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 Nov. 17.

THE VACUUM OIL COMPANY.....SUPPLIANTS ;
 AND
 HER MAJESTY THE QUEEN.....RESPONDENT.

Customs duties—The Customs Act, 1883, ss. 68, 69, 102, 198, 207—Money deposited in lieu of seizure—Market value—Waiver of notice of claim—Penalties—Prescription.

The suppliants, who were manufacturers of oils in the United States, sold some of their oils in retail lots to purchasers in Canada. The price of such oils to the consumer at Rochester was taken as a basis upon which the price per gallon to the Canadian purchaser was made up, but the goods were entered for duty at a lower value,—two sets of invoices being used, one for the purchaser in Canada, and the other for the company's broker at the port of entry.

Held : That the oils were undervalued.

2. The suppliants, having established a warehouse in Montreal as the distributing point of their Canadian business, exported oils from the United States to Montreal in wholesale lots. The invoices showed prices which were not below the fair market value of such oils when sold at wholesale for home consumption in the principal markets of the United States.

Held : That there was no undervaluation.

3. When goods are procured by purchase in the ordinary course of business, and not under any exceptional circumstances, an invoice correctly disclosing the transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad is, as a general rule, assumed to indicate the market value thereof. It is presumed that he buys at the ordinary market value.

4. It is not the value at the manufactory, or place of production but the value in the principal markets of the country, *i. e.*, the price there paid by consumers or middlemen to dealers, that should govern. Such value for duty must be ascertained by reference to the fair market value of such, or like goods, when sold in like quantity and condition for home consumption in the principal markets of the country whence they are exported.

5. The neglect of an importer, whose goods have been seized, to make claim to such goods by notice in writing as provided by section 198 of *The Customs Act, 1883*, may be waived by the act of the

Minister of Customs in dealing with the goods in a manner inconsistent with an intention on his part to treat them as condemned for want of notice.

Quære : Does section 198 apply to a case where money is deposited in lieu of goods seized ?

6. The additional duty of 50 per cent. on the true duty, payable for undervaluation under section 102 of *The Customs Act, 1883*, is a debt due to Her Majesty which is not barred by the three years' prescription contained in section 207, but may be recovered at any time in a court of competent jurisdiction.

Quære : Is such additional duty a penalty ?

PETITION OF RIGHT for the return of moneys deposited with the Customs authorities at the port of Montreal in lieu of goods seized for alleged breaches of the Customs laws.

The facts of the case are fully stated in the judgment.

November, 7th 1890.

Gormully, Q. C., H. Abbott, Q. C. and Campbell for suppliants.

Osler, Q.C. and Hogg, Q.C. for the respondent.

BURBIDGE, J. now (November 17th, 1890) delivered judgment.

The suppliants, who are manufacturers of oils doing business at Rochester, in the State of New York, bring their petition to obtain repayment of the sum of five thousand dollars held by the Crown in substitution for a quantity of oils seized at the port of Montreal for fraudulent undervaluation. The principal part of the company's business in the United States is done directly with consumers, and not through middlemen ; their sales to jobbers constituting only a small percentage of their total business. In conducting their business they use a large number of brands to indicate the different oils sold by them. Some of such brands distinguish different classes or grades of oils, but many, it appears, are nothing more than trade devices used

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to gratify the prejudices of purchasers ; and in neither case is the price of any particular brand of oil that happens to become a favorite with consumers advanced for that reason. The advantage to the company results from the fact that in this way they are enabled the more easily to obtain and retain purchasers. Oils similar in all substantial particulars of grade, quality, test and value to those manufactured and sold by the company are obtainable in the principal markets of the United States.

In 1882, the company, desiring to do business in Canada, sent to the Minister of Customs their wholesale and retail price lists and samples of their oils, and invited him to fix the value for duty of the several brands of oils. The Minister in reply sent to the company the Customs Acts directing their attention to the provisions relating to the valuation of goods for duty, and intimating that a scale of values for duty could not be established as requested, but that such values would have to be determined on the entry of the goods at the port of entry in Canada. Thereupon the officer of the company who had charge of their shipping and billing department, upon consultation with the vice-president and manager of the company, made a schedule of values for duty for their different brands of oil.

From 1882 to 1885 the company from their office at Rochester, through their travellers, did business in Canada directly with the Canadian consumer. In the course of this business some oils were sold duty-paid, and in other cases the consumer paid the duty. In the latter case the oils were invoiced at the price at which similar oils were sold to consumers in the United States, and the Canadian purchaser paid duty on that price. But when such oils were sold duty paid they were entered for duty at a price less than that at which they were sold to the consumer in the United States ;

although such price was taken as the basis of the price charged to the Canadian purchaser, which was ascertained by adding thereto the cost of transportation and the duty. From their Rochester office the company sent the Canadian purchaser an invoice showing the duty-paid price, and to their broker at Prescott they sent another invoice showing the name and place of residence of the purchaser, and giving as the value of the oils the arbitrary value they had established as already mentioned.

In 1885 the company put their Canadian business on a different basis. They established a warehouse and office at Montreal, and shipped their goods from Rochester to Montreal in wholesale lots, consigned to themselves or their agent; and Montreal instead of Rochester then became the centre and distributing point of their Canadian business. At first, and until a stop was put to the practice by the Customs authorities, the company entered at the port of Brockville the oils destined for Montreal. It is in connection with the Prescott and Brockville entries principally that the questions to be discussed arise.

In June, 1885, the Customs authorities seized, for fraudulent undervaluation, the oils in store at the company's Montreal warehouse. The value of such oils was estimated to be \$8,765.66, and the sum of \$5,000 was deposited with the Crown in lieu thereof. On enquiry, and after examining the Customs entries made by the company at several ports of entry, the Minister acquitted the company of the offence of fraudulent undervaluation, but found that the fair market value of the oils imported by them into Canada was \$23,415.98, the duty on which amounted to \$5,853.98; that there had been an undervaluation of \$6,514.24, and that there was due to the Crown for unpaid duty \$1,603.81; and for the further duty resulting from such

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undervaluation \$2,926.99, making in all the sum of \$4,530.80, upon payment of which the Minister consented to release the seizure. This decision the company declined to accept, and no further action for the condemnation of the goods seized having been taken within the three years mentioned in section 207 of *The Customs Act*, 1883, this petition was brought to recover the deposit.

The main question to be determined is the value for duty of the oils in question.

By the 68th and 69th sections of *The Customs Act*, 1883, it was provided, as by the corresponding sections of the Acts now in force it is provided, that where any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value, in the usual and ordinary acceptance of the term, of such goods when sold for home consumption at the usual and ordinary credit in the principal markets of the country whence, and at the time when, the same were exported directly to Canada; and not the cash value of such goods, unless by universal usage they are considered and known to be a cash article, and so *bonâ fide* paid for in all transactions relating to such goods. The words "market value" and "principal markets of the country" were, in Canada, first used in the Act of the old Province of Canada, 12 Vic. (1849), c. 1, s. 6, by which the value of goods for duty was declared to be

the actual cash value thereof in the principal markets in the country where the same were purchased, &c.

By this Act each appraiser was required

by all reasonable ways and means in his power, to ascertain, estimate and appraise the true and actual market value and wholesale price, &c., of such goods.

In 1853, by the Act 16 Vic. c. 85 s. 3, the 6th section of 12 Vic. c. 1 was repealed, and it was enacted that

the value for duty of goods imported into the Province should be "the fair market value thereof in the principal markets, &c.," and it was provided that the Customs appraisers should appraise the value for duty of such goods at such fair market value.

By the Act of the Province of Canada 29-30 Vic. (1866), c. 6, s. 11, it was provided that the fair market value for duty of goods imported into the Province should be the fair market value of such goods

"in the usual and ordinary commercial acceptance of the term at the usual and ordinary credit, and not the cash value of such goods, except in cases in which the article imported is by universal usage considered and known to be a cash article."

The first Customs Act of the Dominion of Canada, 31 Vic. c. 6, is founded on the Acts previously in force in the Province of Canada; and the enactments to which I have referred have remained in the subsequent consolidations substantially as they were in 1867 (30 Vic. c. 6, ss. 29-31; 40 Vic. c. 10, ss. 30-32; 46 Vic. c. 12, ss. 66-68). To this there is one exception, to which I think I ought to refer. In the Act of 1883 it was declared that the value for duty should be the market value of the goods "when sold for home consumption in the principal markets, &c.," the intention of Parliament being, in part, no doubt, to prevent Canada becoming a slaughter market for the surplus stocks and products of other countries, to the injury of Canadian manufacturing industries.

The words "market value" and "principal markets of the country" occur in the Act of the Congress of the United States of August the 30th, 1842, and in other subsequent Acts; and have been the subject of judicial interpretation by the courts of that country.

In British Columbia, before that Province became part of the Dominion, the value for duty was, as in the old Province of Canada, determined by the "fair

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market value" of the goods "in the principal markets &c." (1). In the other Provinces before the Union the basis of the value for duty was, speaking generally, ascertained by reference to the real and true value of the goods at the place whence they were imported, and the importer was liable to be called upon to declare that the invoice price indicated the current value at such place (2). In this, as in many other respects, the Customs laws of such Provinces followed substantially the Act of the Parliament of the United Kingdom 8-9 Vic. c. 93, as did also the Act of the Province of Canada 10-11 Vic. c. 31.

In a number of the Acts of the Province of Canada and of the Dominion passed prior to 1883, to which I have referred, there will be found, preceding the enactments authorizing the appointment of appraisers and the valuation of goods for duty, the following recital :

And inasmuch as it is expedient to make such provisions for the valuation of goods subject to *ad valorem* duties as may protect the revenue and the fair trader against fraud by the undervaluation of any such goods, therefore, &c (3)

It is a matter of common knowledge that, commencing with the year 1879, the Parliament of Canada has also sought by Customs laws to give a measure of protection to Canadian manufacturers, to one instance of which I have adverted. So that now it may, I think, be said that, by the provisions of the Customs Acts relating to the valuation of goods for duty, Parliament intends to protect the revenue, the fair trader and the Canadian manufacturer.

Another matter that should, it appears to me, be kept in view is the distinction more or less clearly recognized in *The Customs Act* of cases where the

(1) R. S. B. C. (1871) No. 79 s. 7. Vic. (P.E.I.) c. 1 (1873.) s. 2.

(2) See 30 Vic. (N. B.) c. 1 s. 2 (1866) ; Rev. Stat. Nova Scotia S.C. c. 17 s. 23 ; 31 Vic. c. 6 s. 29 ; 3rd series (1864) c. 13 s. 25 ; 36 40 Vic. c. 10 s. 30.

importer procures his goods by purchase, and cases in which he is the manufacturer or producer thereof, or in which he obtains them otherwise than by purchase.

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(1) Blatchford, J. in 3109 Cases of Champagne, 1 Ben. 241. son 4 U. C. C. P. 548; Cliquot's Champagne, 3 Wallace 114; 3109

(2) Attorney-General v. Thompson Cases of Champagne, 1 Ben. 241.



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question as to whether or not the value for duty is in the cases mentioned to be ascertained by reference to the wholesale market value only. That ordinarily, I fancy, is the result; because the larger part of the importations of the country are made by wholesale merchants and dealers. I think, however, that the true meaning of the Act is that the value for duty of goods imported into Canada should be ascertained by reference to the fair market value of such or like goods when sold in like quantity and condition for home consumption in the principal markets of the country whence so imported. That is the view that Chief Justice Macaulay gave expression to in *The Attorney-General v. Thompson* (1), and must, it seems to me, be taken to be the true view; otherwise, that uniformity of operation would not be maintained, without which, as was said by Mr. Justice Blatchford in the case I have already alluded to (2), every *ad valorem* system of revenue would become oppressive and unjust.

Leaving then this general discussion of the provisions of *The Customs Act*, under which the questions depending in this case are to be decided, and coming to such questions, I am of opinion that the oils mentioned in the invoices, on which the company's entries were made at Prescott, were undervalued, and that such invoices were, in that respect, untrue invoices. The cost of the oils to the Canadian purchaser, less the duty and transportation, was the actual selling price in the United States under like circumstances. At that price, representing at once the true transaction between the parties and the fair market value in the United States, the company should have entered their oils. It is unnecessary to enquire whether the undervaluation was fraudulent or not. The goods are not within reach of the court, and are not represented by

(1) 4 U.C. C. P. 548.

(2) 3109 Cases of Champagne, 1 Ben. 241.

any part of the \$5,000 for the recovery of which the petition is brought. The most to which the Crown is entitled in this proceeding is to set-off the duties still payable upon such goods against the sum mentioned, and it is equally so entitled whether the undervaluation was fraudulent or not fraudulent. The company are liable to pay to the Crown the duty on the difference between the true value for duty of such goods and the value at which the same were entered, and, whenever the former exceeds the latter by more than twenty per centum, to a further duty equal to one-half the duty leviable on such true value.

The importations from Rochester to Montreal, by way of Brockville, were made in car-load lots, that is, I think, wholesale lots. The specific goods had not been sold and set apart for the Canadian purchaser. The company were importing goods manufactured by themselves, and were entitled, I think, to enter them for duty at the fair market value of the same or like goods when sold in like quantity and condition for home consumption in the principal markets of the United States. The evidence shows, I think, that, taking the entries as a whole, these oils were not entered below such fair market value. I have not, either in the case of the Prescott entries or of the Brockville entries, examined each entry. From what was said by counsel at the trial, I have no doubt that the officers and experts of the Crown and the company can readily ascertain the amount in which the company are indebted to the Crown, the rule of valuation being once determined. But if not, there will be a reference to ascertain such amount.

I must now briefly refer to two questions of less importance. Counsel for the Crown argued that as the company did not within one month from the date of the seizure, by notice in writing, make a claim to

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the goods seized, as provided in section 198 of *The Customs Act, 1883*, the goods, and, consequently, the money deposited in lieu thereof, became forfeited. But even admitting that this section applied to a case where money was deposited in lieu of goods seized, the circumstances disclosed by the evidence show most clearly that the Minister waived such notice. It would, I think, be most unreasonable to hold that the Minister could invite or allow the importer to submit evidence to show whether there was an undervaluation or not, give full opportunity for the presentation of the case, make his decision, and then say that all this went for nothing, that he had no notice in writing, within the strict letter of the law, that the importer intended to claim the goods, and that, consequently, the law had effected a condemnation that he, after hearing the parties, did not believe the goods were liable to.

By their reply, the company raised an objection to the form of the Crown's set-off or counter-claim, but this was abandoned at the hearing; and it was conceded that if there was found to be any undervaluation, the duty thereon should be deducted from the \$5,000 in question. It was, however, contended that the further duty (of fifty per centum of this true duty) payable under section 102 of *The Customs Act, 1883*, was in the nature of a penalty, and therefore prescribed by section 207 of the Act; and in support of such contention I was referred to *Swanston v. Morton* (1); *United States v. 67 packages of dry goods* (2); and *Ring v. Maxwell* (3), and to the Act of the Congress of the United States of the 30th of August, 1842, section 17. The argument that the additional duty levied in this case is a penalty is not without weight, but the case, I think, falls within the express terms of the 15th

(1) 1 Curtis (C. C. R.) 294.

(2) 17 How. 85.

(3) 17 How. 147.

section of the Act of 1883 (4), by which it is in effect enacted that the true duty payable on any goods imported into Canada, and the additional sum, if any, payable under section 102, shall constitute a debt due and payable to Her Majesty, which may at any time be recovered in any court of competent jurisdiction. I am of opinion that both the true duty and the additional sum or duty mentioned, for which the company are liable on the transactions to which I have referred, may be set-off against the \$5,000 claimed in this action.

In agreeing to the amount for which judgment should be entered for the suppliants, in accordance with the conclusions to which I have given expression, neither party will be understood to accept or adopt such conclusions. If they cannot agree, there will be a reference to the Registrar to ascertain the amount; and in the meantime the question of costs will be reserved.

*Judgment as ordered, costs reserved.*

Solicitors for suppliants : *Abbotts & Campbell.*

Solicitors for respondent : *O'Connor & Hogg.*

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