

1895 THE TORONTO RAILWAY COM- } APPELLANT;
 *Mar. 30. PANY (PLAINTIFF)..... }
 *June 26. AND

HER MAJESTY THE QUEEN (DE- } RESPONDENT.
 FENDANT) }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Customs duties—50 & 51 V. c. 39, items 88 and 173 — Exemption from duty—Steel rails for use on railways—Application to street railways.

The exemption from duty in 50 & 51 V. c. 39, item 173, of "steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks," does not apply to rails to be used for street railways which are subject to duty as "rails for railways and tramways of any form" under item 88. Strong C.J. and King J. dissenting.

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the Crown in an action for repayment of duties paid under protest by the plaintiff company.

The Customs Tariff Act, 1888 (50 & 51 Vic. ch. 39), by item 88 imposes a duty of \$6 per ton on iron or steel railway bars and rails for railways and tramways of any form, not elsewhere specified, and by item 173 "steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks," are exempted from duty.

The only question for decision on this appeal was, whether steel rails weighing more than twenty-five pounds per lineal yard, imported by the plaintiff company for the construction of street railway tracks in Toronto, were exempted from duty under item 173, or

*PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and King JJ.

subject to duty under item 88. The learned Judge of the Exchequer Court held that the exemption did not apply to steel rails for street railways. The company appealed.

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Robinson Q.C. and *Osler* Q.C. for the appellant. The learned judge of the Exchequer Court held that the construction of the statute should be in favour of the railway company, but he decided the case outside of the wording of the act and on the general policy of the legislation.

A street railway is not a tramway. The distinction between them is recognized in the Tariff Act of 1888.

This question arose in New Brunswick in *Ex parte Zebbley* (1); and see also *Grinnell v. The Queen* (2); *Ayer v. The Queen* (3).

The course of tariff legislation shows that rails for street railways were intended to be included in the exemption.

Newcombe Q.C. Deputy Minister of Justice, and *Hodgins* for the respondent. Street railway and tramway are synonymous terms.

The exempting item does not use the word tramway and the taxing item does.

The intention of the legislature was to encourage the building of long distance railways and not of those for the convenience of municipalities.

The learned counsel referred to *Attorney General v. Bailey* (4).

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 * * * * *

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

(3) 1 Ex. C.R. 270.

(2) 16 Can. S.C.R. 119.

(4) 1 Ex. 281.

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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.

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 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 1887, (50 & 51 Vic. ch. 39) on which the decision of the question thus raised must depend are as follows:—

The duty is imposed by

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.

The appellant contends that the rails in question are covered by this exemption 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 par-

liament 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 the same class of railways as that which had been favoured by parliamentary grants of money. The learned 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 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 learned judge then adverts to what are called the bonus acts, and from the practice of subsidising railways, other than street railways, by these grants, he infers 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, and it is the constant practice of the courts, to call in aid the language and expressions used by the legislature in, and the intention indicated by, other statutes which are in *pari materiâ*. The bonus acts are, however, not in *pari materiâ* 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 customs exemption to the same

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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 widening the language imposing duties, or in restricting that authorizing 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 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 railways tracks" does not include rails for use in tramway tracks.

I am compelled to deny the correctness of these propositions. A great 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, the deposition 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 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. It is also shown that these rails are in all respects identical with those used for long line steam railways. The witness says "a street railway may be a tram and

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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 the United States ever applied to these street or surface railways used for rapid transit in cities or towns, but that they are always colloquially referred to as street railways. Further, the evidence shows that in this country there are 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 weigh-

ing 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.

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 street 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 exempted from duty by the terms "for use in railway tracks."

For these reasons I am of opinion that the appellant is entitled to the relief prayed.

FOURNIER J.—I concur with Mr. Justice Taschereau that this appeal should be dismissed.

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

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1895 Canadian Pacific Railway tramways, or call themselves
 THE a railway company in the sense that these companies
 TORONTO are so called. I would not have thought it possible to
 RAILWAY contend that when, for instance, one speaks of the
 COMPANY system of railways of Canada, or of the railways in
 v. Canada, the city passenger railways or street railways,
 THE or tramways, are included. These tramways do cer-
 QUEEN. tainly not fall under the general railway acts of the
 Taschereau Dominion or of the provinces.
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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 that 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 the Grand Trunk Railway or the Canadian Pacific Railway under that clause acquire and work the city passenger railways of Toronto, Winnipeg and Montreal? I should think it impossible so to 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 contentions prevailed.

Then, by the course of the legislation of the Dominion, the difference between a tramway and a railway is constantly recognized.

For instance, the Criminal Code (sec. 330) punishes the stealing of any tramway, railway or steamboat ticket, the forgery (sec. 423) of any carriage, tramway or railway ticket, and the obtaining by false tickets (sec. 362) of a passage on any carriage, tramway or railway. By sec. 90 of 51 Vic (D.), 1888, power is given to cross any railway or tramway. And when, by sec.

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 one hundred dollars, I would not think that such an enactment applies to a tramway car, or that sec. 499, punishing by imprisonment for life the damaging of a railway, would apply to a street railway.

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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 in railway tracks, when, as 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. A *chemin de fer* could never be called *un tramway*, or *un tramway* be called a *chemin de fer*, and a 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 tramway company; if not, there are no tramways in Toronto, Montreal, London, Paris, New York, a proposition that needs not be refuted.

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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 it is called the Toronto Railway Company. It is 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 Vic. ch. 73, sec. 13, that the appellant is the continuation of.

Then in this very Customs Act itself, 50 & 51 Vic. ch. 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.*

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 88, a duty of \$6 per ton is imposed upon:

Iron or steel railway bars, and rails for railways and tramways, of any form, punched or not punched, not elsewhere specified.

By item 173 the Act authorizes to be imported into Canada free of duty:

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

The suppliant is 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 peti-

tioners 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 purchase 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.

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The company is essentially a street railway company. In the month of December, 1892, it entered into a contract with a firm in England for delivery in Toronto of 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 of the rails at Toronto accompanied with invoices wherein they were described as in the contract for their purchase, viz., "steel girder tramway rails."

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 its railways in the streets of the city of Toronto. All these rails were respectively entered by the suppliant precisely as described in the above invoices and upon them was charged to the suppliant the sum of six dollars per ton in virtue of the above item 88 of the statute.

The contention of the suppliant 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 items 88 and 173 of the Act must be read together as follows, that is to say, as imposing a

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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 *ejusdem generis* with tramways which street railways, I think, undoubtedly are. They are very commonly, and not unfrequently even in Acts of Parliament authorizing their construction, spoken of indifferently as tramways or street railways, and in commerce it is evident from the contract under which the particular rails in question were purchased and imported that 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 thing 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 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.

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KING J.—I am of opinion that this appeal should be allowed with costs and judgment entered for the suppliant in the Exchequer Court, for the reasons stated in the judgment of the Chief Justice.

**Appeal dismissed with costs.*

Solicitors for the appellant: *Kingsmill, Saunders & Torrance.*

Solicitor for the respondent: *Frank E. Hodgins.*

*The Toronto Railway Co. obtained leave to appeal to the Judicial Committee of the Privy Council from this decision.