

I would not be willing to say that no action at law can be founded upon a policy of this character. Facts and circumstances might arise under which the beneficiaries could bring a suit at law upon the policy, but I am unable to see any sufficient reason for holding that such a contract as this is absolutely null and void. It is not a contract which confers a right and denies a remedy, (such a contract might well be held to be contrary to public policy,) but it is a contract which confers certain rights upon the policy-holder, and in which the parties agree that the remedy shall be by a proceeding to compel the levy of the assessment, and not by an action at law to recover damages. If the policy provided in clear terms that the beneficiaries shall, in case of death, receive a particular sum, to be recovered by assessment, or to be paid by the company after making an assessment, if the company had refused to make an assessment, I am inclined to the opinion that an action at law might be maintained, especially if there was no provision in the policy itself forbidding it. But since the policy here does not fix upon the company an absolute liability to pay any particular sum, but only a liability to pay the proceeds of a particular assessment, to be levied in a particular way; and since it further provides that the company shall only be liable in a proceeding to compel it to make the assessment,—we are of the opinion that an action at law cannot, at least in the first instance, be maintained. However inequitable such a contract may be, it is undoubtedly within the power of the parties to enter into it, and therefore we think that the only remedy, according to the practice of this court, and under the terms of the policy, is by a proceeding in chancery to compel a specific performance. The demurrer to the petition must, therefore, be sustained, but the plaintiffs may, if they choose, have leave to file a bill to compel the assessment in accordance with the contract.

UNITED STATES *v.* LENG.

District Court, S. D. New York. August 23, 1883.

1. CUSTOMS DUTIES—RELIQUIDATION—ACT JUNE 22, 1874, § 21—LIMITATION.

Section 21 of the act of June 22, 1874, (1 Supp. Rev. St. 81,) is in the nature of a statute of limitations, as respects the government's right to reliquidate duties, and limits this right, if the duties have been paid, to one year after entry, in the absence of fraud or protest, and any such reliquidation after that period is void; but if such reliquidation be lawfully made within the year, the statute is not a limitation upon a suit to collect the duties accordingly, and such suit may be brought at any time afterwards.

2. SAME—"ABSENCE OF PROTEST."

The words "in the absence of protest" mean the absence of any existing protest pending and in force at the time of the reliquidation, not a protest which has become spent through a previous liquidation of duties in accordance with it.

3. SAME—APPEALS TO SECRETARY OF TREASURY.

The collector is the special statutory officer for the liquidation of duties in the first instance; and the secretary of the treasury's jurisdiction of any particular liquidation is appellate only.

4. SAME—REV. ST. § 2931.

The hearing and decision of appeals under section 2931 by the secretary of the treasury is a *quasi* judicial proceeding before a special statutory officer or tribunal; and their effect is to be determined by the rules ordinarily applicable to such tribunals.

5. SAME—REVERSING SECRETARY'S DECISION.

The decision upon such an appeal, when promulgated by the secretary's order and acted on by a subsequent reliquidation of duties accordingly, is "final and conclusive" upon the government, and cannot be lawfully recalled by the secretary, and reversed or modified, either as a part of the same proceeding on appeal, or collaterally by any independent order. Section 2931, in enacting that his decision shall be "final and conclusive," enacts the rule ordinarily applicable to such decisions, and is intended to bind the government as in appraisals of value under section 2930.

6. SAME—ACT OF MARCH 3, 1875.

The act of March 3, 1875, does not authorize a reliquidation against the importer, in the absence of any pending protest and appeal, except for errors arising solely on matters of fact, and not for an erroneous construction of the tariff law or classification of goods.

7. SAME—CASE STATED.

Where, in January, February, and April, 1880, three entries on importations were made, and the estimated duties paid at the time of entry, but the duties were liquidated at a larger sum, which, on appeal to the secretary, was set aside, and the importer's classification sustained, and the duties paid accordingly; and afterwards the secretary gave a contrary order to the collector, who again, in April, 1881, reliquidated the duties according to his first liquidation, and the government thereupon sued for the excess.—*held*, that the payment of the duties upon the first two entries had become a binding settlement by the lapse of a year before the last liquidation under the act of 1874, but not as to the third entry; *held, also*, as respects the third entry, that the decision on appeal in favor of the importer, under section 2931, was binding and conclusive upon the government, and that the subsequent order of the secretary and the last liquidation were invalid and void.

Motion for judgment upon a verdict directed in favor of the plaintiff, subject to the opinion of the court. The action was brought to recover an alleged balance of duties due to the government upon three importations by the defendant, in 1880, of "iron tank-plates, punched and cut ready for use." The three entries were made, respectively, January 30th, February 16th, and April 10th. The goods were entered by the defendant as "manufactures of iron not otherwise provided for," and subject to estimated duties amounting, respectively, to \$1,927.45, \$1,348.55, and \$1,835.05, which sums were paid to the collector for duties on the day of entry in each case; and the goods were at the same time delivered to the importer. The collector, in his first liquidation of the duties upon these importations, assessed them as "boiler or other plate iron," which is subject to a higher rate of duty. Upon due protest and appeal by the defendant, the secretary of the treasury, by order of November 23, 1880, reversed the classification and assessment of the collector, and sustained the position of the importer; and, in accordance with this decision and order, the duties were reliquidated by the collector in Jan-

uary, 1881, at the amounts deposited and paid by the importer upon the original entries, with the exception of \$11.90, which it is claimed was immediately paid by the importer. Thereafter, on the twenty-fourth of February, 1881, the secretary made a further order, contrary to his previous decision in favor of the importer, and directed another reliquidation in accordance with the collector's original assessment and liquidation; and under this last order the duties were again liquidated by the collector on the third of March, 1881, amounting to \$4,015.83 in excess of the amount previously liquidated and paid, to recover which this suit was brought, with interest to the time of trial, amounting to \$301.17; and a verdict was thereupon directed for the aggregate sum of \$4,317, subject to the opinion of the court, with leave to either party to file a bill of exceptions, to which direction the defendant excepted.

William C. Wallace, Asst. Dist. Atty., for the United States.

Scudder & Carter, for defendant.

BROWN, J. The small balance of \$11.90, which, upon the reliquidation in January, 1881, after the original decision of the secretary of the treasury, was found not to have been covered by the deposit at the time of the original entry, must, I think, be assumed to have been paid in January, 1881, before the date of the last reliquidation. It was proved that the money was given by the defendant to his custom-house broker for the purpose of payment, and the latter testified to his belief that he did pay it; and on the trial it was not understood that any question was made upon this point. Upon the facts, therefore, admitted or proved, it appears that after due protest and appeal to the secretary of the treasury from the original liquidation of the collector, pursuant to section 2931, the secretary's decision thereupon had been communicated to the collector by a formal order, and acted upon by a reliquidation of the duties in conformity therewith, and by payment and settlement of the duties in accordance with the secretary's decision. The third liquidation, namely, that of March 3, 1881, based upon the subsequent order of the secretary of the treasury, of February 24, 1881, was made more than a year after the entries upon the first two importations, and was, therefore, in my judgment, unauthorized and void, under the act of June 22, 1874. By section 21 of that act, (1 Supp. Rev. St. 81,) it is enacted that—

“Whenever duties upon any imported goods shall have been liquidated and paid, and such goods shall have been delivered to the owner, such *settlement* of duties shall, after the expiration of one year from the *time of entry*, in the absence of fraud, and in the absence of protest by the owner, be final and conclusive upon all parties.”

This statute is binding upon the government, (*U. S. v. Phelps*, 17 Blatchf. 316;) so that after one year from the date of entry, no previous settlement of the duties, in the absence of fraud or protest, can be