1911
April 12.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

MOSES L. MORRIS.....DEFENDANT;

AND

MOSES L. MORRIS.....CLAIMANT;

AND

HIS MAJESTY THE KING..... DEFENDANT.

Customs Act—Reference by Minister of a Claim to the Court—Affidavit used before Minister in respect of which there was no opportunity of cross-examining the Deponent—Admissibility.

By sec. 183 of *The Customs Act* (51 Vict., c. 14) it is provided that upon a reference of any matter to the court by the Minister of Customs, the court shall hear and consider the same upon the papers and evidence referred, and upon any further evidence produced under the direction of the court. Among the documentary evidence referred in connection with a claim for a refund of duties paid, was an affidavit by a witness, since deceased, testifying to a fact adverse to the claimant, and in respect of which no opportunity was afforded the claimant to cross-examine the deponent.

Held, that while the statements of the deponent were not as effective as if he had been examined as a witness in court, and so subject to cross-examination, yet the affidavit was admissible as evidence under the statute.

THIS was a claim referred to the court by the Minister of Customs, under the provisions of sec. 183 of 51 Vict. c. 14.

The facts of the case are stated in the reasons for judgment.

March 28th, 1911.

S. Beaudin, K.C., for the claimant, contended that the affidavit of Wallace, the deceased carter, should not be admitted in evidence as he had not been cross-examined, and the proceedings before the Minister were not

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judicial. This was the first time that he had seen the affidavit in question. It ought not to be relied on as establishing delivery of the goods by the customs authorities.

J. Archambault, for the Crown, contended that the court was bound to receive all the evidence referred to the court by the Minister.

CASSELS, J. now (April 12th, 1911) delivered judgment.

This was a matter referred to the Exchequer Court by the Minister of Customs under the provisions of section 182 of chapter 14 of 51 Victoria. The Minister had found Morris guilty of a contravention of the customs laws, and held that the sum of $123.42, deposited as security, be forfeited to the Crown as a mitigated penalty, and dealt with accordingly.

It appears that an information had been filed on behalf of His Majesty, the fact that the reference had been made under the statute referred to being overlooked. On the opening of the case, counsel for the Crown moved to consolidate the two cases, and asked that the pleadings in the case of His Majesty against Morris be made the pleadings in the case referred by the Minister. No objection was made to this application, provided that no more costs should be allowed than if only the one case were being proceeded with. The motion was granted, and the matter was proceeded with before me in Montreal upon the papers and evidence before the Minister, and also on further additional evidence produced before me. At the trial I formed a strong opinion in favour of upholding the decision of the Minister. Since the trial I have gone carefully over the evidence and the various exhibits and still adhere to the same opinion.

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There are certain salient facts in connection with the case which strongly tend to the conclusion arrived at. It is unquestioned that two bales consigned to Morris arrived in Montreal on the steamer *Canada* of the Dominion Line. These bales were numbered M.773 and L.M.450. Apparently no invoice had been received for bale No. 450, but an invoice for bale No. 500 was in the possession of Morris. The agent of Morris, Greene, paid the freight of the Dominion Line for two bales; he also paid the customs dues for two bales. It is proved, I think, clearly, that bale No. 450 which had arrived by the *Canada* was delivered in lieu of bale No. 500. No doubt this was a mistake; but there is no question on the evidence that the two bales had arrived, one numbered 773 and the other numbered 450, and that both of these bales were consigned to Morris. Number 773 was detained for examination at the custom house, and was delivered to Morris on the 4th September; and the other bale 450 was delivered to Mullally's carter, one Wallace, on the 3rd September. In his evidence, referring to other bales delivered on the 3rd September, Morris is asked this question:

"Q. Where did they come from?

"A. I think they came from the Steamship Company's.

"Q. Do you know which Company?

"A. I could not say, because we passed entries for "sometimes two or three bales, or sometimes one bale, "or sometimes half a dozen bales in a day. Sometimes "we would get three or four bales from the same place. "Mr. Mullaly was our carter, and Mr. Mullaly's men "would bring them to the store."

Under section 183 of the statute, it is provided that the court shall hear and consider such matter upon the papers and evidence referred, and upon any further evidence, &c.

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Wallace, the carter who delivered the bale, is dead. His affidavit was before the Minister, and he swears to the delivery of bale No. 450 on the 3rd September. I quite agree that, there having been no opportunity of cross-examination, the statements in the affidavit are not as effective as if the witness had been examined in court and counsel for Morris given the opportunity to cross-examine him. Wallace is corroborated by Bushel, who gave his evidence clearly, and I do not think Bushel's evidence in any way is shaken by the cross-examination. There can be no doubt whatever, on the evidence, that these two bales Nos. 773 and 450, were intended for Morris, and I think 450 was received by Morris. As stated, 773 was delivered on the fourth September. The duty on the two bales had been paid in the latter part of August. The customs dues on the two bales were paid also in the latter part of August. There is no evidence of any application or request by Morris for a refund of the duty paid upon bale No. 450, which he states was not received. About two weeks afterwards the *Devona*, of the Donaldson Line, arrived in Montreal; and consigned to Mr. Morris on this vessel was a bale, number 5 or 500, which corresponded with the invoice given to Greene upon which bale No. 450 had been handed over. Mr. Greene then went to the custom-house with the invoice and showed that he had already paid duty on bale number 500 or number 5, and the result was that this bale 500 was handed over, the duty previously paid on No. 450 being credited as against this bale. This left bale 450 in the possession of Morris without the duty being paid. The letter of the 3rd October, 1906, asks for an invoice for bale 450. There is no suggestion that the goods in bale 450 had not been purchased by Morris, nor is there a suggestion in the letter that the goods in this bale 450 had not been received by Morris.

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Staton, the agent, in the letter which he wrote to Day & Fox makes no reference whatever to any contention that the bale in question had not been received. Their letter is as follows:

"Dear Sirs,—Kindly send this firm a duplicate invoice for goods invoiced August 13th. They claim not to have received this invoice, and there is some trouble with the cartage company. Kindly mark on the invoice 'duplicate'."

Subsequently Day & Fox were paid by Morris for the goods contained in bale 450.

The contention is raised that sometimes carters were in the habit of leaving bales at the wrong places, and it was suggested that Wallace, the carter, may have left the bale at some other place. It would not in my mind affect the case if it were so. The property passed through the custom-house, and was handed to Mullaly's carter, and as between the custom-house and Crown the duties were payable on this bale, the bale being the property of Morris, whether he received it or not.

I think there is but one conclusion to be arrived at on the facts, and that the application on behalf of Morris should be dismissed with costs.

Judgment accordingly.

Solicitors for claimant: *Beaudin, Loranger & Cie.*

Solicitor for the Crown: *J. Archambault.*