

THE SAINT JOHN PILOT COM- }  
 MISSIONERS (DEFENDANTS) . . . . . } APPELLANTS;

1906  
 \*Dec. 17.  
 \*Dec. 26.

AND

THE CUMBERLAND RAILWAY }  
 AND COAL COMPANY (PLAIN- } RESPONDENTS.  
 TIFFS) . . . . . }

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Pilotage—Port of St. John, N.B.—Ships propelled wholly or in part by steam—Coal barges towed—R.S.C. c. 80, ss. 58, 59.*

Coal barges towed by steamers or tugs between the ports of Parsboro', N.S. and St. John, N.B., are exempt from compulsory pilotage at the latter port, even though under favourable conditions they could be navigated as sailing ships.

Judgment appealed from (37 N.B. Rep. 406), affirmed.

**APPEAL** from the judgment of the Supreme Court of New Brunswick(1) sustaining the verdict at the trial in favour of the plaintiffs.

The plaintiffs' barges were registered as schooners and built on the model of schooners of over 400 tons. They were not rigged for sailing, but had masts on which were fitted sails which could be used for sailing purposes in favourable weather. These barges were loaded with coal at Parsboro, N.S., and towed by steamers or tugs to St. John, N.B. The question for decision was whether or not they are exempt from being compelled to pay pilotage dues at St. John as being propelled wholly or in part by steam under "The

\*PRESENT:—Fitzpatrick C.J. and Davies, Idington, MacLennan and Duff JJ.

(1) 37 N.B. Rep. 406.

1906  
 SAINT JOHN  
 PILOT  
 COMMIS-  
 SIONERS  
 v.  
 CUMBERLAND  
 RY. AND  
 COAL CO.

Pilotage Act," R.S.C. ch. 80, sec. 59 (R.S.C. (1906), sec. 477).

The trial judge held that they were exempt and his judgment was affirmed by the full court, Tuck C.J. dissenting.

*McAlpine K.C.* and *Coster K.C.*, for the appellants. The vessels on which pilotage dues are sought to be recovered are not of the class in question in the case of *The "Grandee"* (1).

By the "Pilotage Act," R.S.C. ch. 80, sec. 2(b), the expression "ship" includes every description of vessel used in navigation not propelled by oars. See also *The "Mac"* (1). There can be no doubt that these schooners or so-called barges are "ships" within the meaning of the Act. R.S.C. ch. 80, secs. 58, 59, leave only two questions to be considered: (1) Did these schooners or so-called barges navigate within the pilotage district of Saint John? (2) Had they motive power of their own, independent altogether of the tugs that towed them, and apart from steam altogether? These vessels are ships that navigated within the pilotage district of Saint John and come under the 58th section of the Act, and therefore must pay pilotage dues, unless exempt under the provisions of the Act, and that said ships or barges, with respect to their employment and only with respect to their employment, come under the exemptions of the 59th section of the said Act. The evidence abundantly proves that these vessels had motive power of their own, in and of themselves by their sails, apart altogether from the tugs which towed them. Fifteen witnesses testify that the schooners (or barges) in question, equipped

(1) 8 Ex. C.R. 54.

(2) 7 P.D. 126.

as now, can sail from four to six and seven miles an hour, according to the wind, and that, if provided with greater sail area, which they could easily carry, they would sail as fast as any ordinary sailing vessel.

The words of the 59th section of the "Pilotage Act" (c), "propelled wholly or in part by steam," means steam power within the vessel itself and do not mean steam power within a tug that may be used to tow the vessel. The propelling power must be within the vessel itself to come within the meaning of the Act. By R.S.C. ch. 79, sec. 1(c), the expression "steamship" or steamboat includes every vessel propelled wholly or in part by steam, or by any machinery or power other than sails or oars. By the "Steamboat Inspection Act," R.S.C. ch. 78, sec. 2(a), the expression "steamboat" includes any vessel used in navigation or afloat on navigable water and propelled or movable wholly or in part by steam.

It is submitted further that the appellants being a corporation for certain public purposes only, possessed of no property or ability to acquire property, could not in their corporate capacity be sued or made defendants in this cause, and no Act or law authorizes such a suit.

*Hugh H. McLean K.C.*, for the respondents, was not called upon for any argument.

The judgment of the court was delivered by

DAVIES J.—At the close of the argument of the appellants' counsel we intimated that we did not desire to hear respondents' counsel, as we were unanimously of opinion that the appeal must be dismissed and the judgment of the court below confirmed.

1906

SAINT JOHN  
PILOT  
COMMISSIONERS  
v.  
CUMBERLAND  
RY. AND  
COAL CO.

1906

SAINT JOHN  
PILOT  
COMMISSIONERS  
v.  
CUMBERLAND  
RY. AND  
COAL CO.  
Davies J.

The judges who delivered the majority judgment below have, in their reasons, dealt at great length and quite satisfactorily with the questions at issue.

In deference, however, to the dissenting judgment of the Chief Justice and to the vigorous and strenuous argument at bar in this court, we desire to re-state very shortly the grounds on which we think the judgment appealed from is correct.

The action was one brought by the respondents to recover back from the Saint John Pilot Commissioners certain sums of money which they had been compelled to pay and had paid under protest for years past as "compulsory pilotage" upon their laden barges which were towed by a steamer or tug between Parsboro and Saint John, in the Bay of Fundy.

The Pilot Commissioners contended that these barges were ships within the meaning of "The Pilotage Act," ch. 80 of the Revised Statutes of Canada, which, under the 58th section of the Act "navigated within the pilotage district of Saint John," and, as such were liable to pay the pilotage fees and that they were not within the exemption of sub-section (c) of section 59, exempting from liability to pay such fees:

Ships propelled wholly or in part by steam employed in trading from port to port in the same province or between any one or more of the provinces (of Canada) and any other or others of them or employed on a voyage between any port in any of the said provinces and the port of New York, or any port of the United States, on the Atlantic, north of New York.

Mr. McAlpine and Mr. Coster, for the appellants, contended that the plaintiffs' barges came clearly within the definition of ships contained in the interpretation clause of the Act and that the word "navigated" in the 58th section and on the true construction of which the liability for pilotage dues arose,

means "navigated by any way or means whatsoever," whether in itself or outside of itself, and, so must include a barge or ship being towed.

We think, however, that the true construction of the word, somewhat ambiguous in the place where used in the section, must be determined, not by its literal and technical meaning only, but by reading it in connection with its context, including the exemption section following.

To reach the true meaning of the word one must read, not alone the section imposing the liability, but also that creating and defining the exemptions.

But, reading section 58 by itself alone, and its own special exemption, it will be found that that liability only attaches to such ship on her inward voyage, in cases "where a licensed pilot offers his services as a pilot." In any case where such offer is not made liability does not attach. And so it might well be argued and maintained on the construction of this section alone, a section imposing a tax, that it clearly only contemplates such cases and ships as might require or could utilize a pilot's services, and did not apply to those cases where such services could not either be required or utilized. And so, in the case of one, two or three barges being towed from any one of the specified points to Saint John, each barge being a "ship navigating within the pilotage district" and separately liable to pilotage dues as contended, it would seem absurd for as many licensed pilots as there were barges to tender their services as pilots, and unnecessary and unrequisite in the case of one barge.

What would the two or three pilots do? Which would control and direct the tow, and which be responsible for wrongful orders and bad navigation?

1906  
 SAINT JOHN  
 PILOT  
 COMMISSIONERS  
 v.  
 CUMBERLAND  
 RY. AND  
 COAL CO.  
 ———  
 Davies J.  
 ———

1906

SAINT JOHN  
PILOT  
COMMISSIONERS  
v.  
CUMBERLAND  
RY. AND  
COAL Co.  
Davies J.

These considerations would indicate that the ship navigating the pilotage district and so becoming liable for dues is a ship having independent practical moving or sailing powers which a pilot could direct and control, and not one or more barges towed by a tug and relying for its or their motion or propulsion practically and substantially, if not absolutely, upon the power generated and applied in the tug.

In point of fact, the barge, or ship if you like so to call her, when being so towed, either by a line behind the tug or lashed to the tug, is no different from a raft or congeries of logs or deals not coming within the statutory definition of a ship. Such a barge is not being "navigated" within the meaning of that word as used in this section.

But, if there were any doubts upon the point, they seem entirely to vanish in the light of section 59, the exempting clause. Here, by sub-section (c) "ships propelled wholly or in part by steam employed in trading" between any of the specified ports are exempt from liability to pilotage dues.

Now, these barges are admittedly ships, admittedly propelled in large part, if not altogether, by steam, and admittedly engaged in trading between the specified ports. They would seem, therefore, to come within the very letter as well as the spirit of the exempting section.

But, it is said by Mr. Coster, the propelling power which moves them must be a power within themselves and not in a steamer to which they may be lashed or which is towing them. Why? If Parliament desired to exclude barges being towed from the exemption, surely they would have used language shewing their desire. By what rule of construction could the courts

put an artificial and arbitrary meaning upon the words "ships propelled wholly or in part by steam," and confine it to ships in which the steam is generated and the power applied on board of itself? The barge or line of barges moves, navigates, is propelled, and except in certain favourable weather when they can use their small sails as auxiliary power, alone by steam generated and applied by the controlling tug which has them in tow or lashed to it, as the case may be.

The case seems to us a clear one, not admitting of reasonable doubt, and the fact so much relied upon that under certain favourable conditions of weather, wind and tide, the barges might, independently of a tug, move along at the rate of from three to five, and possibly, even six miles an hour cannot alter the conclusion we have reached.

If any such barge attempted to trade between any of the specified points independently and without a tug she, being a ship navigating the pilotage district and not moved or propelled by steam, would, of course, be liable, provided she successfully overcame the danger of navigation and reached Saint John.

But no such case occurred here or was suggested could reasonably occur.

The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *C. J. Coster.*

Solicitor for the respondents: *H. H. McLean.*

1906  
 SAINT JOHN  
 PILOT  
 COMMIS-  
 SIONERS  
 v.  
 CUMBERLAND  
 RY. AND  
 COAL Co.  
 ———  
 Davies J.  
 ———