THE DOMINION BAG COMPANY (LIMITED) ..... } CLAIMANTS; 1894 Dec. 6.

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Revenue laws—R.S.C. c. 33, items 261 and 673—57-58 Vict. c. 38, item 621—Construction—Importation of jute cloth.

In construing a clause of a Tariff Act which governs the imposition of duty upon an article which has acquired a special and technical signification in a certain trade, reference must be had to the language, understanding and usage of such trade.

By item 673 of R.S.C. c. 33, jute cloth "as taken from the loom, neither pressed, mangled, calendered nor in any way finished, and not less than forty inches wide, when imported by manufacturers of jute bags for use in their own factories," was made free of duty. By item 261 of such Act, it was provided that manufactures of jute cloth, not elsewhere specified, should be subject to a duty of 20 per cent. *ad valorem.*

The claimants, who were manufacturers of jute bags, had for a number of years imported into Canada jute cloth cropped after it was taken from the loom. Item 673 was susceptible of several interpretations, one of which was that the jute cloth so cropped should be entered free of duty, and in this construction the importers and the officers of customs had concurred during such period of importation.

Held, that, inasmuch as the cloth in question had been, in good faith, entered as free of duty and manufactured into jute bags and sold, and it would happen that if another construction than that so adopted by the importers and customs officers was now put upon the statute, the whole burden of the duty would fall upon the importers, the doubt as to such construction should be resolved in their favour.

Quære, whether the words used in sec. 183 of *The Customs Act* (as amended by 51 Vict. c. 14 s. 34) "the court.....shall decide according to the right of the matter," were intended by the legislature in any way or case to free the court from following the strict letter of the law, and to give it a discretion to depart therefrom if the enforcement, in a particular case, of the letter of the law, would, in the opinion of the court, work injustice?

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Statement of Facts.

THIS was a claim for the return of goods alleged to have been improperly seized for the non-payment of customs-duties.

The facts of the case appear in the reference of the claim to the court by the Minister of Trade and Commerce, which is as follows :—

Department of Justice, Canada,
October 16th, 1894.

To the Registrar of the
Exchequer Court of Canada.

Sir,

In the matter of the detention by the Acting Collector of Customs at Montreal, Quebec, under the terms of section 161 of the Customs Act, of certain Jute Cloths, known as Cream Weft Hessians, imported by and in possession of The Dominion Bag Company, Limited, of the city of Montreal, as the result of an investigation made by Mr. Henry McLaughlin, Tide Surveyor of the Port of Montreal, upon sworn information supplied to him, to the effect that the Cream Weft Jute Hessians imported by the said company, during the three years antecedent to such detention, had been improperly entered at Customs free of duty, as coming within the provisions of the old and present tariffs, which except Jute Cloths from duty when the same are, "as "taken from the loom, neither pressed, mangled, calendered, nor in "any way finished, and not less than forty inches wide, when import-"ed by manufacturers of jute bags for use in their own factories," or item 621 of the present tariff, "as taken from the loom, not coloured, "cropped, mangled, pressed, calendered nor finished in any way." when in reality, as alleged in the information, the said Hessians or Jute Cloths were not as taken from the loom, but had been cropped and lapped, the former of which operations constituted a finishing of the goods after the same had been taken from the loom.

The Acting Commissioner of Customs having, in pursuance of ection 178 of the Customs Act, duly notified The Dominion Bag Company, Limited, the owner and claimant of the said goods, and having considered and weighed the evidence submitted by that company, and the circumstances of the case, and reported his opinion and recommendation thereon to me, I do thereupon refer the matter, together with the said report of the Acting Commissioner, and the evidence and papers, to the Exchequer Court of Canada, for decision.

I have the honour to be, Sir,
Your obedient servant,
(Sgd.) N. CLARKE WALLACE,
Controller of Customs.

I concur in the reference of this matter, respecting the seizure, detention, penalty or forfeiture and the terms if any upon which the goods seized or detained may be released or the penalty or forfeiture remitted, to the Exchequer Court for decision.

(Sgd.) M. BOWELL,
Minister of Trade and Commerce.

Statement of Facts.

The case was heard at Montreal on the 6th of December, 1894.

D. Macmaster, Q.C., for the claimants, cited R. S. C. c. 33, items 261 and 673; 57-58 Vict. c. 38, item 621; *Grinnell* v. *The Queen* (1).

W. D. Hogg, Q.C., for the defendant, cited *The Customs Act* (R.S.C. c. 32) secs. 167 and 233, 263; R. S. C. c. 33, item 173; 57-58 Vict. c. 38, item 673.

D. Macmaster, Q.C., replied.

THE JUDGE OF THE EXCHEQUER COURT.—

The main question to be determined is: Was jute cloth that had been cropped, but not calendered or mangled, free of duty under item 673 of the Act respecting duties of Customs in force prior to the 27th of March, 1894, or dutiable under item 261 of that Act? (2).

By item 261 it was provided that manufactures of jute, not elsewhere specified, should be subject to a duty of twenty per cent. *ad valorem*, and then, as being elsewhere specified, and so excepted from that clause, it was enacted (item 673) that:

> Jute cloth as taken from the loom, neither pressed, mangled, calendered nor in any way finished, and not less than 40 inches wide, when imported by manufacturers of jute bags for use in their own factories,

should be free of duty.

Now it is clear, and as to that I agree with Mr. Hogg, that the process of cropping, as now performed, is done after the cloth is taken from the loom; that in

(1) 16 Can. S. C. R. 119. (2) R.S.C. c. 33, items 261 and 673.

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the ordinary course of manufacture and business cropped jute cloth is not as it comes from the loom. The provision in question, if I may rely upon the compilation of statutes relating to the Customs and duties of Customs that I have in my hand, first occurs in an order in Council of the 22nd of December, 1881, and what I have said of the present manufacture of such cloth is, I think, equally applicable to the trade or business as it was carried on in 1881. It appears that formerly the cropping was done with shears while the cloth was passing through the loom. But before 1881 that process had been generally abandoned in favour of a cropping done by machinery after the cloth left the loom.

Construing the clause then by the state of the art or trade as it existed in 1881, and has since been carried on, it is obvious that if the words "as taken from the loom" are to be taken literally as the controlling words in determining the intention of the legislature, then cropped jute cloth was dutiable and not free under the Act to which I have referred. That view is supported somewhat, it seems to me, by the consideration that this clause is found in a Tariff Act, a leading feature of which was, and is, as we all know, to give protection to Canadian manufactures and labour. And for myself I should have been inclined to think that the intention of the legislature, in the particular matter under discussion, was to give the manufacturers of bags in Canada jute cloth free, but at the same time to compel them to perform in Canada all the labour that could possibly be performed here. There is no doubt that the cropping, which we have seen is a separate process, could be done here, and if that view were to prevail the cropped cloth would be dutiable.

But if that was the intention of Parliament there was no occasion for the addition of the words "neither

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pressed, mangled or calendered, nor in any way finished," and either the latter expression is to be treated as surplusage, or as qualifying the preceding words, "as taken from the loom." As Mr. Mcmaster pointed out, jute cloth cannot be imported in the actual condition in which it comes from the loom, for whether it is cropped or not, it must be folded or lapped and packed in bales before it can be shipped. These necessary things must of course be done, and it would not, I think, occur to any one to say that because of these the cloth, when so put upon the market, was not as it was taken from the loom. But "cropping" is not, it seems to me, one of these necessary things. It may or may not be usual, but it is not necessary, and so perhaps that consideration is not very helpful in ascertaining the intention of the legislature.

Now, I gather from the papers that the acting Commissioner of Customs has taken the view that the words "as taken from the loom" have to be construed by reference to the expression following, to which I have referred "neither pressed, mangled, calendered nor in any way finished"; the distinction being, in his view, between cloth that was in the rough and cloth that was finished, and that, I may add, is not an unreasonable construction of the clause.

But this qualifying expression is itself open to two different constructions. First, it appears that there is no distinct process of pressing as known in the manufacture of jute cloth. It is clear also that the word "pressed" cannot be taken literally, as that would include packing or baling, one of the necessary things be done before the cloth is put upon the market, and we must limit the word "pressed" to such "pressing" as occurs in the process of mangling or calendering. If the general word "finished," following the particular terms "mangled or calendered," is subject

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as in accordance with a settled rule of construction, it might well be, to a like qualification or limitation, then of course it is obvious that "cropping" is not a process of "finishing," within the meaning of the clause. The doubt as to that being the true construction of the provision, arises from the fact that there are other processes of finishing, such as dyeing, which one would have expected to find in the same category as mangling and calendering. This difficulty could, I think, be solved, and the intention of Parliament ascertained, if it were permissible, to examine the corresponding clause in the Act now in force, which reads as follows:—

> 621. Jute cloth as taken from the loom, not coloured, cropped, mangled, pressed, calendered nor finished in any way. 57-58 Vict. c. 33, item 621.

That, but for the amendment to *The Interpretation Act*, which provided that the repeal or amendment of an Act should not be deemed to be, or involve any declaration whatsoever as to the previous state of the law (1), would, it seems to me, show that the legislature itself understood the word "finished" in item 673 of *The Revised Statutes*, chapter 33, to be limited to a finishing such as mangling or calendering. That would, perhaps, have been conclusive. But at all events the construction I have mentioned is one to which the provision is open.

Then there is the other construction which, as I have said, the acting Commissioner of Customs has placed upon the clause, that the expression "as taken from the loom" is to be qualified by the words "neither pressed, mangled, calendered nor in any way finished," but that the term "finished" is not itself to be qualified by the words immediately preceding it.

(1) 53 Vict. c. 7.

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That construction raises in this case a question of fact, as to whether or not the "cropping" of jute cloth is a process of finishing. The acting Commissioner of Customs, on the facts before him has found, and I think rightly found, that it is not; and I do not think the position of affairs has in that respect been materially changed by the additional evidence adduced before me. The question is one that must be determined by the language, understanding and usage of the trade, and it appears tolerably clear that cropping is not in the trade considered to be a process of finishing, and that the jute cloth in question in this case is understood commercially to be in the rough and not finished. There is, of course, some evidence the other way, but on the whole case I agree with the acting Commissioner, and find the fact as he found it.

Then it is important to bear in mind the rule of construction to which Mr. Macmaster has called attention, and in support of which he has cited the opinion of the late Chief Justice of the Supreme Court of Canada, sitting in this court, that a tax must be imposed in clear terms, and that if it is doubtful whether it has been imposed by the statute or not, the doubt ought to be resolved in favour of the importer. Notwithstanding anything contained in *The Customs Act*, I am, I think, bound by that decision and a decision of the Supreme Court to the same effect, [*Grinnell* v. *The Queen* (1)], to hold that duties of Customs must be imposed in clear terms or by necessary intendment, and that the importers should have the benefit of any fair and reasonable doubt.

With regard to the cloth under seizure, I should, as I have said during the course of the argument in this case, hesitate on the evidence before me to find that any of it has in fact been cropped. I should have great

(1) 16 Can. S. C. R. 119.

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difficulty in finding either one way or the other. Experienced witnesses examined here have either differed as to that, or have expressed their opinion with a good deal of hesitation and reserve. It is a question, however, which without doubt could be definitely determined. If the importers do not know, and apparently they do not know, whether this cloth is cropped or not, the manufacturers or shippers would know, and if it were necessary to the disposition of the case, I should not hesitate to direct a reference to ascertain that fact.

Now there is another observation which I think I ought to make, and that is that it is perfectly clear that the jute cloth which the claimants imported under the tariff in force prior to the 27th of March, 1894, and which they passed at the Custom house as free of duty, was so entered and passed by them in good faith, in the belief that it was free, and that the Customs officers at Montreal, whose duty it was to examine the cloth, must at the time have been of the same opinion. I should agree with the view presented by Mr. Hogg that so far as the collection of the duty is concerned that consideration would not be material, if it were perfectly clear that the goods were dutiable. It is important only in view of the incident that the case on the whole is a doubtful one, and in that connection is, I think, entitled to very considerable weight.

By the 183rd section of *The Customs Act*, as amended by 51 Vict. c. 14, s. 34, under which this case is proceeding, 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.

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Now the words "decide according to the right of the matter" might, I suppose, be taken to raise a somewhat important question as to whether or not the legislature, by the use of the term, intended in any way or case to free the court from following the strict letter of the law, and to give it a discretion to depart therefrom if the enforcement, in the particular case, of the letter of the law would, in the opinion of the court, work injustice or unrighteousness. If the exercise of such a discretion were open to me, I should have no hesitation in the present case, in which in good faith and without the slightest intention of defrauding the revenue, the importer and manufacturer have entered the goods as free under an interpretation of the Tariff Act, in which during a series of years the Customs officers have acquiesced, in which the goods so entered have for the most part been manufactured and sold, the consumer or purchaser getting wholly, or largely, the benefit of the free entry, in which, if another construction is now to be put upon the statute and the duty collected, the whole of such duty must fall upon the manufacturer, who will not in any way be able to reimburse himself by increasing the price of the goods he sells, and in which, in short, it is impossible to restore parties to their original positions; in such a case I should, I say, have no hesitation in coming to the conclusion that "the right of the matter" would be to let the free entries stand and to release the seizure.

But it is doubtful if such a construction of the statute under which the case is referred is open to me, and I do not rest my judgment on that, but in this particular case on the following view of the matter.

While I think, as I have already intimated, that there is a good deal to be said for the construction of

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the provision in question for which Mr. Hogg has so forcibly contended, it is now too late to adopt that construction. There are, as we have seen, three different constructions that may be put upon the clause. The importers and the officers of Customs have, during a series of years, concurred in an interpretation under which the cloth in question has in good faith been entered as free of duty. The cloth has, for the most part, been manufactured into bags and sold, and if duty is now exacted the whole burden must fall as a loss upon the importers. That makes a case in which, it seems to me, there is especial reason for resolving the doubt as to the construction of the statute in favour of the importer. The seizure will be released in respect of the cloth imported prior to the 27th of March last.

Now that disposes of the whole case, with the exception of importations that may have occurred since that date. As to that there is, I understand, nothing to show definitely whether any cropped jute cloth has since March been entered as free of duty. It is conceded, as it ought to be, for there can be no possible doubt as to that, that such cloth is dutiable under the Act that took effect on that day.

There will be, in accordance with the agreement between the parties, a reference to the Registrar of the court to inquire and report whether any of the cropped jute cloth in question in this case has been entered since the date mentioned, and if any, the value thereof and the duty leviable thereon.

The question of costs is reserved.

Judgment accordingly.

Solicitors for claimants: *Macmaster & Maclellan.*

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