

Case No. 4,625.

[5 Blatchf. 38.]<sup>1</sup>

FALLECK v. BARNEY.

Circuit Court, S. D. New York.

Feb. 12, 1862.

CUSTOMS DUTIES—UNDERVALUATION—DISCHARGE OF FORFEITURE  
PROCEEDINGS—PENALTY—RECOVERY BACK—PROTEST—MERCHANT  
APPRAISER—WAIVER OF OBJECTIONS TO HIS QUALIFICATIONS—DEPUTY  
COLLECTOR—ADMINISTRATION OF OATH.

1. After imported goods have been seized by a collector, as having been invoiced and entered below their value, to defraud the revenue, and have been libelled for forfeiture, and discharged on a trial, the collector may still impose upon them the additional duty of twenty per cent ad valorem, for undervaluation, provided for by the 8th section of the act of July 30, 1846 (9 Stat. 43).
2. If such additional duty is paid, it cannot be recovered back, unless a proper protest against its payment is made at the time of such payment.
3. A deputy or acting collector has power to appoint a merchant-appraiser, on a re-appraisement, and to administer the oath to him.

[Cited in *Chadwick v. U. S.*, 3 Fed. 753.]

4. All objections to the qualifications of the merchant-appraiser must be made at the time of the re-appraisement. If not so made, they will be deemed to have been waived.

This was an action against [Hiram Barney,] the collector of the port of New York, to recover back an alleged excess of duties paid under protest by the plaintiff [Baer Falleck], on a quantity of diamonds imported into the port of New York. After entry of the diamonds was made, they were appraised by one of the general appraisers, and the appraised value, as fixed by him, exceeded, by more than ten per cent., the value declared in the entry. The plaintiff, not being satisfied with this appraisement, gave notice of his dissatisfaction to the collector, as

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he had a right by law to do, and the collector appointed a merchant-appraiser to act, in a re-appraisalment of the diamonds, with one of the general appraisers. The re-appraisalment resulted in no reduction of the value fixed in the original appraisalment. In the meantime, the diamonds were seized by the collector, as forfeited to the United States, on the alleged ground that they were originally invoiced and entered below their value, with intent to evade the payment of duties and defraud the revenue. A libel was filed in the district court to forfeit the property, and, upon a trial before a jury [case unreported], a verdict was rendered for the claimant, the present plaintiff, and the property was discharged. The collector then imposed the additional duty of twenty per cent. ad valorem, provided for by the 8th section of the act of July 30, 1846 (9 Stat. 43). This additional duty was paid by the plaintiff under protest, in order to get possession of the property, and this action was brought to recover back such additional duty.

Martin V. B. Wilcoxson, for plaintiff.

E. Delafield Smith, Dist. Atty., for defendant.

SHIPMAN, District Judge (charging jury). The first point raised by the plaintiff is that, when the collector had instituted proceedings to forfeit the property, and failed, his power was exhausted, and he could not then legally exact the twenty per cent. additional duty. But I do not think this position can be sustained. The exaction of the twenty per cent., when the appraised value exceeds, by ten per cent. or more, the value at which the property was invoiced and entered, is imperative on the collector. He has no discretion in the matter. The law fixes his duty. The seizure of the property and the determination of the proceedings in the district court in favor of its owner, cannot affect the question.

But, if this were a valid objection to the exaction of the additional duty, it should have been stated in the protest. It has been repeatedly decided, that no objection can be made, in an action of the present character, to the validity of the duties demanded, which is not distinctly and specifically set forth in the protest. The protest, in this case, does not allude to the matter now set up, as one of the grounds of objection to the payment, and, therefore, it cannot be urged on this trial. The statute which requires the grounds of objection to the payment to be set forth in the protest applies to this additional twenty per cent., as well as to the ordinary rate of duty. This is well settled.

We must look, then, to the protest alone, for the grounds upon which the plaintiff's case rests. The protest objects to the validity of the appraisalment, on the ground that the appointment of the merchant-appraiser was made by a deputy or acting collector, and that the oath was administered to such appraiser by him. But, it was held in *U. S. v. Barton* [Case No. 14,534] that a deputy collector was a permanent officer of the customs and could lawfully perform the duties of the collector. I see no reason to distrust that decision, especially as it seems to have been generally acquiesced in, and the practice under it has become universal.

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The protest also raises the point that the person who acted as merchant-appraiser was not a discreet or experienced merchant, within the true intent and meaning of the act of congress. It is a sufficient answer to this objection, that it comes too late. The importer who sought the re-appraisal was present, or had notice to be present, at the time and place when and where the goods were to be appraised, and should have made his objections to the qualifications of the appraiser then, if at all. As he did not do so, he must be deemed to have waived them, and cannot now set them up.

The defendant is entitled to your verdict.

<sup>1</sup> [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]