UNITED STATES *v.* ROSE.

(*District Court, S. D. New York.* December 21, 1882.)

PENALTY—ACTION FOR—MODE OF PROCEDURE—SUMMONS, INDORSEMENT OF.

Actions for penalties brought in the name of the United States correspond with those brought by the state in the name of "The People of the State of New York;" and by section 914, U. S. Rev St., the provisions of the New York Code of Procedure, in regard to such actions by "The people," etc., are applicable to similar actions brought here in the name of "The United States," and the summons served must therefore be indorsed with a general reference to the statute by which the action for the penalty is given. This indorsement is part of the process; and, being designed to give immediate notice of the nature of the action, is a material part; and, if omitted, is not amendable, and the service of the summons should be set aside.

Motion to Set Aside Service of a Summons.

The action was for a penalty, alleged to have been incurred by the defendant under the provisions of section 4504, U. S. Rev. St. The summons was served without the complaint. The copy of the summons, which was delivered to the defendant, was not indorsed with any reference to the statute by which the penalty was given, as required by the New York Code of Civil Procedure, §§ 1897, 1964, and 1962. The *præcipe* to the clerk, upon which the summons was issued, contained only a pencil indorsement, "R. S. 4504." Defendant's attorneys appeared, reserving the right to move to set aside the summons; and, upon the complaint being served, made this motion.

William C. Wallace, Asst. U. S. Atty., for plaintiff.

Goodrich, Deady & Platt, for defendant.

BROWN, D. J. Actions for penalties brought in the name of "The United States" correspond entirely with those brought by the state in the name of "The People," etc. Each represents the sovereignty which is plaintiff. Hence, when congress adopts (section 914, Rev. St.) the "forms and modes of proceeding" of the several states, an action by "The United States," brought in the state of New York, must be in the form and mode prescribed in this state for similar actions by "The People," etc.; and therefore a reference to the statute and penalty was required to be indorsed on the summons in this action, as prescribed by sections 1897, 1964, and 1962 of the New York Code of Procedure. These sections required an indorsement "upon the copy of the summons delivered in the following form: According to the provisions of, etc., adding such a description of the statute as will identify it with convenient certainty, and also specifying the section," etc.

The matter required to be indorsed is a substantial and material part of the writ, because designed to give immediate notice to the defendant of the nature of the action. The *præcipe* does not supply this notice, and was not a compliance with the statute. The summons having no indorsement was defective in a material part, and hence it is not amendable, and the service of the summons must be set aside. *Brown* v. *Pond*, 5 FED. REP. 31; *Peaslee* v. *Haberstro*, 15 Blatchf. 472; *Dwight* v. *Merritt*, 18 Blatchf. 305.

Motion granted.

UNITED STATES *v.* SCHLESINGER and others.*

(Circuit Court, D. Massachusetts. December 29, 1882.)

1. DUTIES ON IMPORTS—RECOVERY BACK—PROTEST AND APPEAL.
   In an action to recover back duties illegally exacted, protest and appeal are necessary as a condition precedent to the right to recover, even when the United States are plaintiffs in an action to recover duties in excess of those already paid.
2. SAME—REMEDY OF IMPORTER.
   Where the United States sue to recover duties upon importations of what is called steel in bars, which was entered and duties paid as upon "scrap steel," and the goods were delivered before the final liquidation, the defendants may set up facts which make the assessment illegal in such action, and are not bound to suffer judgment to be entered against them, and proceed by suit to recover back the amount paid at any time within 90 days thereafter, under the provisions of section 2931 of the Revised Statutes.

Geo. P. Sanger, U. S. Atty., for plaintiffs.

L. S. Dabney and *W. S. Hall*, for defendants.

LOWELL, C. J. Four cases, of which this is one, have been argued here within a short time, which bring up for review the decision in *U. S.* v. *Cousinery*, 7 Ben. 251. I shall criticise that case with as much freedom as if I had made it under like circumstances; that is, when the important considerations affecting the decision were not argued and escaped notice.

The cases here pending are of two kinds: those in which the United States sue for duties, and those in which the importers sue to recover back duties; and the learned counsel for the importers inform me that they are much embarrassed by the principal case. In the four cases now under advisement the importers had received delivery of their goods, and had paid the assessed or the estimated duties, and when a new liquidation was made, they protested and appealed, and

*Affirmed. See 7 Sup. Ct. Rep. 442.

the decision of the secretary was against them. They have, therefore, taken all the steps prescribed by Rev. St. § 2931, which was formerly St. 30 June, 1864, § 14, (13 St. 213.) Now their embarrassment occurs in this way: *U. S.* v. *Cousinery* is decided upon the theory that the importer who has duly protested and appealed may pay and then recover back the amount illegally charged to him. This *ratio decidendi* is given on pages 255 and 256 of the report. But in a case like the present, where an importer has received all his goods, before the last liquidation is made, if he should pay the additional sum demanded and sue to recover back what was excessive, he would be met by the objection that he had paid voluntarily; and under a familiar principle of law he cannot maintain an action under those circumstances; while if he refuses to pay and is sued, *U. S.* v. *Cousinery* decides that he has no right to defend, but must pay and sue.

Nothing can be more familiar than the rules of law on the general subject of recovering money once paid. It would be an impertinence to cite authorities, and I shall cite none, except to show that the revenue laws lay down no different doctrine from that prevailing at the common law, but simply permit the common law to operate.

In *Elliott* v. *Swartwout*, 10 Pet. 137, the usual rule was applied that one who pays money extorted from him by a public officer who has in his possession property of the payer, so that he can enforce payment without suit, is at such a disadvantage that he is considered as paying under duress, and may recover back whatever was illegally exacted.

In *Cary* v. *Curtis*, 3 How. 236, the supreme court modified this rule by holding that a public officer who was absolutely bound to pay into the treasury every dollar which he received, so that he could not protect himself in case of suit, was not liable to an action. Congress, then in session, approved of the dissenting opinion of STORY and MCLEAN, JJ., in that case, and promptly reversed this decision by St. 26 Feb. 1845, (5 St. 727.) This statute gave no new rights. It simply removed the obstruction of *Cary* v. *Curtis*, and left the importer to his remedy at common law. That remedy, of course, was to pay, if compelled by the retention of his goods, and then to sue. If he paid after his goods had been delivered, as, for instance, upon a bond, he could not recover, but should have resisted payment. *Marshall* v. *Redfield*, 4 Blatchf. 221.

So, when the internal-revenue acts were passed, it was a serious question whether the tax-payer had a remedy in court, because those