Privy Council Appeal No. 10 of 1913.

The Canadian Pacific Railway Company and others - - - - *Appellants.*

v.

The Canadian Oil Companies, Limited - *Respondents.*

AND

The Canadian Pacific Railway Company - *Appellants.*

v.

The British American Oil Company, Limited *Respondents.*

(Consolidated Appeals)

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 14TH JULY 1914.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD DUNEDIN.
LORD MOULTON.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD DUNEDIN.]

In these consolidated appeals exception is taken to the unanimous judgment of the Supreme Court of Canada affirming a determination of the Board of Railway Commissioners.

The dispute arose in connection with the through rates charged by the Canadian Railway Companies on petroleum and its products carried from certain points in Ohio and Pennsylvania to Toronto and other points in Canada. The Oil Companies considering that they were aggrieved by the rates which had been exacted

from them since 1st January 1907, presented, in August 1910, three applications to the Board of Railway Commissioners against the two Railway Companies asking for a declaration that they had been over-charged, in respect that the Railway Companies had refused to carry petroleum and its products at joint tariff rates for the fifth class in accordance with the official classification.

The three applications were heard together, and judgment was given in all on 16th May 1911. The order pronounced in each case, though not in exactly the same words, was really exactly the same, and it is sufficient here to quote that pronounced in the application of the Canadian Oil Companies, Limited, against the Grand Trunk and the Canadian Pacific which was in these terms :—

"It is declared that the legal rates chargeable on petro-
" leum and its products in carloads, from the said shipping
" points in the States of Ohio and Pennsylvania to Toronto,
" Ontario, were the fifth class joint through rates in effect
" at the time the said shipments moved, as shown in the
" joint through tariffs published and filed with the Board,
" and in accordance with the Official Classification No. 29,
" and subsequent issues thereof.

" J. P. MABEE,
" Chief Commissioner,
" Board of Railway Commissioners for Canada."

The Board granted leave to the Railway Companies to prosecute an appeal on the following question of law :—"Did the Board place the " proper legal construction on the documents " referred to in the judgment " ? In addition to this, by means of an application in Chambers, the Companies obtained leave from Mr. Justice Idington to raise upon this appeal the additional question of whether the Board had jurisdiction to make the order it did.

The facts which raise the dispute may be very shortly stated. The Railway Companies in conjunction with the corresponding Railway

Companies in the United States filed a joint tariff which specified certain rates for the different classes, as per the official classification in use in the United States. Up to 1st January 1907 the official classification did not classify petroleum or its products, which were accordingly carried at a special commodity rate, being the sum of the local rates. On 1st January 1907 official classification No. 29 came into force. This classification inserted petroleum in class 5. The result of this was to apply the fifth class rate to petroleum and its products. In other words, taking a concrete instance of a transit in question, the through rate became 20 cents per 100 lbs. instead of 32 cents per 100 lbs. In order to avoid this result the Railway Companies filed with the Board documents which they entitled supplements. The wording of those supplements, and the dates at which they were declared to be effective varied somewhat. One illustration will suffice. The Indianopolis Southern Railroad Company with the concurrence of the two Canadian Railway Companies filed the following :—

" Rates named in above described tariff will not apply " on petroleum and its products to points in Canada. Rates " to Canadian points will be on basis of lowest combination " to and from the Canadian gateways."

The question therefore on the merits is simply whether such a proceeding was effective to relieve the Railways from their obligation to carry petroleum at fifth class rates.

The question as to jurisdiction arises thus : The Railway Companies would not deliver unless the sum of the local rates was paid. The Oil Companies were therefore forced to pay the higher rate, and this continued up to the time of the presenting of the application to the Railway Commissioners. By the time, however, that the application came to be disposed of, the Railway

Companies of their own free will had consented to carry at fifth class rates. In these circumstances an order of the Board could only be declaratory, as it was unnecessary to pronounce an executive order. And the Railway Companies contend that such an order is *ultra vires* of the Board.

The Supreme Court of Canada held unanimously that the Board had jurisdiction to make such an order. Their Lordships agree with that view, and concur with the reasons set forth in the judgments of the learned Judges of the Supreme Court. Section 26 of the Railway Act confers jurisdiction on the Board " to inquire " into, hear, and determine, any application of a " party interested complaining that any Company " . . . has done or is doing any act, matter, " or thing, contrary to or in violation of this Act or " the Special Act." If the charges exacted were illegal charges because the Acts did not allow them, it seems clear that the Railway Companies were doing something contrary to or in violation of the Acts, and it seems impossible to refuse a person interested a declaration to that effect. It was urged by the Companies that a declaration was in the circumstances unmeaning as to the future, and would only prejudice them as to the past in a possible action of repetition. It is probably not right to allow considerations as to actions of repetition to enter into the matter if the point on jurisdiction be clear. But even if it were it is evident that the Railway Companies suffer no real prejudice. Any action for repetition to be successful must begin in substance though not in form by a declaration of right. All pleas of a prejudicial character based on the fact of money in fact paid, settlement with other parties, &c., will be just as good or just as bad as replies in a future petitory action, whether the declaratory finding—if

such is justified on the merits—is settled for the first time in that action, or is taken as settled by the determination of the Supreme Tribunal in this.

Turning now to the merits. Argument was adduced to their Lordships on various topics, embracing the rights of Railway Companies in Canada to resist joint tariffs filed by American Companies, subjects which were dealt with in what is known as the Stoy Case (43 S.C.R. 311). In the view of their Lordships such topics do not arise for decision in this action, and their Lordships express no opinion upon them. It seems to their Lordships that there is a short ground of judgment which is conclusive so far as this case is concerned.

All tariffs are composed of two parts, (1) what may be termed the tariff proper and (2) the classification. Now the matter of classification is regulated by Section 321 of the Railway Act which applies to *all* tariffs, whether standard, special, competitive, or through, and that section is as follows :—

" 1. The tariffs of tolls for freight traffic shall be subject " to and governed by that classification which the Board " may prescribe or authorise, and the Board shall endeavour " to have such classification uniform throughout Canada, as " far as may be, having due regard to all proper interests.

* * * *

" 4. Any freight classification in use in the United States " may, subject to any order or direction of the Board, be " used by the Company with respect to traffic to and from " the United States."

Joint tariffs for through routes from points outside Canada into Canada (which is the class of traffic referred to in the application) are regulated by Section 336, which is in the following terms :—

" As respects all traffic which shall be carried from any " point in a foreign country into Canada or from a foreign " country through Canada into a foreign country by any " continuous route owned or operated by any two or more " Companies, whether Canadian or foreign, a joint tariff for " such continuous route shall be duly filed with the Board."

The effect is prescribed by Section 338 :—

" Joint tariffs shall, as to the filing and publication " thereof, be subject to the same provisions in this Act as " are applicable to the filing and publication of local tariffs " of a similar description; and upon any such joint tariff " being so duly filed with the Board the Company or " Companies shall, until such tariff is superseded or dis- " allowed by the Board, charge the toll or tolls as specified " therein : Provided that the Board may except from the " provisions of this section the filing and publication of any " or all passenger tariffs of foreign Railway Companies.

" The Board may require to be informed by the Com- " pany of the proportion of the toll or tolls, in any joint " tariff filed, which it or any other Company, whether " Canadian or foreign, is to receive or has received."

Now in the first case it is admitted that a joint tariff was filed; and it is admitted that the Companies did not, so far as the classification is concerned, make use of a classification which the Board has prescribed or authorised, under Section 321 (1), but availed themselves of the liberty given them by Section 321 (4) to use a classification in use in the United States. What, however, the Railway Companies sought to do by means of their so-called supplements was to introduce a classification which was neither a classification in use in the United States—for that ex-hypothesi was No. 29 which they sought to amend—nor a classification authorised by the Board, for no one says that the Board ever authorised the charges proposed by the so-called supplements. This in their Lordships' judgment was quite beyond their powers : with the result that they proceeded to exact charges which were not sanctioned by any joint tariff framed with classification in the way in which the statute permits it to be framed.

Upon this short ground, and without entering into the other matters argued, their Lordships are of opinion that the Supreme Court was right in upholding the jurisdiction of the Board to make the order it did, and in deciding

that that order embodied a declaration which was right on the merits; and they will humbly advise His Majesty to dismiss the appeals with costs.

In the Privy Council.

THE CANADIAN PACIFIC RAILWAY COMPANY AND OTHERS

v.

THE CANADIAN OIL COMPANIES, LIMITED,

AND

THE CANADIAN PACIFIC RAILWAY COMPANY

v.

THE BRITISH AMERICAN OIL COMPANY, LIMITED.

DELIVERED BY LORD DUNEDIN.

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