" within item 173. Mr. Justice Gwynne thought that item 173 is not 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, viz., steel rails for use in great arterial commercial lines. He also thought that the word "railways" in item 88 meant railways *ejusdem generis* with tramways, and not the "railway tracks" mentioned in item 173. Mr. Justice Taschereau, with whom Mr. Justice Fournier concurred, referred to various instances of expressions both in common parlance and in enactments, to show that "railways" on the one hand had been distinguished from "tramways" and "street-railways" on the other. And holding that the Appellants' road is a "street-railway" or "tramway," he decided that it falls within item 88 and not within 173. In that conflict of judicial opinion the case comes before their Lordships.

On two points they expressed themselves

as clear during the argument. First, they cannot concur in the view that the policy of the Canadian Parliament leads to the construction contended for by the Crown. Supposing it to be made out by legitimate evidence that protection for Canadian manufactures was intended in 1887, protection is given however the Act be construed, and the only question is how much? Secondly, they cannot see any reason for holding that the railways spoken of in item 88 are only those which are *ejusdem generis* with tramways, or that item 173 refers only to rails for great arterial lines.

The question is what is meant by the "Railway tracks" for which rails are to be admitted free. The Appellants were incorporated by an Ontario statute passed in the year 1892 (55 Vict., cap. 99). They received authority to construct and work a double or single track street railway in Toronto. By the Ontario Street Railway Act (Ontario Revised Statutes 1887, cap. 171) companies chartered for that purpose may construct and work a double or single iron railway with necessary side tracks (Section 4). Section 5 provides that the railway track shall conform to the grades of the streets. And Section 6 that all other vehicles may use and travel on the said tracks, but giving place to the Company's cars by leaving the tracks. It was stated at the bar, that the same expressions are found in an Ontario statute on the same subject passed in the year 1883.

The Appellants then are the owners of what the Legislature of their own province calls a single or double track street railway, and the line which they work is called a railway track. These expressions are not conclusive as to the meaning of the term as used by the Dominion Legislature in the Act under discussion. But they show that the term is known to draftsmen of statutes in Canada, and is there applied to

such a line as that of the Appellants. It seems to their Lordships to be good evidence as to the meaning of the term in the mouth of a Canadian legislature, and to afford *prima facie* ground for holding that "railway track" includes a line of street railway.

Then does the Act of 1887 contain any intrinsic evidence that the expression has some other meaning? Their Lordships look at the course of legislation on this subject. The first Act which imposed a duty on rails was passed in the year 1879 when one rate of duty was placed on "iron rails or railway bars for railways or tramways," and another rate on "steel railway bars or rails." According to the grammatical construction of the first of these sentences iron railway bars are applicable both to railways and to tramways; and steel railway bars or rails appear to have the same application. There is no distinction taken between railways and tramways for this purpose.

In the year 1883 "steel railway bars or rails" were exempted from duty and they remained free till 1885, when a new Act (48 & 49 Vict., cap. 59) was passed which exempted "steel railway bars or rails, not including tram or street rails." This is the first mention of street rails, and it seems that the expression "railway bars or rails" was calculated to include tram rails and street rails (if indeed there is any difference between them) and that express words were thought necessary to exclude the latter from the exemption accorded generally to "steel railway bars or rails."

This then was the state of the enactments in 1887. Steel railway bars or rails were exempt from duty provided they were not tram or street rails. Then the Legislature appears to have taken a wholly new dividing line between free and dutiable articles. For the first time the distinction of weight was introduced. Item

88 which imposes duty on "iron or steel railway bars or rails for railways or tramways" follows the language of 1879 in treating railway bars and rails as applicable to both railways and tramways. Item 173 exempts "steel rails weighing not less than 25 pounds per lineal yard for use in railway tracks."

It is true that the expression of "street rails," which were disallowed the benefit of exemption in 1885, has now disappeared, and an elaborate argument, with much evidence directed to it, is submitted for the purpose of showing on behalf of the Crown that the Appellants' line is nothing but a tramway, taxed under item 88, and not exempted by 173. Their Lordships do not enter into this verbal discussion. It may be that in other Acts and for other purposes there are substantial distinctions between railways or railway tracks, and street railways, and tramways. But for this purpose and in this Act and in its three predecessors, there is not traceable any idea of making such a distinction, but rather the idea of putting all kinds of railways on the same footing, except in the one passage in the Act of 1885, in which the generality of the words "railway bars or rails" is limited by express words excluding "tram or street rails." They hold that the only distinction in the Act between taxed and free steel rails for railways is that of weight; and that as the rails of the Appellants are above the specified weight and are for use on their railway track, they are exempted from duty. Their Lordships will humbly advise Her Majesty to discharge both the orders below, and to enter judgment for the Appellants with costs in both Courts. The Respondent must also pay the costs of this appeal.

