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June 27.

Coram SIR W. J. RITCHIE, C.J.

THE QUEEN, ON THE INFORMATION OF }
 THE ATTORNEY-GENERAL FOR THE } PLAINTIFF;
 DOMINION OF CANADA,..... }

VS.

4,349 DOZ. BOTTLES AYER'S SARSAPARILLA, ETC.,

AND

THE J. C. AYER COMPANY (CLAIM- }
 ANTS)..... } DEFENDANTS.

29-30 Vic. (Can) c. 6, s. 11—"The Customs Act, 1883" (D.) secs. 68
 and 69—Construction—Importing constituent parts of proprietary
 medicines—"Market value."

Some time before the Dominion of Canada was constituted, the J. C. A. Co., manufacturers of proprietary medicines in the United States, established a branch of their business in St. John's, P.Q., and commenced to import from the United States certain articles required in the preparation of their medicines. These articles were in the form of liquid compounds, and were valued for duty under the provisions of the act 29-30 Vic. (Can.), c. 6, s. 11, then in force, at the aggregate of the fair market value of the several ingredients entering into the compounds so imported, with the addition of all costs and charges of transportation. These ingredients after arrival in Canada were mixed, bottled and sold under various names. The import entries were made under the rates of duty fixed by the Customs authorities in virtue of the provisions of the said act, they being fully aware of the purposes to which the articles imported were to be applied.

The company continued to import such goods in this way for upwards of twenty years, except some alterations they were called upon to make in the valuation for duty of certain liquids in 1883, when, on the 22nd May, 1885, the Dominion Customs authorities seized large quantities of their manufactured medicines, and caused an information to be laid against the company for smuggling, evasion of the payment of duties, undervaluation, and for knowingly keeping and selling goods illegally imported, contrary to the provisions of "The Customs Act, 1883."

Held:—(1.) That there was no importation of goods as compounded medicines ready for sale, and that the duty having been paid upon the fair market value, in the place of exportation, of the ingredients of which the liquids in bulk were composed, there was no foundation for the seizure.

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- (2.) Where the constituent parts or ingredients of a specific article are imported, their value for duty within the meaning of sections 68 and 69 of "The Customs Act, 1883" is not the fair market value of the completed article in the place of exportation, but is simply the fair market value there of the several ingredients. The form in which the material is imported constitutes the discriminating test of the duty.
- (3.) Notwithstanding the interpretation clause in "The Customs Act, 1883," which provides that Customs laws shall receive such liberal construction as will best insure the protection of the revenue, &c., in cases of doubtful interpretation the construction should be in favour of the importer.
- (4.) Where an importer openly imports goods and pays all the duties imposed on them at the fair market value thereof in the place of exportation at the time the same were exported, he has not imported such goods with intent to defraud the revenue simply because he had the mind to do something with them, which, had it been done in the country from which they were exported would have enhanced their value, and, consequently, made them liable to pay a higher rate of duty, but which in fact was never done before the goods came into his possession after passing the Customs.

THIS was a case arising out of two informations filed by the Attorney-General for the Dominion of Canada, on behalf of Her Majesty the Queen,—one *in rem* asking for condemnation of goods, the other *in personam* seeking recovery of a statutory penalty and other moneys due to the Crown.

By the information *in rem* the court was informed in substance as follows:—

1. " * * * * * That by the 153rd section of the Act passed by the Parliament of Canada in the 46th year of Her Majesty's reign, chaptered 12, and intitled: "An Act to amend and consolidate the Acts respecting the Customs," it is provided, amongst other

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things, that if any person, with intent to defraud the revenue of Canada, smuggles or clandestinely introduces into Canada any goods subject to duty, the said goods shall be seized and forfeited.

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“That a certain person or persons, to your informant unknown, on the 23rd day of May, A.D. 1882, and on many days and times since that date up to the 22nd day of May, A.D. 1885, did, with intent to defraud the revenue of Canada, smuggle and clandestinely introduce into Canada, to wit: at the Port of St. John's, in the Province of Quebec, from the United States of America, certain goods, portion of which consisted of to wit: 4,349 dozens of bottles of Ayer's Sarsaparilla; 2,822 dozens of bottles of Ayer's Cherry Pectoral; 4,446 dozens of bottles of Ayer's Hair Vigor; 936 dozens of bottles of Ayer's Ague Cure, and 1,926 dozens of packages of Ayer's Pills, whereby the said goods became and are forfeited to Her Majesty.

“2. That by the said section 153 of the statute in the first count herein mentioned, it is amongst other things in effect enacted, that if any person with intent to defraud the revenue of Canada makes out, or passes, or attempts to pass, through the Custom House, any false, forged or fraudulent invoices of any goods subject to duty, the said goods shall be seized and forfeited.

“That a certain person or persons unknown did, on the 23rd day of May, A.D. 1882, and on many days and times since that date up to the 22nd day of May, A.D. 1885, with intent to defraud the revenue of Canada, make out and attempt to pass, and did pass through the Custom House at the Port of St. John's, in the Province of Quebec, false and fraudulent invoices of certain goods subject to duty, imported from the United States of America by the person or persons unknown into Canada, at the said Port of St. John's,

whereby the said goods became and are forfeited to Her Majesty.

“3. That by the said section 153 of the said statute, if any person attempts to defraud the revenue of Canada by evading the payment of the duty, or of any part of the duty, on any goods subject to duty or introduced or imported into Canada, such goods shall be seized and forfeited.

“That a certain person or persons unknown did, on the 23rd day of May, A.D. 1882, and on many days and times since that date and up to the 22nd day of May, A. D. 1885, attempt to evade and did evade the payment of part of the duties on certain goods imported by the said person or persons unknown, from the United States of America at the port of St. John's, (naming goods as before) by entering the said goods at the Custom House of said port at a value much below their proper value to wit: at the value of \$38,428.00, and the said entries were so made with the intent and design of defrauding the revenue of Canada of the duties properly payable upon the said goods at the proper value thereof, by reason whereof the said goods above described became and are forfeited to Her Majesty.

“4. That by section 155 of the said Act, if any person knowingly harbors, keeps, conceals, purchases, sells or exchanges any goods illegally imported into Canada (whether such goods are liable to duty or not), or whereon the duties lawfully payable have not been paid, such person shall, for such offence, forfeit treble the value of such good as well as the goods themselves.

“That a certain person or persons unknown did, on the 23rd day of May, A.D. 1882, and on many days and times since that date up to the 22nd day of May, A. D. 1885, knowingly keep and sell certain dutiable goods (as stated in the 1st paragraph), which had been illegal-

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ly imported into Canada, and whereon the duties lawfully payable have not been paid, whereby the said goods became and are forfeited to Her Majesty.

“ 5. That by section 108 of the said Act if any goods are found upon an entry of goods which do not correspond with the goods described in the invoice or entry, or if the description in the invoice or entry has been made for the purpose of avoiding payment of the duty, or of any part of the duty, on such goods, or if any entry of any goods has been undervalued for such purpose as aforesaid, such goods shall be seized and forfeited.

“ That a certain person or persons to your informant unknown did, on the 23rd day of May, A.D. 1882, and on divers days and times since that date up to the 22nd day of May, A.D. 1885, make entries at the Custom House, at the Port of St. John's, of certain patent medicines and medicinal goods (as stated in the 1st paragraph), and in the entries the said goods were described and represented to be the crude drugs or materials in bulk of which the said patent medicines and medical goods are composed, by which description the said person or persons unknown sought to pass, and did pass, the said goods through the said Custom House at a rate of duty lower than the duty payable upon such goods if the same had been properly described as the medicines and medicinal preparations hereinbefore mentioned and described, and with the view and for the purpose of avoiding the payment of part of the duty on such goods, whereby the said goods became and are forfeited to Her Majesty.

“ 6. That by the 109th section of the said Act, if the oath made with regard to any entry is wilfully false in any particular all the packages and goods included, or pretended to be included, or which ought to have been included in such entry shall be forfeited.

“ That a certain person or persons to your informant

unknown did, on the 23rd day of May, A. D. 1882, and on many days and times since that date up to the 22nd day of May, A. D. 1885, import and introduce from the United States of America into Canada, at the Port of St. John's, a large quantity of patent medicines and medical goods (as stated in the 1st paragraph), and the said person or persons unknown with intent and design of defrauding the revenue of Canada, made the oaths with regard to the entries of the said goods as required by the said act and therein represented and stated that the said goods so imported, including the portion thereof particularly described as aforesaid, consisted of crude drugs or materials in bulk, of which the said patent medicines and medical goods are compounded, then well knowing the said representations and statements to be wilfully false and untrue, whereby the said goods above particularly described, being part of the goods so described, became and are forfeited to Her Majesty.

“That William J. O'Hara, then being a clerk of Customs, and Julien Brosseau, then being a landing waiter and searcher, both authorized and employed by Her Majesty and attached to the Port of Montreal, on the 22nd day of May, A. D. 1885, at the Ports of Hamilton, London and Toronto, in the Province of Ontario, and at the Port of Montreal, in the Province of Quebec, and at the Port of St. John, in the Province of New Brunswick, and at the Port of Halifax, in the Province of Nova Scotia, did, as such officers for Her Majesty, aforesaid, seize and take and did cause to be seized and taken the said goods before mentioned, as forfeited for the causes aforesaid.”

The information *in personam* claimed judgment against the defendants, under the provisions of the 155th section of the said act, for the sum of \$237,302 being treble the value of the goods specified in the

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first paragraph of the information *in rem*, and also for the sum of \$148,011. for duty payable by reason of undervaluation of the said goods, together with costs of suit.

The defendants, in answer to the two informations, pleaded as follows:—

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“1. That the J. C. Ayer Company of Lowell, Massachusetts, are and were, at the dates of the seizures effected in the present cause, the true and lawful owners and proprietors of all and every the said: 4,349 dozens of bottles of Ayer's Sarsaparilla, 2,822 dozens of bottles of Ayer's Cherry Pectoral, 4,446 dozens of bottles of Ayer's Hair Vigor, 936 dozens of bottles of Ayer's Ague Cure, and 1,926 dozens of packages of Ayer's Pills referred to in the information [*in rem*] and alleged to have been seized and taken by the said William J. O'Hara and Julien Brosseau; the said contestants not admitting, but, on the contrary, expressly denying that the quantities of the said patent medicines alleged in said information to have been seized, are correctly enumerated, and reserving to themselves the right to contest the said allegations as to quantity, or otherwise.

“2. That the said goods were seized in the possession of divers persons and commercial firms at different places in Canada, who held the same as the agents of claimants.

“3. That none of the said goods were imported into Canada on the 23rd day of May, A.D. 1882, or since that date up to the 22nd day of May, A.D. 1885, but, on the contrary, the said goods and each and every of them were manufactured, bottled and labelled at St. John's, in the Province of Quebec.

“4. That the said William J. O'Hara and Julien Brosseau took possession of said goods without any

legal right or authority, and no legal seizure of said goods was ever made.

“5. That said goods are not subject to condemnation by reason of the breach of any of the Customs laws of Canada in respect of them.

“Wherefore said claimants, the J. C. Ayer Co., pray that they be declared to be, and to have been, at all the times aforesaid, the only true and lawful owners and proprietors in lawful possession of the said 4,349 dozens of bottles of Ayer’s Sarsaparilla, 2,822 dozens bottles of Ayer’s Cherry Pectoral. 4,446 dozens of bottles of Ayer’s Hair Vigor, 936 dozens of bottles of Ayer’s Ague Cure, and 1,926 dozens of packages of Ayer’s Pills, and that the said goods be restored to the custody and possession of the claimants; that the said pretended seizure be set aside and the said goods be released and delivered to claimants, and that the said information be dismissed with costs, and claimants pray that a recommendation may be made that Her Majesty should pay claimants’ costs.”

The defendants also filed a claim to the said goods, alleging, *inter alia* :

“1. That none of the goods seized were imported into Canada, but, on the contrary, were manufactured, bottled and labelled at St. John’s.

“2. That all their importations and entries had been made openly and with the knowledge of the officers of the Customs at the port of entry, and that they had not been guilty of any infraction of the Customs Acts of Canada, or of any attempt to evade the requirements of the same.

“3. That during the year 1883 the question of the proper duty payable on said importations was considered by the Customs authorities, and that the decision of the Minister of Customs that all entries previous to the 28th day of December, 1883, should be

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1887 allowed to stand as made, was communicated to the
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 AYER all right to dispute or question said entries made prior
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 actions and claims in respect of the said importations."

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"5. That from the said last-mentioned date until the 23rd day of May, 1885—the date of the seizure of the goods—the defendants had entered for duty all goods imported by them at the rate of duty fixed by the Department of Customs of Canada, and valued the same for duty at a valuation acceptable to, and accepted by, the Customs authorities.

"6. That all the importations were duly and regularly entered at the true and fair value for duty of each and every of them; but in most cases the articles so entered had not, as imported into Canada, a market value or wholesale price in the United States; and in such cases the full, true and fair market value, or wholesale price, of the several ingredients entering into the compound, with the cost of compounding and all other expenses of production, was in good faith given by defendants as the true and fair value for duty.

"7. That proper and true invoices of the same were produced, and the descriptions of the said goods contained in said invoices were the true and correct descriptions of the same.

"8. That during the times and periods mentioned in the informations the defendants imported certain supplies, consisting of crude drugs and raw materials, both separately and in combination, and upon each and every of such importations the full and lawful duties were paid.

"9. That these importations were made openly, regularly and in good faith, and with the full know-

ledge of the collectors, appraisers and other Customs officers at the port of entry."

The Attorney-General joined issue upon the claim and answer of the defendants.

It appeared upon the evidence adduced at the trial of the case that the J. C. Ayer Co., who are manufacturers of patent and proprietary medicines at Lowell, Mass., some years ago established a factory at St. John's, P.Q., for the manufacture of their medicines in Canada. In order to carry on their business in this country, it was necessary for them to import from the United States certain articles which entered into the composition of their medicines. Before commencing to so import, their agent called upon the Collector of Customs, at St. John's, with a view to ascertaining the rates of duty payable upon such articles. He was informed that the duties could not be fixed until the goods were presented for entry. When the first shipment of goods arrived at St. John's, the agent took the invoices to the Collector and explained the nature of the several articles imported. Thereupon the Collector communicated with the Customs authorities at Montreal, who sent down a special officer to examine the goods. After this officer had made his examination, and had been informed by the agent of the company to what purposes the goods were to be applied, the rates of duty payable thereon were assessed under the provisions of 29-30 Vic. (Can.), c. 6, s. 11 (1).

(1) By 29-30 Vic. (Can.) c. 6, s. 11, it is enacted as follows: "The fair market value for duty of goods imported into this Province shall be the fair market value of such goods in the usual and ordinary commercial acceptance of the term at the usual and ordinary credit, and not the cash value of

such goods, except in cases in which the article imported is by universal usage considered and known to be a cash article, and so *bond fide* paid for in all transactions in relation to such article, and no discounts for cash shall in any case be allowed in deduction of the fair market value as herein-

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The several articles imported were compounded with other ingredients, at the factory, at St. John's and there bottled, labelled and sent out for sale as completed medicines.

The company continued to import goods in this way for upwards of fifteen years, observing perfect good faith in valuing the goods for duty and complying implicitly with the demands of the Customs authorities.

On the 11th August, 1882, the Commissioner of Customs at Ottawa, by a circular addressed to the Collector at St. John's, instructed him that different and higher rates of duty than those theretofore paid by the company were chargeable upon such importations, specifying therein the increased rates of duty which were to be so charged. The instructions contained in this circular were never acted upon; but in December, 1883, the Customs authorities demanded, in addition to the *ad valorem* duty paid by the company, an excise duty of \$1.90 per gallon on the liquid compounds imported.

before defined; and all invoices representing cash values, except in the special cases hereinabove referred to, shall be subject to such additions as to the collector or appraiser of the port at which they will be presented, may appear just and reasonable to bring up the amount to the true and fair market value as required by this section."

By 46 Vic. ch. 12, s. 68 ("The Customs Act, 1883,") it is enacted: "Where 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."

By s. 69 thereof it is provided: "Such market value shall be the fair market value of such goods in the usual and ordinary commercial acceptance of the term, at the usual and ordinary credit, and not the cash value of such goods, except in cases in which the article imported is, by universal usage, considered and known to be a cash article, and so *bonâ fide* paid for in all transactions in relation to such article; and all invoices representing cash values, except in the special cases hereinbefore referred to, shall be subject to such additions as to the collector or appraiser of the port at which they are presented may appear just and reasonable, to bring up the amount to the true and fair market value, as required by this section."

After that date the Customs authorities, for two years, received the entries of these liquid compounds upon the company paying the *ad valorem* duties and the excise tax of \$1.90 per gallon.

On the 22nd May, 1885, Customs authorities seized large quantities of goods belonging to the company, at various places in Canada, on the ground that the ingredients used in their manufacture should have been valued for duty at the wholesale value of the finished article, less the cost of such ingredients as were supplied in Canada and labour performed here, instead of at the market value of the several ingredients at the place of exportation.

The case was heard before His Lordship the Chief Justice.

Hogg and Ferguson for plaintiff;

McMaster, Q.C., for defendants.

Sir W. J. RITCHIE, C.J., now (27th June, 1887) delivered judgment.

The Attorney-General of Canada, on the 2nd October, 1886, informed the court that by section 53 of 46 Vic, c. 12, it is provided, *inter alia*, that if any person, with intent to defraud the revenue of Canada, smuggles or clandestinely introduces into Canada any goods subject to duty * * * the said goods shall be seized and forfeited.

[Here His Lordship recites the information *in rem*, which will be found on pages 233-237.]

The seizure was made by W. J. O'Hara, a clerk of Customs, and Julien Brousseau, a landing waiter, who seized and took possession of the goods mentioned in the first paragraph of the information *in rem*. This information asks for the condemnation, as forfeited to Her Majesty, of 4,349 doz. bottles Ayer's Sarsaparilla, 2,822 doz. bottles Ayer's Cherry Pectoral, 4,446 doz.

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 AYER the defendants for the sum of \$237,302., being treble
 COMPANY. the value of the goods mentioned in the 2nd para-
 graph of the information, and for a judgment against
 Reasons defendants for \$148,011., namely, the amount payable
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 imported, and for the costs of this suit.

. It is admitted that there is no controversy, or claim, on the part of the Crown as to the Hair Vigor, or Ague Cure. The contestation remains as regards 4,349 doz. bottles Ayer's Sarsaparilla, 2,822 doz. bottles Ayer's Cherry Pectoral, and 1,926 doz. packages Ayer's Pills.

To understand aright the position of the Ayers in relation to their business operations with the Customs authorities at St. John's, and in justice to the Ayers as well as to the Custom House officers, I think it important and right to refer to the evidence of an, apparently, most creditable witness, Mr. Mansfield, who started the business at St. John's, and the strong corroborative testimony in relation thereto of the Customs officers at St. John's, and their uniform dealing with the entries of the goods of Ayer & Co. for a period of about twenty-one years.

Mr. Mansfield was sent by the Ayer Company to St. John's, and started the factory there. The following is his evidence in regard to his operations there :

Q. What did you do there? A. Upon my first visit to Canada, I called upon the Customs House officer, Mr. Wilson, to make enquiries in regard to putting up our goods in St. John's. Mr. Wilson was the Customs officer at that time. Before shipping any goods there I asked him if we could ship goods, either manufactured in whole or in part ; he said he could not give any information in regard to the case until the goods were presented for entry, and that when the goods were presented for entry he had to act upon them. Then I went to Lowell and had goods prepared for shipment to St. John's and brought the invoices, and explained what the goods were. When the goods arrived at St.

John's, Mr. Wilson did not feel confident to pass on the goods, and he took my invoices and sent them to Montreal. He brought from Montreal a gentleman who, it was stated, was from the Customs Department. I explained to him all that we wished to do, that the goods we wanted to send there might be manufactured, or partially manufactured. I could not tell who the officer that accompanied Mr. Wilson was.

Q. You gave them every opportunity to see what you were importing? A. Yes.

Q. He took his means of examining? A. Yes; either that officer or Mr. Wilson. I know an officer of the Customs took samples of the goods. I explained just exactly what they were.

Q. You made full enquiries as to how the Customs would treat your medicines? A. Yes.

Q. You explained everything? A. Yes.

Q. And gave them samples? A. Yes; and told them what the goods were, and our purpose.

Q. What you did was in accordance with your instructions from your principals? A. Yes.

Q. In entering these goods did you consult with the Customs House officer as to the proper rates of duty payable upon them? A. Yes.

Q. You did that fully? A. Yes.

Q. And they were entered at the rates he thought right? A. Yes.

Q. Did he ever at a later date make any representations of changes? A. Not to me. That was in eighteen hundred and sixty-four and eighteen hundred and sixty-five.

Q. You say you were the originator of this business. Did you enquire about the rates they would impose, and how the Customs authorities would treat your products before you put up your factory? A. Yes.

Q. Before you commenced your business you went to the Customs to find out how they would deal with you? A. Yes; I made enquiries before I ever shipped a dollar's worth to Canada; they gave me the answers I have heretofore explained.

Q. Was there any attempt to conceal what you brought in, or to conceal the mixing process at St. John's? A. Not at all; it was done openly. We had nothing to fear, nothing to suspect.

* * * * *

Q. In your day, do you know that all the medicines that were brought in were mixed up together? A. Yes. All the time I was there.

Q. What did you do with the things you bought in Montreal and elsewhere in Canada? A. I brought them from Montreal to St. John's.

Q. What did you do with them there? A. I united the drugs I pur-

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chased with the material imported from Lowell in order to complete the article.

Q. So that in that early day, from the operations that you carried on there, and the components you carried them on with, there could be no claim that the Customs officers did not know what you were doing? Everything that was done was open to the eyes of the officers of the Customs? A. Mr. Wilson has been with me when I came to Montreal and purchased goods. He knew I purchased the goods.

Q. Had he been in and seen you working? A. Fifty times. The doors were open and he visited our establishment at will.

Q. Were those additions that you made in St. John's essential additions to the medicines? A. Yes.

Q. And were they things required by the formula? A. Yes.
 * * * * *

Q. When you brought these articles into St. John's you say you saw the Customs officer, and his name is Wilson? A. Yes.

Q. You do not know what he was in the Customs? A. I only know he was the officer there to whom we paid our duty.

Q. What explanation did you give Wilson as to what the article in the barrels was? A. I told him it was Cherry Pectoral, with the addition of morphia to be added.

Q. What were you going to do with it in Canada? A. Bottle it and fix it up in the regular form, having the name of the Ayer company on it.

Q. You say you showed samples of this to the Customs officers. A. Yes.

Q. Where did you get the samples? A. From the barrel.

Q. You showed it to Mr. Wilson? A. They were both together when I got out the sample. One or the other took it; I do not remember which one.

Q. So that when this article, with so much iodide, was put up in bottles it was put on the market and sold for so much per bottle: how much was that? A. Somewhere about \$7.50 and \$8.00 per dozen to the wholesale trade. I cannot recollect our prices of that date.
 * * * * *

Q. You said, I think, that the medicines to which you added iodide of potassium and morphia in St. John's were incomplete? You told that to the Customs officer? A. Yes; and Mr. Wilson has been present fifty times when we were at work at them. I explained everything to him.

Mr. Wilson, the Custom House officer, it is admitted, is dead, but Mr. Mansfield's evidence is fully corroborated by the practice continuously pursued at St.

John's, by the evidence of the Customs officers here, and by the conduct of Underhill, himself, during all the time he was in charge of the business, which, from his evidence, was from 1868 to 1884.

The evidence of Mr. Perchard, the Collector of Customs at St John's, is as follows :—

Q. You are the Collector of Customs for the Port of St. John's? A. Yes.

Q. That is where this factory of Ayers' was? A. Yes.

Q. How long have you been Collector? A. Since March, 1884.

Q. And before March, eighteen hundred and eighty-four, you occupied some office there in the Customs? A. I was Acting Collector from December, eighteen hundred and eighty-two, up to March, eighteen hundred and eighty-four. Previous to December, eighteen hundred and eighty-two, I was Chief Clerk.

Q. When did you enter the public service at St. John's? A. In eighteen hundred and sixty eight.

Q. During all these years you were aware of the existence of this factory the Ayers had at St. Johns? A. Yes.

Q. You used to go in and out there? A. Only very seldom.

Q. You saw them importing these liquids and pills spoken of? A. I did.

Q. Will you now produce copies of the entries that were made in the Custom House during the years referred to here? A. Exhibit "A," produced by the Crown and examined by me, now contains true copies of all entries of importations of goods made at St. John's, and also original invoices of the goods therein referred to, from the end of 1881 to the end of eighteen hundred and eighty-four. There were no entries or importations made in eighteen hundred and eighty-five.

Q. During all that time, I think, according to what you have already stated, you were either Acting Collector or Collector? A. Yes; or clerk.

Q. In these positions it would be your duty and privilege to inspect and examine all goods entered there? Yes.

Q. Then, as regards these entries, you had full opportunities to examine the goods? Yes.

Q. Was every opportunity you expected, or desired, given to you to thoroughly examine these goods to ascertain their quality and character, so as to ascertain what would be the proper rate of duty to impose upon the goods? A. It was.

Q. Was the business there conducted openly and publicly by them, so that you or other officers could have an opportunity to examine the goods? A. Yes.

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- Q. Did they always supply you with samples for inspection?
A. Yes.
- Q. They afforded you every facility? A. Yes.
- Q. Did you or your officers draw the samples from the barrel?
A. My officers did.
- Q. Was the stock that was brought in, that was imported, brought in bottled and marked as indicated here—so many bottles of Ayers Sarsaparilla, so many bottles of Cherry Pectoral, so many bottles of Hair Vigor, so many bottles of Ague Cure, and so on; was it brought in bottled and labelled and ready for the market? A. No, it was not.
- Q. None of what was brought in was brought in in that way? A. No.
- Q. How was it brought in? A. In bulk.
- Q. Was it in barrels, or what? A. In barrels, containing about 40 gallons.
- Q. You saw the stuff yourself? A. I have seen the samples only.
- Q. And you have seen the stuff that is put up in bottles? A. Yes, I have.
- Q. I think you misunderstood my previous question. You saw the barrels in the Custom House which contained the stuff? A. Yes, I saw the barrels, but not the contents.
- Q. Except when drawn by sample? A. Yes.
- Q. In eighteen hundred and eighty-three, I do not know if you remember, but you may have heard it read here to-day, there was a letter addressed to the Ayers, in which it was stated that in future they would have to pay the correct duties. In eighteen hundred and eighty-three, did you receive any instructions from the Customs Department with regard to what would be the correct duties to impose upon Ayers' goods? A. I did.
- This is again corroborated by the evidence of Wolff, the Inspector, as follows:—
- Q. You knew that this firm of Ayer & Co. had been importing these medicines into this country for many years? A. I was aware of that from the records.
- Q. They brought in their stuff openly and publicly on the railway trains? A. Yes.
- Q. All the gauger or appraiser, or any other officer had to do, was to go to the stuff and examine it? A. That was all that was necessary.
- Q. And I suppose you came in contact with their agents, or somebody representing them there, who imported their goods and entered them at Her Majesty's warehouse? A. Yes, a Mr. Underhill.
- Q. You had some officers under you, I suppose? A. Four or five men.
- Q. St. John's is not a very big place? A. No.

Q. You were there yourself and you had a staff fully competent to investigate everything brought into it? A. I was there with the usual staff allowed to a port of that kind.

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Q. Which was ample? A. In numbers.

Q. I suppose, at any rate, the chief was competent? A. I should not like to say.

Q. Did you take any samples of these medicines? A. Yes; I drew samples as required by the regulations of the Department.

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Q. What was done with those samples? A. They were submitted to the Board of Appraisers at Ottawa.

Q. Who were the members of the Board of Appraisers? A. The Commissioner of Customs was chairman, the late Mr. Fraser was one of the members, and David Sinclair, at present of Montreal, was also a member at that time, I think,—I am not quite sure—and they had a secretary there who also acted on the Board.

Q. Did they freely and readily supply you with the samples? A. I am under the impression I took them. It was my place to take them, and not ask for them.

Q. What samples did you take? A. That I cannot state now.

Q. Was it liquid stuff? A. Yes, some liquid.

Q. You took more than one sample? A. Various samples.

Q. Of the different liquids they imported? A. Of the various goods imported by them, and others, at the port of St. John's. Anything that was new to me I would submit.

Q. So you took those samples and forwarded them to the Board of Appraisers at Ottawa? A. Yes.

Q. When was that? A. While I was Acting Collector at the port of St. John's, which, I think, was in eighteen hundred and eighty-one.

Q. Did they send you any reply to your submission of samples, or send you any instructions with regard to them? A. There was some correspondence, which the letter-books at the port will show. I cannot, from memory, state what the result was.

Q. Did it result in any changing of the duties which were imposed upon these articles? A. Not any change of duties. I think there was one case in which the values were raised, but I am not positive.

Q. Will you say whether, during your experience there with your staff at St. John's, there was not every facility given to you and your officers to make the fullest investigations into the materials that were imported there? A. We had everything in our own hands, and it was our duty to investigate. The matter of facility did not come in at all.

Q. There never was any obstruction or impediment put in the way of the fullest investigation? A. No.

Q. Did you send any samples to chemists in Montreal, or to any

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chemist? A. Not what you would call chemists. I either sent, or directed, that one sample of a liquid should be sent to the Appraiser at Montreal. I cannot say I sent it, but I directed it to be sent.

Q. What was the name of the Appraiser? A. I do not know whether Appraiser Ambrose was on the staff or not, but at that time I sent a sample into Montreal.

* * * * *

Q. Was the Appraiser you refer to Mr. Gabler? A. I cannot state whether Mr. Gabler was the Appraiser, or Mr. Ambrose. However, the sample was sent in for appraisal as to the quantity of spirits contained in the compound.

* * * * *

Q. Is it not the case that all importations of the Ayers, to St. John's came in sealed cars, and could not be opened or interfered with without the intervention of an officer? A. I might answer, yes. They should come in that way. If they did not, it was not the fault of the Ayers; it was the fault of the Customs officers at the frontier, and the railway companies.

Q. (By the Court). The regular mode for the merchandize to come would be in sealed cars? A. Yes.

Q. And the regular mode of getting to them would be through the medium of Customs officers? A. Yes.

Q. So, as you stated in the beginning of your examination, it was not a matter of facility at all. The Customs have the whole thing in their own hands? A. Yes.

Cross-examined :

Q. Did you ever go into this factory or place of business the Ayer Company had in St. John? A. Yes.

Q. While you were Acting Collector? A. I should like you to understand that I was in St. John's for a long time while I was not Acting Collector, and many things occurred while I was not Acting Collector which I might think to-day occurred while I was Acting Collector.

Q. I am asking you whether, while you were Acting Collector, you ever visited this factory? A. I did while I was at St. John's and representing the Customs Department.

Q. I am asking you, while you were Acting Collector? A. I cannot answer.

Q. Were you ever in their place of business? A. Yes; frequently.

Q. Had they always the same place of business? A. No.

Q. What year were you in it first? A. In 1881, I think, or in 1882.

Q. How did you come to go there? A. I went in for the purpose of looking at some of their compounds, the manner of bottling and packing and mixing.

Q. What did you see when you got there? A. I saw a lot of their goods there. 1887

Q. Put up in packages? A. Some of it in packages and some of it they were running through cotton to clarify it—either cotton or some process they had. THE QUEEN
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Q. You did not examine the process? A. Not closely.

Q. What was there in the establishment besides the goods and this cotton they were running liquor through? A. There were some long tables at which girls were working. Reasons
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Q. You remember there were some girls there? A. Yes.

Q. What were the tables for? A. For their bottles, and rolling them up.

Q. Was there any sort of machinery or apparatus there in the building in St. John's,—any steam engines or machinery? A. No; there were some little hand machines.

Q. Connected with the bottling? A. Yes. It was not a very elaborate establishment.

Q. Was there any machinery at all of any kind? A. Not what is generally known as machinery.

Q. Can you tell us if there was anything more than what you have already told us? A. There were some mixing tubs or barrels.

Q. Do you remember anything about mixing tubs being there? A. I remember the barrels, I think, they were running the liquor through. I am not positive, but I think they were running through Cherry Pectoral when I was there.

Q. What were they running it through? A. Cotton, or a strainer of some kind.

Q. You do not recollect very well? A. No.

Q. That is about all you saw there? A. Yes.

Q. You do not remember what the process was? A. I could not describe it now.

Q. What you saw the people principally engaged at was putting this stuff up in bottles, packing and labelling? A. Yes.

Q. Did you examine any material you saw there? A. Not there.

Q. In their factory? A. I think not. I had already had samples; I think I drew one or two samples.

Q. You did not draw off any of the liquids? A. I think so.

* * * * *

Q. You spoke about samples having been sent to Montreal, and you think to Ottawa, of the liquors imported by the Ayer Company at St. John's. Were these samples sent to Ottawa? A. They were sent to Ottawa.

Q. Do you know as a matter of your own knowledge that they

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- were sent? A. I submitted samples to Ottawa while I was Acting Collector at St. John's.
- Q. Samples of what? A. Of the goods that passed under my notice.
- Q. Do you mean to say of all Ayers' goods? A. That includes Ayers'.
- Q. What goods did you submit samples of? A. I cannot specify the goods.
- Q. Can you specify any particular goods you submitted samples of to Ottawa while you were there, at St. John's, as Acting Collector? A. I cannot.
- Q. How did you submit them? A. In samples.
- Q. Did you send them, or take them? A. I sent them by mail, possibly by express.
- Q. You do not remember by which? A. No.
- Q. Did you receive any reply to the transmission of your samples? A. In some cases.
- Q. Do you remember that, or are you only speaking from what you expected you received? A. I am afraid I cannot answer that.
- Q. Were you requested to send these samples? A. It was a general regulation.
- Q. Were you requested particularly? A. We were directed to send all samples.
- Q. Were you requested to send samples at that particular time? A. No.
- Q. Do you know what particular subject was under discussion at that time with reference to the importations of the Ayers': was it not a question about the duties on spirits? A. Yes. It arose out of the samples I submitted, I believe, at that time.
- Q. That was the question that was then up for discussion? A. Yes.
- Q. And in consequence of that a change was made in reference to the duties, as far as the spirits were concerned? A. Correspondence went on for some time, when the Department ordered the imposition of the non-enumerated clause of the tariff, that they should pay one dollar and ninety cents.
- Q. That was as to Ayers' importations? A. Certain importations—red liquor—sarsaparilla, or some of the kind, I forget exactly which.
- Q. But you have no recollection what the samples were that you sent up? A. No.
- Q. Do you remember any pills being brought in? A. I do not know if there was any brought in while I was Acting Collector. I remember pills having come into St. John's while I was there.
- Q. Were they finished pills? A. They were finished pills in bulk.
- Q. That is to say, large quantities; and all that had to be done was

to put them up in bottles and boxes? A. Yes; I was instructed at the time to inquire into that.

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Q. You do not remember any other liquors? A. No.; not by name.

Q. Did you say that you had ever drawn from the casks in the factory samples yourself, to taste them? A. No; they were drawn in my presence.

Q. When was that? A. When I was at St. John's as Acting Collector.

Q. On more than one occasion. A. I cannot say.

Q. Who drew them off for you? A. That I do not remember.

Q. What did you do with them? A. I suppose I submitted them to Ottawa.

Q. Do you know? A. I won't swear to that particularly.

Q. Did you ever examine them yourself? A. Yes.

* * * * *

Q. During the time you were there, had you any great doubts as to whether Ayer & Co. were paying proper duties on the goods they were bringing in—were there any doubts raised in your mind?

A. As regards the proper rates of duties they paid on pills, I do not say that occurred while I was Acting Collector, but during my stay at St. John's I was instructed to look into the matter of pills.

Q. Anything else? A. I think not as to the rate and as to the quantity of spirits. Of course I enquired into the pills, but I do not remember what the result was. I was told to ascertain how many pills went to a pound.

The witness Boivin, a Custom House officer at St. John's, also gives evidence as to taking samples, and his evidence is corroborated in this respect by Mr. French, the Customs Broker, who filled the blank entries.

It is worthy of observation in this connection that, although the samples of Ayers' goods could have been produced on the trial of this cause, they were not produced nor their absence accounted for; and also that Mr. Ambrose, who is mentioned in the evidence just read as one of the appraisers, was not called upon to give evidence, although it was said, and not denied, that he was present in court during the trial.

This mode of transacting the business of the Ayers at St. John's, and the dealings there of Underhill with the Customs House officers, was carried on without any interruption (except with reference to the spirit duty and the circular issued on the 11th August, 1882,

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but never acted on,—to be hereafter more particularly referred to), without any objection, remonstrance or complaint of undervaluation or mis-description, and without notice or intimation of any irregularity or impropriety on the part of the Ayer Company by the Customs authorities at St. John's or at Ottawa, from the time the business was started until the month of May, 1885. Then these officers, O'Hara and Brousseau, seized, in the principal cities of the Dominion, that is to say, London, Ont., Hamilton, Ont., Montreal, Que., Halifax, N.S., and St. John N.B., the goods now sought to be condemned in the hands of their agents and customers; thus paralyzing and destroying the company's business, of the extent of which some idea may be formed by their purchases and expenses in Canada in making and completing the goods and conducting such business, in addition to the importations from Lowell,—amounting during the three years previous to the seizure, for the purpose of enabling the goods to be completed and made fit to be put on the Canadian market as a merchantable article, to the sum of \$30,590.78,—and the enormous amount paid during the same time for advertising the goods throughout the Dominion, amounting to \$50,760.96—in all, \$81,352.74. This will more fully appear from the subjoined statement.

As to amounts expended in completing the preparations in Canada, the claimants in their statement (Exhibit B.S.) put them as follows :—

From May 22nd, 1882, to May 22nd, 1885.

Cost of glass, drugs, boxes, sugar, etc., purchased in Canada.....	\$12,789.86
Expenses paid in St. John's for mixing and completing.....	11,594.49
Newspaper, card advertising, &c..	50,761.96
Estimated cost of conducting the business (5 p.c.).....	6,206.43
	<hr/> \$81,352.74.

It must also be considered that the seizure made involved the goods put up at St. John's for three years only, and that the counsel for the Crown claimed, at the hearing, that the Crown, though only seeking forfeitures and penalties in the present case for three years, yet they had the right to recover for all the forfeitures and penalties of all preceding years. Be this as it may, I feel it the bounden duty of this court to investigate the matters connected with this case with the greatest possible care, to ascertain if it can be possible, in view of the action of the Customs authorities and on a fair construction of the revenue laws applicable to this case, that mercantile and business men in the Dominion stand in such jeopardy as they would be in if the contentions of the Crown can be sustained. If the law is so, I must so administer it; but, before I can or will declare such to be the law I must be satisfied, beyond any doubt, that such is the law. I am bound to say it is not easy to understand how honest business men, desirous of making honest importations in carrying on their business in the Dominion, could do more than it appears was done in this case, viz., to apply to the Customs officers to ascertain on what terms, and at what rate of duty, their proposed goods could be imported into the Dominion; nor can I conceive what honest and cautious Customs officials could do more than was done in this case, in reply to such application, viz., to state that, when imported, the goods would be duly examined by the Customs officers and the correct rate of duty then fixed.

It would appear that when the goods were imported they were examined, samples taken and transmitted to the Board of Appraisers at Montreal and at Ottawa, the duty fixed, and the business commenced and continued thenceforward for a period of twenty odd years until the seizure,—that, too, without the slightest com-

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plaint of any irregularity, undervaluation or misdescription.

Considering the principles involved and the amount at stake in this case, I have felt it my duty carefully to examine the invoices and entries of the goods imported and shipped by Ayer & Company from Lowell, Mass., to St. John's, in the Province of Quebec. The first invoice and entry on the record appears to be that of October 29th, 1881. This invoice explains very clearly the articles used in the business carried on at St. John's. It comprises: sarsaparilla directions and wrappers, cherry pectoral directions, ague cure directions and wrappers, labels, pills, circulars, cherry pectoral cards, hair vigor cards, ague cure cards, sarsaparilla cards, hair vigor lithographs, pill cards, white sealing wax, red sealing wax, a package of labels, cherry pectoral wrappers, hair vigor wrappers, pill box labels, corkscrews, wrappers, strawberry top cards, felt paper packing, upholsterers' twine, pills, pill directions, labels on same, brown sealing wax, bronze wrappers, stencil ink, pill labels for hardware paper, felt filter cloths, boxes of corks, barrels of sarsaparilla syrup, barrels of red syrup, oil of bitter almonds, etc.

The invoice specifies particularly the articles imported, their value for duty in dollars, their quantity, the rate of duty, and the duty.

Annexed to this entry is the following affidavit or oath of E. Underhill:

I, E. Underhill, do solemnly and truly swear that I am owner of the goods mentioned in the invoice now produced by me, and hereunto annexed and signed by me, and that the said invoice is the true and only invoice received by me, or which I expect to receive, of all the goods imported as therein stated for account of myself; that the said goods are properly described in the said invoice and in this entry thereof; and that nothing has been, on my part, nor to my knowledge, on the part of any other person, done, concealed or suppressed, whereby Her Majesty the Queen may be defrauded of any part of the duty

lawfully due on the said goods ; that any goods included in this entry as paying a lower rate of duty for specific purpose than would otherwise be chargeable upon the same, are to be, and will be, used for such specific purpose only. And I do further solemnly and truly swear that the prices named in the said invoice, of the goods mentioned in this bill of entry now presented by me, are net prices, and exhibit, to my personal knowledge, the fair market value of the said goods for consumption at the time and place of their exportation to Canada, without any deduction or discount for cash, or because of the exportation thereof, or for any other special consideration whatever. So help me God.

Sworn before me this 3rd }
day of November, 1881. }

(Sgd.) E. UNDERHILL.

(Sgd.) H. G. PERCHARD,

Collector.

The duties on this invoice, the total of which is \$3,817.29, amount to \$1,333.15.

The next invoice is dated November 3rd, 1881, and contains 12 barrels of glycerine and one cask of white sugar of lead, on which the duties amount to \$339.40. A similar affidavit by Underhill is attached to this entry.

Some question, I may state in passing, was raised as to whether there was not some irregularity in the manner in which these affidavits of Underhill were taken. Mr. Perchard stated that it having come to his knowledge that Mr. Underhill did not believe in the truth of the scriptures, he did not put the book in his hands but accepted his affirmation. Without inquiring whether this was regular or irregular, which might fairly come up if perjury were assigned on the affidavit, so far as the conduct of Underhill is concerned nothing could be more clear or distinct than his declarations in passing these entries ; and, of course, if they were all untrue, as he now says they were, nothing could be more reprehensible than the turpitude of his conduct in making the affidavits in this way.

The next entry is dated November 11th, 1881. It comprises one box containing lead pipe, in use, and

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1887 one box of sage leaves and directions. A similar affidavit is attached to this.

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The next entry is that of November 17th, 1881, and contains sage leaves, labels, lithographs, 16 barrels and 21 lbs. of oil of citronella, gallon of golden syrup, certificates, renewal cards, lithographs, circulars, Sarsaparilla, Sarsaparilla wrappers, corkscrews, coated pills, and Ague syrup. The golden syrup is entered as patent liquid; essential oil is entered as such; labels and circulars entered as before; barrel of corkscrews, hardware, boxes of sugar-coated pills as before; barrels of Ague syrup as patent liquid. The whole amount of the invoice was \$1,703—and the duty paid on it was \$655.52.

The duty levied on the Sarsaparilla, syrup and the red liquor, patent medicine liquid, was 50 per cent. On the coated pills, 25 per cent. On the Sarsaparilla syrup and red liquor, (patent medicine liquor) 50 per cent. On the glycerine, 20 per cent. On the casks of white sugar of lead, 20 per cent. In the entry of Nov. 22nd, 1881, golden syrup, as a patent liquid, is charged at 50 per cent; boxes of sugar-coated pills 25 per cent. In the second entry of the invoice of Nov. 22nd, 1881, are 10 barrels of glycerine at 20 per cent. The third entry on this invoice is printed labels, 30 per cent. All these have similar affidavits attached to them.

Then on Nov. 3rd, 1881, printed labels were entered at 30 per cent. Second invoice, Dec. 10th, 1881, 10 barrels glycerine, 20 per cent. Dec. 13th, 1881, printed circulars and directions, coated pills, twine, wrapping paper, cards, Sarsaparilla syrup and proprietary medicines (at 50 per cent.) amounting on the proprietary medicines, to \$762.50. Dec. 31, 1881, cards and labels, were entered at 30 per cent. Jan. 5th, 1882, printed wrappers and directions at 30 per cent, and brown wax at 20 per cent. Jan. 13th,

1882, 22 barrels Sarsaparilla syrup, and 1 barrel red syrup at 50 per cent., duty amounting to \$711. Jan. 14th, 1882, package of printed labels at 30 per cent. Jan. 27th, 1882, 5 boxes coated pills at 25 per cent., duty amounting to \$62. Feb. 1st, 1882, boxes containing advertising cards and labels at 30 per cent. One box of corks at 20 per cent. May 22nd, 1882, advertising cards at 30 per cent. To this entry an affidavit, in the same form as before given, is made by Geo. French as the duly authorized agent, or attorney, of E. Underhill, and to this affidavit no objection or charge of irregularity is made.

In the entry of Nov. 13th, 1882, the goods were consigned to A. J. Wright, and an affidavit similar to that made by Underhill is made by him without objection. It contains boxes of printed cards and advertisements entered at 30 per cent. The next is Dec. 27th, 1882, consigned to A. J. Wright and entered by him (he making the affidavit as consignee), containing 2 boxes advertising matter, at 30 per cent. March 3rd, 1883, imported by A. J. Wright, 2 boxes of printed matter at 30 per cent., he making the usual affidavit without objection. March 6th, 1883, A. J. Wright entered, as consignee, 20 boxes printed matter at 30 per cent., and made the usual affidavit without objection. On the 11th of April, 1883, A. J. Wright entered one box of printed matter at 30 per cent. May 15th, 1883, A. J. Wright entered 5 boxes banner advertising cards at 30 per cent. July 7th, 1883, Underhill entered 10 barrels glycerine at 20 per cent., and made and signed the affidavit. On the 12th July, 1883, an entry was made of similar goods, among which were 8 barrels (287 gallons) red syrup (patent medicine), entered at a rate of duty of 50 per cent., and valued for duty at \$447, the duty thereon being \$223.50. The whole amount of the invoice was

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1887 \$2,739.88, that of the value for duty \$2,740, and of the
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The invoice for this entry, Mr. Perchard, the Collector, certifies, was sent to Ottawa in 1883, and has not since been returned. The usual affidavit was made by Underhill to this.

On July 13th, 1883, Underhill entered 12 barrels of glycerine at 20 per cent., and made the usual affidavit. On July 26th, 1883, Underhill entered 50 boxes of glass bottles at 30 per cent. duty, and made the usual affidavit. On July 30th, 1883, Underhill entered 60 boxes of glass bottles at 30 per cent. On July 30th, 1883, Underhill entered 30 barrels syrup of Sarsaparilla (medicinal preparation), at 50 per cent. Mr. Perchard, the Collector, certifies that the invoice for this entry was sent to Ottawa in 1883, and not returned.

On Aug. 3rd, 1883, Underhill entered 5 bundles of wrapping paper at 20 per cent. Mr. Perchard, Collector, certifies that the invoice for this entry was sent to Ottawa in 1883, and not returned. The usual affidavit was made.

Aug. 7th, 1883, Underhill entered 6 boxes containing advertising matter, namely, circulars, cards, directions, etc., at 30 per cent.; 4 boxes of sugar-coated pills (proprietary medicines), amounting, currency of invoice, to \$206.80, value for duty, in dollars, \$207.,—duty, at 25 per cent., \$51.75; 3 boxes of glass bottles at 30 per cent.; and 2 casks and 1 box of pill-boxes, wood manufacture, at 25 per cent. Mr. Perchard, the Collector, certifies that the invoice for this entry was sent to Ottawa in 1883, and not returned.

Aug. 11th, 1883, Underhill entered 2 boxes of advertising cards at 30 per cent., and made the usual affidavit. Aug. 15th, 1883, Underhill entered 1 box of advertising matter, namely, labels, at 30 per cent., and made the usual affidavit. On Aug. 15th, 1883, a second entry was

made by Underhill; in which, among other items, there were sugar coated pills (proprietary medicines) valued at \$100, quantity 250 lbs., at 25 per cent., duty \$25; and 42 barrels Sarsaparilla syrup (medicinal preparation), value, \$2,519, 1,527 gallons, at 50 per cent., duty, \$1,259.50; 5 barrels medicinal preparations (no syrup), value \$278, gals. 179, at 50 per cent., duty \$139. The whole value of this entry was \$3,353.85, value for duty, \$3,384, and duty, \$1,555.30.

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The invoice for this entry, Mr. Perchard certifies, was sent to Ottawa in 1884, and not returned. It has the usual affidavit.

Aug. 18th, 1883, Underhill entered 67 boxes of glass bottles at 30 per cent., making the usual affidavit. Aug. 24th, 1883, Underhill entered 30 boxes of glass bottles at 30 per cent., and 1 box of corks at 20 per cent., making the usual affidavit. Aug. 30th, 1883, Underhill entered 55 boxes of glass bottles at 30 per cent., and 2 boxes of advertising cards at 20 per cent., with the usual affidavit. Sept. 11th, 1883, Underhill entered 1 box of advertising directions, labels, &c., with the usual affidavit. Sept 12th, 1883, Underhill entered 4 barrels of glycerine at 20 per cent., with the usual affidavit. Sept. 13th, 1883, Underhill entered 1 package containing 1 set of electrotype plates for advertising purposes at 20 per cent., and 1 box containing perfumed oil at 30 per cent., making the usual affidavit. September 17th, 1883, Underhill entered 6 boxes of advertising matter, namely, wrappers, directions, labels, etc., at 30 per cent.; 3 boxes of packing felt, and 1 piece and bundles of wrapping paper, at 20 per cent. Oct. 9th, 1883, A. J. Wright entered 3 boxes of advertising cards at 30 per cent., and made the usual affidavit. On Jan. 10th, 1884, James McPherson entered 2 boxes of country doctors' banner cards at 30 per cent., subject to amendment if required by the Customs

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Department,—the entry containing this indorsement: “See post entry 1157, 29-2-1884.” By this post entry the entry by Jas. McPherson was amended, as follows, on Feb. 29th, 1884: “Entry of 2 boxes country doctors’ banner cards, 30 per cent., should be: 2 boxes doctors’ advertisements, 20 per cent., and 6 cents per pound.”

Jan. 21st, 1884, McPherson entered 1 box of printed cards and circulars, advertising matter, at 30 per cent., subject to amendment if required by the Customs Department. Jan. 21st, 1884, McPherson entered 1 box printed matter, advertising cards, at 30 per cent. Feb. 29th, 1884, McPherson entered 2 boxes of advertising cards at 30 per cent. March 24th, 1884, McPherson entered 3 cases containing advertising cards and circulars. On the 24th of June, 1884, he was directed to amend the entry of the 24th of March in accordance with the departmental decision of the 18th of April and 16th of May. The entry, 3 cases, &c., should have been: 3 cases pictorial advertising cards, 20 per cent. and 6 cents per lb.; circulars, advertising matter, 20 per cent. and 10 cents per lb. This very plainly shows that the entries made were scrutinized at Ottawa, and corrected when deemed incorrect.

April 2nd, 1884, McPherson entered 3 boxes advertising cards and circulars. He subsequently made a post entry in accordance with the departmental instructions of the 18th of April and 16th of May; the entry should have been: 2 cases pictorial advertising cards, 20 per cent. and 6 cents per lb.; advertising pill circulars, 20 per cent. and 10 cents per lb. July 12th, 1884, on the invoice it is stated the entry, in cases of pictorial advertising cards, was made at 20 per cent., subject to amendment if required by the Customs Department. It appears by the amendment on the invoice in this case, that samples

were sent by post to Ottawa on the 14th June, 1884,
enclosed in a letter to the Commissioner of Customs.

On June 11th, 1884, McPherson entered 9 boxes pictorial cards and Sarsaparilla cards for duty at 20 per cent. and 6 cents per lb. July 31st, 1884, the invoice for entry specifies (*inter alia*) perfumed oil, brown sealing wax, oil bitter almonds, machinery, mattress twine, Sarsaparilla flavoring, acetate of lead, cask of lac sulphate, 1 barrel iodide of potassium, 4 barrels red syrup, 15 barrels liquorice liquor, 1 bag corks, 50 cases Sarsaparilla bottles. These appear to have been entered as perfumed oil, brown sealing wax, oil bitter almonds, quassia for mixing, mattress twine, flavoring extract containing spirits, acetate of lead, iodide of potassium, mixed tinctures containing spirits, bag of corks, 50 cases glass bottles.

On the perfumed oil the duty is 30 per cent.; sealing wax 20 per cent.; oil of almonds 20 per cent.; machinery 25 per cent.; twine 25 per cent.; flavoring extract \$1.90 per gallon and 20 per cent.; acetate of lead 5 per cent.; iodide of potassium 20 per cent.; mixed tinctures \$1.90 and 20 per cent.; corks 20 per cent.; glass bottles 30 per cent.; 1 cask lac sulphate, free. The usual affidavit was made by Underhill in respect of this invoice.

August 2nd, 1884, Underhill entered 11 barrels of glycerine at 20 per cent. August 12th, 1884, he entered 55 boxes of glass bottles, which in the invoice were specified as 25 boxes Pectoral bottles, 30 boxes of Vigor bottles, (7 oz. bottles), and on the entry described as subject to amendment if required by the Department at Ottawa. This entry shows that the Customs Department knew well the purposes for which the bottles were supplied.

August 25th, 1884, Underhill entered barrels of mixed tinctures, containing spirits, at 50 per cent. and

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1887 \$1.90 per gallon. In the invoice they were described as
 THE QUEEN 25 barrels liquorice liquor. September 3rd, 1884, Under-
 v. hill entered 15 boxes glass bottles at 30 per cent.
 THE J. C. September 9th, 1884, Underhill entered 1 box pictorial
 AYER advertising cards at 20 per cent. and 6 cents per
 COMPANY. pound. Sept. 9th, 1884, a further entry of 1 box
 pictorial advertising cards, at 20 per cent. and 6 cents
 per pound, was made by Underhill. September 17th,
 1884, Underhill entered 2 boxes corks at 20 per cent.,
 and 49 barrels of mixed tinctures, containing spirits, at
 20 per cent. and \$1.90 per gallon. In the invoice the
 49 barrels are described as 1,987 gallons of liquorice
 liquor and 171 gallons red syrup. Sept. 20th, 1884,
 Underhill entered 30 boxes glass bottles at 30 per cent.
 The invoice shows that there were 17 boxes of Sarsa-
 parilla bottles and 13 boxes Pectoral bottles. Oct. 1st,
 1884, Underhill entered 1 box printed Sarsaparilla
 labels and wrappers at 30 per cent., and 1 box of
 corks at 20 per cent. Oct. 1st, 1884, second entry,
 Underhill entered 5 boxes containing printed labels,
 wrappers and directions, at 30 per cent.; twine, 25 per
 cent.; advertising pill cards, 20 per cent. and 10 cents
 per pound.; sealing wax, 20 per cent. Oct. 21st, 1884,
 Underhill entered 21 barrels, mixed tinctures con-
 taining spirits, and 1 box iodide of potassium,—the
 tinctures at 20 per cent. and \$1.90 per gallon; the
 iodide of potassium at 20 per cent.; the invoices fur-
 nished show that the 21 barrels contained 932 gallons of
 liquorice liquor, the box containing 77 pounds iodide
 of potassium, 1½ gallons of Sarsaparilla flavoring. Oct.
 22nd, 1884, Underhill entered 1 box containing printed
 wrappers and directions. Oct. 28th, 1884, Underhill
 entered 1 box printed directions, 30 per cent., and 1
 bundle hardware paper, 20 per cent.

With reference to the entries of July and August,

1883, above referred to, the Collector at St. John's thus wrote to Underhill:—

CUSTOM HOUSE, ST. JOHN'S, P.Q.,
1st October, 1883.

E. UNDERHILL, Esq.,
Agent J. C. Ayer & Co.,
St. John's, P.Q.

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SIR,—I have been instructed by the Commissioner of Customs to call upon you to amend your entries passed in July and August last for Sarsaparilla and Red Syrup, it having been ascertained that they both contain spirits, the former 16 6-10 and the latter 49 2-10 degrees per cent., and therefore coming under that clause in the tariff which imposes a duty on such mixtures of \$1.90 per Imp. gall. and 20 p.c., whereas they were entered as proprietary medicines at 50 p.c. You are also requested to amend the entries passed for sugar coated pills, they having been entered at 40 cts. per lb., instead of the wholesale price as required by law, which has been found to be \$19.00 per gross, less \$3.00 allowed for putting up, making \$16.00 per gross as "fair market value" in the United States, and on which duty has to be paid here.

The amount thus claimed by the Government is distributed as follows:—

Invoices from Lowell, 2nd July, Red Syrup, 344 galls.	\$ 447 20
26th July, Sarsaparilla, 1,322 galls.	1,817 75
8th Aug. do 1,832 galls.	2,519 00
do Red Syrup, 278 galls.	278 21
Total.....	\$5,062 15

3,712 Colonial gallons are equal to 3,093 Imperial, at \$1.90 per gall., and 20 p.c. on \$5,062.00 amounting to.....	6,889 10
Less 50 p.c. already paid.....	2,531 00

Leaving balance to be paid...\$4,358 10

Coated pills:

Invoices from Lowell, Aug. 2nd, 517 lbs., at 40 cts..	206 80
Aug. 8th, 250 lbs. at 40 cts...	100 00
767 lbs.	\$306 80

767 lbs. are computed to make 510 gross, which, at \$16.00 per gross, amounts to \$8,160, and this at 25 p.c. makes.....	2,040 00
Less paid, \$307.00, at 25 p.c.....	76 75

Leaving balance of.....\$2,963 25

Duty on pills:

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The total amount thus due the Customs would be :

On Red and Sarsaparilla syrup.....	\$4,358 10
On coated pills.....	1,963 25
Total.....	<u>\$6,321 35</u>

which I have to request you to meet by passing post entries in accordance with the instructions of the Department of Customs, Ottawa.

I am, Sir,

Your obedient servant,

(Signed) H. G. PERCHARD,

Acting Collector, Port of St. John's, P.Q.

These entries having been corrected in reference to the spirit duty, Ayer & Co., feeling that they could not afford to pay the duty on the pills as claimed by the Customs authorities, by permission of such authorities, returned the great bulk of the pills to Lowell; and, after this, the materials containing spirits were entered as before, with the addition of the spirit duty of \$1.90 per gallon.

On the 11th August, 1882, the Commissioner of Customs appeared to have issued a circular as follows :—

Circular No. 315.

No. 21.

CUSTOMS DEPARTMENT,

OTTAWA, 11th August, 1882.

SIR,—I have to request your special attention to importation of patent or proprietary medicines, in bulk, under invoices representing but a fraction of the "fair market value" of the same preparations when put up for sale. The pretence is, usually, that they are not in a finished state, and, consequently, should be regarded as material for their manufacture, while, generally, the whole work to be performed in Canada consists of bottling and attaching labels, etc., in the case of liquids, and putting in paper or other boxes, and also labelling, in the case of pills and other dry preparations. This practice is purely an evasion of the provisions of Customs law and must not be allowed.

To ascertain the "fair market value for duty" you should find the wholesale price when sold for consumption in the United States in a finished or merchantable state, and deduct therefrom the value of bottles, boxes, labels, corks and cost of labour in putting up the various compounds. You may also deduct the cost of the United States' internal revenue stamps. The balance will then be the proper value

for duty in Canada at the rates prescribed for such preparations in the tariff, viz.: Liquids, 50 per cent., and pills and other dry preparations, 25 per cent. 1887

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The same remarks will equally apply in all respects, except as to rates of duty, to toilet and all other proprietary preparations.

This matter is highly important, and this and other circulars are supposed to be properly filed in each Custom House in some convenient form for reference, and not contemptuously thrown aside.

I am, Sir,
Your obedient servant,
(Signed) J. JOHNSON,
Commissioner.

The Collector of Customs,
Port of——.

If Underhill is to be believed, it would seem that the Ayers were aware of the issuing of this circular.

Under what authority this circular was issued did not appear. I find by the 5th section of 40 Vic. c. 10 (1877), in force in 1882, in reference to duties and exemptions from duty there is the following enactment:

And inasmuch as doubts may arise as to whether any or what duty is payable on particular goods, more especially when such goods are of a new or unusual kind, or compounded of various kinds of materials, or imported in an unusual manner or under unusual circumstances: Therefore, for removing such doubts and avoiding litigation, if in any case any doubt arises as to whether any or what duty is, under the laws then in force, payable on any kind of goods, and there is no decision in the matter by any competent tribunal, or there are decisions inconsistent with each other, the Governor-in-Council may declare the duty payable on the kind of goods in question, or goods imported in the manner or under the circumstances in question, or that such goods are exempt from duty; and any Order-in-Council containing such declaration and fixing such duty (if any) and published in the *Canada Gazette*, shall, until otherwise ordered by Parliament, have the same force and effect as if such duty had been fixed and declared by law; and a copy of the said *Gazette* containing a copy of any such order shall be evidence thereof.

It was not shown or contended on the part of the Crown, and it was strenuously denied on that of the claimants, that, in relation to this matter, any order-in-council had ever been made; and the circular may, for

1887 that reason, have been thrown aside. Whether this
 THE QUEEN was so, or not, it never was acted on, either by the
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 AYER at Ottawa, in respect of the entries of the Ayers at St.
 COMPANY. John's; and the entries continued to be made in pre-
 cially the same way they had been for the preceding
 twenty years.

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The first entry after the promulgation of this circular, viz., on the 7th of July, 1883, was 10 barrels glycerine, which formed an ingredient in the manufacture of some or one of these compounds, and was entered at 20 per cent.; the invoice of July 12th, 1883, clearly shows a great variety of articles, used in relation to the putting up of medicines, at the several rates of duty on such articles, respectively, at their respective values, thus: 8 bbls. Red Syrup (patent medicine) value \$44., quantity 287 gallons, rate of duty 50 per cent., amount of duty \$223.50. This invoice was transmitted to Ottawa, and never returned or repudiated.

The entry of the 18th July, 1883, contained materials for filtering, etc., for putting up medicines, and 8 barrels Red syrup (patent medicine). The invoice for this entry was likewise sent to Ottawa, and not returned or repudiated. So, also, the entry of the 30th July, 1883,—30 barrels syrup of Sarsaparilla (medicinal preparation). This invoice was sent to Ottawa, and never returned or repudiated. Then comes the entry of the 3rd August, 1883. That invoice was sent to Ottawa, and not returned. The entry of 7th of August, 1883, contained 4 boxes sugar-coated pills (proprietary medicines): invoice sent to Ottawa, and never returned or repudiated. The entry of the 15th August, 1883, contained boxes sugar coated pills (proprietary medicines), labels, etc., 42 barrels Sarsaparilla syrup, 5 barrels Red syrup: the invoices for this entry were sent to Ottawa in 1884, and not returned or repudiated. And so the entries continued to be

made, notwithstanding the circular, until the 29th December, 1883, when the following letter was sent to the Collector of Customs at St. John's:

[Copy.]

CUSTOMS DEPARTMENT, OTTAWA,

29th Dec., 1883.

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SIR,—I have to inform you that Messrs. J. C. Ayer & Co. have been notified that their entries of the past may be allowed to stand, and your especial attention is directed to future importations by this firm, that all proprietary medicines containing spirits must be assessed at the spirit rate, and that pills and other dry medicines are 25 p.c., according to the fair and ordinary market value as given in circular 315, No. 21.

As heavy undervaluations have taken place on the part of this firm, you are instructed to submit the invoices with information to this Department when in doubt as to value or rate of duty.

I am, &c., &c,

(Sgd.) J. JOHNSON.

The Collector of Customs,
Port of St. John's, P.Q.

[A true copy.] (Sgd.) H. G. PERCHARD,

Collector.

Previous to this time all the entries appear to have been submitted to the authorities at Ottawa, and, after that, the entries show that the proprietary medicines containing spirits were entered as usual with the addition of the spirit rate of duty, and, in obedience to directions, the invoices appear to have been transmitted to Ottawa, and, with the exception of the spirit duty, the practice which had prevailed since 1882 was continued, and no objections raised as to misdescription or undervaluation of liquid material. In short no difficulties were raised until 1885, when Underhill, having been discharged by the Ayers for alleged misconduct, came to Montreal, and, combining with O'Hara and Brousseau, appears to have concocted a scheme to procure the confiscation of all the goods entered from 1882 to 1885, inclusive, from which, together with the forfeitures thereon, amounting to \$385,313.00, they doubt-

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less anticipated the realization of enormous gains. These two officers appear, by the evidence of the Commissioner of Customs, to have acted on their own responsibility in making the seizures, and undertook, with the assistance of the discreditable witnesses Underhill and Flint, for their joint pecuniary benefit, to cause this large amount of property to be seized, and now seek to have it condemned, and enormous forfeitures adjudged against this unfortunate firm, who, from the start of their business in 1862, up to its close in 1884, so far as I can gather from the evidence, appear to have dealt with the Customs Department, and acted throughout, in an open, fair and businesslike manner, without concealment or fraud.

Notwithstanding this conduct on the part of the Ayers, which, in my opinion, should exculpate them, if not legally, certainly morally, from any imputation of fraud, they are now specifically charged with the disgraceful offence of smuggling,

The term "smuggling" has been defined to be the importation of prohibited articles, or the defrauding of the revenue by the introduction of goods into consumption without paying the duties chargeable thereon. It is a technical word having a known and accepted meaning. It implies illegality, and is not consistent with innocent intent (1). It is a secret introduction of goods with intent to avoid payment of duty.

Let us proceed to inquire whether, in point of law the Ayers have been guilty of any breach of the revenue laws of this country.

In the first place, let us see how the revenue laws are to be interpreted. There is a general provision in "The Customs Act, 1883" (2) that all the terms of that act,

(1) *United States v. Clafflin*, 13 Blatch 178. (2) 46 Vic. c. 12, s. 4.

or of any Customs law, shall receive such fair and liberal construction and interpretation as will best insure the protection of the revenue and the attainment of the purpose for which that act, or such law, was made, according to its true intent, meaning and spirit. But I do not understand from this that laws imposing duties are to be construed beyond the natural import of their language, or that duties or taxes are to be imposed upon terms of vague or doubtful interpretation.

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Maxwell on the Interpretation of Statutes (1) says:—

Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction. It is presumed that the Legislature does not desire to confiscate the property, or to encroach upon the rights of persons; and it is therefore expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt.

(See per Bramwell L.J. in *Wells v. London, Tilbury &c., Rail. Co.* (2); per Mellish, L.J. in *re Lundy Granite Co.*, (3); per James, L.J. in *ex parte Jones* (4); per Kelly, C.B. in *Randolph v. Milman* (5); *Green v. The Queen* (6); *ex parte Sheil* (7)).

No doubt revenue laws are to be construed as will most effectually accomplish the intention of the legislature in passing them, which simply is to secure the collection of the revenue. But it is clear that the intention of the legislature, in the imposition of duties, must be clearly expressed, and, in cases of doubtful interpretation, the construction should be in favour of the importer. This rule was adhered to by Lord Cairns in *Cox v. Rabbits* (8), and it was said by the same learned judge in *Partington v. The Attorney General* (9):

(1) 2nd Ed. p. 346.

(2) 5 Ch. D. at p. 130.

(3) L. R. 6 Ch. 467.

(4) L. R. 10 Ch. 665.

(5) L. R. 4 C. P. 113.

(6) 1 App. Cas. 513.

(7) 4 Ch. D. 789.

(8) 3 App. Cas. 478.

(9) L. R. 4 H. L. 122.

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I am bound to say that I myself have arrived, without hesitation, at the conclusion that the judgment ought to be affirmed.

I do so both upon form and also upon substance. I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient ; because as I understand the principle of all fiscal legislation, it is this : If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The act of the Province of Canada, 1866, 29–30 Vic. c. 6, was the act in force when the Ayers commenced business in St. John's ; and section 11 thereof provided that the fair market value for the duty on goods imported into the Province should be the fair market value of such goods in the usual and ordinary commercial acceptation of that term at the usual and ordinary credit, and not the cash value, &c. ; and schedule " B " thereof fixed on patent medicines, and medicinal preparations not elsewhere specified, 25 per cent., and on drugs not otherwise specified 15 per cent.

And 46 Vic. c. 12 (the act under which this seizure was made) by sections 68 & 69, enacted that :

68. Where 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.

69. Such market value shall be the fair market value of such goods in the usual and ordinary commercial acceptation of the term, at the usual and ordinary credit, and not the cash value of such goods, except in cases in which the article imported is, by universal usage, considered and known to be a cash article, and so *bond fide* paid for in all transactions in relation to such article ; and all invoices representing cash values, except in the special cases hereinbefore referred to, shall be subject to such additions as to the collector or appraiser of the port at which they are presented may appear just and reasonable, to bring up

the amount to the true and fair market value as required by this section.

Now as to the fair market value of these goods, in the usual and ordinary acceptance of that term, when sold for home consumption at the time when they were imported directly into Canada, the evidence appears to me to be overwhelming, and has not been contradicted. I need only refer to the evidence of Frederic Humphreys, which is fully corroborated by John A. Gilman, Jacob S. Farrand, Charles C. Goodwin, Erastus H. Doolittle, George C. Osgoode, David Dewar, Stanley Mansfield, W. V. Lawrence and Solomon Carter, all persons peculiarly conversant with the value of the bulk article as imported into Canada, to show that the Ayers' goods were never sold in bulk, and had no market value beyond the value of the ingredients of which they were composed.

This evidence shows that the Sarsaparilla and other preparations in bulk could not be sold in the United States, and would be worthless to any one but the manufacturers, and more especially would this be the case if such preparations were incomplete in themselves; that the cost of ingredients and labour was from 10 to 12½ per cent. of the selling value of the completed article as put on the market,—which was \$7.75 a dozen with 10 per cent. off; that the preparations could be manufactured at \$1.25 per gallon with a large profit,—the witness Mansfield putting cost of manufacture as follows :

Sarsaparilla 79 cents, and 4 cents for labour, 83 cents.

Sarsaparilla syrup73 cents.

Liquorice liquor.....86 cents.

and these values are expressly corroborated by Gilman and Dewar.

In fact, the bottling, wrappers, directions, trademark and advertising, together with a certain mdei-

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cial value in the preparations themselves, went to make up the value of the completed article in the market.

[Here His Lordship read the evidence of the witnesses Humphreys and Gilman taken at the trial.]

The evidence clearly shows that the fair market value, in the usual and ordinary commercial acceptance of the term, of Ayer's Sarsaparilla, or Ayer's Cherry Pectoral, as placed on the markets of the United States, was the aggregated article as put up for sale, composed of the completed liquid in bottles with Ayer's name on them, corked and sealed with Ayer's trademark, with wrappers and directions surrounding them, considered in the market, in the ordinary course of trade, as one article, as opposed to the article in bulk, which was never placed on the market for home consumption and which we have seen, according to the evidence in this case, had no market value beyond the value of the ingredients of which the liquors in bulk were composed. The putting up of these, in the manner in which they are placed on the markets of the United States, as merchantable commodities, are accessories of the goods and enter into the price, and are not merely meant for the transportation of the goods to the market, but form an element of the intrinsic value of the commodity; and it is only with reference to the article thus put up, that there is a market value of \$7.50 a dozen; therefore, it is the form in which the article is imported that regulates the market value for duty at the time the same is imported, and with reference to form we have seen what Lord Cairns says in *Partington v. the Attorney General* (1).

During the course of the argument, in suggesting the case of a party importing wine or ale, assuming there should be a higher duty on the article when imported in bottles (as, in fact, there is now on the articles of ale

(1) *Ante*, p. 272.

and beer and porter (1)) I asked the counsel for the Crown if a party imported a cask of ale, and entered the goods truly and paid the duty imposed by law on ale imported in casks, if, when the goods were so imported the importer subsequently bottled the ale, could the Customs officer step in and seize the goods on the ground that they were illegally imported with intent to defraud the revenue? The counsel contended that if the importer were a manufacturer or dealer in liquors, and had the intention to bottle when the importation was made, the forfeiture was complete. Then I asked how it would be if a private individual should import a cask of ale for his own use, to bottle in his own cellar, and did so: could it be contended on the part of the Crown that, by reason of the intention to bottle at the time of the importation, the forfeiture was complete? But the counsel would not go so far as that, but drew the line between the manufacturer, or dealer, and the private individual; but I fail to see why the latter, having the same intent as the former, should escape with his ale, and the unfortunate manufacturer, or dealer, have his goods forfeited. Thus, to use a common expression, making fish of one and flesh of the other. But I am clearly of opinion that, if the ale were duly imported in cask, and the legal duty were paid on it, it would be legally imported, and the Customs officers would have no right to inquire what the importer intended to do with it,—whether to drink it in whole or in part, to bottle it in whole or in part, or to sell or dispose of it in bulk or in bottle, as the importer's exigencies, or inclinations, or business, should prompt. I am satisfied no authority can be found to justify the condemnation of an article, which, in the Customs' entry, has been properly described, and on which the legal duty has been paid at the time of importation.

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(1) Customs Tar. 1886-7, Sched. A, Nos. 9-10.

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THE J. C. The term *ad valorem* as used in the customs laws does not always
 AYER denote the actual or intrinsic value of the article. The goods often
 COMPANY. derive a value from the mode in which they are put up for the market.
 Reasons For Judgment. For instance, wine in bottles has a market value exceeding the value
 of the wine by the quantity of gallons when put up in casks. In that
 condition, the bottles truly represent a part of the value. In fact, the
 wine in bottles acquires a market value of its own, distinct from wine
 by the measure and in casks. This is the more evident from the fact,
 that, while wine put up in bottles is thus practically subject to greater
 duty on the quantity than that imported in casks, yet the tariff laws
 impose a distinct and separate duty on the bottles as bottles. *United*
States v. Clement (2). Manifestly, therefore, the enhanced amount of
 duty based on the additional value because contained in bottles is not
 because of the value of the bottles, but of the special market value of
 the wine put up in that condition for the market. Other articles may
 readily be called to mind, the market value of which is derived in a
 special sense because of the manner of preparation for sale. Many
 articles are not sold in bulk at all, and have no usual selling price apart
 from their packing or covering. The packing or covering therefore
 becomes substantially a part of the thing itself. By device of the im-
 porter, in order to lessen the duties, some of these articles may be in-
 voiced by the pound, or measure, or in bulk, but such an invoice
 would not truly represent the market value.

It seems to me only necessary to test this practically to see what, I humbly think, is the absurdity of the proposition. In the supposed illustration, if the ale is imported from England, the bottles from the United States, and the corks from Spain or Portugal, and all duties on such, as provided by the tariff, are duly paid with the full intent, when they respectively reach this Dominion, of bottling the ales in this country and putting it on the market as bottled ale, upon which of these articles does the full duty on bottled ale attach? Is it on the importation of the bottles or the corks, if they should be valued and duty paid, or would the importer be obliged to say to the Customs House officers "we

(1) § 503 p. 209.

(2) 1. Crabbe, 499 : Syn. Treas. Decis. (1884) 5706, 7642.

intend to use these bottles and corks for bottling ale we expect to receive from the United States"? And would the officer be justified in saying "if that is the case you must pay 18 cents a gallon, because you intend to defraud the revenue of the duty on bottled ale."? Or, "I will seize it by reason of your intention to use the bottles and the corks at some future time in bottling ale you intend to import"? Or, is the duty to be imposed on the ale itself when it arrives, as on bottled ale? The duty, in the case suggested, on the bottles or corks having been already paid, I think the importer would naturally ask: under what provision of the tariff do you claim this duty, on the bottles or the corks which have already paid duty, or on the ale as bottled ale which was never imported as such? And unless the Customs officers are much more astute than I am, I think they will search in vain for any authority to justify such unreasonable pretensions.

The simple answer to the whole question is, in my opinion, that there never having been any importation of ale in bottles, and the importer having entered them as bottles, corks and ale in casks, as in truth the articles really were, and the duties imposed by law having been paid and the revenue laws having thus been complied with, there could be no intention of evading them. And so in this case, these proprietary medicines having been imported in bulk, and all duties having been imposed on the various articles imported with them, and the importer having paid the duties prescribed by law, and the goods having been put up, with the material so imported and with the articles purchased in the Dominion, in bottles, the greater part of which were procured in Canada, and the articles having been largely added to and mixed, or manufactured in the Dominion, they were not liable to seizure.

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The case of the *United States v. Breed, et al* (1) puts very strongly the way in which revenue laws should be construed, and the importance of the form in which an article is imported. The Customs laws of the United States are very similar to ours.

In the case I have just referred to, loaf sugar was brought in crushed, on which the Customs authorities sought to make the importer pay as if the article had been brought in in loaves.

STORY, J. said : Revenue and duty acts are not in the sense of the law penal acts ; and are not, therefore, to be construed strictly. Nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial ; and, therefore, to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms ; and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them. We are not to strain them to reach cases not within their terms, even if we might conjecture, that public policy might have reached those cases ; nor, on the other hand, are we to restrain their terms, so as to exclude cases clearly within them, simply because public policy might possibly dictate such an exclusion.

* * * * *

That the sugars in controversy were, at the time of their importation, in form and appearance, white, clayed, or powdered sugars ; that is, that they were white, and clayed, and in powder, is disputed by no one. The whole testimony proves this ; and the whole argument admits it. But on the part of the United States it is contended, that, though this was the form of the sugar at the time of the importation, it was in fact British loaf sugar, highly refined, and that it had been crushed from the loaves and then imported by the defendants, not fraudulently, but *bonâ fide*, openly and without disguise, having been bought by them in its crushed state. And the argument is, that the change of form does not change the thing ; it is still loaf sugar ; and the change of form is a mere evasion of the act.

* * * * *

Nor is there anything extraordinary in Congress taking articles according to their colors, or forms, or any other peculiarity. . . Sometimes the tax is levied upon a thing with reference to the country of its origin ; sometimes according to its colors ; sometimes according to its predominant component material ; sometimes in its raw shape ;

(1) 1 Sumn. pp. 160—166.

sometimes in its manufactured shape ; and sometimes, with reference merely to its form or mode of manufacture, or the vehicle in which it is. Thus by this very act of 1816, ale, beer, and porter in bottles pay different duties from that in other vessels. Wines are taxed differently according to their origin, as Madeira, Sherry, Champagne, Burgundy ; and differently, in some cases, when imported in bottles or cases, from what they are in other vessels. So, raisins in jars and boxes pay a higher duty than those in casks. Green teas pay a higher duty than black. The form of a material is also a ground for a discriminating duty.

* * * We see that here, the form of the material constitutes the discriminating test of the duty. Doubtless in many of these cases the descriptive terms indicate the quality ; not as quality, but as being usually found combined with a particular form or a particular vehicle. It would be absurd to say, that iron did not pay a duty according to its form as designated in the tariff ; and that, if the same quality was imported in bars and bolts, and in sheets, and rods and hoops, all must pay the same duty. So that, however true it may be that the substance may be the same though the form is changed, it does not follow that the form of the substance may not be the very groundwork of the duty.

Here, the article is in a state exactly such as may be dutiable by law under a particular description. Its form is precisely that indicated by the law. And it is assuming the whole question, to say the change of form is an evasion of the act, much more that it is a fraudulent evasion. If the legislature has made the form, or descriptive appellation, the basis of the discriminating duty, then the change of form to meet the discrimination is no evasion, and no fraud.

* * * To constitute an evasion of a revenue act, which shall be deemed, in point of law, a fraudulent evasion, it is not sufficient that the party introduces another article, perfectly lawful, which defeats the policy contemplated by the act, or which supersedes or diminishes the use of the article taxed by the act. There must be, substantially, an introduction of the very thing taxed under a false denomination or cover with the intent to evade or defraud the act.

And in *Cobb v. Hamlin* (1), Clifford, J. says :—

Some descriptions of goods are purchased and sold in the foreign market in bulk, and are subsequently to the purchase and sale put into boxes, packages, or coverings, by the purchaser, for the preservation of the merchandise and the convenience of shipping. Other descriptions are put into boxes, packages, or coverings by the producer, manufacturer, or wholesale merchant in the foreign country, and merchandise

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(1) 3 Cliff. Rep. at p. 200.

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is there purchased and sold for exportation in the boxes, packages, or coverings in which it is so placed by the producer, manufacturer or wholesale merchant. The actual market value, in the former case, does not include the cost of the box, package, or covering within the meaning of that act of Congress (1), as the boxes, packages or coverings in such cases are purchased by the shipper, as the means of preserving the goods and for the convenience of shipment. But no doubt is entertained that the words "actual market value," without more, would include the cost of the box, package, or covering in all cases where the merchandize in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering as well as the goods therein contained. *Bernard, et al v. Morton* (2); *Grinnell v. Lawrence* (3); *Belcher v. Linn* (4); *Knight, et al v. Schell* (5); *Wilson v. Maxwell* (6).

It seems to me monstrous to say that an importer, having openly and legally imported the goods, and duly paid all the duties imposed on the articles imported at the fair value thereof at the time when the same were imported, in accordance with the terms of the tariff, can be declared to have imported such goods with intent to defraud the revenue because he had the mind to do something with them which, had it been done in the country from which they were exported, would have enhanced their value, and consequently made them liable to pay duty on such enhanced value, but which was, in fact, never done, and so the value never was increased at the place of exportation at the time of such exportation. The importer, having paid the duty on the several articles, as named and described in the tariff, at their value in the place of exportation, has the right to deal with, use and dispose of the articles so imported as the exigencies of his business may prompt him.

The question, then, in this case seems really to resolve itself into this: were the Ayers bound to pay

(1) 14 Stat. at Large, 330.

(2) 1 Cur. 412.

(3) 1 Blatch. 350.

(4) 24 How. 535.

(5) 24 How. 530.

(6) 2 Blatch. 35.

duty on the value of Ayer's Sarsaparilla and Cherry Pectoral as put up at Lowell for the United States market, or only on the value of the respective articles imported in bulk, namely, the market value of the ingredients of which the imported articles were composed, and of the wrappers, bottles, corks and other articles required to put them on the market as Ayer's Sarsaparilla and Cherry Pectoral, where a large portion of such articles, particularly the bottles, essential to their becoming a merchantable article and having a merchantable value, were not imported at all, but were procured in Canada? I do not understand that the goods respectively named in the invoices were claimed to have been undervalued; on the contrary, the evidence very clearly shows that they were rather overvalued than otherwise. But were the Ayers bound to enter these goods and describe them as so many bottles of Ayer's Sarsaparilla and Cherry Pectoral, as bottled, corked, labelled with directions in Lowell, and ready to be put on the United States market, and which, if the same had been so put up, would have had a certain market value in the United States, but which, when in bulk as exported, as we have seen, had no market value beyond the value of the ingredients composing the article in bulk and the labor of compounding them? And if described as contended for, it is clear that such description would have been entirely inconsistent with the truth. In point of fact, in the invoices the goods were correctly described and valued, and the duties paid on the respective articles, so entered, in accordance with the express terms of the tariff. I have already enumerated the several articles so entered, and the respective rates of duty imposed on each, and it is unnecessary to repeat them.

The bottling and putting up and the trade-mark, as detailed, were part of the preparation for sale, and an

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integral part of the value of the whole as a unit, ready for home consumption or sale. Therefore, the market value of Ayer's Sarsaparilla consisted in the liquid being found combined in a particular manner and in a particular vehicle, in the form in which it is presented on the market; and, until so put up, it is not in the form or in the condition in which it can be sold, and has no market value. The liquid imported may, or may not, be the same (and in many cases, at any rate, it was not so) as that put up for home consumption; the form in bulk is not the same, and this is the very foundation of the market value. The articles as imported have been correctly described in the invoices and entries, and as, in truth, they only could be described, and the duty on its actual value, as proved, has been paid. Had they been entered as described in the information, they would have been clearly misdescribed

By way of testing this a little further: what would be the position of the Crown, or a purchaser from the Crown, supposing, on entry, the goods had been seized in bulk, and that, under the 103rd and 104th sections of "The Customs' Act, 1883," the Customs Department had elected to take the goods as imported, by adding 10 per cent. to the invoice price: could they have completed the goods by adding the ingredients necessary to do so, or, if the liquids were completed, in either case could the Customs authorities, or a purchaser from them, have bottled the goods with Ayer's name on them, corked and sealed them with Ayer's trademark, covered them with Ayer's labels and directions, and put them on the market as Ayer's goods? I am aware of no authority which would enable the goods to be so dealt with. If not, does not this show that, until dealt with as they were in Canada, they had no market value at the place of exportation beyond the value of the ingredients of which they were composed?

I am satisfied from the evidence that, during the course of the dealings with the importations, and the entry and passing of these goods through the Custom House, there was no question in the minds of Underhill or the Ayers in relation to any irregularity connected with the Customs, unless, indeed, they feared the goods might be considered liable to the spirit duty, and endeavored to escape it. Indeed, I think that Underhill, in his dealings with the Custom House in regard to the valuation of the goods, was a much more honest and truthful man than he would now have us believe he was, and that it was not until the spirit duty was disposed of, that, to gratify his revenge and, at the same time, secure the many thousand dollars he evidently anticipates receiving if he can secure the condemnation of these goods and the infliction of the forfeitures, that he raised the question of undervaluation. Notwithstanding Underhill's repudiation of the honesty and truthfulness of his own conduct in connection with the entering of the goods, during the long period he conducted the business of the Ayers, at St. John's, I am inclined to think better of him during that long period; and I am inclined to think, also, that it was not until he desired to revenge himself on the Ayers, and had the prospect placed before him of doing so, and at the same time realizing thousands of dollars by the operation, that he became alive to the fact of his own alleged turpitude. I am of opinion that the only doubt entertained by the Ayers, or Underhill, was in relation to the spirit duty; and it was that duty, and that duty alone, the Ayers, or Underhill, feared and were desirous of escaping. I am of opinion that, with reference to the entries in every other respect, the conduct of the Ayers was open and above board, and that every facility was afforded to the Customs officers to examine, appraise and establish the rate of duty to

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which the goods were liable; and that the officers of the Customs House availed themselves of such facilities; and that the said goods were passed by the Customs after repeated examination and reference to the appraisers, with full knowledge of the nature, and, it must be presumed, with like knowledge of the value of the goods.

A question having arisen as to the spirit duties, the Minister of Customs investigated the matter and considered it in view of the way in which the entries of the goods had been treated. Having done this he made the following order:

OTTAWA, 24th Nov., 1883.

DEAR SIR,

I have your favour of 22nd inst., *re* J. C. Ayer's importations.

I have to inform you that the decision of the Department is that no action will be taken relative to past transactions so far as they affect the spirit duty, errors having partly arisen from the action of the Customs officers; but all future importations will be rated at the correct duties.

The collector will be instructed accordingly.

Yours truly,
 (Signed) M. BOWELL.

John Black, Esq.,
 St. John's, P. Q.

The following letter was also sent by the Commissioner of Customs to the Ayers:

CUSTOMS DEPARTMENT,
 OTTAWA, 28th Dec., 1883.

SIRS,

In reply to the letter of your Mr. E. A. Bigelow, requesting that past entries of your goods may be allowed to stand as they are, I have the honour to inform you that the Honourable the Minister of Customs has complied with your request; but in all future entries the correct rate of duty, on the fair and ordinary market value, will be enforced.

I have the honour to be, Sirs,

Your obedient servant,
 (Signed) J. JOHNSON,
 Commissioner of Customs.

Messrs. J. C. Ayer & Company,
 Lowell, Mass., U.S.A.

This appears to me to have been the only controversy at that time, and it having been disposed of, and this ground of complaint having been so removed, and the subsequent entries having continued as formerly, (with the exception of the imposition of spirit duties) and there having been no order-in-council under the section of the act referred to, I am of opinion that the idea of the goods not having been entered at their market value, or of there having been fraudulent undervaluation with intent to defraud the revenue, was an after-thought, and a scheme concocted by O'Hara, Brousseau, Underhill and Flint, when the spirit duty was ignored and settled as to the past by the Minister, and the duty afterwards duly paid, to secure the condemnation and forfeiture of goods as to which no question had arisen for twenty odd years.

There are two or three other matters which came under my notice on the hearing of this cause which I dare not, without a dereliction of duty, pass over in silence.

The books of the Ayers's business kept by the agent Underhill at St. John's, having been surreptitiously obtained through the instrumentality of one Flint, without, as Underhill states, his knowledge, and having come into the possession of the Customs House authorities at Montreal, an order of one of the judges of the Supreme Court of Canada was obtained, directing that the claimants should be allowed to inspect these books and the papers and documents in the possession and custody of Mr M. P. Ryan, Collector of Customs, at the Port of Montreal, specifying particularly the books kept by one Underhill,—as to which it appeared in evidence that the Assistant-Commissioner of Customs, in a letter to the Deputy Minister of Justice, says "the books and documents procured from Mr. Underhill are, I understand, in the private keeping of

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1887 the Collector at the Port of Montreal, and of course,
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Though these books were the property of the Ayer Co., the claimants, and though it was ordered that they should be allowed to inspect them, and although they were duly applied for under this order, and the order was served on the Collector with the knowledge of O'Hara, instead of being forthcoming when required by the order, as most certainly they should have been, they never were produced, and the claimants were never allowed access to, or inspection of them; and, from the evidence of O'Hara, they were evidently kept secreted in the safe of the Customs House, at Montreal, for the express purpose of preventing the access and inspection so ordered.

It appeared, also, that efforts were made to effect service of a subpoena on Underhill; and, instead of assisting the claimants to accomplish this object, or remaining quiescent in the matter, O'Hara and Brousseau aided the witness to keep out of the way,—O'Hara by suggesting to the Collector, to be communicated to the solicitor of the claimants, what he, O'Hara, knew to be false,—and Brousseau, as he admits, by down-right untruths.

The conduct of O'Hara in thus conniving at the concealment of the books, and setting at defiance the order of the judge, the aiding of a witness to keep out of the way of the service of a subpoena by the claimants, the false suggestion of O'Hara (who, as to this false suggestion, when asked if it was not made to deceive, he says: "I suggested that because the witness did not wish to come into court until called by the Crown, and I did not wish to afford any information to the other side"), and the downright untruths admitted by Brousseau himself; the conduct of Brousseau in trafficking, or endeavoring to traffic, in the proceeds

which he had evidently made up his mind he and Underhill, beyond all peradventure, were to make out of this seizure, and the equivocating and discreditable manner in which both these officers gave their testimony, are open, in my opinion, to the gravest censure.

I regret, in the interests of justice, and of the business community of the Dominion who may have controversies with the Customs officials, to be compelled to make these observations in reference to persons, holding responsible positions in the Customs Department, at Montreal, whose duty it most certainly was to have obeyed the order of the Supreme Court, instead of setting it at defiance, and, if not to have aided, certainly not to have thrown obstacles, by false suggestions and false statements, in the way of effecting service of subpoenas on witnesses the claimants desired to have examined. With reference to the conduct of these witnesses, considering the peculiar position in which they stood, it should have been marked by the greatest propriety, and with the same desire and disposition to answer all questions, as well those on the part of the claimants as those on the part of the Crown, with fairness, honesty and truthfulness,—which, I very much regret to say, was far from being the case. In other words, they should have acted as public officers in the discharge of a public duty, desirous only that justice should be done alike to the Crown and to the claimants. Surely, the public, having controversies with the Customs, are entitled to this measure of justice; and certainly the Customs officers should not act, as their conduct would seem to indicate in this case, as partizans having a deep pecuniary interest in the result, and with an apparent determination to effect, at all hazards, a condemnation.

In conclusion, then, I find that a large amount of material was purchased in Canada to complete the

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articles, and that the principal part of the bottles, stamped with the name of Ayer & Co., and of the medicines and boxes for the pills, were bought in Canada.

I find, as a fact, that the goods mentioned in the first count of the information *in rem* were never smuggled nor clandestinely introduced into Canada, at the Port of St. John's: that no bottles of Ayer's Sarsaparilla, Cherry Pectoral, Hair Vigor or Ague Cure were ever introduced or brought into Canada, as alleged.

As to the second count, I find as a fact that, between the 23rd May, 1882, and the 22nd May, 1885, there was no proof that any person, with intent to defraud the revenue, did make out and attempt to pass, and did pass, through the Customs House, at the Port of St. John's, any fraudulent invoice of certain goods consisting of 4349 doz. of Ayer's Sarsaparilla, etc., [as specified in the information *in rem*, ante p. 234] that no such goods were passed, or attempted to be passed, through the said Customs House.

As to the third count, I find as a fact that, between the 23rd May, 1882, and the 22nd May, 1885, no attempt was made to evade, nor was there evaded, the payment of part of the duties on certain goods which consisted of 4349 doz bottles Ayer's Sarsaparilla, etc., by entering the said goods much below their proper value, with the intent of defrauding the revenue of the duties properly payable upon the said goods, at the proper value thereof: that no such goods as 4349 doz. bottles of Ayer's Sarsaparilla, etc., were entered at the Customs House as alleged in the said third count.

As to the fourth count, based upon section 155 of "The Customs Act, 1883," which enacts that :

If any person knowingly harbours, keeps, conceals, purchases, sells or exchanges any goods illegally imported into Canada, (whether such goods are dutiable or not), or whereon the duties lawfully payable have not been paid, such person shall, for such offence, forfeit treble the value of the said goods, as well as the goods themselves.

I find that it is not proved that certain persons, between the 23rd of May, 1882, and the 22nd of May, 1885, did knowingly keep and sell certain dutiable goods consisting of 4349 doz. Ayer's Sarsaparilla, etc., which had been illegally imported into Canada, and whereon the duties lawfully payable had not been paid, because I find, as a fact, that no such goods have been imported into Canada.

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As to the fifth count, under section 108, to the effect that if any goods are found upon an entry of goods which do not correspond with the goods described in the invoice or entry, or if the description in the invoice or entry has been made for the purpose of avoiding payment of the duty, or of any part of the duty, on such goods, or if in any entry any goods have been undervalued for such purposes, such goods shall be forfeited : I find as a fact that, between the 23rd May 1882, and the 22nd May, 1885, no entries were made of 4349 doz. bottles Ayer's Sarsaparilla, etc., but that the goods entered corresponded with the goods described in the invoice or entry, and that the invoice or entry was not made for the purpose of avoiding payment of the duty, or any part of the duty, on the goods so entered, nor was the entry of the goods undervalued for such purpose.

And, as to the sixth count, under section 109 which enacts, in effect, that if the oath made with regard to any entry is wilfully false in any particular, all the packages and goods included in such entry shall be forfeited : I find as a fact that, between the 23rd May, 1882, and the 22nd May, 1885, there was not imported and introduced, for use in Canada, patent medicines and medicinal goods consisting of 4349 doz. bottles Ayer's Sarsaparilla, etc., with intent and design of defrauding the revenue ; and, therefore, that no person, with intent and design of defrauding the revenue of

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Canada, did make, or could have made, oaths with regard to the entries, therein representing that portions of the said goods consisted of crude drugs and materials in bulk of which the said patent medicines were compounded, they well knowing the said representations and statements to be wilfully false and untrue.

The Crown, therefore, has failed to establish the charges in the informations against the Ayer Co., i.e., that the goods seized were illegally imported, or that they were undervalued, or that the entries did not correspond with the invoices, and that the oaths or affirmations made in entering them were untrue. There being, therefore, no foundation for the seizure of the said goods, I order and adjudge that they be forthwith restored to the claimants, and the information *in rem* dismissed with costs.

Furthermore, the charge of undervaluation not being sustained, it follows that there were no goods illegally imported into Canada, and that there are no unpaid duties for which the claimants are liable; the information *in personam*, therefore, must also be dismissed with costs.

After the evidence had been gone through, the counsel for the Crown applied for leave to amend his pleadings so as to charge the claimants with illegally importing medicinal preparations in bulk, but I was of opinion that, under the peculiar circumstances of this case, I should not allow this amendment, but that the case should be decided on the informations, pleadings and evidence as they appeared at the hearing. I am now of opinion that had I allowed the amendment, in the view I take of the case, it would not have altered the result of the judgment I am now delivering herein.

Informations dismissed with costs.

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

Solicitors for defendants: *McMaster, Hutchinson & Weir.*