ANGUS SINCLAIR AND WILLIAM DOHENY..... SUPPLIANTS; 1894 Oct. 29.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Customs-duties—R. S. C. c. 32 sec. 13—50-51 Vict. c. 39, items 88 and 173—Steel rails imported for temporary use during construction of railway—Rate of duty.

Steel rails weighing twenty-five pounds per lineal yard to be temporarily used for construction purposes on a railway and not intended to form any part of the permanent track cannot be imported free of duty under item 173 of The Tariff Act of 1887 (50-51 Vict. c. 39).

2. In virtue of clause 13 of *The Customs Act* (R. S. C. c. 32) the court held that such rails should pay duty at the same rate as tramway rails (under 50-51 Vict. c. 39 item 88) to which of all the enumerated articles in the Tariff they bore the strongest similitude or resemblance.

THIS was a petition of right for the return of certain moneys alleged to have been improperly paid in respect of customs-duties.

The facts of the case are stated in the reasons for judgment.

The case was heard at Montreal on 22nd March, 1894.

W. P. Sharpe for the suppliants;

W. D. Hogg, Q.C., for the respondent.

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

The suppliants were contractors for the execution of certain works connected with the double tracking of a portion of the Grand Trunk Railway. To facilitate the work of widening the permanent way of that railway, they, from time to time, laid down alongside thereof a temporary track or way on which were

1894

SINCLAIR v. THE QUEEN.

Reasons for Judgment.

hauled, with horses, cars loaded with material taken from the excavations. As one piece of work was finished the rails on such temporary track or way were taken up and used for a like purpose on another portion of the railway, and so on during the progress of the work. For the purpose of making these temporary tracks or ways, the suppliants, in the year 1891, imported a quantity of steel rails weighing twenty-five pounds per lineal yard. They were not intended for use in the permanent track or way of the Grand Trunk Railway or of any railway. They were too light in weight to be useful for that purpose, and they were in fact never so used. The suppliants, in the first instance, passed the rails through the Customs as being free of duty. Subsequently they were called upon to amend their entries and to pay duty. This they did under protest, and they now bring their petition to recover the amount of duties so paid ($1,276.87).

At the time of the importation the duty leviable on steel rails for railways and tramways was regulated by the Act 50-51 Vict. c. 39, to amend the Act respecting the duties of Customs. By the first section of the Act, item 88, a duty of six dollars per ton ad valorem was imposed upon "iron and steel railway bars and "rails for railways and tramways, of any form, punched "or not punched, not elsewhere specified"; and by the second section, item 173, it was provided that "steel "rails, weighing not less than twenty-five pounds per "lineal yard, for use in railway tracks" should be free of duty.

The question to be decided is:—Were the rails in question for use in the track of the Grand Trunk Railway? I am of opinion that they were not. This temporary track or way in which they were used may

1894

SINCLAIR v. THE QUEEN.

Reasons for Judgment.

or may not have been a tramway. I express no opinion on that point; but it clearly was not a railway. It is equally clear that it formed no part of the permanent way owned by the Grand Trunk Railway Company. The company owned, I assume, the way on which the rails were by its license laid for a temporary purpose; but it had no right or interest in the rails, which remained the property of the suppliants, to be by them removed. The rails were undoubtedly imported to be used, and they were used, in the construction of a railway track in the same sense that the shovels and picks and other tools and appliances used by the men employed by the suppliants were so used, but they were not for use in the track either of the main line or the sidings of the railway. That was not either their immediate or ultimate destination.

There may be some question as to whether they were rails for a railway or tramway at all within the meaning of the 88th item referred to. If the words "for railways or tramways" in that provision are not merely descriptive, but indicate the use to which the rails are to be put after importation, there may be some doubt whether the rails in question were dutiable under that provision of the Act. That perhaps would depend upon the character of the temporary way laid down,—whether or not it was a tramway within the meaning of the Act. If not, then it might be that the rails were not dutiable under item 88, but under the clause prescribing the duty on unenumerated articles. The difference is not great, but such as it is it would be in favour of the suppliants.

I shall reserve leave to them to amend their Statement of Claim, and to move for judgment for such difference, the motion to be made within thirty days.

1894

SINCLAIR v. THE QUEEN.

Reasons for Judgment.

If no such motion is made within that time there will be judgment for the respondent, with costs.*

Judgment accordingly.

Solicitor for suppliants :—*J. S Hall, jr.*

Solicitors for respondent :—*O'Connor, Hogg & Balderson.*

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* NOTE :—On the 28th November, 1894, the suppliants moved in pursuance of the leave reserved.

The following is a transcript of the stenographic report of the motion :

A. F. May in support of motion.

W. D. Hogg, Q.C., *contra*.

Mr. May: This is a motion to amend the petition of right under leave reserved in your lordship's judgment, and to move for judgment for the difference between the duty on the rails that were seized under item 88 of the Tariff Act and that which would be payable under the clause that prescribes the duty on unenumerated articles. I now move under the reserve.

(THE JUDGE OF THE EXCHEQUER COURT : What have you to say, Mr. Hogg ?)

Mr. Hogg: If I have the right to do so now, I would submit that under the similitude clause of *The Customs Act* (R. S.C. c. 32 s. 13) the similitude which these rails, looking at the use to which they were put, bear is that of tramway rails, but as your lordship has given judgment I don't suppose it is open for me to argue this point.

(THE JUDGE OF THE EXCHEQUER COURT : I have not given judgment upon the amendment. I have merely given leave to amend.)

Mr. May reads from concluding clauses of judgment : " I shall " reserve leave to them to amend " their Statement of Claim, and " to move for judgment for such " difference, the motion to be " made within thirty days.

" If no such motion is made " within that time there will be " judgment for the respondent, " with costs."

(THE JUDGE OF THE EXCHEQUER COURT : That only reserves leave to amend and to move for judgment. I did not give judgment on the amendment. The clause now referred to by Mr. Hogg was not relied upon at the trial. It is raised now for the first time).

Mr. Hogg : I submitted at the trial that it was a tramway, and still do so. It embraces all the elements of a tramway.

(THE JUDGE OF THE EXCHEQUER COURT : The suppliants claimed the rails were used for railway tracks. I was of opinion at the trial that they were not).

Mr. Hogg : The mere question of permanency cannot be taken into consideration here, because that would make against their character as a " railway " as well as against their character as a " tramway." The rails were never used for a railway in the proper sense of the term. They were used for the carriage of dumping

cars in construction work. They might have been here for one month and away the next week. But there is this to be said about their permanency that they were permanently used for tramways during the whole construction, in one place or another. It seems to me to be a case as near a tramway as you can get with the exception of permanency, and I submit under the similitude clause in *The Revised Statutes* (Clause 13 of *The Customs Act*) that as they could be used for tramway purposes they must be rated for duty in the same way that rails to which they bear the closest resemblance are rated. Your lordship in your judgment holds that whether it was a tramway or not would, perhaps, depend upon the character of the temporary way laid down. I was under the impression that all the elements of a tramway were there.

(THE JUDGE OF THE EXCHEQUER COURT: I did not intend by my judgment to express any opinion one way or another whether the duty had been properly levied or not.)

Mr. May: I submit to your lordship that the rails in question should not be charged for duty under the rate provided for tramways. These rails were moved about from place to place as they were required on construction, and were simply part of the contractor's tools or utensils. These parties were engaged in double-tracking the Grand Trunk Railway. In putting down these temporary double tracks they had no right to make a permanent way so far as we know, and it is fair to assume that they had no right to lay down a "tramway" as we understand it. They were not an incorporated company having power to do so. The rails should therefore be considered as contractor's tools such as derricks, &c.

(THE JUDGE OF THE EXCHEQUER COURT: But what do you say as to the clause of *The Customs Act* on which Mr. Hogg relies?)

Mr. May reads clause 13. "On "each and every non-enumerated "article which bears a similitude, "either in material or quality, or "the use to which it may be appli- "ed, to any enumerated article "chargeable with duty, the same "rate of duty shall be payable "which is charged on the enumer- "ated article which it most res- "embles in any of the particulars "before mentioned."

(THE JUDGE OF THE EXCHEQUER COURT: The rails in question in this case bear at least a similitude to rails for tramways in material and quality as well as in respect of the use to which they were applied.)

Mr. May: As to the question of what value should be taken as the value for duty, I might say that the statute directs that it shall be the cost price at the place where the goods are exported. Here the Customs' officers have added the freight and insurance on the goods to the cost price. The invoice shows this.

THE JUDGE OF THE EXCHEQUER COURT: That question was not raised or reserved, and you cannot go into it now. The leave reserved to you in the judgment does not cover that. I will allow the suppliants to make the amendment and you will have the advantage of it in case of appeal, but there will be judgment for the respondent with costs.

Judgment accordingly.