SMITH AND PATTERSON.....CLAIMANTS; 1891

AND Dec. 9.

HER MAJESTY THE QUEEN.....RESPONDENT.

Customs duties—The Customs Act, R.S.C., c. 32, ss. 58, 59, 65; 51 Vic. c. 14, s. 15—52 Vic. c. 14, s. 6—Market value—Value for duty—Misrepresentation—Costs.

The rule for determining the value for duty of goods imported into Canada, prescribed by the 58th and 59th sections of *The Customs Act* (R.S.C., c. 32), is not one that can be universally applied.

When the goods imported have no market value in the usual and ordinary commercial acceptation of the term in the country of their production or manufacture, or where they have no such value for home consumption, their value for duty may be determined by reference to the fair market value for home consumption of like goods sold under like conditions.

The *Vacuum Oil Company* v. *The Queen* (2 Ex. C. R. 234) referred to.

2. The goods in question in this case were part of a job lot of discontinued watch cases, and at the time of their sale for export were not being bought and sold in the markets of the United States. They could be purchased for sale or use there, but only at published prices which were greater than anyone would pay for them.

The claimants bought the goods for export at their fair value, being about half such published prices. They let their agent in Canada know the prices paid, but withheld from him the fact that the purchase was made on the condition that the goods were to be exported. The agent, without intending to deceive the Customs appraiser, represented that the prices paid were those at which the goods could be had in the United States when purchased for home consumption. The representation was untrue. On the question of the alleged undervaluation the court found for the claimants, but, because of such misrepresentation, without costs.

CLAIM arising out of the seizure of certain goods at the port of Montreal for an alleged violation of the Customs laws.

The matter came before the court on a reference by the Minister of Customs under *The Customs Act* (R.S.C,

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c. 32, sections 182 and 183, as amended by 51 Vic. c. 14, s. 34). No pleadings were ordered by the learned judge.

The question submitted for trial under the reference was whether certain watch cases, which had been imported by the claimants from the United States, had been properly valued for duty.

The facts of the case appearing upon the evidence are sufficiently stated in the reasons for judgment (1).

(1) The following are the provisions of the Customs Acts referred to by the learned judge in his reasons for judgment.

R. S. C. c. 32, sec. 58. Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

Sec. 59. Such market value shall be the fair market value of such goods in the usual and ordinary commercial acceptation 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, and so *bonâ fide* paid for in all transactions in relation to such article; and all invoices representing cash values, except in the special cases herein referred to, shall be subject to such additions as to the collector or appraiser of the port at which they are presented appear just and reasonable, to bring up the amount to the true and fair market value, as required by this section.

52 Vic. c. 14, sec. 6. The fair market value of goods shall be taken to include the amount of any draw-back which has been allowed by the Government of any other country, also the amount of consideration or money value of any special arrangement between the exporter and the importer or between any persons interested therein because of the exportation or intended exportation of such goods, or the right to territorial limits for the sale or use thereof, and also the amount or money value of any so-called royalty, rent, or charge for use of any machine or goods of any description, which the seller or proprietor does or would usually charge thereon when the same are sold or leased or rented for use in the country whence they have been exported to Canada. When the amount of such draw-back, consideration, money value, royalty, rent, or charge for use has been deducted from the value of such goods, on the face of the invoice under which entry is to be made, or is not shown thereon, the Collector of Customs or proper officer shall add the amount of such deduction, draw-back, consideration, money value, royalty, rent or charge for use, and cause to be paid the lawful duty thereon.

R.S.C. c. 32, sec. 65. No deduction of ony kind shall be allowed from the value of any goods im-

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Greenshields, Q.C. and *R. C. A. Greenshields* for claimants;

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

BURBIDGE, J. now (December 9th, 1891) delivered judgment.

This matter comes before the court on a reference by the Minister of Customs under sections 182 and 183 of *The Customs Act*, the claimants having declined to accept his decision maintaining a seizure made, at the port of Montreal, of 1149 open face and 670 hunting cyclone rolled plate watch cases for undervaluation and misrepresentation. The claimants, who are wholesale dealers in watches and jewelry, have their principal place of business at Boston, in the United States,

ported into Canada, because of any draw-back paid or to be paid thereon, or because of any special arrangement between the seller and purchaser having reference to the exportation of such goods, or the exclusive right to territorial limits for the sale thereof, or because of any royalty payable upon patent rights but not payable when goods are purchased for exportation, or on account of any other consideration by which a special reduction in price might or could be obtained: Provided, that nothing herein shall be understood to apply to general fluctuations of market values.

51 Vic. c. 14, sec. 15. Whenever goods are imported into Canada under such circumstances or conditions as to render it difficult to determine the value thereof for duty, either because such goods are not sold for use or consumption in the country of production,—or because a lease of such goods or the right of using the same is sold or given, but not the right of property therein,—or because such goods having a royalty imposed thereon, the royalty is uncertain or is not, from other causes, a reliable means of estimating the value of the goods,—or because such goods are usually or exclusively sold by or to agents or by subscription, or are sold or imported in or under any other unusual or peculiar manner or conditions,—of all which matters the Minister of Customs shall be sole judge,—the Minister of Customs may determine the value for duty of such goods; and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

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and a branch house at Montreal. The watch cases mentioned formed part of a job lot that the claimants had purchased from the Keystone Watch Case Company, of Philadelphia, for export to Canada. For two or three years prior to 1890 the Keystone Watch Case Company had been manufacturing watch cases that bore its trade-mark, and were known as cyclone rolled plate watch cases. The company was a member of the American Watch Case Manufacturers' Association, the object of which was to sustain uniform discounts on the goods manufactured by the members of the association, and, generally, to further the interests of the watch case business. As a member of such association, the company was free to establish such list prices as it deemed best in its own interest for any case made by it, subject to a uniform discount prescribed by the rules of the association; but it was bound to send a copy of such price lists to the secretary and each member of the association, and if it discontinued the manufacture of any case, to give notice to all members of the National Association of jobbers in American watches, and to distribute such cases, *pro rata* as near as practicable, among such members of the latter association as might desire such goods. In November, or December, 1890, the Keystone Watch Case Company entered into an agreement with the Crescent Watch Case Company and Joseph Fahys & Company, whereby the three companies agreed, for one year, not to sell any discontinued watch cases in the markets of the United States.

Some time prior to the autumn of 1890, a competitor of the Keystone Watch Case Company put on the market a better looking case than the Cyclone case, and the sale of the latter dropped off. Then the company brought out a new case under the old name with a new style of chasing or ornamentation. There was

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no difference in the intrinsic values of the old case and the new, and both were listed at the same prices, namely, $4.50 for the open face case, and $5.00 for the hunting case. This, it may be added, was about twice their real value. The new case caught the eye of the trade, and after January, 1891, when it was put on the market, there was no sale of the old cases. They had gone out of fashion, and jobbers who had them in stock returned them, and the company gave credit therefor. At the time the company had on hand from 3,000 to 5,000 old cases. So far as concerned the more public restraints upon their liberty to sell created by the rules of the association, the company might have reduced the price of the old cases, giving the requisite notice, and have sold them in the markets of the United States ; and there can be no doubt, I think, that under such circumstances the company would not have been able to get a better price for them than that paid by the claimants. But by the private arrangement with the Crescent Watch Case Company and Joseph Fahys & Company, to which reference has been made, the Keystone Watch Case Company was prevented from adopting that course during the year 1891, and it was compelled either to hold the old Cyclone cases in stock, to sell them for export, or to melt them down. No one would buy them at the published prices, and they could not be sold for less in the United States markets.

The Canadian market, it appears, is not so quickly affected by a change in style or fashion as the United States market; and the claimants thought these old Cyclone watch cases would be more salable in Canada than in the United States, and that something was to be made by exporting them to Canada. Mr. Patterson, one of the claimants, in giving his evidence expressed that view in the following terms :

" The Canadian buyers don't catch on to the new

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" styles so quick, and we thought we could market " them and make a few cents out of them before " they found that there was a newer and hand- " somer and better case on the market."

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Accordingly, the claimants in January, 1891, purchased a quantity of the old Cyclone watch cases, paying $2.52 each for the hunting case, and $2.67 for the open face case, and shipped them to Montreal to Mr. Abbott, who was the manager of the branch house there. The claimants knew that at the time these cases could not be purchased for sale in the United States except at the list prices, and it was part of their bargain with the Keystone Watch Case Company that the cases should be exported. These facts, however, they did not communicate to Abbott. They confined their communications to him to letting him know that the cases were part of a job lot, and that the prices mentioned were the actual prices paid for the cases; and they instructed him to see Mr. Ambrose, a Dominion Appraiser at the port of Montreal, and ascertain if he would pass the entry at such prices. Abbott saw Ambrose and submitted a sample of the goods, letting the latter know the price that had been paid and that the importation was part only of a job lot. Ambrose, at the time, knew the list of prices, and he made enquiries and found out that the manufacture of the cases had been discontinued, and satisfied himself that under the circumstances the prices paid, and at which Abbott proposed to enter the cases, represented the fair market value of the goods when sold as a job lot. After completing his enquiries, Ambrose told Abbott that he would pass the cases at the prices mentioned if the whole lot were entered at the same time. Abbott, as has been seen, did not know that the claimants had purchased the cases on the condition that they were

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to be exported, and that they could not be purchased at the same prices for sale in the United States. His principals had not seen fit to let him know the true facts of the case, and so it happened that, without intending to deceive Ambrose, he gave the latter to understand that the cases could be bought from the manufacturers for home consumption at the prices paid for them by the claimants. That representation he would have had to repeat in a more formal manner if, with his entry, he had been required to make the oath usually exacted from the importer or his agent; but which, in this case, so far as I can ascertain from the copies of the entry papers put in evidence, was dispensed with.

The claimants, complying with the demands of the appraiser, completed their arrangements for the purchase of an additional number of the cases, and shipped them to Montreal, where, on March 2nd, 1891, the whole number purchased were entered and passed at the Custom House at the prices agreed upon between Abbott and Ambrose. On the 1st of April, the cases, except some 200 that had in the meantime been sold, were seized by a special officer of the Customs for undervaluation and because of the misrepresentations made by the importer to the Customs Appraiser. Mr. Parmalee, the Assistant Commissioner of Customs, upon the enquiry reported to the Minister of Customs that the goods had been undervalued, and that the importers had secured their entry at such undervaluation by misrepresentation of the facts of the case; and he recommended that the seizure be maintained unless the claimants should pay a sum of $3,785.80, which represented the amount of the undervaluation and the duty thereon. The Minister took the same view of the case as Mr. Parmalee, and confirmed his report.

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The principal question to be determined is the value for duty of the watch cases in question.

For the crown, it was contended that the published prices disclosed the true value for duty. By sections 58 and 59 of *The Customs Act* such value is declared to be the fair market value, in the usual and ordinary acceptation of the term, at the usual and ordinary credit of such goods when sold for home consumption in the principal markets of the country whence, and at the time when, the same were exported directly to Canada. Until January, 1891, the Cyclone watch cases of the old style were bought and sold at the published or list prices for consumption in the United States markets. Such prices, without doubt, at that time represented the value for duty. The manufacturers never took any steps to reduce the price, and subsequently there were no sales for home consumption; and it is contended that there is nothing to show that the goods ever lost the market value that they admittedly had acquired.

Reliance is also placed upon the 64th and 65th sections of *The Customs Act*. By the 64th section it is enacted that the fair market value of goods shall be taken to include, among other things, the amount of consideration or money value of any special arrangement between the exporter and the importer, or between any persons interested therein, because of the exportation or intended exportation of such goods; and by the 65th, no deduction of any kind shall be allowed from the value of any goods imported into Canada because of any special arrangements between the seller and purchaser, having reference to the exportation of such goods. But I do not see that sections 64 and 65 add anything in this respect to the requirements of sections 58 and 59. If on the one hand the market value for home consumption of the watch cases was represented by the pub-

lished prices, the latter indicate the value for duty whether there was any agreement for export or not ; and, on the other, if the prices paid by the claimants represented the true value for duty, there cannot be said to have been any deduction from such value depending upon the proposed exportation. And that brings us back to the question under consideration, as to whether or not the value of the cases for duty was to be determined by list prices continued by the manufacturers without any thought or expectation of finding a purchaser at such prices, and at which, in fact, no one would think of buying them for any purpose.

It is obvious that the rule for determining the value for duty of goods imported into Canada, prescribed by the 58th and 59th sections of *The Customs Act*, is not one that can be universally applied. An article may have no market value in the usual or any acceptation of the term ; or it may be produced or manufactured for export only, and, there being no home consumption, it can, it is clear, have no market value for home consumption. The latter difficulty is recognized by the 2nd sub-section of the 65th section of the Act in 51 Vic. c. 14, s. 15, where it is provided that whenever goods are imported into Canada under such circumstances or conditions as to render it difficult to determine the value thereof for duty, either because such goods are not sold for use or consumption in the country of production, or for any one of a number of other reasons therein enumerated, the Minister of Customs, who is to be the sole judge of all such matters, may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied. Perhaps I should stop to add here that the powers entrusted to the Minister by this provision were not invoked or exercised in this case,

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which, as has been noticed, comes before the court under sections 182 and 183 of the Act, under which the court is to "decide according to the right of the "matter."

The weak point in the argument for the crown, it appears to me, is that after the new cyclone cases were brought out there was in the United States no consumption of, and no market for, the old cyclone cases; and it is not possible to find or say that they had a market value for home consumption in the principal markets of the United States.

There can, I think, be no reason to doubt that if the Keystone Watch Case Company had been free to offer the cases in question for sale in the United States for consumption there, the prices paid by the claimants would have represented the fair value as well as the fair market value thereof. Such prices, it appears from the evidence, represented also the market value of like goods sold under like conditions for use in the United States; and that is a test which, in *The Vacuum Oil Company* v. *The Queen* (1), I thought might be applied in certain cases in which there were no actual sales by which the question could be determined.

Applying these tests, which in a case of this kind are, I think, safer and better than the test afforded by published prices, which, under the circumstances, meant nothing, and at which no one would think of buying or selling, it appears to me that there was no undervaluation of the watch cases, the subject of the seizure now in question.

With reference to the representation made by Abbott to Ambrose that the cases could be purchased for sale in the United States at the prices at which it was proposed to enter them for duty, I did not understand counsel for the crown to contend that they were liable

(1) 2 Ex. C. R. 242.

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to forfeiture because the representation was untrue. The misrepresentation was proved, but, I inferred, for the purpose of showing that no undue importance should be attached to Ambrose's valuation. Not having been made knowingly or wilfully, and as a part of the entry, the misrepresentation, whatever other effect it might have, cannot have the effect of a wilfully false statement, such as the provisions of sections 47 and 204 of the Act are directed against. I think, however, that the untrue statement made to Ambrose was one of the principal reasons, and constituted "probable cause," for the seizure in this case. The claimants knew the truth and withheld it from their agent. If it had been disclosed, an opportunity might have been afforded the Minister of Customs to determine the value of the cases for duty under the 2nd sub-section of the 65th section of the Act, to which reference has been made. They took the risk of not disclosing all the facts and now, it appears to me, have no great reason to complain that the agent's misrepresentation was followed by the seizure.

Under the circumstances there will be judgment for the claimants without costs.

Judgment for claimants without costs.

Solicitors for claimants: *Greenshields & Greenshields.*

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