1899
April 10.

WILLIAM SCHULZE & CO..... ..... CLAIMANTS;

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Customs law—Breach—Importation—Fraudulent undervaluation—Manufactured cloths—Cut lengths—Trade discounts—Forfeiture.

Claimants were charged with a breach of *The Customs Act* by reason of fraudulent undervaluation of certain manufactured cloths imported into Canada. The goods were imported in given lengths cut to order, and not by the roll or piece as they were manufactured. The invoices on which the goods were entered for duty showed the prices at which, in the country of production, the manufacturer sells the uncut goods to the wholesale dealer or jobber, instead of showing the fair market value of such goods cut to order in given lengths when sold for home consumption in the principal markets of the country from which they were imported. The values shown on the invoices were further reduced by certain alleged trade discounts for which there was no apparent justification or excuse.

Held, that the circumstances amounted to fraudulent undervaluation; and that the decision of the Controller of Customs declaring the goods forfeited must be confirmed. [Leave to appeal to Supreme Court of Canada refused.]

REFERENCE by the Department of Customs of a claim under the 182d section of *The Customs Act* for the return of certain goods seized for fraudulent undervaluation for duty.

The facts are stated in the reasons for judgment.

March 28th, 1899.

The case was heard at Montreal.

W. D. Hogg, Q.C. and *T. Dickson* for claimants;

The Solicitor-General of Canada, E. L. Newcombe, Q.C. and *J. O'Halloran, Q.C.* for the defendant.

Mr. Hogg contended that the goods were in every sense invoiced at their fair market value in the country

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Argument of Counsel.

of production. It had been urged that the claimants could not make a larger profit on their goods than others in the trade if they paid the proper amount of duty on them; this is a question with which this court has nothing to do. If the claimants get the amount of the duty out of their customers the propriety of that cannot influence the decision here. It is simply *res inter alios acta*. The issue here is: Were the goods entered at a proper valuation for duty? The facts show that they were.

Mr. Dickson took the following grounds: If Schulze & Co. are the importers, and that is so, they are in precisely the same position as the purchaser in this country. He is entitled to have his discount deducted from the value of the goods. The evidence taken in Great Britain shows that the valuation made by the claimants is the proper one for duty; the difference between the invoices sent to customs and the invoices submitted to their customers has no legal bearing on the case.

The Solicitor-General of Canada: The solution of the question lies in this fact that it is impossible to get the cloths in the shape the claimants imported them from the mill. The cut lengths are the result of the cloths passing through the middlemen or jobbers' hands, and of necessity the cut lengths involving the additional labour in this way are proportionately higher in price than the goods in the piece as they came from the loom. The intermediary's profit has to be paid in addition to the first cost, and the whole cost is thus increased.

Again, claimants have not proved that the discount they claim is allowed in Scotland.

THE JUDGE OF THE EXCHEQUER COURT now (April 10th, 1899), delivered judgment.

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Reasons for Judgment.

This matter comes before the court on a reference by the Controller of Customs and the Minister of Trade and Commerce exercising the powers to make such a reference given to the Minister of Customs by the 182nd section of *The Customs Act* as enacted in the 34th section of *The Customs Amendment Act*, 1888.

By a decision of the Controller of Customs rendered in June, 1896, upon a report of the Acting Commissioner of Customs dated 7th May, 1896, certain goods of the claimants that had been seized were declared to be forfeited to the Crown for the fraudulent undervaluation thereof in the invoices by which the same had been entered for duty, at the Port of Montreal. The report of the Acting Commissioner, approved by the Controller, also recommended that the claimants be called upon to pay the sum of $787.50 in respect of certain other fraudulent undervaluations mentioned in the report and that "in default thereof proceedings " be instituted for the enforcement of the same and the " imposition of such other penalties as the law allows."

By the 183rd section of *The Customs Act*, as enacted in the amending statute referred to, it is provided that " on any reference of any matter by the Minister to the " court, the court shall hear and consider such matter " upon the papers and evidence referred, and upon any " further evidence which the owner or claimant of the " thing seized or detained, or the person alleged to have " incurred the penalty, or the Crown, produces under " the direction of the court, and shall decide according " to the right of the matter; and judgment may be " entered upon any such decision, and the same shall " be enforceable and enforced in like manner as other " judgments of the court."

With reference to the charge of undervaluation for which the goods in question here were seized and for-

feited to the Crown, it is perfectly clear that the claimants sent into Canada and caused to be used for customs purposes invoices of such goods in which the latter were entered and charged at a less price than that actually charged to the purchasers in the invoices sent to them; and so far from being able to meet the *primâ facie* case which the law under such circumstances raises against them (*The Customs Act*, ss. 201-203), the evidence before me shows clearly, I think, that the goods were entered for duty on invoices that did not represent the true value for duty.

There is no question of mistake or inadvertence. What the claimants did, they did with intention and deliberation. The two sets of invoices were prepared with an object. Under their arrangement with their Canadian customers the latter were to pay the duty and the double invoices enabled the claimants to pay one sum for duty at the custom house, and to collect another and a larger sum therefor from their customers. The duty was paid on invoices made specially for use in passing the goods through the customs. It was collected from the customers calculated upon the higher value shown in the invoices sent to the latter. The claimants say that that was their affair; that if in that way they took an advantage of their customers it is no concern of the customs authorities; and they allege that the invoices on which duty was paid show the true value of the goods for duty. It is with the last proposition that I have to deal; and if I pass the others over without further reference than this, it is not because I concur in the views expressed. If in order to get the better of their customers the claimants first get the better of the customs officers, the latter, it seems to me, have a very direct interest in the matter. The invoices on which the goods were entered for

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duty show, it would appear, the prices at which in the country of production the manufacturer sells such goods in full length pieces to the wholesale dealer or jobber, and not, as under the circumstances of the case they should, I think, show the fair market value of such goods cut to order in given lengths when sold for home consumption in the principal markets of the country from which they were imported. But that is not all; the values as shown were further reduced by discounts for which there appears to have been no justification or excuse. The case appears to be a clear one of fraudulent undervaluation, and I think the decision of the Controller of Customs declaring the goods forfeited to the Crown was the proper decision to render, and I confirm it.

The remainder of the Acting Commissioner's report, which was approved by the decision of the Controller, deals, as has been seen, with certain penalties which it is alleged the claimants incurred in respect of other goods, and for the recovery of which it is recommended that proceedings should be instituted. Nothing of course would be gained by affirming that recommendation. It is equally effective without any approval of the court. And I am in doubt as to whether it was in the minds of the parties that in the present proceeding the court might deal with the matter and impose or not impose such penalties as the claimants appeared to have incurred. That question was not discussed. And as there may be considerable doubt as to the authority of the court on this reference to impose any such penalties I shall refrain from disposing of the matter, reserving to the Crown the right to move for judgment for such penalties if it is advised that they may be recovered in the present proceeding.

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The claimants will pay the Crown its costs of the reference so far as the latter has been proceeded with.

*Judgment accordingly.**

Solicitor for claimant: *W. D. Hogg.*

Solicitor for defendant: *E. L. Newcombe.*

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* On the 6th day of May, 1899, an application was made to the Honourable Mr. Justice Gwynne, in the Supreme Court of Canada, for leave to appeal from the judgment herein. W. D. Hogg Q. C. supported the application, E. L. Newcombe Q. C. contra.

At the conclusion of the argument the learned Judge gave the following oral judgment:

I think in all applications to this Court for leave to appeal from the Exchequer Court, when the amount involved is under $500, leave should not be granted unless the judge before whom the motion is made is of the opinion that the judgment of the Court below is so clearly erroneous that there is reasonable ground for believing that a court of appeal should reverse the judgment upon a point of law, or upon the ground that the evidence does not at all warrant the conclusions of fact arrived at. In the present case no such grounds appear, and the motion for leave will, therefore, be refused with costs.