

UNITED STATES V. GEORGE ET AL.

{6 Blatchf. 406.}¹

Circuit Court, S. D. New York.

April 16, 1869.

CUSTOMS

DUTIES—FORFEITURES—DISTRIBUTION—AUTHORITY
TO COMPROMISE—INFORMERS.

1. The proper course of practice, where claims are made by the United States, by customs' officers, and by informers, to a fund in court, paid in under the laws relating to the customs.
2. There is no statute of the United States which forfeits the value of dutiable goods which have been unlawfully removed from a bonded warehouse, without payment of the customs duties.
3. Customs' officers and informers are entitled to share only in fines, penalties, and forfeitures which are created by some law of the United States.
4. The authority to compromise, conferred on the secretary of the treasury by the tenth section of the act of March 3, 1863 (12 Stat. 740), is not an authority to compromise criminal prosecutions.
5. The authority so conferred, defined and explained.
6. The secretary of the treasury has no power, under any act of congress, to compromise criminal proceedings pending in court.
7. Duties are not simply a charge upon merchandise, to be collected only by means of the custody of the property, but are a personal debt against the importer, which may be collected by a civil action.

{Cited in U. S. v. Boyd, 24 Fed. 691.}

8. Money in the registry of the court, which is shown to have been demanded by the United States as duties, to have been due as such, and to have been paid as such, must be distributed by the court as such.
9. The rights of customs' officers and informers are rights which should be carefully protected.
10. In a contest between informers, he is the informer, who, with the intention of having his information acted upon,

first gives information of a violation of law, which induces the prosecution and contributes to the recovery of the fine, penalty, or forfeiture which is eventually recovered.

[Cited in *U. S. v. Simons*, 7 Fed. 712.]

This was a controversy between the customs' officers and certain informers on the one hand, and the United States on the other, and also between the informers, among themselves, in regard to the distribution of a certain fund, which originally consisted of \$59,722 in gold, and \$32,000 in currency, and which was paid into the registry of this court under the following circumstances: In the summer of 1867, the officers of the customs, having discovered that great frauds upon the government had been perpetrated by persons doing business in the city of New York, under the name of J. W. George & Co., by means of the withdrawal, without payment of duties, of dutiable merchandise, from their bonded warehouse, Nos. 290 and 291 West street, criminal proceedings were instituted against the offenders, in which several of them were arrested and held to bail for trial, and a civil action for duties, amounting to \$400,000, was commenced in the district court, against one of them named Henry Hart, in which suit a large amount of real estate and personal property was attached. A quantity of segars, appraised at some \$25,000, was also seized by the collector, as forfeited by reason of these frauds. Pressed by these proceedings, the offenders commenced negotiations with the officers of the government, which terminated in an agreement, made at Washington, with the secretary of the treasury, by which it was arranged that the offenders should pay to the United States the sum of \$59,722 in gold, for the duties on the segars, brandy, rum, gin and wine withdrawn by them without payment of the duty, and also \$32,000 in currency, as penalties for the illegal abstraction of such bonded merchandise; and that upon such payment, the government should discharge all the property which had been attached or seized, and release the offenders from all civil and criminal liabilities relating to the illegal transactions. Accordingly, instructions were issued to the district attorney to carry into effect this arrangement, and the offenders proceeded to make the payment agreed on. This payment, however, by arrangement with the district attorney, was not made in the action for duties which was pending in the district court; but a new, and, in some sense, a friendly action of debt was commenced in this court, not for duties but for penalties and forfeitures, amounting to the sum agreed on, namely, \$59,722 in gold

and \$32,000 in currency, in which action judgment was confessed on the same day, and the same was satisfied, on the payment into the registry of this court of the sums demanded. At the same time, the property attached in the action pending in the district court was released from custody, and all the criminal proceedings were stopped. The segars held under seizure by the collector were also directed to be released, on due entry and payment of the duties to the collector. There being thus \$59,722 in gold, and \$32,000 in currency, in the registry of this court, a controversy arose respecting the rights of the customs' officers and the informers in this fund, it being claimed, by the officers and the informers, that no part of it was duties, but that it was all penalties and forfeitures, and, as such, distributable, one-half to the government, one-fourth to the customs' officers, and one-fourth to the informers. [See Case No. 15,197.] A controversy also arose between the parties claiming to be the informers 1278 in regard to their respective rights. One-half of the gold and one-half of the currency being clearly payable to the United States was so paid, by consent, and one-half of the residue of the currency, admitted to be payable to the collector, was paid, by consent, thus leaving in the registry \$29,861 in gold, and \$8,000 in currency. To one-half of this \$29,861 in gold the customs' officers laid claim, and the informers claimed the other half, as well as the balance of the currency. These several claims were set forth by petitions, under which, by order of the court, testimony in behalf of all the parties was taken by the clerk. Upon these petitions, and some 363 pages of testimony, with a mass of exhibits the case now came before the court for its determination.

Simon Towle, for the United States.

Clarence A. Seward. Christopher Fine and Asa W. Tenney for the several informers.

BENEDICT, District Judge. The course of procedure adopted in this matter appears to have been somewhat irregular. A more proper practice would have been, for the customs' officers and the informers to have set forth. Their claims to this fund by petitions, to which answers should have been interposed by the government, and, upon the issues thus framed, and the testimony adduced by the respective parties, in support of their allegations, a decree could have been rendered, with less danger of confusion and mistake.

The respective parties petitioning here seem to have treated each petition as an answer to the others; and the customs' officers appear to have considered themselves entitled to prove their case under the petition presented by the United States. But, as all parties have spread out their case very fully in the evidence, and as all the points in controversy have been considered and argued by the counsel, without objection, as if duly pleaded, it appears unnecessary to direct the proceedings to be reformed.

In considering the questions thus presented, it will be convenient to examine, first, the claim made by the customs' officers and the informers to the portion of the fund consisting of \$29,861 in gold. The claim in regard to this is, that the \$59,722 in gold, of which the \$29,861 remaining in the registry is a moiety, consisted of fines and penalties, and that a moiety of it is given by law to the customs' officers and informers; while, on the part of the United States, it is contended that the \$59,722 was not fines and penalties, but duties, in which no person is entitled to share with the government.

The determination of this issue renders it necessary to consider, at the outset, the effect of the record of the judgment in favor of the United States, and against the offenders, which was entered on the 27th of December, 1867, and was satisfied upon the payment of this fund into the registry. This record, which it has been suggested, on this argument, must be conclusive in favor of the customs' officers and informers, would, as I view it, if held conclusive, deprive those persons of any right to any portion of this fund. This will appear from an examination of the record itself. The cause of action which the record sets forth, and which was admitted by the confession, is, that certain parties defendant unlawfully removed from the bonded warehouse dutiable goods, without payment of the duties, whereby, as it is averred, the value of the

goods became forfeited to the United States, and the United States became entitled to have of the defendants \$59,722 in gold, and \$32,000 in currency. The record nowhere refers to any statute by virtue of which the alleged forfeiture arose, and no statute has been found which forfeits the value of goods for any such act as is set forth in the declaration, or which upon the facts stated in the declaration, created a legal liability on the part of the defendants to pay to the United States this \$59,722 in gold, and \$32,000 in currency. Customs' officers and informers can claim to share only in fines, penalties, and forfeitures which are created by some law of the United States. If no statute exists, by virtue of which any particular sum of money, whether called a fine, a penalty, or a forfeiture, has been demanded and paid, no customs' officer or informer can share in the money. Here was no forfeiture of goods for no goods subject to forfeiture were proceeded against. The segars which were seized by the collector were released, without any other condition than that they should be duly entered, and the duties be paid; and the illegal acts charged in the declaration did not render the parties liable in a civil action, under any law of the United States, to such fines and penalties as were demanded. It may be that the \$32,000 in currency, which formed part of the demand, can be held to be thirty-two fines of \$1,000 each, incurred by virtue of the act of August 6, 1846 (9 Stat. 53), and that portion of the fund has been so treated by the government. But this would not affect the \$59,722 in gold, which is now under consideration. If, then, the record alone were to be looked to as fixing the rights of the parties, it would seem to confer no right upon the customs' officers and informers to a distributive share of the gold in the registry. This difficulty has been realized on this proceeding, and, accordingly, the customs' officers and informers have not rested their claims upon the record

of the judgment alone, but have, without objection on the part of the government, introduced much testimony to show the real nature of the claims made by the government against the offenders. The case being thus opened, evidence has been also introduced by the United States, tending to show the circumstances under which this money was demanded and paid. This evidence, therefore, thus introduced by the respective petitioners, and which discloses the actual liabilities which the parties who paid 1279 this money were under to the United States, and from which they sought to be discharged by the payment which they made, must be considered in connection with the record, in determining the character of the fund in question, and the rights of the parties to share therein. It is proper to say here, that, if the course of this proceeding had been otherwise, and the judgment entered on the 27th of December, 1867, had been relied upon as decisive of the character of this fund, it would, doubtless, have been incumbent upon the court—called on, as this court is by this proceeding, to distribute a fund in its registry to require a fuller explanation than has yet been given of the circumstances under which that judgment was taken. On this argument, it has been treated by the counsel for the government as an inadvertence, and, perhaps, properly so treated; but, it is such an inadvertence as to require full explanation before I should feel justified in disposing of this large amount of money in accordance with its terms.

Looking, then, into the evidence as it has been given, it appears, that certain parties, doing business under the name of J. W. George & Co., perpetrated frauds upon the government, by removing for consumption, dutiable goods from a bonded warehouse, without payment of the duties; that criminal proceedings were commenced against them and also a civil suit to recover some \$400,000 of

duties, in which suit a large amount of property was attached; that, thereupon, the offenders applied to the secretary of the treasury for relief, and then, plainly and deliberately, admitted themselves to be liable to the government for duties amounting to \$59,722 in gold, which they promised to pay, together with the sum of \$32,000, as thirty-two penalties for as many unlawful withdrawals, which they also admitted to have been made by them; and that, thereupon, the secretary agreed that all the parties implicated should be released from all civil and criminal liability relating to the transactions in which they had been engaged, upon the payment of such duties and penalties. In pursuance of this agreement, the parties did pay into the registry of this court the \$59,722 in gold, and the \$32,000 in currency, in question; and all the pending civil and criminal proceedings, were thereupon stopped by the district attorney. But the payment, instead of being made in the proceedings, pending at the time of the agreement with the secretary, was made in satisfaction of a judgment confessed by them in a friendly action, which they suggested should be commenced, as affording them a more satisfactory evidence of the payment of the money which they had agreed with the secretary to pay.

Upon the evidence, it is claimed, on the part of the government, that the agreement made by the secretary was a compromise made by virtue of the 10th section of the act of March 3, 1863 (12 Stat. 740), and, therefore, decisive of the character of the fund realized in pursuance of it. To this view I do not assent. The authority, conferred by the act referred to, is an extraordinary power, which the interests of the secretary of the treasury, as well as those of the government, require to be carefully guarded against abuse. The statute, therefore, confines the power to the compromise of claims in favor of the United States, and confers no power at all in regard to

criminal prosecutions. It looks, also, to the attorney of the government, in charge of the claim, as the proper place of origin for arrangements looking to a compromise, and might well be held to confer no power in regard to claims not in suit; and it requires, as the basis, and the only legal basis, of action on the part of the secretary, a report of the attorney of the government, showing in detail the condition of the claim, and the terms of compromise proposed, and also showing the approval of the terms by the attorney. It also requires, in addition, that the solicitor of the treasury shall recommend the acceptance of the terms. The act thus provides for the creation and preservation of a complete record of all cases of compromise, showing the transaction in detail; and the voluntary assent of three different officials to the terms of any compromise which it is proposed to accept, is required to make it effective. Under the statute, the action of the secretary is confined to the acceptance or rejection of the terms recommended by the attorney. Here, the terms agreed to by the secretary were never reported or recommended by the district attorney, and the action of the secretary must, therefore, be held to be without sanction of law, and of no effect as a legal compromise. The present case, in which it is claimed by the government that the recommendation, by the district attorney, of terms requiring a less sum than that finally agreed on with the secretary, warranted the secretary, under the statute, in accepting terms deemed more favorable, affords a good illustration of the result of any other than a strict adherence to the provisions of the act. For, it seems, as I understand the figures, that the terms agreed upon by the secretary, although apparently less favorable to the offenders than those recommended by the district attorney, were, in fact, more favorable, and the sum realized was several thousands of dollars less than the parties themselves had offered to the district attorney.

While considering the action of the secretary in making this compromise, I feel bound to notice another prominent feature in it, which is, that the secretary undertook to compromise the criminal proceedings which were pending in court. Neither the act of March 3, 1863, nor any other act that I know of, confers that power on the secretary of the treasury. The solicitor of the treasury may perhaps, have power, in a proper case, and upon his own official responsibility, to instruct 1280 a district attorney to effect a discontinuance of a criminal prosecution, for offences arising under the revenue laws; but I know of no statute which permits either the secretary or the solicitor to demand money of a person accused of crime, in consideration of causing a criminal prosecution to cease, although the money may be demanded for the United States, as was the case here. Civil suits for penalties and forfeitures may be compromised or remitted by the secretary, in the manner prescribed by law; but I apprehend, that neither the power to determine the extent of punishment to be inflicted in a criminal proceeding, nor the pardoning power, has been entrusted to the secretary or the solicitor, or the collector. The action of the secretary, in regard to the criminal proceedings pending against John W. George, Henry Hart, and others, was, therefore, of no legal or binding effect whatever; and his action in regard to the civil suits against the same parties was unauthorized, for want of compliance with the conditions which the statute imposes upon his power of remission and of compromise. But, while the agreement made by the secretary has no effect, as a legal compromise, to determine the character of the fund in question, the admissions of the parties, made to the secretary, during the negotiation which ended in the agreement, are competent and very controlling evidence to show the liabilities of the parties to the government, and the

real character of the fund which they subsequently paid in discharge of their liabilities. These admissions, with other uncontradicted evidence in the case show, that the parties who paid this \$59,722 in gold, were legally liable to the government, for duties upon segars and liquors, amounting to that sum. This cannot be disputed as to \$34,834.50 of the amount; for, Henry Hart was the importer of segars on which the duties had been duly ascertained and assessed at that sum, and which he withdrew without payment of any duty. As to the remainder, being duties charged on rum, gin, brandy and wine, although the custom-house officials seem to have had difficulty in tracing the articles, the secretary had thirty-two orders on the bonded warehouse for certain specified withdrawals of such liquors, which were signed by these same parties, which quantities, it is proved, they withdrew without payment of the duties. The appraisers and other officers of the customhouse declare, that neither the records of the customhouse, nor the orders, nor both together enable any one to say what amount of duties has been lost; but there is evidence tending to show withdrawals of liquors by these parties from this warehouse, without payment of the duties. This evidence, with the admissions of the parties as to the amount, is sufficient to show that this is not a case of simply calling a sum duties, which was, in reality, penalties, as has been contended, but that an actual legal liability to the government for duties existed, the exact amount of which the parties admitted and promised to pay.

It is said, that there could be no legal liability for duties, because no duties can be "collected, levied, and paid," as duties, unless the merchandise is in the possession and control of the government; that, as soon as property is fraudulently withdrawn, the power to collect duties ceases, and fines, penalties, and forfeitures are imposed. But the law is otherwise.

Duties are not simply a charge upon the merchandise, to be collected only by means of the custody of the property. They are also a personal charge against the importer—a debt created by law, which may be collected by a civil action, wholly irrespective of the possession and custody of the goods. *United States v. Lyman* [Case No. 15,647]. Here, segars, on which the duty was \$34,834.50, were actually imported by these parties, who were liable, as importers, for such duties, and who discharged that liability by the payment of the fund in question while the liquors were bought by them in bond, subject to duties, sufficient in amount, as they themselves admitted, to make up the balance of the \$59,722, and which they became liable to pay when they withdrew the merchandise for consumption, as they subsequently did.

Again, it is said that there was no liability for duties, so far as the liquors were concerned, because these goods had been taken out of the bonded warehouse on bonds to deliver them to a manufacturing warehouse, whereby the right to duties was lost; and that the only subsisting liability was for damages upon the bonds. But the evidence shows, quite plainly, that the ostensible transfer to the manufacturing warehouse, which was owned by these same parties, was simply a cover for the fraud. The real intention of the parties, when the goods were bought, was to withdraw them and put them upon the market, without payment of duties; and that intention was successfully carried out, by means of an ostensible transfer to the manufacturing warehouse. The whole was one single connected enterprise, namely, the withdrawal of these dutiable goods for consumption, without payment of the duties. Furthermore, if this \$59,722 in gold be not duties, what is it? It is said to be penalties prescribed by the act of August 6, 1846. But, the penalties prescribed by that act are a fine of \$5,000, or imprisonment, in the discretion of the court,

and a penalty of \$1,000 for opening the warehouse, and getting access to the goods, in the absence of the custom-house officer. If the latter penalty was ever incurred by these parties, which is by no means clearly shown, it forms the portion of the fund consisting of the \$32,000 in currency, and is not the gold. Besides, what act prescribes a penalty in gold?

But, the fund in court is said to be a single amount, paid by virtue of the duress of 1281 the civil and criminal proceedings, and, therefore, no part of it duties. An exaction, not based on a legal liability, paid to avoid the exposure and punishment likely to follow a criminal prosecution, is what is characteristically termed, in common parlance, "hush-money." If such were the character of this fund, it would not avail the customs' officers and informers, for, they are, by law, entitled to a certain share of lawful fines, penalties, and forfeitures, imposed and collected by virtue of provisions of law. No statute gives them any right to any portion of irregular exactions. But, to suppose the secretary of the treasury, or the solicitor, or the district attorney, to have consented to such an exaction from offenders like these, is to impute a gross dereliction. No such supposition is necessary to determine the character of this gold, for the evidence sufficiently shows that it was demanded as duties, was due as such, and was so paid. It must, accordingly, be distributed as such.

In dismissing this branch of the case, I may properly add, that the action of the secretary of the treasury, in making the agreement which he did with these offenders, and which was severely criticised, on the argument, as an attempt to deprive the customs' officers and the informers of their legal rights, does not appear to me to be capable of such a construction. If such an intention were disclosed by the proofs, it would receive no support at the hands of this court; for, the rights which the law gives to informers

and to customs' officers, in order to insure a better enforcement of the revenue laws, are rights which are entitled to be carefully protected, both by officials and courts. I discover no such intention, in the action of the secretary, but only an effort to obtain for the government as great a portion of the duties legally due to it as was possible by the method adopted. Whether a vigorous prosecution of the civil action for the \$400,000 of duties supposed to have been lost, and a proper criminal punishment of the offenders for their crimes, together with an enforcement of the forfeitures incurred, would not have been a method more likely to secure obedience to the law in future, is, perhaps, open to question. It may be that such a course would have realized, in addition to these duties, a larger amount of penalties and forfeitures than the \$32,000 which was paid. But the abandonment by the officers of the government of the prosecutions for penalties and forfeitures, although it may have been irregular or injudicious, can have no effect to change the character of a payment of duties, which is shown to have been made in discharge of a subsisting liability for such duties. My conclusion, upon this branch of the case, is, therefore, that the customs' officers and the informers have failed to show themselves entitled to a distributive share of the \$29,861 in gold, now in the registry.

It remains only to determine who are the informers entitled to the \$8,000 in currency, which has been substantially conceded to be penalties distributable to the informers, the other one-quarter of the \$32,000 in currency having been paid over to the collector, as penalties in which he was entitled to share. The persons claiming to be the informers are J. W. Wiggin, D. H. Burnett, and J. W. Hefflin, on the one hand, who claim one-quarter of the whole amount of penalties; and E. D. Webster, Rodman G. Moulton, and John S. Beecher, on the other. The latter persons

do not present, for the decision of the court, any issue between themselves, but have consented that whatever may be found payable to any of them shall be paid to the attorney who represents them all. They do, however, dispute the right of Wiggin, Burtnett, and Hefflin, to any share as informers. I have examined with care the voluminous evidence bearing upon this question, and, while I am satisfied that Wiggin procured valuable evidence, and Burtnett and Hefflin evidence still more important, tending to make out a strong case against the offenders, without which, indeed, it is doubtful whether any considerable sum would have been recovered from them, and, although it seems to me not consistent with justice that Burtnett, who spent much time, and expended some money, in ferreting out the details of the fraud, and in finding the property, which was attached as the property of Henry Hart, should receive no reward, still I am unable to adjudge either Wiggin or Burtnett or Hefflin to be legally entitled to share in this fund, as informer. Their action cannot be said to have induced the prosecutions which were instituted. The fraud was discovered by others, proceedings were commenced in pursuance of that information, and the clue to the parties was obtained before either Wiggin or Burtnett or Hefflin gave any information. What they did was to furnish evidence tending strongly to confirm the truth of the statements of the informers. The informer is he who, with the intention of having his information acted upon, first gives information of a violation of law which induces the prosecution, and contributes to the recovery of the fine, penalty, or forfeiture, which is eventually recovered. *Sawyer v. Steele* [Case No. 12,406]; *City Bank v. Bangs*, 2 Edw. Ch. 95. 105; *Lancaster v. Walsh*, 4 Mees. & W., 16. In the present case, information had been given of the frauds, upon which positive and effective action was taken, and which contributed to the recovery of the \$32,000, a

considerable period before either Wiggin or Burtnett or Hefflin gave any information at all; and such first informers, who were Webster, Moulton, and Beecher, are the legal informers, entitled to the informer's share of this fund.

In accordance with these views, a decree must be entered adjudging that E. D. Webster, Rodman G. Moulton, and John S. Beecher, are entitled, as informers, to the \$8,000 1282 in currency, in the registry, and that the United States are entitled to the \$29,861 in gold.

¹ [Reported by Hon. Samuel Blatchford. District judge, and here reprinted by permission.]

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