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Oct. 29.

THE TORONTO RAILWAY CO..........PLAINTIFFS;

AND

HER MAJESTY THE QUEEN...........DEFENDANT.

Customs-duties—Importation of steel rails for street railways—Tariff Act, 50-51 Vict. c. 39, items 88 and 173—Construction.

The word "railway" as used in (free) item 173 of the Tariff Act of 1887, 50-51 Vict. c. 39, does not include street railways.

2. In construing a revenue Act regard should be had to the general fiscal policy of the country at the time the Act was passed. When that is a matter of history reference must be had to the sources of such history, which are not only to be found in the Acts of Parliament, but in the proceedings of Parliament, and in the debates and discussions which take place there and elsewhere. This is a different matter from construing a particular clause or provision of the Act by reference to the intention of the mover or promoter of it expressed while the Bill or the resolution on which it was founded was before the House, which cannot be done under the rules which govern the construction of statutes.

THIS was a claim for the return of moneys alleged to have been improperly paid for customs-duties.

The case was heard at Toronto on the 19th and 20th of April, 1894.

C. Robinson, Q.C., for the plaintiffs:

The question here is: What is the meaning of the term railways as used in the statute 50-51 Vict. c. 39? To answer that question we must have reference to the statutes *in pari materia*. We have to trace the legislation on this subject throughout, and see the change of language which has been adopted by the legislature, and then see if it is possible to assign to that change of language any other meaning and intention than the meaning and intention which the plaintiffs claim will admit their rails free of duty. (He here discusses the legislation on the subject in question from 1879 until the Act 50-51 Vict. c. 39).

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It is a principle of construction that a change of language imports, *primâ facie*, a change of intention. The legislature showed in 1885 and 1886 that when they wished to exclude street rails from the free list they knew how to do it, using the appropriate expressions; they did it specifically. Why did they drop that exclusion altogether? Why did they omit from the statute governing this case any exclusion of street rails from the free list? If the legislature here intended to continue the exclusion of street rails from the free list, why did they not use the same words they had previously used in two successive Acts for that purpose, words which could have left no doubt? It must be inferred that their intention was to make these rails free.

(He cites *Elmes on Customs Laws* (1); *United States* v. *200 chests of tea* (2); *Hardcastle on Statutes* (3); *Bell and the Master in Equity* (4); *Maxwell on Statutes* (5); *Endlich on Statutes* (6); *Aerated Bread Company* v. *Gregg* (7); *Doughty* v. *Firbank* (8); *Swansea Improvements Co.* v. *Swansea Urban Sanitary Authority* (9); *MacFarlane* v. *Gilmour* (10); *Ex parte Zebley* (11); *Gyger* v. *Philadelphia City Passenger Ry. Co.* (12); *Hestonville Passenger Ry. Co.* v. *City of Philadelphia* (13); *Millvale Burough* v. *Evergreen Railway Co.* (14); *Pennsylvania Railroad Co.* v. *Pittsburgh* (15); *Lumley* v. *Guy* (16).

B. B. Osler, Q.C., followed for the plaintiffs. He cited *Nix* v. *Hedden* (17); *Conmee* v. *Canadian Pacific Railway* (unreported).

(1) Sec. 880.
(2) 9 Wheat. 430.
(3) 2d ed. p. 93.
(4) 2 App. Cas. 565.
(5) P. 394.
(6) Pp. 382 to 385.
(7) L. R. 8 Q. B. 355.
(8) 10 Q. B. D. 358.
(9) [1892] 1 Q. B. 357.
(10) 5 Ont. R. 302.
(11) 30 N. B. R. 130.
(12) 136 Penn. 96.
(13) 89 Penn. 219.
(14) 131 Penn 1.
(15) 104 Penn. 529.
(16) 2 El. & Bl. 216.
(17) 39 Fed. Rep. 109.

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F. E. Hodgins, for the defendant:

The plaintiffs are estopped by their sworn entries at the Customs from denying the correctness of such entries now. In the affidavits it is stated that the descriptions of the goods in the invoices are correct.

The Customs Act (1), secs. 13, 35, 58 and 63, requires that the invoices should correctly state the description of the goods imported, and the court must be influenced in its construction of the Act by the terms used by the manufacturer or exporter of the goods in question. (He cites *United States* v. *Sarchet* (2); *Ross* v. *Fuller* (3); *Elmes on Customs Laws* (4).

But apart from this, the statute will in no way permit entry of these rails free of duty. The plaintiffs, to bring themselves within the free entry item 173, must clearly show that these are rails for railway tracks such as are contemplated by that section. Due consideration must be given to the fact that the duty item stands first in the statute. The duty is there clearly and expressly imposed. It is quite certain that were it not for the words, "not elsewhere specified" the duty so imposed would cover the rails in question here. Then in the free list the admission of rails thereunder is limited to those for use in railway tracks. [THE JUDGE OF THE EXCHEQUER COURT: You say the effect of these two things is to get rid, on your part, of the rule that requires a tax to be imposed by clear words. To state your proposition in another form, you say the court has to construe not the positive enactment but the exception, and it is for the plaintiffs to bring themselves within the exception?] Yes, my lord; and the authorities sustain the position I take. (He cites *Hogg* v. *The Parochial Board* (5); *Elmes on*

(1) R. S. C. c. 32.
(2) Gilp. 273.
(3) 17 Fed. Rep. 224.
(4) P. 24.
(5) 7 Rettie's Rep. 986.

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Customs Laws (1); *Phillips on Tramways* (2); *Clarke on Tramways* (3); *Roberts and Wallace on Employers* (4); *Spens and Younger on Employers* (5); *Wood on Railways* (6); *Re Brentford & Isleworth Tramway Company* (7); *Swansea Improvement Company's Case* (8); *Louisville Railway Company* v. *The Louisville City Railway Company* (9); *Clement* v. *The City of Cincinnati* (10); *Williams* v. *The City Electric Ry.* (11): *Matson* v. *Baird* (12); *Doughty* v. *Firbank* (13); *The Birmingham Mineral Railway Co.* v. *Jacobs* (14); *Commonwealth* v. *Central Passenger Railway Co.* (15).

Then, in order to find the intention of Parliament in regard to the exclusion of rails such as these in question from free importation under item 173 of the Tariff Act, I refer the attention of the court to a statement made by the Finance Minister, during the passage of the free item through the House, to the effect that "tramway" was intended to include "street railway." (He cites on this point *Hardcastle on Statutes* (16); *Reg.* v. *Bishop of Oxford* (17); *South Eastern Railway Co.* v. *The Railway Commissioners* (18); *Best on Evidence* (19); *Taylor on Evidence* (20); *Brant* v. *Midland Railway Co.*(21); *Hill* v. *East and West India Dock Co.* (22); *Smiles* v. *Belford* (23); *Roots* v. *Snelling* (24); *Mersey Docks* v. *Lucas* (25); *Mayor of Southport* v *Morris* (26); *Woodward* v. *London & North Western Railway*

(1) Sec. 880.
(2) P. 2.
(3) Pp. 4, 5, 6, 7 and 15.
(4) P. 289.
(5) P. 248.
(6) P. 1.
(7) 26 Ch. D. 527.
(8) [1892] 1 Q. B. 357.
(9) 2 Duv. 175.
(10) 16 W. L. Bull. 355.
(11) 41 Fed. Rep. 556.
(12) 3 App. Cas. 1082.
(13) 48 L. T. 530.
(14) 92 Ala. 187.
(15) 52 Penn. 506.
(16) P. 143.
(17) 4 Q. B. D. 525.
(18) 5 Q. B. D. 236.
(19) 7th ed. 231.
(20) 8th ed. 61.
(21) 2 H. & P. 89.
(22) 9 App. Cas. 448.
(23) 1 Ont. App. 436.
(24) 48 L. T. 216.
(25) 8 App. Cas. 902.
(26) [1893] 1 Q. B. 359.

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Co. (1); *South Eastern Railway* v. *Railway Commissioners* (2); *Hickman* v. *Birch* (3); *The Dunelm* (4); *Wandsworth* v. *The United Telephone Company* (5); *Fleming* v. *The Toronto Street Railway* (6).

C. Robinson, Q.C., replied. (He cited *The Queen* v. *The Bishop of Oxford* (7); *South Eastern Railway* v. *Railway Commissioners* (8); *Julius* v. *Bishop of Oxford* (9); *Rankin* v. *Lamont* (10); *Bray* v. *Justices of Lancashire* (11); *Endlich on Statutes* (12); *Sutherland on Statutory Construction* (13); *Warrington* v. *Furbor* (14); *The Queen* v. *The J. C. Ayer Co.* (15).

THE JUDGE OF THE EXCHEQUER COURT now (October 29th, 1894) delivered judgment:

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 was 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 Vict. ch. 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

(1) 3 Exch. D. 121.
(2) 6 Q. B. D. 586.
(3) 24 Q. B. D. 172.
(4) 9 Prob. D. 171.
(5) 13 Q. B. D. 920.
(6) 37 U. C. Q. B. 116.
(7) 4 Q. B. D. 245, 525; 5 App. Cas. 214.
(8) 5 Q.B.D. 217; 6 Q.B.D. 586.
(9) 5 App. Cas. 214.
(10) 5 App. Cas. 44.
(11) 22 Q. B. D. 484; 8 App. Cas. 501.
(12) Pp. 41 and 479.
(13) P. 384.
(14) 8 East 242.
(15) 1 Ex. C. R. 270.

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?

The first Act by which duties of Customs 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 (1). In the latter year an Act was passed to alter the duties of Customs and Excise (2), 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 (3). The date upon which the duty would be leviable on steel railway bars or rails was extended from time to time (4) until 1883 when they were placed upon the free list (5). 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 (6)."

Now it is clear that the expression "railways and tramways" in the 88th item of 50-51 Vict. ch. 39, sec. 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.

(1) 31 Vict. c. 7, Schedule C; and 31 Vict. c. 44, Schedule C.

(2) 42 Vict. c. 15.

(3) Acts of 1879 pp. 127, 133 and 141.

(4) Acts of 1880 pp. 64 and 66; 1881 pp. 67 and 69: 1882 pp. 69 and 70.

(5) Acts of 1883 p. 156.

(6) Acts of 1885 p. 148. See also R. S. C. c. 33, items 217 and 770.

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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 of 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

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 (1). 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

(1) Dictionnaire de Littré vo. *Tramway*:—Dictionnaire de l'Académie Française, 7ième edn., vo. *Tramway*: —Dictionnaire de Bescherelle, vo. *Tramway*.

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superfluous if the term "tram rails" included "street rails." But for that circumstance I should have thought that the word "tramways" 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 plantiffs 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 from 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.

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, authorizing such subsidies, we find the names of four lines of railway (45 Vict. c. 14): in the Act of 1883, eleven (46 Vict. c. 25): in the Act of 1884, twenty-five (47 Vict. c. 8): in the Act of 1885, seventeen, (48-49 Vict. c. 59): in the Act of 1886,

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thirty-one (49 Vict. c 10) : and in the Act of 1887, thirty-eight (50-51 Vict. 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 aid 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 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 the 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 use 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.

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* (1). A majority of the Supreme Court of New Brunswick in that case, (Allen, C.J., Wetmore, Palmer and Fraser, JJ., Tuck, J. dissenting, and King, J. taking no part) held that The Saint 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 consid-

(1) 30 N. B. R. 130.

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eration. It is, therefore, with great deference to the opinion of the majority that I add that I think 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 reasons stated by him for the conclusions to which he came.

Judgment for the defendant, with costs.

Solicitors for plaintiffs: *Kingsmill, Saunders, Symonds & Torrance.*

Solicitor for defendant: *F. E. Hodgins.*