IN THE MATTER OF

THE FOSS LUMBER COMPANY,....CLAIMANTS; 1912 JUNE 1.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Customs law—Tariff item 504—Interpretation—Lumber sawn and faced—"Further manufactured."

Tariff item 504 of 6-7 Edw. VII, c. 11 provides for the free entry into Canada of "planks, boards and other timber and lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured".

Held, that lumber which, having been sawn and faced on one side, was afterwards sized by being put through machinery other than that by which the original sawing and facing were done, had been "further manufactured" within the meaning of the above item, and was not entitled to free entry.

THIS was a reference by the Minister of Customs of a claim for the refund of Customs duty paid, under protest, upon the importation of a carload of lumber from the United States into the City of Winnipeg.

The claim was referred to the Court under the provisions of *The Exchequer Court Act*, R.S., 1906, c. 140, s. 38. The amount of the duty paid was $77.00; the case involving an interpretation of tariff item No. 504 of Schedule A of 6-7 Edw. VII, c. 11.

June 1st 1912.

The case came on for hearing before Mr. Justice Cassels at Ottawa.

W. D. Hogg, K.C., for the claimants;

J. Travers Lewis, K.C., for the respondent.

E. Lafleur, K.C., and G. H. Cowan, K.C., were heard (by leave of the court) on behalf of the British Columbia Lumber Company.

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Mr. *Hogg*:—The controversy, as your lordship will observe, is over a comparatively small amount, but the question involved is one of considerable importance affecting the importation of lumber into this country generally—and therefore becomes a large question. Now the lumber which was brought into this country, and samples of which we have here, I think upon the evidence is clearly planks or boards. The tariff item which we say applies is free item 504—"Planks or boards of wood sawn and dressed on one side, but not further manufactured".

I think it is beyond any question now, on the evidence of nine witnesses, that these planks or boards are sawn on three surfaces and dressed on one surface. That is unanimously proved by all the witnesses. Then, if that is the case, I submit to your lordship, as a proposition that the form in which the lumber is imported is the discriminating test for duty. This is supported by the case of *The Queen* v. *The J. C. Ayer Co.*, (1). That involved medicinal preparations, and what is decided there is that the form in which the materials were imported constitutes the discriminating test for the duty.

When the article is produced to the Collector of Customs its form is the discriminating test of whether it is dutiable or not. Following that up, your lordship will see that, while the Court here may get evidence from a number of people to say that something else was done, and that it was sawed five or six different times in the country of production, the test of the Customs Department must be, does the article when it is shown to the Collector come within the four corners of item 504 or not? I submit the Act must not only be applied uniformly, but also reasonably, in

(1) 1 Ex. C. R. 232.

the administration of the Department. Just think for a moment what would happen if the Collector of Customs had to hold an investigation like your lordship is holding here to-day—if he had to ascertain what was done to these particular things in the country of production—how could the Department be administered at all? In *Magann* v. *The Queen* (1) the question was with respect to certain oak lumber which had been offered at the Customs sawed into specific lengths, and apparently intended for a specific purpose. The argument there was, and one which prevailed, that it would be absolutely ridiculous if the Customs officer were obliged to consider the uses to which the lumber might be put, to enable him to decide if it were dutiable or not. To apply that test would be productive of such uncertainty that the Customs would never know when duty was applicable or not.

If the use to which the lumber is to be put is no test, then the condition of the article itself as produced to the customs for entry should be the discriminating test, and if the particular article fits the section of the statute, then it comes under that specific item of the tariff and no other.

What has happened here? Does the lumber as it is produced to this Court show any evidence of further manufacture than what we have had in evidence? Sawn on three surfaces and dressed on one side. Does it show anything further? The evidence shows that there was no further manufacture.

Let us go back to the sawmill and planing mill. What is attempted here is to show that because these planks have been sawn to a uniform width, and may be used for certain purposes even as they stand, therefore there is further manufacture. Supposing it is made

(1) 2 Ex. C. R. 64.

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so that it will fit railway cars, does the article show any further manufacture? What is there in the statute about one sawing or two sawings, or three sawings? One can easily understand that lumber coming from the rough saw of the mill, might be irregular, and for the purposes of commerce, for the purposes of saving weight in freight, it may go through several processes.

Supposing there were 100,000 feet of 12x12 in a yard, all dressed on two sides, if you like, in the United States, and that was sawed up in three or four different ways, for the purposes of fulfilling some requirements of this country—supposing that were the case,—what difference would it make so long as the article when it was produced at the customs, or produced here, showed that it was "sawn" only?

And with respect to the next item of the tariff, I submit that item 505 would not apply to this case, because that plainly contemplates some additional manufacture.

Now, I would submit, following out my theory, that the further manufacture which your lordship must find upon this lumber, and which the Customs must find upon this lumber, must be something other than sawing on three surfaces and dressed on one side.

[THE COURT:—Your whole point seemingly is this, that under this section which we are dealing with, the planks may be sawn as often as they like as long as they come into this country as planks?]

The statute says nothing about one sawing, or two sawings, or fourteen sawings. Having gone through all of these processes for the purpose of making it a merchantable commodity for the purpose of saving waste in freight, or for any other good commercial purpose, it does not matter whether it is sawn by hand or sawn by machinery—so long as it is "sawn" it is free in the tariff.

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"Laws imposing duties on importations of goods are "intended for practical use and application by men "engaged in commerce, and hence it has become a "settled rule of interpretation of Customs statutes to "construe the language adopted by the legislature, and "particularly in the denomination of articles, according "to the commercial understanding at the time".

"*Elmes, Law of Customs*". (1)

That seems to me to be a perfectly reasonable proposition, and one which should be applied in all cases, if we are to have anything like uniformity of duties upon articles imported into this country.

Then, further, is there any ambiguity at all about the item in question? I think it a plain item—and if you are to ingraft something upon it, that is, to look at something which was done in the country of production other than what we see, then we are getting away from the plain words of the tariff. If there is any ambiguity in respect to it, then it seems to me there is a very proper statement of the law which should apply, at page 26 of *Elmes*, as follows "In cases of "serious ambiguity in the language of an Act, or in "cases of doubtful classification of articles, the con- "struction should be in favor of the importer, for duties "or taxes are never imposed on the citizen upon vague "or doubtful interpretation".

Now, *The Customs Act*, as your lordship will observe, (sub-section 2 of section 2) lays down a general rule, as to the interpretation of the *Customs Act*, and any other law which bears upon the Customs.

"All the expressions of this Act, or of any law relating "to the *Customs*, shall receive such fair and liberal "construction and interpretation as will best ensure "the protection of the revenue and the attainment of

(1) P. 22, sec. 49.

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"the purposes for which this Act or such law was made, "according to its true intent, meaning and spirit".

I do not think that this means anything more than Sir William Ritchie, C. J., said in *The Queen* v. *The J. C. Ayer Co.* (1) and I would submit that it is the proper interpretation. He says: "No doubt revenue laws are "to be construed as will most effectually accomplish "the intention of the legislature in passing them, which "simply is to secure the collection of the revenue. "But it is clear that the intention of the legislature, in "the imposition of duties, must be clearly expressed, "and, in cases of doubtful interpretation, the construc- "tion should be in favour of the importer."

Mr. *Lafleur*: I thank the court for the favour shown the British Columbia Lumber Company, by allowing them to intervene, and put their side before the court. The interest of the lumber people in this case far transcends the amount involved in it. This was brought as a test case, to determine a question of great importance which has been in abeyance for the last few months.

In respect to the question as to how the Collector proceeded, and how he came to make this lumber dutiable, I may say that the provisions of this statute have been in force since 1894; and there never has been any question about these articles being dutiable, because the device which has been invented has only been used about 18 months, and it is only recently this question has arisen. Before that, no attempt was made to avoid paying the duty—by means of sizing the lumber by this small buzz saw,—which was originally and cheaply done, by what the witnesses have called, the side-head or planer.

(1) 2 Ex. C. R. 232.

[Mr. *Hogg*.—Sawed sized lumber could be bought for many years].

No, I am informed not. It is the invention of a recent date, and that is how the case has arisen now. At any rate, your lordship is asked to settle that controversy whenever it began.

I am not quite able to appreciate the proposition which was laid down at the outset by counsel for claimants in his argument, and that is, that you must take the article in the condition in which it apparently is, in order to ascertain whether it is dutiable or not. Surely that is not the test? That may be the test to the Collector, for want of better knowledge. He may not have at hand the materials to enable him to ascertain what in reality is dutiable or not. Surely the proper test is, how many processes has the thing gone through before it is imported into this country? It is that fact which decides whether or not that article is dutiable; not its external appearance to the view of the Collector.

By section 43 of *The Customs Act*, it is enacted as follows:

"The Dominion Customs Appraisers and every one "of them and every person who acts as such appraiser "or the Collector of Customs, as the case may be, shall, "by all reasonable ways and means in his or their "power, ascertain, estimate and appraise the true and "fair market value (any invoice or affidavit thereto to "the contrary notwithstanding) of the goods at the "time of exportation and in the principal markets of "the country whence the same have been imported "into Canada, and the proper weights, measures or "other quantities, and the fair market value thereof, "as the case requires".

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I would like to make this observation, that it is now conceded on all hands by witnesses and counsel, that the sizing, if that be a further manufacture, is not and was not done in the sawmill. That is not the process which it goes through in any sawmill. That is conceded—my learned friend's admission covers that.

[THE COURT.—It might be done in another sawmill or adjacent building?]

It is a different piece of machinery that does it.

[THE COURT.—It is different from the sawmill?]

Yes, I address myself to the difficulty which exists in this case. Does the sawing, that is meant in item 504 of Schedule "A" of the Customs tariff, mean an original sawing, or any repeated number of sawings? Because the proposition that is laid down by my learned friend, Mr. Hogg, amounts to this, that you can take a sawn plank and then subject it to any quantity of further sawings, and the only restriction is that you cannot dress it on more than one side. You can, he says, do any quantity of manufacturing, by way of sawing, to that product; and you can do it not only with one kind of saw but with any number of different kinds of saws. Where will you stop?

Mr. *Lewis*.—I would point out at the outset, that these items in the tariff have been in use, and have been administered without difficulty for the past 18 years. A couple of years ago, in 1909, this type of wood was brought in, resulting in a controversy, which again has resulted in this test case. The items of the tariff have not been, by amendment or otherwise, interfered with for 18 years and upwards, and no attempt was made to evade or avoid the duty until the year 1909. Now the Crown, whom I represent, supports the action of the Department; and on the threshold it should be borne in mind that there has been a

decision by the officers of the Customs, under the sections of *The Customs Act*, imposing the duty—and with the result, that when you turn to section 264 of *The Customs Act*, the burden of proof is upon the suppliant—but even more, it is to be assumed under section 264 that the decision of the Customs is right. Not only *primâ facie* right, but the whole burden of proving to a demonstration before your lordship that this lumber is entitled to free entry is on the suppliants.

It was suggested, at the close of the suppliant's case, that I should move for a non-suit; but as it was desired to get all the evidence in before your lordship, that course was not taken. None the less I maintain that, when the suppliant's case closed, the suppliant had not made a case for bringing those exhibits within the free list under section 504. In that view, I would also quote from *Elmes on Customs Laws* (1). You will there find the same thing, in a suit of this nature, against a Collector of Customs, that the burden of proof is on the plaintiff holding the affirmative. That onus, I maintain, has not been discharged here. Primarily, only rough lumber, as it comes from the sawmill is to be free. We all understand what lumber from the sawmill is and means. It is a finished product itself when it leaves the sawmill. It has there to be treated on two sides and two edges, and treated with saws. It is a finished product, when it leaves the sawmill as planks and boards. The only further manufacture, designed or permitted by item 504, was the dressing of it on one side, and on one side only. That process has been stated in the evidence to be for two purposes; one, possibly, that the consumer got that much benefit from the smoothing of one surface, although it is stated that the consumer

(1) Sec. 744

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would much rather have the thicker plank than the surfaced plank; but, secondly, the real reason seems to be that this surfacing is done at the instance of the manufacturer, who desires to dress one side to reduce weight, because all freight charges are payable by weight and not by bulk, and it greatly lessens the freight charges by dressing the mill planks on one side. That is the only form of manufacture that is permissible. Section 504 of the tariff, on its face, was plainly intended to apply to unfinished products—unfinished so far as the market for sized dimension stuff is concerned, unless the consumer desired to buy rough lumber from a mill. But for any designated process, such as studding or joisting, it was never conceived for a moment that the product, coming from the United States, should be there manufactured for any specific purpose for which a sawmill did not complete it with its ordinary equipment.

Your lordship made an observation during the course of my learned friend's remarks, that in putting the product through the planer, the sizing was done. True this was not done with the little planer, what is called the side-head, but in this case with a saw, yet it is contended it was done during or in course of the same operation. The saw, being no part of the planer, is specially put on at the far end of the planer for the purpose of sizing up the lumber in question. The truth and fact is that what the statute contemplated was that the manufacturer should manufacture the rough lumber in the mill, and then, to smooth it, put it through a well known operation—a surfacer was mentioned in the evidence. It meant that it went through a planing machine, with upper rolls which held it down in place, and planed one surface of it only. There is none of the other devices in the surfacer for making

it uniform in width. But the American manufacturer has taken advantage of this country, in going further and discarding the use of the surfacer, and treating this lumber in a complicated planer, which not only surfaces it, but trims the edges and brings the rough lumber to dimension stuff, such as joists and studding.

We say, therefore, that the suppliant is doing two dutiable things straightening the edge, and reducing the plank to a standard size, in the factory, as distinguished from the sawmill.

If we look at the item of the statute itself, 504, the first observation I wish to make is that, in construing the statute, the ordinary canon of construction is to be observed, that full value and some meaning must be given to all the words.

[THE COURT.—What is the construction of item 503?]

That merely deals with rough lumber from the mill. A further concession was made to the manufacturers by allowing them to dress it on one side, and that is found in item 504. Item 503 is with respect to planks not further manufactured than sawn or split—that is free. When you come to the question of manufacture, item 504 is the first concession to the manufacturer, enabling him to put it through the surfacer and dress it on one side, but not to further manufacture it. Their value, and full meaning, ought to be given to those words *"but not further manufactured."*

The plank was a plank, and a finished plank, when it left the sawmill. They were entitled to dress it on one side. If Mr. *Hogg's* contention is correct, that he can saw it *ad libitum* after that, then you could make anything out of it. You can put it through a lathe and make newel posts, stair rails, or balusters out of it—and there is nothing left for the operation of those words, "but not further manufactured",—and you

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ignore and reject the concluding words of item 504, which under the ordinary canons of construction is not permissible.

[THE COURT.—What Mr. *Hogg* says there, is that they are not limited to ordinary deals or planks, but that they can cut them down to any size they like after the first sawing?]

This case is to be determined by the exhibits and the evidence touching them—and I have not conceived it my duty to consider the re-sawing of larger planks into smaller ones, but rather to take the evidence as we have it with regard to these particular shipments. Further considerations may come up in future cases.

Our plain contention is that this wood, as it was offered in Winnipeg for free entry, was ordered originally as sized lumber. It comes into Winnipeg as sized lumber, —and the argument of my learned friend, Mr. *Hogg*, is that the Collector of Customs can only determine whether that is properly entered by a view of the lumber as it is.

I do not want it to appear that there is any difficulty in administering the law, because the Customs authorities have as much power as a court in ascertaining the facts.

Lastly, I want to point out, as to this particular shipment, since the lumber left the mill as a finished product, there has been a change in its form. There has been an obvious change in the uses it can be put to, as finished studding or joists,—and when we find these changes have taken place, there has clearly been a further manufacture since it left the sawmill, beyond the dressing on one side which is alone permissible by the statute.

Mr. *Hogg*, in reply.—What is the point about the sizing? They say it must be the sawing of the saw-

mill. Where is there anything in the tariff which says that the sawing must be the sawing of the sawmill ?

Now, as a matter of fact, in order to dress the lumber, it has to be taken to another place and put through another process. In doing that what more do they make of it than planks? They smoothe one side and they still continue it a plank; and they cut it to a uniform size and width by what? By a saw—and therefore the sawing is sawing, no matter whether it is done with one kind of a saw or another kind of a saw.

My learned friend, Mr. *Lewis*, says that item 503 applies to the rough planks. I have no doubt it does. It is the rough plank, and you have the rough plank dealt with. It is the rough plank as it comes out of the mill. If we have a section which deals with the rough plank, then we have exhausted the tariff as to rough lumber coming from the mill. Then we come to another class of planks that are allowed to be dressed on one side—and I would like my learned friends to point out where there is anything in that which would prevent the planks from being reduced to a particular size, even if it is for a particular purpose.

I quite agree that you must dress it on one side, but, is there anything in 504 which prevents it being reduced to a uniform width by a saw?

And then as to the argument of my learned friend Mr. *Lewis*, that this operation which is called the sizing, has only been in operation for a short time, I don't know that there is any evidence of that sort. I understand that lumber of this kind, dressed on one side, has been imported for the last 15 years—dressed on one side and reduced to a size, that is, the edge taken off it and made to a uniform width.

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I agree that under section 264 of the Customs Act the burden of proof must be upon us. I submit to your lordship that I have satisfied the burden of proof in the evidence that has been given here.

CASSELS, J. now (June 12th, 1912) delivered judgment.

This was a reference under section 38 of chapter 140, Revised Statutes of 1906, whereunder the Minister of Customs referred the claim of the Foss Lumber Company against the above named respondent to the Exchequer Court of Canada for adjudication thereon.

The claimants filed their statement of claim to which the respondents filed their defence. The claim is to recover back the sum of seventy-seven dollars Customs dues, paid at Winnipeg, on certain lumber imported from the United States. The amount is small, but it is said that this is a test case involving a large amount.

The contention of the claimants is that the lumber in question was free from the payment of duties under tariff item 504 in Schedule "A" of the Customs tariff. This schedule is a schedule to the Customs Tariff Act of 1907, being chapter 11, 6 & 7 Edward VII.

Item 504 reads as follows:

"Planks, boards and other timber and lumber of wood, sawn, split or cut and dressed on one side only but not further manufactured."

The contention of the claimants is that the lumber in question was free from duty as the planks were sawn and dressed on one side only but not further manufactured. The Crown on the other hand contends that the carload of planks in question, after being sawn and dressed on one side only were further manufactured.

At the trial certain admissions were filed. It was intended by the admissions to admit that all the lumber in the carload in question was according to these samples. It was admitted at the trial that the samples in question would be taken as samples of the carload.

The point of dispute is whether or not after the planks in question were sawn at the sawmill they could be further manufactured in the planing mill; and the claimants contend that if only saws were used, they came within the strict letter of this item 504, and were to be treated as not further manufactured.

I am of the opinion that the contention of the Crown is well founded, and that the planks in question have been further manufactured, and are not entitled to free admission under item 504. After being sawn in the mill the planks were dressed on one side, and with the aid of other contrivances were sized. The sizing was not done by the circular saws or gang saws in the mill, nor under the evidence is it possible to size them in the first sawing. The sizing has to be done with the aid of other machinery; and according to the evidence and the admission of counsel, there is no machinery in what is known as a sawmill proper which is capable of sizing the planks.

During the course of the evidence the following statement is made in the examination of James D. McCormack:

"Q.—In no equipment of any sawmill in your "experience, either in the United States or Canada, "is the sizing equipment machinery, such as you "spoke of, part of the equipment of the sawmill pro- "per? Or does it belong wholly to the planing mill?

"A.—Not a part of the sawmill at all; it belongs "wholly to the planing mill.

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"MR. LAFLEUR.—I am instructed there is not "such a thing as a sawmill with the sizing equipment.

"MR. HOGG.—I am quite prepared to admit that, "if it is important."

Mr. Robinson, who is the manager of the claimant company, states that he ordered the lumber in question as sized lumber. This order was given to the American firm from whom he purchased the planks in question, Schagler & Nettleton of Seattle.

It is clear from the evidence that the planks in question came in ready for use as joists or studding. It had been sold by the vendors for that very purpose. The onus is upon the claimants to show that the decision of the Customs Department was erroneous. They have given no evidence to contradict the evidence given on the part of the Crown. The case was very forcibly argued by Mr. Hogg on behalf of the claimants. His contention goes the length of claiming that any planks or boards might be completely manufactured for any use that the purchaser might desire, and that so long as nothing but saws were used, no matter where the saws were used, it comes within the strict letter of item 504, and that the planks have to be treated as planks sawn in the case in point upon one side and two edges, and dressed on the other side. This is not my view of the meaning of the tariff. I am not concerned with anything but the construction to be placed upon this tariff. As to the policy of such an item, that is not a matter with which I am concerned. I do not know why the concession was made allowing the planks to be dressed on one side only. Reference to item 503 is important.

It reads:

"Planks, boards, clapboards, laths, plain pickets 'and other timber or lumber of wood, not further

"manufactured than sawn or split, whether creosoted, "vulcanized, or treated by any other preserving "process, or not."

Section 504 permits the dressing on one side. It may be that there were two reasons for allowing this concession; first, to save the freight; and secondly, —for a great many purposes the boards dressed on one side could be utilized for building purposes. Any expert with an axe could size them so as to fit them for building purposes. I think the whole scope of the statute and the tariff is to prevent completely manufactured articles being entered free of duty. It would be straining the Act and the meaning of item 504 to construe it in the manner the claimants seek to have it construed in this particular case. I do not think the case of *Magann* v. *The Queen*, (1) covers this case. In that particular case, the Tariff Act provided that oak lumber sawn, but not shaped, planed or otherwise manufactured may be imported into Canada free of duty. The only question for decision before the Court in that case was whether or not the lumber in question had been shaped within the meaning of the Tariff Act. It was held it was not.

It was also very strongly pressed by Mr. *Hogg* that what should govern in deciding this case, is the condition and the form in which the lumber is produced to the Customs, and that forms the determining factor in applying any item of the Tariff. Apparently, according to his contention, no evidence should be receivable except the appearance of the wood, and he cites in support of his proposition the case of *The Queen* v. *The J. C. Ayer, Co.* (2), a decision of the late Sir W. J. Ritchie, C.J. I think this case has no application to the question before me. In that particular case,

(1) 2 Ex. C. R. 64. (2) 1 Ex. C. R. 232.

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as pointed out by the Chief Justice, there were various provisions in the Tariff Act, some of which permitted the ingredients to be entered separately on payment of certain duties. The Ayer Company imported these various items for years, paid full duty—and then it was subsequently contended that after having legally imported and paid the dues chargeable, because they chose in Canada to put them together and make a compound liable to higher duty if imported in that form, that fraud had been perpetrated, and that they were bound to pay the extra duties and the penalties. The Chief Justice's simile explains his view. Importation of wine in a cask subsequently bottled in Canada indicates what he meant. As pointed out, the Customs tariff provided a certain duty to be levied on the wine in the cask. There was a larger duty if the wine were imported in bottles. The man imported the wine in the cask, paid the duties, and then subsequently bottled it in Canada—and the Chief Justice in referring to the form in which the goods were entered, determined that if they came in under the item of the tariff, and the proper duties were paid under that item, it is of no consequence what was subsequently done with the goods in Canada.

Here in the case before me, the sole question is whether the planks in question after being sawn went through any other process of manufacture. This is a question of fact from the evidence. I think the action fails and should be dismissed with costs.

Judgment accordingly.

Solicitors for the claimants: *Hogg & Hogg.*

Solicitor for the respondent: *E. L. Newcombe.*