

BETWEEN

1908  
Nov. 6.THE RED WING SEWER PIPE } CLAIMANTS;  
COMPANY..... }

AND

HIS MAJESTY THE KING.....DEFENDANT.

*Revenue—Customs—Reference of claim—R. S. 1906, c. 48, sec. 179—Evidence before court which claimants neglected to produce before Minister of Customs—Reversal of Minister's decision—Costs.*

Where, in the case of a Customs claim referred to the court under the provisions of sec. 179 of the Customs Act (R. S. 1906, c. 48), the judgment was mainly based on evidence which, though it was in their possession at the time, the claimants had neglected to produce to the Minister of Customs when the claim came before him, the claimants were not allowed the costs of the reference.

**T**HIS was a reference to the court of a claim for goods alleged to have been wrongfully seized by the officers of the Customs Department.

The reference was made under the provisions of sec. 179 of the *Customs Act* (1) and the facts of the case are set out in the reasons for judgment.

September 15th and 16th, 1908.

The case came on for argument at Winnipeg before Sir Thomas W. Taylor, Acting Judge.

*Fullerton and Graham* for the claimants;

*Affleck* for the defendant.

Sir THOMAS W. TAYLOR, Acting Judge, now (November 6th, 1908) delivered judgment.

This case arises out of a seizure of a quantity of sewer pipe, made by a Customs official at Winnipeg, in October, 1906, and confirmed by a decision of the Minister of

(1) R. S. 1906, c. 48.

Customs, in February, 1907. The parties interested being dissatisfied, the Minister by virtue of the powers vested in him by the Customs Act, has referred to this Court for adjudication, the claim against his decision.

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Lee, the purchaser from the Red Wing Sewer Pipe Co., now alleging that he has no interest in, and makes no claim to, the pipe, the company prosecutes the claim as claimants.

At the trial, all the correspondence, affidavits, statutory declarations, invoices, shipping bills and other documents, contained in the file from the Customs Department, were produced and read or referred to, except one. That was an affidavit made by Charles E. Sheldon, and it was objected to on the part of the respondent as having been sent in too late, and not before the Minister of Customs when he disposed of the matter. It was ruled out, following a decision of the late Mr. Justice Burbidge in *Dominion Bag Co. v. The Queen* (1).

There being on the file a letter stating that an official of the company called at the Custom House, admitted that a mistake had been made, and said a cheque for the penalty would be sent, but none had been received, a witness was called to give evidence as to these facts. To the admission of his evidence objection was taken, until the person alleged to have made the admission was proved to be an agent of, or connected with, the company. Counsel for the respondent undertaking to prove the agency, the evidence was permitted to be given. As, however, no such proof was offered, the evidence was rejected and treated as struck out.

Other correspondence was also produced, and oral evidence given.

There was no objection taken to the sum of \$601.82 named in the recommendation of the Commissioner of Customs, dated the 30th January, 1907, as a proper

(1) See Audette's Exchequer Court Practice, p. 183.

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amount, in the event of the seizure being upheld. The only issue raised was:—Is the pipe in question standard pipe, properly valued and entered as such at  $86\frac{1}{2}$  cents, or is it double strength pipe of a higher value?

It appears that in March, 1906, the purchasing agent of the Canadian Pacific Railway wrote to Lee, asking how soon the company could procure a quantity of double strength vitrified culvert pipe, 24 inch, according to C. P.R. specifications, and at what price. A copy of the specifications was sent with that letter. In these, dealing with 24-inch pipe, the minimum thickness of shell is given as 2 inches, length as laid, 30 inches, and weight per lineal foot 190 pounds. To this Lee replied, giving a quotation on "24-inch pipe" in car loads f. o. b., Winnipeg, \$1.90 per foot, or \$1.80 for cash within 30 days.

Lee seems then to have written to the claimants about pipe, for on 30th April they wrote him: "We have an option on 100 cars of pipe at St. Louis, assorted sizes." The latter then proceeded to make him an offer of any portion of this pipe he desired, at the cost price f. o. b. at factory, St. Louis, and prices are given, among them 24-inch double strength at  $\$1.05\frac{3}{10}$  per foot, and the weight is given 178 lbs. to the foot. On 7th May Lee telegraphed to claimants:—"Rush all the 24-inch standard and double strength that you have." Next day he wrote:—"If you have double strength send them, but it is standard that I want." A few days later he wrote:—"You can ship 10 cars 24-inch pipe, but I must say the price is rather high. I will take the 10 cars and I want to keep the Western trade." No doubt this must have referred to the 10 cars double strength. On the 17th May Lee again wrote:—"I want you to ship me, say 10 or 12 cars 24-inch standard, as I want to try to push it off with the other 24-inch double strength that you are sending."

When this correspondence was before the Customs authorities, they seem to have assumed that the option

mentioned in the claimants' letter of 30th April was one from the Evans & Howard Fire Brick Co. of St. Louis, and so connected the pipe seized with it. But it was not so, as that option was from the Laclede Co., another company manufacturing sewer pipe at St. Louis. And from that company double strength pipe was imported by Lee during 1906.

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Lee's letter of 17th May has been unfavourably commented on. In an opinion given the Customs Department, it is said: "that this pipe was purchased by Lee to fill his orders from the Canadian Pacific Railway, and that it was being furnished to said company as double strength pipe, is, I think beyond doubt". And again, it is said of the letter that it "shews the kind of man we are dealing with. Any man who would deliberately push off standard on customers as double strength could scarcely be expected to be scrupulous in his dealings with the Customs".

Now this letter does not necessarily indicate an intention to defraud customers by pushing off on them an inferior class of goods for a higher class. He was a very large dealer, handled during that year great quantities of pipe, and would naturally desire to have always on hand an assorted stock, in order as he says, in another letter "to keep the Western trade". That he could expect to pass off on the Railway Company, with its intelligent and experienced engineers and officials, sewer pipe inferior to that he had tendered to supply, is highly improbable.

Besides in the letters to the Company's agent he always speaks of 24-inch pipe, and never mentions double strength. His doing so can be understood, for when examined as a witness, he swore that his tender to the company was to supply Canadian double strength or American standard. Although one of the Company's engineers was afterwards called as a witness by the res-

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pendent, no attempt was made to impeach Lee's evidence as to his tender, and it stands wholly uncontradicted.

The evidence as to the weight of pipe being a material element in determining its classification, is not very satisfactory. The Evans & Howard Co. issue a catalogue or price list as to the pipe manufactured by them, and in that the weight of the different kinds of pipe is given. But that is said to be an old catalogue issued about 30 years ago, reprinted since then carelessly and without revision. It is said weight is not now considered important, the quality of the pipe depends on the thickness only. Engineers who were examined gave similar evidence. One of them said that weight is no test, that in determining whether light or heavy, the thickness only is looked at. "We gave the elements in determining the the quality of the pipe to be, its strength, that the spigot end fits well, and that it will not be disintegrated by what passes through it." Another said, the weight has nothing to do with the classification. It may be difficult fully to accept such evidence, but it was given by intelligent experts who have handled large quantities of sewer pipe.

No doubt the material used in the manufacture of the pipe has a great deal to do with the weight. The use of fire clay in making the pipe, and the amount of that entering into its composition, must naturally affect the weight.

A letter to the Customs appraiser at Winnipeg from the Monmouth Mining and Manufacturing Company, of Illinois, was produced and read. That company speaking of 24 inch pipe, says:—"So far as we know this pipe is made in only two weights, namely, standard and double strength. This distinction applies to the thickness of the pipe only. Standard 24 inch pipe is  $1\frac{1}{2}$  inches in thickness, and should weigh 125 lbs. per foot. Double strength 24-inch pipe is two inches in thickness and should weigh 150 lbs. per foot. These weights are for pipe in 2

foot lengths. If the pipe was  $2\frac{1}{2}$  foot lengths the weight per foot would be slightly less, owing to the increased length of barrel to each socket". But the Monmouth pipe is made of shale only, for fire clay is not found in that neighbourhood. Shale is a much lighter material than fire clay.

The pipe manufactured by the Evans & Howard Co. is made of fire clay, shale, loam or top soil, gravel, and to that is added what is known as graul, or broken up and crushed sewer pipe. Fire clay, a heavy material, enters largely into the composition of their pipe, and consequently it is heavier than that of other manufacturers.

A good deal of stress was laid by the Customs Department upon the weight, 30,550 lbs. entered on each shipping bill. From the declaration made by one of those, a dealer in sewer pipe, who examined the pipe in question at the instance of the Customs appraiser, it appears that he was asked: "From your experience would you think it at all probable that 187 $\frac{1}{2}$  feet Evans & Howard standard 24-inch sewer pipe, would be billed as weighing 30,550", and he replied:—"No, I do not think this either probable or possible, in straight business. If a dealer was entitled to 210 feet in a car load of 14 tons, he neither could nor would accept 187 $\frac{1}{2}$  feet as weighing 30,550". Another dealer who examined the pipe made a similar statement.

The evidence now given shows that the 30,550 had nothing whatever to do with the actual weight of the pipe contained in the car. The pipe was not weighed before loading, nor was the car weighed after being loaded. The 30,550 was arrived at, and placed on each shipping bill, in this way: There is a Western Weighing Association for all the western and some of the eastern American railroads, and that association has settled a tariff of freight rates, giving the weight and rate of freight at which different articles shall be carried by these roads.

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The provision as to sewer, 24 inches in diameter and  $2\frac{1}{2}$  feet in length, is that it shall be carried, and freight charged on it, as weighing 404 lbs. each piece, and to that is to be added from 200 to 300 lbs. for the weight of the lumber used in packing and staying the pieces of pipe in the car. In each car in question here there were 75 pieces of such pipe. Now taking 75 pieces of pipe at a weight of 404 lbs. each, it will make 30,300 lbs., and adding 250 lbs. for the lumber the 30,550 is arrived at. That amount was put on each shipping bill, not because it was the actual weight of the pipe, but because it was the weight fixed by the Western Weighing Association as that at which the number of pieces of each pipe in each car would be carried, and on which freight would be charged.

The pipe certainly came from, and was manufactured by, the Evans & Howard Co. It was not made specially to fill Lee's order, but taken from the ordinary run of pipe being made at the time. All pipe made by that company is classed as heavy or light, the former is stamped "H", the latter is stamped "L". All the pipe here has the letter "L" on it, with the manufacturer's name.

During the year 1906 the Evans & Howard Co. turned out an immense quantity of pipe of different grades; but they did not, in that year, make any double strength pipe 24-inch in diameter and  $2\frac{1}{2}$  feet in length. The only double strength pipe they made that year was in 2 feet lengths.

The pipe when seized was examined at the instance of the Customs officials by five persons, a civil engineer and four rival dealers in sewer pipe. Two of the latter described the pipe as 25-inch double strength 2 inches thick and 170 lbs. in weight. The other two gave the same description of it, although they say, it ran from a little under to a little over, 2 inches in thickness. Rin-

dall, the engineer says, he found the pipe from,  $1\frac{3}{4}$  to 2 inches in thickness, and it could not possibly be standard pipe. All these persons refer to the Evans & Howard catalogue or price list, and evidently formed the conclusions to which they came on the description and weight of pipes given there. None of them supply any information as to how, or at what part of the barrel, they took their measurements. If they took the thickness at the spigot end, as that of the pipe, or if they measured close to that end, undoubtedly they would find the thickness to be two inches, or in some cases perhaps even a little more. The greater thickness at the spigot end is caused by the pipe when manufactured, and while still in a soft and pliable condition, being set up on that end to dry, the weight crushing in and thus thickening the pipe for a few inches up the barrel. But that affords no criterion for judging the thickness throughout the barrel, or beyond those few inches.

Rindall was examined as a witness, and then said he measured about 8 inches from the spigot end and also some inches from the bell, finding the thickness to be from  $1\frac{3}{4}$  to 2 inches. He was somewhat confused and indefinite in his evidence; his recollection of measuring the pipe seemed vague, and he was by no means a satisfactory witness.

In the interest of the importers, the pipe when seized, was examined by two civil engineers, an architect, and the inspector of sewer pipe for the city of Winnipeg. According to their declarations then made they found, measuring some inches from the spigot end, the thickness to be  $1\frac{3}{4}$  inches and in a few places  $1\frac{7}{8}$  inches. They all, without reserve, declare it to be a standard pipe.

At the trial, two civil engineers who had also examined the pipe, but had made no statutory declarations, were produced as witnesses for the claimants. One of them, the engineer of the City of Winnipeg, has handled sewer

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pipe for many years, having laid nearly fifty miles of it. He found the greatest thickness to be  $1\frac{3}{4}$ , and in a few places  $1\frac{5}{8}$  inches. He says it is standard or light pipe. The other witness was an engineer who has also had extensive experience, and he was perhaps the most satisfactory witness of all. He had examined no less than 123 pieces of the pipe, and produced his notes made at the time of the measurement. He found the thickness to be generally  $1\frac{3}{4}$  inches, a few ran  $1\frac{1}{2}$ ; a few others, in some places,  $1\frac{7}{8}$ . None were in any place 2 inches. He declares the pipe to be 24-inch standard vitrified sewer pipe.

At the request of counsel, I visited the Customs Examining Warehouse, where samples of the pipe have been kept. There were present with me, counsel for both parties, one or two Customs officials, the President of the Evans & Howard Co., and the engineer of the City of Winnipeg. The samples, three in all, are stamped "L.24" with the name Evans & Howard. They are no doubt about two inches thick at the spigot end, but it could easily be felt that this thickness extended into the barrel only a few inches. Measurements made in my presence, with proper calipers, at the distance of 10 inches or so from the spigot end, shewed the thickness to be  $1\frac{3}{4}$  inches, in a few spots slightly in excess of that, nowhere 2 inches.

From the evidence adduced in this case, I have no hesitation in coming to the conclusion that the pipe in question is, as it was represented to be, standard pipe. The evidence also shows that the price at which it was sold to Lee was  $86\frac{1}{4}$  cents, and there was no agreement or understanding that a higher price should be paid.

The entry therefore of the pipe as standard pipe, at  $86\frac{1}{4}$  cents, was the correct entry, and the seizure of it should not have been made.

My judgment is that the goods should be restored to the claimants.

The case has been decided mainly on the evidence given at the trial. The evidence was, when the question of the seizure was before the Minister of Customs, in the possession, or at the command, of the claimants, and they neglected to produce it. Had they laid it before the Minister there can be little doubt a different decision would have been given. I therefore award no costs to the claimants.

*Judgment accordingly.*

Solicitors for claimants : *Graham & Young.*

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