WEDDEL LIMITED (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... RESPONDENT.

1946

*Feb. 27
*May 20

WATT & SCOTT (TORONTO) LTD. (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... RESPONDENT.

TEES & PERSSE LIMITED (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Customs duty—Goods imported and duty paid according to value fixed at port of entry—Minister's (National Revenue) power to re-determine value of goods for duty—Imposition of additional duty—Applicability of such power to goods already imported—Construction of section 41 of the Customs Act—Whether Minister's power is referable to past as well as to future importations—Alleged re-appraisal by Customs appraiser under section 48—Whether Crown can claim, in the present cases, additional duty under such re-valuation—Customs Act, R.S.C. 1927, c. 42 and amendments, sects. 4, 19, 20, 35, 38, 39, 40, 41, 42, 43, 48, 52, 111, 112.

Section 41 of the *Customs Act* provides that "whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because" of several enumerated causes or reasons, as to the existence of which the Minister of National Revenue shall be the sole judge, "the Minister 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."

The appellants during 1940, 1941 and 1942 imported into Canada large quantities of canned corned beef from Argentine, Uruguay and Brazil and paid customs duty based on the values at which the goods were entered for customs. In December 1942, it being considered that

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

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the goods had been undervalued, the Crown alleged that the Chief Dominion Customs appraiser, purporting to act under section 48, made fresh appraisals and sent the appellants a statement showing such appraised values and the amount of underpaid duty and taxes. Protests were made by the appellants and the matter was referred to the Minister of National Revenue, who, in August 1943, acting under the provisions of section 41, re-determined the value for duty of the goods imported by each of the appellants, and additional customs duty and taxes were demanded from them. Actions were brought to recover in each case such additional amount, or, in the alternative, the additional amount resulting (as contended) from the re-appraisal by the Chief Dominion Customs appraiser. The appellants submitted that the Minister had no jurisdiction under section 41 to determine increased values for duty purposes in respect of individual past importations on which duty had been assessed by the proper officer and paid and the goods released; and they also contended that the power vested in the Customs appraiser by section 48 was not and could not be exercised in these cases.

Held, The Chief Justice and Rand J. dissenting, affirming the judgments of the Exchequer Court of Canada ([1945] Ex. C.R. 97 and 111), that the appellants were liable for the additional duty claimed by the Crown in accordance with the re-valuation determined by the Minister of National Revenue—Section 41 is not solely prospective in its application. Parliament, when dealing in that section with cases where it was difficult to determine the value, was still dealing with goods that have actually been imported and appraised, upon which duty may also have already been paid; and the Minister was given power to determine the value for duty of such goods. *Per* Estey J.:—Moreover, section 41 does not impose any time limit within which the Minister may act after importation.

Per The Chief Justice and Rand J. (dissenting):—The Minister's power, under section 41, to determine the value for duty of imported goods, is not referable to past importations, which have already been legally appraised. Such power is restricted to future importations: it must be exercised at the time the importation takes place and the Minister's ruling must be antecedent to a valid allowance of the entry.

Held that the Crown cannot succeed on its alternative claim. There is no satisfactory evidence that a fresh appraisement under section 48 has been made by a Dominion appraiser and that there was any direction by him for an amended entry and payment of the additonal duty. If that had been done, the appellants might have exercised their right to a re-valuation by a board selected under section 52.—*Per* The Chief Justice:—The alternative argument suggested by the Crown shows by itself that it has no basis in fact: both the Minister under section 41 and the Dominion appraiser under section 48 could not act at the same time, and the evidence establishes that what was done here was a determination by the Minister.

APPEALS from the judgments of the President of the Exchequer Court of Canada (1), maintaining actions by the Crown, on informations of the Attorney General of

(1) [1945] Ex. C.R. 97 and 111.

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Canada, to recover from each of the appellants the additional amount of customs duty and taxes resulting from the determination by the Minister of National Revenue of the values for duty of certain goods imported into Canada in excess of those at which they had been entered for duty.

Aimé Geoffrion K.C. for the appellants.

J. Singer K.C. and *W. R. Jackett* for the respondent.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

THE CHIEF JUSTICE (dissenting): These three cases were heard together and I intend to dispose of them by the same reasons.

The facts, as stated in the judgments of the learned President of the Exchequer Court (1), are as follows:

During the years 1940, 1941 and 1942, the appellants imported into Canada large quantities of canned corn beef from Argentine, Uruguay and Brazil and paid custom duties based on the value at which the goods were entered for customs.

On December 16, 1942, the Commissioner of Customs of the Department of National Revenue notified the appellants that the importations appeared to have been undervalued and that he proposed to instruct the collectors at the various ports where their entries had been passed, to call for amending entries, accounting for additional duty on appraised values on all entries passed by them since January 1, 1940.

After correspondence between the department and the appellants, or their representatives, the Department of National Revenue made an appraisal of the value of the imported goods, in excess of those at which they had been entered for duty, and directed the appellants to make amended entries and to pay additional customs duty and taxes; and, on April 6, 1943, it sent the appellants statements showing such appraised values and the amount of underpaid duties and taxes.

(1) [1945] Ex. C.R. 97 and 111.

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No appeal from the appraisals was taken, but representations protesting against this were made to the Department by the appellants and their representatives.

Subsequently, the matter was referred to the Minister of National Revenue, and, on June 29, 1943, the Minister advised the appellants' representatives, by letter, that it appeared that this might be a proper case in which to determine the value for duty under section 41 of the *Customs Act*, but that, before he decided what determination should be made, he would be glad to arrange an appointment to hear any further representations or to receive any further statement in writing.

An appointment was then arranged with the Minister on July 14, 1943, at which time he heard oral representations both by the appellants' representatives and by their counsel. Further written representations were also made. Finally, on August 19, 1943, the Minister made his determination to the effect that, on reviewing the circumstances and conditions of importation, it appeared to him and he found that such circumstances and conditions rendered it difficult to determine the value of the goods in question for duty, because:

(1) Such goods are not sold for use or consumption in the country of production.

(2) Such goods, by reason of the fact that the circumstances of the trade render it necessary or desirable, are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption.

The Minister accordingly determined

that the value for duty of the canned beef imported into Canada from Brazil, Argentine and Uruguay, during the calendar years 1940, 1941 and 1942 by Messrs. Weddel Limited (and the other appellants), shall be as set forth in the statement attached as Schedule "A" hereto.

In the case of Weddel Limited, the schedule showed that the amount of additional customs duty and taxes payable by them amounted to $49,312.03.

The Deputy Minister of National Revenue (Customs and Excise) notified the appellant of the Minister's determination, sent a copy of the schedule and required the entries to be amended not later than September 2, 1943.

On the appellant's refusal to pay any additional duty or taxes, this action was brought, claiming the additional

amount of customs duty and taxes resulting from the determination of the Minister, under section 41 of the *Customs Act,* (R.S.C. 1927, c. 42) and, in the alternative, the additional amount resulting (as contended) from the appraisal by the Chief Dominion Customs appraiser purporting to act under section 48.

In the Watt and Scott (Toronto) Limited case, the facts are the same except that the judgment is for $158,215.18; and the appellant suggests that there are two differences: no details were asked in this case, and the appellant is not a principal but only the agent of the owner.

In the Tees and Persse Limited case, the judgment is for $68,825.30, and it is subject to the same two differences as in the Watt and Scott case.

As already stated, the Minister purported to have acted under sections 41 and 48 of the *Customs Act.*

These two sections read as follows:

Section 41. Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because:

(*a*) such goods are not sold for use or consumption in the country of production; or

(*b*) a lease of such goods or the right of using the same but not the right of property therein is sold or given; or

(*c*) 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

(*d*) such goods are usually or exclusively sold by or to agents or by subscription; or

(*e*) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions;

the Minister 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.

(2) the Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

* * *

Section 48. If, upon any entry or in connection with any entry, it appears to any Dominion appraiser or to the Board of Customs that any goods have been erroneously appraised, or allowed entry at an erroneous valuation by any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with, such Dominion appraiser or such Board may make a fresh appraisement or valuation, and may

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direct, under the valuation or appraisement so made, an amended entry and payment of the additional duty, if any, on such goods or a refund of a part of the duty paid, as the case requires, subject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as in such case hereinafter provided for.

The learned President gave judgment against each of the appellants for the amounts claimed by the respondent. On behalf of the appellants, it is contended that the Chief Dominion Customs appraiser did not make any appraisal of the value of the imported goods in excess of those at which they had been entered for duty, and did not direct the appellants to make amended entries and pay additional duty and taxes, as it is suggested in the judgment appealed from.

According to the appellants, this was done by the Commissioner of Customs; and the point may be one of importance in connection with the alternative ground in the Minister's decision and in the action of the respondent.

The appellants submitted that these judgments were erroneous because, under section 41 of the *Customs Act,* the Minister had no jurisdiction to determine increased values for duty purposes in respect of individual past importations on which the duty had been assessed by the proper officer and paid, and the goods released. The appellants also claimed that the power vested in the Dominion Customs appraiser by section 48 of the *Customs Act* was not and could not be exercised in this case.

Under section 112 of the *Customs Act,* the true amount of Customs duty payable to His Majesty with respect to any goods imported into Canada shall, from and after the time when such duty should have been paid or accounted for, constitute a debt due and payable to His Majesty, jointly and severally, from the owner of the goods at the time of the importation thereof, and from the importer, as the case may be.

Under section 111, the importation is deemed to have been completed from the time the goods are brought within the limits of Canada.

Under section 35, 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 they were exported directly to Canada; and the Minister may determine the value 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, under regulations prescribed by the Minister.

But if the goods imported into Canada are under such circumstances or conditions as render it difficult to determine the value thereof for duty because of some of the reasons stated in section 41, the Minister 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.

If one compares section 35 and section 41, it would seem, at first glance, that in the case of section 35 what is contemplated is a ruling ("under regulations prescribed by the Minister") which applies whenever the goods do not come under one of the conditions inserted in section 41.

There are some exceptions covered by sections 42 and 43 in respect of medicinal or toilet preparations or the valuation of imports considered as prejudicially or injuriously affecting Canadian producers.

We are not concerned with the latter.

Under ordinary circumstances, the Dominion Customs appraisers and every one of them, and every person who acts as such appraiser, or the collector, 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 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 importer pays duties then and there upon taking possession of the goods.

The decision of any appraiser or collector as to the principal markets of the country, or as to the fair market value of goods for duty purposes, is subject to review by the Board of Customs; and, in that respect, the decision of the Board of Customs, when approved by the Minister, is final and conclusive, except as otherwise provided in the Act.

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Then, under section 52, if the importer is dissatisfied with the appraisement made of any such goods by the appraiser, he may within six days give notice in writing to the collector of such dissatisfaction. Upon receipt of such notice, the collector shall at once notify the importer to select one disinterested and experienced person familiar with the character and value of the goods in question, and the collector shall select a second person of similar knowledge and notify the importer of such appointment.

Then, the persons so selected, together with a third selected by the Minister from among the Dominion appraisers, shall examine and appraise the goods in accordance with the provisions of the Act, and the decision arrived at either unanimously or by a majority of them, shall be reported to the collector and shall be final and conclusive, and the duty shall be levied and collected accordingly.

It should be stated that all customs officers are local appraisers under the Act; and that, therefore, when the goods of the appellants in the present cases were imported into Canada and were appraised by the Customs' officers acting as local appraisers and, the duties having been paid as assessed and asked for, the appellants took possession of their goods, everything required by the *Customs Act* had been complied with.

I think the several sections to which I have just referred indicate correctly the whole scheme of the collection of duties for customs purposes provided for by the Act.

Such scheme therefore appears to be as follows:

Upon arrival of the goods in Canada, the value thereof is ascertained by the local customs officer acting as appraiser; and, in the ordinary course of events, the duties are paid and the goods handed over to the importer. It may be that the value of the goods imported was already determined and has to be computed and levied under regulations prescribed by the Minister in conformity with section 35 of the Act.

The appraisal of the Customs officer is subject to review by the Board of Customs in accordance with subsection 4

of section 38, or may be made the subject of another appraisement by three disinterested and experienced persons, under the provisions of section 52.

The decision of the Board of Customs in the first case, when approved by the Minister, is final and conclusive; and so is the decision of the three appraisers under section 52.

But, if it should happen that the goods imported into Canada are under one or more of the circumstances or conditions mentioned in section 41, then the local Customs officers are not to act as appraisers; sections 35, 38 and 52 do not apply, and section 41 alone states what should be done:

> The Minister 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.

In those cases, the Minister is the sole judge as to the existence of all or any of the causes or reasons enumerated in section 41.

In the present case, the local appraisers, when the goods were imported, acted under sections 35 and 38 of the Act. There was no review of the decision made by the Board of Customs, under section 38, subsection 4, nor was there any notice of dissatisfaction and consequential appraisement under section 52.

In my view, therefore, there the whole matter lies. The several provisions of the Act covering the situation had been fully satisfied and there was no coming back against the importers, subject to what may be said about section 48.

It was only if, at the time of the importation (n.b. section 41: "*whenever* goods are imported into Canada" etc.,) on account of one or more of the reasons enumerated in section 41, the Customs officers acting as local appraisers found themselves unable to ascertain the fair market value, that the Minister was called upon to determine the value of the goods, upon which duty on such goods shall be computed and levied.

But it is only at that time and that is to say: at the time when the importation took place that the Minister could act under section 41.

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There is nothing in that section which authorizes the Minister and gives him jurisdiction to determine increased value for duty purposes in respect of individual past importations on which the duty has already been assessed by the proper officer, paid, and the goods released.

The alternative contemplated by the *Customs Act* is that either the appraisal takes place by the local Customs officers or it must be then and there made by the Minister, provided one of the conditions enumerated in section 41 applies.

The first alternative took place; the goods were appraised by the officer entitled to make the appraisal; the duty was paid; the goods were released; and that was complete compliance with the provisions of the *Customs Act*. The Minister had no jurisdiction to interfere and more particularly several years after the goods had been released.

If there was cause for dissatisfaction, the matter came under the jurisdiction of the Board of Customs or is covered by section 52 of the Act.

The Minister now says in his decision that these were not cases for the local appraisers, but rather cases coming under section 41 and where he alone could act.

I could not find anything in section 41 giving him that power and authority, more particularly three years after the whole scheme of the Customs appraisal had been gone through in accordance with the Act.

There remains the new point very forcibly raised by Mr. Singer at the argument before this Court.

He said that even if the Minister, in the premises, was lacking of authority to act under section 41, in the alternative the Dominion appraiser could reopen the question by force of section 48; and he endeavoured to show that a re-appraisal had really been made by the Dominion appraiser in such a way that the determination of the value for duty of the goods in question was thereby made and supports the claims of the respondent in these several cases.

Section 48 of the *Customs Act* may be again quoted here:

If, upon any entry or in connection with any entry, it appears to any Dominion appraiser or to the Board of Customs that any goods have been erroneously appraised or allowed entry at an erroneous valuation by

any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with, such Dominion appraiser or such Board may make a fresh appraisement or valuation and may direct, under the valuation or appraisement so made, an amended entry and payment of the additional duty, if any on such goods, or a refund of a part of the duty paid, as the case requires, subject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as in such case hereinafter provided for.

Under section 4 of the *Customs Act*,

there may be appointed * * * appraisers to be called Dominion Customs appraisers and assistant Dominion Customs appraisers, with jurisdiction at all ports and places in Canada; and Customs appraisers and assistant Customs appraisers with jurisdiction at such ports and places in Canada as are designated in an Order-in-Council in that behalf.

They shall, before acting as such, take a prescribed oath of office. If no appraiser is appointed in any port of entry, the collector there acts as appraiser, but without taking any special oath of office as such; and every appraiser is deemed an officer of Customs.

The Dominion appraiser is independent of the Department and, when he acts under section 48, he does so as a special officer with, as may be seen, the same powers as the Board of Customs.

For the purposes of section 48, they are both put on exactly the same footing.

It so happens that when the appellants were negotiating with the Department in connection with the announced intention that their goods were to be re-appraised and that the entries were to be amended, some of the correspondence exchanged between the Department and the appellants was signed by the then Dominion appraiser. But I could not interpret that correspondence to mean that the Dominion appraiser was at the time acting as such, and surely that intention was nowhere conveyed to the appellants.

The Department and the Minister were then purporting to act under section 41; the Dominion appraiser, who apparently was then also an employee of the Department, appears to have been carrying on some of the correspondence on behalf of the Department, and nowhere was it specifically mentioned that he was undertaking to act as a Dominion appraiser under section 48.

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It is not satisfactorily established that he made a re-appraisal under that section, and that, under it, he directed an amended entry and payment of the additional duty.

The appellants were certainly not advised that he pretended to act under section 48; and one of the results to their prejudice, if it were to be so decided now, would be that they were deprived of the right to a re-valuation by a Board selected under section 52.

I do not find in the record any satisfactory evidence that proceedings were ever gone through in conformity with section 48; and moreover, I am of opinion that, in the circumstances, that could not have been done, since the whole matter was then before the Minister, avowedly acting under section 41:

By force of that section, it is for the Minister to determine the value for duty of such goods, and it is upon the value so determined by him that the duty on the goods shall be computed and levied.

Moreover, the Minister is the sole judge as to the existence of all or any of the causes or reasons enumerated in section 41.

It can not be contended that after the Minister has given his decision under section 41, the Dominion appraiser or the Board of Customs could yet review the case under section 48.

The Minister's determination is final for all purposes and the Dominion appraiser or the Board of Customs are ousted of any jurisdiction in the matter.

Likewise, when the case stands to be decided by the Minister under section 41, the Dominion appraiser or the Board of Customs could not step in and proceed to make a re-appraisal so to say *pendente lite*.

I simply look upon the suggestion that section 48 could be relied on to support the case of the respondent as a clever after-thought, upon the assumption that the assessments made in the present cases could not be otherwise supported.

The very fact that it is suggested as an alternative argument would in itself show that it has no basis in fact. Both the Minister, under section 41, and the Dominion appraiser, under section 48, could not act at the same time.

It had to be one or the other; and the evidence is clearly to the effect that what was done here was a determination and a decision by the Minister under section 41.

I am therefore of the opinion that, for the purposes of these cases, section 48 must be eliminated.

We have before us the decision of the Minister made under section 41, and I have already indicated that the Minister had no power to make those decisions under that section, in the circumstances.

For these reasons, I would allow the appeals and dismiss the Informations with costs in both Courts.

The judgment of Kerwin and Hudson JJ. was delivered by

KERWIN J.:—An information was filed in the Exchequer Court of Canada by the Attorney General of Canada on behalf of His Majesty the King, claiming from Weddel Limited the sum of $49,312.03 as being the additional amount of customs duty and taxes resulting from a determination of the Minister of National Revenue, purporting to act under section 41 of the *Customs Act*, R.S.C. 1927, chapter 42 and amendments, and, in the alternative, the sum of $50,415.12 as being the additional amount of customs duty and taxes resulting from an alleged appraisal by the Chief Dominion Customs Appraiser, purporting to act under section 48. The President of the Exchequer Court of Canada, before whom the matter came, determined that the claim for $49,312.03 was well-founded, and he accordingly gave judgment for that amount and costs without dealing with the alternative claim. From that judgment Weddel Limited now appeals.

In its factum, the appellant agrees with the following statement of facts appearing in the judgment of the learned President, subject only to what it describes as an important inaccuracy:—

During 1940, 1941 and 1942 the defendant imported into Canada large quantities of canned corned beef from the Argentine, Uruguay and Brazil and paid customs duties based on the values at which the goods were entered for customs. On December 16, 1942, the Commissioner of Customs of the Department of National Revenue notified the defendant that the importations appeared to have been undervalued and that he proposed to instruct the collectors at the various ports where its entries had been

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passed to call for amending entries accounting for additional duty on appraised values on all entries passed by it since January 1, 1940. After correspondence between the Department and the defendant or its Ottawa representative, the Chief Dominion Customs appraiser made appraisals of the values of the imported goods at $104,031.00 in excess of those at which they had been entered for duty and directed the defendant to make amended entries and pay additional customs duty and taxes amounting to $50,415.12, and, on April 6, 1943, sent the defendant a statement showing such appraised values and the amount of underpaid duty and taxes. No appeal from the appraisals was taken, but representations protesting against them were made to the Department by the defendant and its Ottawa representative. Subsequently the matter was referred to the Minister of National Revenue, and, on June 29, 1943, the Minister advised the defendant's Ottawa representative by letter that it appeared that this might be a proper case in which to determine the value for duty under section 41 of the *Customs Act*, but that, before he decided what determination should be made, he would be glad to arrange an appointment to hear any further representations or to receive any further statement in writing. An appointment was then arranged with the Minister on July 14, 1943, at which time he heard oral representations both by the defendant's Ottawa representative and by its counsel. Further written representations were also made. Finally, on August 19, 1943, the Minister made his determination as follows:

"19th August, 1943,

Memorandum for:
David Sim, Esq.,
Deputy Minister of National Revenue,
Customs Excise.

Whereas Messrs. Weddel Limited, Montreal, imported into Canada a quantity of canned beef duing the calendar years 1940, 1941 and 1942,

And whereas, on reviewing the circumstances and conditions of importation, it appears to me and I find that such circumstances and conditions render it difficult to determine the value of the goods in question for duty, because—

(1) Such goods are not sold for use or consumption in the country of production:

(2) Such goods, by reason of the fact that the circumstances of the trade render it necessary or desirable, are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption.

Acting under the provisions of the *Customs Act*, I determine that the value for duty of the canned beef imported into Canada from Brazil, Argentine and Uruguay during the calendar years 1940, 1941 and 1942 by Messrs. Weddel Limited shall be as set forth in the statement attached as schedule "A" hereto.

Encl.

Colin Gibson
Minister of National Revenue."

The schedule showed that the amount of additional customs duty and taxes payable by the defendant amounted to $49,312.03. On August 21, 1943, the Deputy Minister of National Revenue (Customs and Excise) notified the defendant's Ottawa representative of the Minister's determination, sent him a copy of the schedule and required the entries to be amended not later than September 2, 1943.

The appellant claims that the Chief Dominion Customs Appraiser did not make any appraisement of the values of the imported goods at $104,031.00 in excess of those at which they had been entered for duty, and did not direct it to make amended entries and pay additional customs and taxes amounting to $50,415.12. I may say at once that, in my opinion, the respondent is unable to succeed on its alternative claim. The correspondence and evidence make it clear that even if the Chief Dominion Customs Appraiser made a fresh appraisement under section 48, there was no direction by him for an amended entry and payment of the additional duty. If that had been done, the appellant, under section 52 of the Act, might have given notice in writing, within the prescribed six days, of its dissatisfaction and proceedings would thereupon have ensued for the selection of three persons to examine and appraise the goods, in accordance with the provisions of the Act. Any direction given was by the Commissioner of Customs.

However, on the respondent's main claim, I have come to the same conclusion as the President although not for precisely the same reasons. The determination of this question involves a consideration of various sections of the *Customs Act*. Speaking generally, section 19 requires every importer of goods to make "due entry" of such goods, and by section 20, the person entering such goods is to deliver to the Collector of Customs, or other proper officer, an invoice and bill of entry in a prescribed form. This bill of entry, according to an exhibit filed, shows the importer's description of the goods imported, the quantity, the rate of duty, the value for duty in dollars, the total customs duty, the duty paid value, the war exchange tax, and the sales tax. In the present case the appellant paid, as it was obliged under section 22 to do, all duties and taxes so shown by it upon the canned corned beef it imported.

By subsection (1) of section 35:—

> 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.

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By subsection (1) of section 38:—

The Dominion Customs appraisers and every one of them and every person who acts as such appraiser, or the collector, 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.

It will be necessary later to revert to some of the other subsections of these sections but, in the meantime, section 41, under which the Minister purported to act, should be read in its entirety:—

41. Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because

(*a*) such goods are not sold for use or consumption in the country of production; or

(b) a lease of such goods or the right of using the same but not the right of property therein is sold or given; or

(*c*) 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

(*d*) such goods are usually or exclusively sold by or to agents or by subscription; or

(*e*) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions;

the Minister 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.

2. The Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

While other questions were apparently argued at the trial, the appellant's sole point in this appeal upon the Attorney General's main claim is on the construction of this section. Its contention is that the power given the Minister is either one to make a general ruling as to a class of importations for the future or, to quote its factum, a power to choose individual past importations on which the duty has been assessed by the proper officer and paid and the goods released no matter how many years before, and determine a higher valuation and consequently, a higher duty whenever he thinks fit without there being any remedy.

It may be conceded that if the section gives the Minister power to determine the value for duty of goods that have been imported and upon which duty has been paid, it may work a hardship in particular cases, depending, among other things, upon the length of time that has elapsed. However, it must be borne in mind that the Court does not know what information the Minister had before him and, as the appellant's counsel admits, this appeal is not, and could not be, on the merits of the decision of the Minister but is as to his jurisdiction.

Along with the relevant provisions of the *Customs Act* must be read subsection (1) of section 3 of the *Customs Tariff Act*, R.S.C. 1927, chapter 44 as amended, which, so far as pertinent, enacts:—

3. (1) Subject to the provisions of this Act and of the *Customs Act*, there shall be levied, collected and paid upon all goods enumerated, or referred to as not enumerated, in Schedule A to this Act, when such goods are imported into Canada or taken out of warehouse for consumption therein, the several rates of duties of Customs, if any, set opposite to each item respectively or charged on goods as not enumerated, in the column of the tariff applicable to the goods.

Provision having thus been made for the levying, collecting and paying certain rates of customs duty upon goods imported into Canada, the value for duty of such goods, whenever any duty *ad valorem* is imposed, is taken care of by the general rule set forth in subsection (1) of section 35 of the *Customs Act*. That provision has been in the Act for some years and appeared as R.S.C. 1906, chapter 48, section 40. In 1922, by chapter 18, section 2, subject to an immaterial change, what are now subsections (2) and (3) of section 35 appeared as one paragraph, while what is now subsection (4) appeared as an unnumbered paragraph. The 1922 amendment reads as follows:—

2. Section forty of the *Customs Act*, chapter forty-eight of the Revised Statutes, 1906, is amended by adding thereto the following subsection:—

(2) In the case of importations of goods the manufacture or produce of a foreign country, the currency of which is substantially depreciated, the value for duty shall not be less than the value that would be placed on similar goods manufactured or produced in the United Kingdom and imported from that country, if such similar goods are made or produced there. If similar goods are not made or produced in the United Kingdom, the value for duty shall not be less than the value of similar goods made or produced in any European country the currency of which is not substantially depreciated.

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The Minister may determine the value 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 under regulations prescribed by the Minister.

The mere fact that in the revision of 1927 this enactment was divided into subsections (2), (3) and (4) cannot alter its proper construction.

I pay some attention to this enactment because Mr. Geoffrion seeks to obtain some comfort from it. He points out that subsection (4) is the same as the last leg of subsection (1) of section 41 except for the words "under regulations prescribed by the Minister". Now, looking at subsection (1) of section 35, it seems to me that Parliament is there dealing with the fair market value of goods upon which an *ad valorem* duty is imposed by the *Customs Tariff Act* and saying in very plain terms that when such goods have been imported into Canada, the value for duty shall be as therein specified. Parliament is surely still dealing with goods that have been imported when in what are now subsections (2), (3) and (4) it takes care of the cases of the importations of goods, the manufacture or produce of a foreign country, the currency of which is substantially depreciated. In such cases the Minister is given power to determine the value of such goods, that is goods that have been imported from such a foreign country. In order to make the Act work, the last part of subsection (4)

> and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied under regulations prescribed by the Minister.

must mean that once the Minister has determined the value of such imported goods, such value, until otherwise provided, is to be the value upon which the duty, not only on the particular goods already imported, but also on goods of that class to be imported in the future, shall be computed and levied.

When Parliament, in section 41, came to deal with cases where it was difficult to determine the value, it was still dealing, first of all, with goods that have actually been imported. Such, I think, is the fair and proper meaning of the opening words of subsection (1) "Whenever goods are imported into Canada", and the Minister was given power

to determine the value for duty of such goods that had been imported. I would construe the last part of subsection (1) of section 41 in the same way as the last part of subsection (4) of section 35.

This is confirmed by the provisions of section 42:—

The Minister shall in like manner and with the like effect determine the value for duty of all material imported to form medicinal or toilet preparations either alone or with other articles or compounds, and intended to be put up, labelled or sold under any proprietary or special name or trade mark: Provided that the Minister may refer to the appraising officers for valuation such of the materials as have a fair market value in the ordinary course of trade.

When the Minister is empowered "in like manner and with the like effect" to "determine the value for duty of all material imported" Parliament was surely conferring upon him a power to be exercised with reference to material that had been imported. And finally, subsection (1) of section 43 demonstrates how Parliament proceeded when it intended to deal only with the fixing of the value for duty of any class or kind of goods for the future.

43. (1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind not entitled to entry under the British Preferential tariff or any lower tariff are being imported into Canada either on sale or on consignment, under such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value so fixed shall be deemed to be the fair market value of such goods.

Mr. Geoffrion relied upon the words "in any case or class of cases" in subsection (4) of section 39:—

4. The Board of Customs may review the decision of any appraiser or collector as to the principal markets of the country, or as to the fair market value of goods for duty purposes; and the decision of the Board of Customs in regard to such principal markets, and value of goods for duty purposes in any case or class of cases, shall, when approved by the Minister, be final and conclusive, except as otherwise provided in this Act.

The Board of Customs is now the Tariff Board and some difficulties arose as to its power, which were considered in this Court (1). I am unable to perceive how the proper construction of this subsection really assists in the question before us.

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Even without relying upon section 2 of the *Customs Act*:—

> 2. All the expressions and provisions 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 the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

(1) Reference concerning the Jurisdiction of the Tariff Board of Canada [1934] S.C.R. 538.

I am of opinion that section 41 should be construed in the manner above indicated.

In the Weddel case the appellant is the owner but in each of the two other cases argued at the same time, the appellant is the importer, and by section 112 of the Act, the true amount of Customs duties payable with respect to any goods imported into Canada constitutes a debt due and payable to His Majesty jointly and severally from the owner of the goods at the time of the importation thereof and from the importer thereof. In all three cases this provision was referred to as indicating the severity with which the construction adopted might bear upon an importer who was acting merely as agent for the owner. This is quite true and the point has not been overlooked in arriving at a conclusion but as has already been stated, the Court is not seized of all the considerations that moved the Minister in proceeding as he did under section 41.

The appeals should be dismissed with costs.

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RAND J.:—(dissenting): This appeal raises a question of the interpretation of section 41 of the *Customs Act*, which so far as it is material here is as follows:

> Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because
>
> (*a*) such goods are not sold for use or consumption in the country of production;
>
> * * *
>
> (*e*) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions;

the Minister 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.

2. The Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

Mr. Geoffrion argues that the determination by the Minister under this section is prospective only and is inapplicable to an entry of goods made before the Minister's decision. The point is narrow, but some light is thrown on it by other sections of the Act.

The value for duty is prescribed by section 35, and in certain exceptional circumstances special provisions are made as follows:

35. 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.

2. In the case of importations of goods the manufacture or produce of a foreign country, the currency of which is substantially depreciated, the value for duty shall not be less than the value that would be placed on similar goods manufactured or produced in Great Britain and imported from that country, if such similar goods are made or produced there.

3. If similar goods are not made or produced in Great Britain, the value for duty shall not be less than the value of similar goods made or produced in any European country the currency of which is not substantially depreciated.

4. The Minister may determine the value 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 under regulations prescribed by the Minister.

Section 48 empowers a Dominion Appraiser or the Tariff Board to re-appraise and to direct amended entries and payment of additional duty. Dissatisfaction with a re-appraisal is dealt with in section 52, which enables the importer to obtain the finding of a board of three valuators, one chosen by himself, one by the collector and the third by the Minister from among the Dominion appraisers. The decision of a majority of these valuators is final.

I do not think it at all doubtful that the value determined by the Minister under section 41 does have a prospective application. The language

and the value so determined shall, *until otherwise provided,* be the value upon which the duty on such goods shall be computed and levied

is conclusive on that. The phrase "until otherwise provided" occurs likewise in subsection (4) of section 35 and there, beyond any doubt, it is restricted to future entries.

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But the question is whether section 41 is so limited. The language "the value for duty of such goods" is followed in the admittedly prospective sense by "the value upon which the duty on such goods" shall be computed. Now, what is the meaning, first, of the word "value" and then of "such goods" as they appear in both cases? Certainly in the second use, "value" must mean "unit value" and "such goods" must mean "such class of goods" for only in those senses could they have a future application. Can we fairly say that in their first use they mean something different? In the close context presented, I do not think so. If "value for duty of such goods" was intended to mean the fair market value of the goods of a specific entry, then the transfer of meaning would, ordinarily, have been accompanied by a corresponding verbal change. It is "the value so determined" that is prescribed for the future. If intended to be retroactive as well, surely there would have been some such word as "also" after the word "shall" rather than a precise repetition. It is not immaterial that the finding of the Minister is final and in a real sense arbitrary. This may be of no individual consequence for future importations, but it might be of utmost consequence for those of the past. I, therefore, treat the words in both cases as signifying "unit value" and "such class of goods"; and in that sense, the text does not permit us to relate the Minister's ruling to past entries that have been appraised.

Section 42 is as follows:

42. The Minister shall in like manner and with the like effect determine the value for duty of all material imported to form medicinal or toilet preparations, either alone or with other articles or compounds, and intended to be put up, labelled or sold under any proprietary or special name or trade mark: Provided that the Minister may refer to the appraising officers for valuation such of the materials as have a fair market value in the ordinary course of trade.

But by this language, the ascertainment of value is taken away from the appraisers except as it may be referred to them by the Minister. No appraisal can be made and no entry allowed until the Minister acts. His action is not retroactive in the sense of changing a valuation already made and used under the authority of the statute: it is precedent to valuation.

But no one suggests that in this case initially value was not legally ascertained, the appraisal made, the entry allowed and the goods properly released; the Dominion appraiser and the Deputy Minister were acting, though in terms of unit value, in revision of the appraisal; and the contention really is that the Minister under section 41 may, in respect of an entry passed and allowed, supersede an appraisal validly made and make a new appraisal. If the entry here had been held for the Minister's decision whether the situation was one in which he should act, there would, in the proper sense, be no retroactivity; dealing with or passing the entry would be suspended, and the appraisal would be originally made on the basis of unit value laid down by the Minister. So interpreted, the two sections are identical in effect, and neither provides for action by the Minister affecting an entry of goods completed by payment of duty in accordance with an appraisal made under the authority of the statute: there is no *ex post facto* application of the Minister's arbitrary finding and the importer has preserved to him his rights of appeal under section 52.

This brings out clearly the distinction between fixing value and appraisal: the Minister does not appraise; he determines unit value in accordance with which the collectors and appraisers are to carry out their duty. But in such a case as the present, they have already legally appraised, and the entry has been made and allowed. Section 41 does not provide for a re-appraisal or an amendment to the entry, and section 48 does not apply. What the Crown sues for does not appear on the records of the collector at the port of entry, and the proceeding is based on the Minister's letter. Surely nothing could be more conclusive that the Minister's ruling must be antecedent to a valid allowance of the entry, and that when that is done there remains only revision by the Dominion appraisers or the Tariff Board under section 48.

But Mr. Singer raises a further point. He says that a re-appraisal by a Dominion appraiser had been made before the Minister entered the controversy, which the invalidity or inapplicability of the Minister's ruling leaves untouched. This necessitates a consideration of the communications

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which have passed between the Department and the importers. The first letter is from the Commissioner of Customs to the appellant, dated December 16, 1942, the whole of which I quote:

On reviewing past importations of canned corned beef, a wide discrepancy has been found between the values upon which your firm has paid duty and those declared by exporters of other Canadian suppliers. This discrepancy is so marked that I cannot conceive that it would be accounted for by market fluctuations or difference in quality and I can only conclude that your importations have been undervalued.. In the circumstances, therefore, I propose to instruct our Collectors at the various Ports where your entries have been passed to call for amending entries accounting for additional duty on appraised values on all enttries passed by your firm since 1st January, 1940. Before issuing these instructions, however, I am prepared to discuss the matter with you in order to arrive at a fair valuation for the purpose of these amendments and future importations.

The next was under date of March 29, 1943 from the Commissioner, and the material paragraphs are:

A careful study of importations during the period under review shows that, based on values information now before the Department, the canned corned beef imported by your Company has been undervalued to the extent of $92,229.00, resulting in duty and taxes short-paid amounting to $45,425.74.

You are requested to forward a certified cheque for the above amount direct to the Department to cover the amendment of the entries in question.

The period under review was the years 1940, 1941 and 1942.

The appellant answered on March 31, 1943, and the Commissioner was asked for details of the additional value and duty; the reply was under date of April 6, 1943 by the Chief Dominion Customs Appraiser, which included a statement on the importations during the years mentioned and added

Upon further review the undervaluation was found to be greater than as stated in the Department's letter addressed to you on the 29th ultimo.

There followed under dates of the 16th and 17th of April, communications from P. F. Jackson, a customs broker of Ottawa on behalf of the appellant, addressed to the Commissioner, asking an extension of time until the end of April to enable the appellant to obtain additional information from Argentina. A reply was sent by the Chief Appraiser under date of the 19th of April:

As advised verbally on the 17th instant, this matter has been discussed with the Acting Commissioner of Customs, Mr. Sim, and, in view of all the circumstances, he has agreed to an extension of time to

the 5th May, 1943, on the distinct understanding that arrangements for the amendment of the entries, satisfactory to the Department, will be made by that time.

On May 4, Jackson addressed a further letter to the Acting Commissioner, in which a request was made to the Department "to vacate their ruling in this matter, and to withdraw the assessment." On May 10, the Acting Commissioner wrote Jackson:

> This is an interim acknowledgment of brief of the 4th May in the above regard which you left with me at our conference on the 4th May, and also of your letters of the 5th and 7th May dealing with the same case.
>
> There are one or two points on which I feel I should have the benefit of advice from the law officers of the Crown, and when I have had an opportunity of consulting them I shall communicate with you again.

The next letter from the Department was dated June 29, 1943 addressed by the Acting Commissioner to Jackson:

> With further reference to my letter of the 10th May in regard to the appraisal of Canned Corned Beef imported from South America by your clients, Messrs. Weddell Ltd., Watt & Scott, and Teese & Persse, following consultation with our legal advisers I have referred this matter to the Honourable, the Minister, and I understand that he is writing to you today.

Such a letter from the Minister followed, in which he stated that it appeared to him the matter was a proper case for him to proceed to determine the value for duty under the provisions of section 41 on the statutory grounds I have quoted. He then intimated that he would arrange an appointment to hear further representations. These apparently were made, but subsequently on August 19, 1943, a formal ruling was made by him on the alternative basis of which these proceedings have been brought.

This correspondence makes it clear to me that although a tentative re-appraisal appears to have been made by the Department, and although the correspondence does raise the matter of amendment of the entries, there was neither a specific re-appraisal by a Dominion appraiser nor a definitive requirement to amend; and the revised statement was withdrawn by the official who first submitted it to the appellant on his reference of the matter to the Minister.

Now under a re-appraisal, the importer is entitled to a board of valuators; but to enable him to follow the procedure laid down, it is necessary that the steps taken by

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the Dominion appraiser be in accordance with that procedure, and carry some degree of formality and finality. These conditions not only were not present here, but the steps, attributing them to an appraiser, even in their provisional form, were abandoned. To hold the appellant to the inconclusive departmental negotiation and deprive it of its rights under section 48 would be a denial of elementary fairness.

I would allow the appeal and dismiss the information with costs in both Courts.

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RAND J. (dissenting): The facts of this case raise the same questions as are considered in the appeal of Weddel Limited, and as I see no material difference between the correspondence with the Department there considered and that here, I would hold the Department to have taken the same action in relation to the tentative re-appraisal.

The appeal should therefore be allowed, and the information dismissed with costs in both Courts.

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RAND J. (dissenting): The facts of this case raise the same questions as are considered in the appeal of Weddel Limited, and as I see no material difference between the correspondence which the Department there considered and that here, I would hold the Department to have taken the same action in relation to the tentative re-appraisal.

The appeal should therefore be allowed, and the information dismissed with costs in both Courts.

ESTEY J.:—The appellants imported into Canada goods from Brazil, Uruguay and Argentine throughout the years 1940, 1941 and 1942. The duty was paid and the goods released when on December 16, 1942, the Commissioner of Customs intimated that there had been an undervaluation. This was followed by correspondence, conferences and submissions until June 29, 1943, when the Minister of National Revenue advised that these goods would be valued for duty purposes under section 41 of the *Customs Act*, (1927 R.S.C., c. 42). The values so determined by the

Minister were greater than those disclosed in the invoices, and these actions were brought to recover the consequent increase in duty. The issues in each case are identical and were so presented upon the hearing of these appeals.

The appellants contend that in determining these valuations the Minister exceeded the authority vested in him by section 41. That under that section he had no authority to determine increased values for duty purposes in respect of individual past importations on which the duty had been assessed by the proper officer and paid and the goods released.

Section 41 is included in a group of sections numbered 35-53, inclusive, under a heading "Valuation For Duty". The first of these sections, (sec. 35), provides "the value for duty shall be the fair market value" as determined by reference to the domestic market in the country of export. If that value could always be accepted or ascertained some of the following sections would be unnecessary.

The provisions of section 35 indicate how that market value will be determined where the currency in the exporting country is depreciated.

Section 36 fixes a minimum value for duty purposes on new or unused goods and section 36A empowers the Governor in Council, whenever it is deemed expedient, to authorize the disregarding of import, excise and other duties and taxes in estimating the value for duty purposes. Section 38 deals with the methods of appraisers and collectors of customs duties in the determination of fair market value; and subsection (4) thereof provides as follows:

> 38. (4) The Board of Customs may review the decision of any appraiser or collector as to the principal markets of the country, or as to the fair market value of goods for duty purposes; and the decision of the Board of Customs in regard to such principal markets, and value of goods for duty purposes in any case or class of cases, shall, when approved by the Minister, be final and conclusive, except as otherwise provided in this Act.

Sections 39 and 40 deal with drawbacks and deductions.

The intent and purpose of these sections is the determination of value for duty purposes in the more routine or usual conditions that obtain in the importation of goods into Canada. They indicate the basis for valuation, provide

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for certain special facts in appropriate cases, a review of the valuation as determined by the Customs Board and an appeal under section 52 by the importer if he be dissatisfied with the appraisement.

We then come to section 41 which deals with the more unusual cases where, for reasons therein set out, it is difficult to determine the value for duty purposes. This section places upon the Minister the responsibility of deciding whether these difficulties exist and if so, he may determine "the value for duty of such goods". It then continues,

> and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

Section 41 reads as follows:

> 41. Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because
>
> (a) such goods are not sold for use or consumption in the country of production; or
>
> (*b*) a lease of such goods or the right of using the same but not the right of property therein is sold or given; or
>
> (c) 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
>
> (*d*) such goods are usually or exclusively sold by or to agents or by subscription; or
>
> (*e*) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions; the Minister 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.
>
> 2. The Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

As already intimated, the sections preceding section 41 provide for the cases where the market value can be determined by the usual and routine commercial inquiries. Section 41 deals with the cases of goods where difficulties obtain in the determination of that value. These sections do not overlap. Both are necessary if the field of importation is to be adequately covered.

Section 35 contemplates the determination of value for duty purposes after the goods have been "imported into Canada" as that phrase is interpreted in section 111:

Sec. 111. For the purpose of the levying of any duty, * * *

(*a*) The importation of any goods * * * shall be deemed to have been completed from the time such goods were brought within the limits of Canada, * * *

Section 35 commences "whenever any duty *ad valorem* is imposed on any goods imported into Canada". Apart from the words "any duty *ad valorem* is imposed" the opening words of that section are almost identical with those of section 41:

Sec. 35. Whenever any duty *ad valorem* is imposed on any goods imported into Canada * * *

Sec. 41. Whenever goods are imported into Canada * * *

There can be no question but that section 35 applies as and when goods are imported. In adopting almost the identical words Parliament indicated its intention that the value under section 41 should likewise be determined as and when goods are imported into Canada. It is "whenever goods are imported", or at any time when goods are "brought within the limits of Canada" and the difficulty as to valuation arises that the Minister is authorized to act under the provisions of section 41.

Throughout section 41 the phrase "such goods" appears several times and each time relates back to the phrase "whenever goods are imported" as it appears in the first line of the section. It is the specific goods imported as distinguished from a class or kind of goods that may be imported, and it is the value of these specific goods which is determined by the Minister under section 41. In section 43 where Parliament uses the phrase "to fix the value for duty of any class or kind of such goods", it is dealing with future importations. The specific goods that "are being imported" have created a situation which Parliament authorizes the Minister to take steps to avoid in the future. In order to do so he deals not only with the specific goods that "are being imported" but with "any class or kind of such goods" that may make for a continuation of that condition. There is no such authority vested in the Minister under section 41; there he is restricted in the determination of value to the goods imported.

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It is obvious under section 41 that once the value is determined it will apply to future importations, but it would appear that had Parliament intended section 41 to apply only to future importations it would have used language that would have indicated that intention as it did in section 43.

It was the inadequacy of the preceding sections to deal with the difficulties specified in section 41 that prompted Parliament to pass that section, and it is only when such goods are imported that the Minister may determine their value under that section.

Moreover, Parliament has provided in section 42 "in like manner and with the like effect" (as in section 41) the Minister shall

> determine the value for duty of all material imported to form medicinal or toilet preparations, * * *

In other words, whenever the goods described in section 42 are imported then the Minister shall determine the value for duty and that value so determined shall, until otherwise provided, be the value. Such would appear to be the meaning of the phrase "in like manner and with the like effect". It is the importation of the goods that vests in the Minister the authority to determine the value, and as under section 42 he alone can do so, this section appears to cover both past and future importations. It could not be suggested that Parliament intended by this provision that if the collector in error accepted the invoice price as the value for duty that that would prevent the Minister from determining the value for duty purposes as Parliament has specifically directed. Then too, in section 42 there is a proviso that if the Minister decides the said goods have a fair market value in the ordinary course of trade he may refer the matter back to the appraising officers to deal with them in the ordinary routine way. In other words, section 42 appears to provide for a return of the goods to the ordinary routine procedure when the Minister so decides, just as in section 41 they are taken out of that procedure when the Minister so decides.

It is submitted, however, that the words "until otherwise provided" are inconsistent with this construction and consistent only with a construction that restricts the applica-

tion of section 41 to future importations. Such a construction would appear to be contrary to the opening words of the section and to what appears to be the intent and purpose of the section. It is the determination of the value of "such goods" and the value so determined that "until otherwise provided" shall be the value. The determination thereof by the Minister must involve considerable investigation and inquiry and in order to avoid the necessity of doing this work each time such goods are imported, it is provided that the "value so determined shall, until otherwise provided, be the value". The Minister is thereby enabled to avoid the time and trouble incident to inquiry and investigation in each case.

The same phrase "until otherwise provided" appears in section 35 (4). It is not at all clear that that subsection is necessarily restricted to future importations.

It was pointed out that such a construction may impose a hardship upon those called upon to pay additional duty some time after the importation and the payment of the duty as then determined. If so, it is the identical hardship that may at any time be imposed upon importers under sections 38 (4) and 48; indeed, had the Minister in this case seen fit to allow the matter to remain to be dealt with under the ordinary procedure the result would have been similar. In other words, such hardship as may from time to time occur must have been regarded by Parliament as unavoidable.

The contention of the appellants would raise the question that even if the Minister might determine the value of goods as and when imported, he cannot do so after "the duty has been assessed by the proper officer and paid and the goods released". Section 41 does not impose any time limit within which the Minister must act after importation. In this regard these provisions are identical with those providing for a "review * * * as to the fair market value" as in section 38 (4) and for "a fresh appraisement or valuation" as in section 48. The absence of any time limit is in keeping with the policy of the Act and was obviously not an oversight. Moreover, the difficulties of valuation contemplated by section 41 might appear at the port of entry but might not appear until the officials were

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considering the value of the goods and deciding whether any error or mistake existed and whether or not further proceedings should be taken. It is the presence and existence of the difficulty that Parliament is seeking to deal with whenever in the opinion of the Minister it may appear. If the usual methods of determination of value were inappropriate and unsuitable in the first instance, they are equally so upon proceedings taken under sections 38 (4) or 48. A construction of the section that restricts the intervention of the Minister as contended for would be to add words of limitation to the section which were not only not incorporated by Parliament but would appear to defeat the intent and policy of the Act in the determination of value for the purpose of duty.

The statute throughout contemplates the production at the port of entry of an invoice giving the quantity and value of each kind of goods so imported, the entry thereof and the payment of duty before the goods are passed through the customs and delivered to the consignee. That the value so declared and the duty there calculated are not final is made abundantly clear by the sections providing for a review and a fresh appraisal or valuation. The reason is obvious. It avoids delays at the port of entry and the loss and inconvenience necessarily incidental thereto to importers. It is after all this that the values may be checked and reviewed and adjustments made. If in the course of this checking and reviewing a proper case in the opinion of the Minister for his intervention under section 41 arises, it is his duty to so intervene.

The Act contemplates the intervention of the Minister to deal with an unusual situation, one that presents certain difficulties that cannot be dealt with under usual methods of procedure of the Act and therefore his decision is final. This Court has already ruled that the provisions of section 48 do not apply to determinations made by the Minister: *Reference Concerning the Jurisdiction of the Tariff Board of Canada,* (1) where my Lord the Chief Justice, at p. 549, states as follows:

> Perhaps it may be added that the jurisdiction of the Dominion appraiser or of the Board under s. 48 is only by way of appeal from a valuation or appraisal by an appraiser or collector as such. It would

(1) [1934] S.C.R. 538.

therefore appear that the exercise of the powers therein conferred presupposes a valuation or appraisement; and the consequence would be that when the value for duty is fixed by the Minister, and not by an appraisement, the section does not apply and the Dominion appraiser, or the Board, has no jurisdiction under it.

In view of the foregoing it is unnecessary to deal at length with the alternative claim made by the Crown on the basis that the appraiser under section 48 had fixed the valuation for duty purposes. After the intimation under date of December 16, 1942, by a letter signed by the Commissioner of Customs that there had been an undervaluation, further correspondence and interviews followed which were concluded by a letter dated June 29, 1943, signed by the Acting Commissioner of Customs intimating that the matter had been referred to the Minister of National Revenue. The Dominion appraiser, who was also a departmental official, signed a letter or two but not as Dominion appraiser. He did not sign the letter upon which the Crown relies nor is there any intimation that it contained his decision as Dominion appraiser. Moreover, there was no intimation that the provisions of section 48 were being or would be involved. It seems quite obvious that it never occurred to the appellants that action was being taken under section 48. There never was a direction for an amended entry or for payment of the additional duty under section 48. It would seem that after all the efforts to determine the valuation the officials in the department realized this was an importation of goods that should be referred to the Minister. After consideration the Minister concluded this was a proper case for the application of the provisions of section 41. In my opinion there was no appraisal made under section 48.

I would therefore dismiss the appeals with costs.

Appeals dismissed with costs.

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Solicitor for the respondent: *Robert Forsyth.*