25FED.CAS.—27

Case No. 14,787.

UNITED STATES v. CHASE et al.

[25 Int. Rev. Rec. 161.]

District Court, D. Massachusetts. May 26, 1879.[1]

CUSTOMS DUTIES—PROTEST—ACTION TO RECOVER BALANCE.

1. Act June 30. 1864, § 14, Rev. St. § 2931 [13 Stat. 209], making the decision of the collector of customs of the port where merchandise is entered final and conclusive as to the rate and amount of duties on such merchandise unless the importer pays the amount claimed, and duly protests, appeals, and brings suit for its recovery, applies not only in cases where such collector errs in judgment as to the proper rate and amount of such duties, but also where there are informalities and irregularities on the part of the customs officers respecting the appraisal of such merchandise, such as would enable the importer to recover his money back if he had duly protested appealed, and brought suit therefor.

2. In this case it appeared that the collector did not designate in the invoice the requisite number of sample bales for examination, nor did the appraisers make proper examination of the merchandise in question, and the said merchandise was in fact erroneously classified to the prejudice of the importer; but the appraiser made a certificate of appraisal in due form, and the collector made final liquidation of the duties on the basis of the appraiser's report, and the importer, having already paid the estimated duties, refused to pay the balance demanded. *Held,* that in a suit by the government against the importer to recover such balance, the importer could take advantage of none of the above facts in his defence.

This was an action of debt to recover a balance of duties alleged to be due on certain manufactures of jute, most of which are commonly known as "double warp bagging" or "Dundee bagging," imported into the port of Boston from Liverpool at various dates in 1870. The invoices showed that the merchandise in question was a manufacture of jute valued at over ten cents per square yard.

It appeared in evidence that from the time of the passage of the act, similar merchandise had paid a duty of 35 per cent. ad valorem under the provisions of Act June 30, 1864, § 7, el. 1 (13 Stat. 209); and at the time of the entry of the goods, duties were estimated on that basis, and paid by the defendants [Henry S. Chase and others], and the merchandise delivered to the importers. On each invoice the collector designated certain packages for examination, but on none of them did he so designate one package in ten, nor in any case was one package in ten sent to the appraiser's store for examination. In but one of the importations was any package sent to the appraiser's store which contained double warp bagging, and the sample packages in every instance were in a few days thereafter sent to the importers, and all the goods were speedily sold. There was no evidence of actual examination of any of these goods by the appraisers in person, but the testimony tended to show that the assistant appraiser made some examination; and upon the invoices he reported as had previously been done in respect to double warp bagging, that

the merchandise was a manufacture of jute under 30 cents per square yard, and dutiable at 35 per cent. ad valorem. He then handed the invoices with his report thereon to the appraiser for final action.

The appraiser appeared to have delayed final action for several months, and testified that he, before such action, ascertained that double warp bagging was then extensively in use for cotton bagging; and being satisfied it had theretofore been wrongly classified, he made appraisement and report as to double warp bagging as follows directly under the report of the assistant appraiser:

"Manufacture of jute suitable for the uses to which cotton bagging is applied exceeding 10 cents per square yard, change from 35 per cent. to 4 cents per pound;" thus reporting the merchandise as being dutiable under clause third of the section above named. The appraiser at the same time made certain additions to the invoiced and entered value of other merchandise imported

with the double warp bagging. These certificates of the appraiser appeared to have been made without any examination of the goods by him, and without reference to examination by his assistant, and long after the sample packages had left the custom house, and all the goods had been sold and gone into consumption. The invoices with the above certificates were thereupon sent to the collector's department, and notice of the above advances in values was sent the importers on May 17, 1871. No appeal was taken to merchant appraisers. A few days later, the final liquidation of the several entries above named based on the appraiser's report was made by the collector, and notice thereof was duly posted and special notice thereof sent the importers on the same day. They denied the right of the collector to impose these additional duties, but made no formal protest or appeal; and the said suit was brought to recover a balance of $1,403.67, alleged to be due on the double warp bagging whereof the classification was changed as above stated, and a balance of $180.35 on the merchandise whereon the value had been advanced by the appraiser.

It was not denied on the part of the government that the appraiser was in error in classifying the double warp bagging as being suitable for the uses to which cotton bagging was applied, and that the collector was in fault in neglecting to designate on the invoice for examination one package in ten of each importation, and that neither the appraiser nor his assistant in fact had made such examination of the merchandise as the law requires in order to render an appraisement value; but it was claimed that the collector's decision as to the rate and amount of duties was final under section 14 of the said act, and that the defendants had neglected to take advantage of their only legal remedy for these errors and irregularities since they had not paid the amount claimed, and duly, protested, appealed, and brought suit against the collector for its recovery.

The defendants contended that there had been no legal decision of the collector in this case; that the collector had no jurisdiction of the question until there had been an appraisement, and that there not only had been none in this case, but that the collector could but know it, since he had failed to specify on the invoice the sample packages requisite to make a valid appraisement possible; and that his decision therefore was wholly void.

It was replied in behalf of the government that the statute on its face gave the collector jurisdiction to determine the rate and amount of duty, provided there was an entry of merchandise through the custom house of which he was in charge, and that on the entry of merchandise he could determine the rate and amount of duty without any appraisal, and the remedy of the importer would be by protest and appeal and bringing of suit, or possibly by an action for damages against the collector; but that if an appraisal was necessary in order to give the collector jurisdiction, the appraiser's certificate in due form (like an officer's return on a writ) was such evidence to the collector of an appraisal as to give him jurisdiction; that the cases of U. S. v. Frazer [Case No. 15,161], in the United States

district court for the Southern district of New York, and U. S. v. Rodocanachi [unreported], in the circuit court of the United States for the district of Massachusetts, cited by the defendants, were not applicable to the state of facts in this case, since in both these cases the collector had undertaken to revise a final decision and liquidation already duly made; that if the decision of the collector was absolutely void where there had been no valid appraisal, it would not be necessary to set out the irregularities complained of in a protest even in suits against the collector, whereas the cases of Burgess v. Converse [Id. 2,154], s. c., 18 How. [59 U. S.] 413, and Schmaire v. Maxwell [Case No. 12,460], expressly held that such informalities as were here complained of could only be taken advantage of where properly set out in such protest.

After the evidence was all in, it appeared that there was no dispute as to the facts, but that the only question was the question of law, whether the collector in this case had decided the rate and amount of duty within the meaning of section 14 above referred to.

P. Cummings. Asst. U. S. Atty.

C. L. Woodbury, for defendants.

NELSON, District Judge, thereupon said in substance that he had given the matter careful consideration in order to see if any valid defence existed against the government claim, since it appeared that the collector had in the final liquidation assessed a heavier duty on the merchandise imported than was imposed by the law properly construed. That the cases of Westray v. U. S., is Wall. [85 U. S.) 322, and U. S. v. Cousinery [Case No. 14,878], which both parties to this controversy conceded to be law, were to the effect that the decision of the collector was final where the appraiser and collector had made errors of judgment in determining the rate and amount of duties on imports, and where all the proceedings were regular in form; but that in this case there were irregularities in the mode of procedure of those officers as well as an error of judgment, yet that the provision of law making the decision of the collector final unless there be due protest, appeal, and bringing of suit, was intended to apply also to informalities and irregularities such as were here complained of; that it was

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which was passed long before there was any act relating to stamps in force. One of the conditions is in the language of section 7 of said act that the principal "shall truly and faithfully continue to execute and discharge all the duties of the said office according to the laws of the land." These duties were specifically defined by section 6 of the same act, and another condition of the same bond follows substantially the language of that section, and is, that "he shall truly and faithfully continue to execute and discharge all the duties of the said office, according to the laws of the United States, and moreover has well, truly and faithfully kept and shall well, truly and faithfully keep safely without loaning, using, depositing in bank or exchanging for other funds than as allowed by the act of congress hereinafter specially referred to and described, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same has been or shall be ordered by the proper department or officer of the government to be transferred or paid out; and when such orders for transfer or payment have been or shall be received, has faithfully and promptly made, and shall faithfully and promptly make the same as directed, and has done and shall do and perform all other duties as fiscal agent of the government, which have been or may be imposed by any act of congress, or by any regulation of the treasury department made in conformity to law; and also has done and performed, and shall do and perform all acts and duties required by law, or by direction of any of the executive departments of the government, as agent for paying pensions, or for making any other disbursements which either of the heads of these departments may be required by the law to make, and which are of a character to be made by a depositary constituted by an act of congress, entitled 'An act to provide for the better organization of the treasury, and for the collection, safe keeping transfer, and disbursement of the public revenue,' approved August 6, 1846, consistently with the other official duties imposed upon him; then this obligation to be void and of none effect," etc.

The language of the statute and of the condition is very broad, but the words must be taken as having reference to such duties only as have some natural relation to the ordinary duties imposed upon the particular officer, who gives the bond. The language prescribing the duties is the same for "all collectors of customs, all surveyors of customs acting also as collectors, all assistant treasurers, all receivers of public moneys at the several land offices, all postmasters and all public officers of whatsoever character." All these officers are provided for in the same section. It can hardly be supposed that congress intended that the words "all other duties as fiscal agents of the government which may be imposed by this or any other act; in the section prescribing the duties of the officers mentioned and which is inserted in the treasurer's bond, in suit, should include the duties of collectors of customs, receivers of land offices and postmasters in case congress should, after giving the bond, see fit to impose the duties of such officers on the as sistant treasurer.

If so, then the duties of all officers, who have anything to do with the moneys of the government, might be imposed on an assistant treasurer, and the liabilities of his sureties extended far beyond anything contemplated at the time of the execution of the bond. We think these words only intended to include such duties as naturally and ordinarily belong to the particular officer giving the bond, or have some obvious relation to such duties, and such as the sureties acquainted with the duties of the various public officers as usually devolved upon them by law, might reasonably be expected to contemplate at the time of executing the bond, as likely to be imposed upon their principal in case the exigencies of government should require it; and not those duties which are usually imposed upon, and more appropriately belong to, an entirely different class of officers. Thus the duties of treasurers are usually to keep safely, and pay out upon lawful authority the public moneys, not to act as collectors of customs, postmasters, receivers of land offices, or other officers engaged in collecting the different branches of the public revenues. Treasurers are ordinarily understood to be keepers of the public funds collected by other classes of public officers to whom those specific duties are specially assigned. We do not think the words of the treasurer's bond under consideration would cover the duties of collectors of customs, etc., imposed by the act of congress or a regulation of the treasury department after the giving of the bond. The sale of stamps required by act of congress to be used upon certain specified merchandise and written instruments, is one mode of raising and collecting revenue; and the furnishing of stamps to the assistant treasurer for sale to other parties in pursuance of section 170 of the act of 1864, is but making him an agent for the sale of stamps, and collection to the extent of sales of that branch of the public revenue. The stamps themselves are not money. There is no natural or necessary connection of this service with the ordinary duties of that officer, as treasurer. The service is more appropriate to other officers, whose duties are to collect revenue, and it was at first imposed on that class of officers. Section 102 of the act of July 1, 1862, as has been seen, authorized the commissioner to "supply collectors, deputy collectors, postmasters, stationers and other persons (without naming assistant treasurers), at his discretion with adhesive stamps," etc., "upon payment at the time of delivery" of the amount of duties "said stamps represent;" and to allow five

per cent as commission, providing also for a return of such as were not used. Section 161 of the act of June 30, 1864, made a similar provision as to similar parties, the supply to be made upon payment, and also authorized the delivery of stamps to certain manufacturers, without payment upon giving satisfactory security for payment within sixty days. Section 170 of the same act authorized the commissioner of internal revenue in those districts where in his judgment the facilities for distribution of stamps were insufficient, to furnish to the collector and assessor of the district, and to any assistant treasurer, or any postmaster, a suitable quantity of stamps "without payment therefor," and to allow the highest rates of commission allowed other parties purchasing the same; and provided that the "commissioner may in advance require of any such collector, assessor, assistant treasurer of the United States, or postmaster, a bond with sufficient sureties to an amount equal to the value of any stamped vellum, parchment or paper and adhesive stamps which may be placed in his hands and remain unaccounted for, conditioned for the faithful return, whenever so required, of all quantities or amounts sold or not remaining on hand."

Thus it will be seen that under section 161, the stamps were to be supplied to certain officers and persons only on prepayment of the amount represented by the stamps, less commissions, to certain manufacturers on credit upon giving security, and under section 170 they might be supplied for sale on similar commissions to certain officers named without prepayment, in the discretion of the commissioner, but he was authorized to require security and the condition of the bond is prescribed. Some of the officers mentioned in both sections are the same, as postmasters and collectors. It seems to be a fair inference from these sections that congress intended that there should be in all cases either prepayment of the value less commissions, or special security given for the faithful performance of this particular duty.

Why require prepayment of collectors and postmasters in section 161, if their official bonds as collectors and postmasters already given covered the duty? or why authorize the supply of stamps to these same officers in section 170 of the same act, and require other special security, if it was contemplated that their bonds as collectors and postmasters already given protected the government? These officers, like assistant treasurers, give bonds for the faithful discharge of their duties which are prescribed by section 6 of the act of 1846. If the assistant treasurer's bond under that act covers the liabilities by reason of the provisions of section 6, the same must be true of the collectors' and postmasters' bonds. It seems very evident to us that congress intended that the specific bond authorized by section 170 of the act of 1864 should be given to cover the specific duty devolved upon the stamp agents provided for in that section, that is to say, when stamps are delivered without prepayment. The language is not that an "additional" bond shall be required, but that "a bond with sufficient sureties" may be required. If congress had contemplated that a bond as assistant treasurer should cover this duty, there would have been no need of

this bond, or if it had supposed the bond already given insufficient, it would naturally have authorized an additional bond as in case of the bullion fund with a condition covering all duties instead of limiting the responsibility to that particular duty. The bond in question was given after the passage of the act of 1864, yet it does not contain the condition prescribed by section 170 to cover the duties of the assistant treasurer as stamp agent, and makes no reference to it. It does, however, refer in terms to the act of 1846 and to the act of 1850 relating to a bullion fund, and purports to have been executed in pursuance of those acts. It seems to refer specifically to all duties intended to be covered. "Expressio unius est exclusio alterius." The parties executed the bond, and the secretary of the treasury accepted it in this form. If it was intended to cover the duties of the assistant treasurer as stamp agent under the act of 1864, it is reasonable to presume that the secretary of the treasury would have required the conditions prescribed by section 170 to be inserted, or at least to have required some reference in the bond to those duties, or to that act. The secretary prescribes the form of the bond.

We think the reasonable conclusion is, that congress intended to require a distinct and separate bond containing the conditions prescribed in section 170 of the act of 1864, to cover the duties of stamp agents provided for in that act; that as the bond in suit was given since the passage of the act of 1864, and does not contain the conditions prescribed by that act, and makes no reference to the act, but only refers to the acts of 1846 and 1850. the sureties might have reasonably supposed, and were entitled to suppose, that another bond would be given to cover the service of stamp agent, should the commissioner exercise his discretion, and require that service of the person acting as assistant treasurer, and that their liabilities upon the bond were limited to the duties of assistant treasurer and treasurer of the mint, and such duties as usually pertain to that office, and as they existed under prior acts of congress; and that they are not liable on the bond in suit for the delinquencies set out in article 8 of the complaint.

The result is that the averments of said article are immaterial, and should be stricken from the complaint, and it is so ordered.

[1] [Affirmed in 9 Fed. 882.]