

BALFOUR and others v. SULLIVAN, Collector, etc.

(Circuit Court, D. California. March 10, 1894.)

CUSTOMS DUTIES—GRAIN BAGS—RE-ENTRY FREE OF DUTY—POWERS OF SECRETARY.

The customs and revenue laws provide that "grain bags, the manufacture of the United States, when exported filled with American products, may be returned to the United States free of duty, under such rules and regulations as shall be prescribed by the secretary of the treasury." Grain bags manufactured in this country from imported materials were exported full of California wheat. The exporter demanded and received according to law, out of the public treasury, the drawback due him on account of the duty formerly collected upon the materials of which the bags were made. Upon the return of the grain bags, *held*, that they were entitled to pass free of duty. The power of the secretary to prescribe rules and regulations does not authorize him to impose a duty, not provided for by congress, in repayment of the drawback.

At Law.

Page & Eells and *Milton Andros*, for plaintiffs.

S. G. Hilborn, U. S. Atty., and *Ward McAllister*, Asst. U. S. Atty., for defendant.

SAWYER, J. This is a suit to recover of defendant the sum of \$180, collected as duties on 11,850 grain bags, which collection of duties is claimed to be unlawful. The grain bags had been manufactured by *Detrick & Co.*, manufacturers of bags, at San Francisco, out of material of foreign production, upon which the importers had paid the proper duties. The bags were stamped, "*Detrick—Drawback Right Reserved*," and sold to grain producers of the state of California. These bags having been purchased by the grain growers, and filled with wheat produced in California, were, with their contents, afterwards sold to plaintiffs, in the ordinary course of business in the grain market, who shipped the wheat in the bags, as so purchased of the producers, to Liverpool, England, where the wheat was sold, and emptied from the bags, and the bags were afterwards brought back to San Francisco, whence they had been shipped by plaintiffs, the ownership of the bags remaining in the plaintiffs from the time of their purchase, filled with California wheat, till their return to San Francisco empty. Upon their leaving San Francisco, filled with wheat, *Detrick & Co.* claimed the drawback of duties paid on the material used in the manufacture of the bags, and the drawback was paid to them in assumed pursuance of the provisions of section 3019 of the Revised Statutes of the United States, and the regulations of the secretary of the treasury for carrying those provisions into effect. On the return of the bags the plaintiffs claimed, upon various grounds, that they were entitled to bring the bags to San Francisco and receive them free of duty. The collector took the ground that the drawback having been paid on exportation, in pursuance of section 3019, and the regulations of the secretary of the treasury, duties must be paid; and plaintiffs were compelled to pay the duties claimed in order

to obtain the bags. The action of the collector, in collecting the duties, was affirmed by the secretary of the treasury, and this action is brought to recover the duties so collected.

Section 9 of the act of congress of February 8, 1875, "To amend existing customs and internal revenue laws, and for other purposes," (Supp. Rev. St. 130,) provides that "*grain bags*, the manufacture of the United States, when *exported, filled with American products, may be returned to the United States free of duty*, under such rules and regulations as shall be prescribed by the secretary of the treasury." There is no exception to these provisions. The *bags*, whatever may be said of the *material*, were "the manufacture of the United States," and they were exported *filled with American products*, and being such were entitled under this act to "be returned to the United States *free of duty*." It does not appear to me that this explicit language is open to construction. The only exception is that they shall be returned "under such rules and regulations as shall be prescribed by the secretary of the treasury." The authority of the secretary only extends to the *modus operandi*—the course to be pursued in identifying and returning the "grain bags;" and that power does not extend to an imposition of a duty in the face of the provision of the statute that they "may be returned * * * free of duty." The statute in no sense authorizes the imposition of a duty, as a part of the rules and regulations to be prescribed by him. The omission to provide for a repayment of the drawback in such cases may be an oversight on the part of congress. But whether so or not, to require by regulation the collection of the regular duties upon bags manufactured in the United States, because the bags, when exported, paid a "drawback" for duties on the material of which they were manufactured, is to ingraft an exception on the provisions of the act, authorizing the bags which were "exported filled with American products," "to be returned * * * free of duty," which congress either did not see fit or omitted to adopt. The secretary of the treasury was not authorized to make any such exception. *Morrill v. Jones*, 106 U. S. 466; S. C. 1 Sup. Ct. Rep. 423; *Merritt v. Welsh*, 104 U. S. 702; *Balfour v. Sullivan*, 8 Sawy. 648; S. C. 17 Fed. Rep. 231.

Under the provision of the act cited the bags in question were entitled to re-enter the United States "free of duty," and the duties on that ground were illegally demanded and collected. None of the other provisions of the statute cited affect this ground relied on for a recovery, and they therefore need not be discussed.

There must be a judgment for plaintiffs for the amount of duties unlawfully collected, and it is so ordered.

KENNEDY v. CITY OF SACRAMENTO.

(Circuit Court, D. California. February 18, 1884.)

1. MUNICIPAL BONDS—SACRAMENTO CITY—NO ACTION MAINTAINABLE.

The legislature of California in 1858 enacted that thereafter no action should be brought against the city of Sacramento by its creditors; that the city should issue its bonds for the purpose of funding its debt, and should levy an annual tax of 1 per cent., of which a specified portion should be set aside for the payment of the bonds. Those who held claims against the city surrendered their evidences of indebtedness, and took the bonds instead. *Held*, that no action would lie upon the bonds, but that the remedy of the bondholders was by *mandamus* against the proper officers to compel them to carry out the terms of the statute. The creditors, by accepting the bonds, contracted that the city should not be liable to be sued.

2. STATUTE PERMITTING PERFORMANCE OF A DUTY CONSTRUED AS MANDATORY.

In 1863 the legislature revised the act of 1858, re-enacted its provisions with regard to the payment of the bonds, except that the terms of the re-enacted clause, sanctioning a tax of 1 per cent., was permissive instead of mandatory. But, *held*, that the provision was still compulsory, since words in a statute permitting officers to discharge a public duty are to be construed as mandatory. If the act were susceptible of any other construction it would impair the obligation of contracts.

3. WAIVER OF CONSTITUTIONAL RIGHT.

The constitution of the state provided that all corporations should be subject to be sued like natural persons. *Held*, that (even supposing the clause to apply to municipal corporations) the bondholders had by their contract divested themselves of their constitutional right.

At Law.

J. W. Winans, for plaintiff.

J. H. McKune, *A. P. Catlin*, and *W. A. Anderson*, for defendant.

SAWYER, J., (*orally*.) This is an action brought to recover \$9,000 due on coupons of the Sacramento city bonds. It is an ordinary action upon the instruments, not a *mandamus* against the officers of the city, but an action against the city of Sacramento to recover on these coupons as upon a contract. Under the charter of Sacramento, of 1851, a large amount of indebtedness had accrued, for which bonds were issued. In 1858 the city and county of Sacramento were consolidated into a municipal corporation, like the city and county of San Francisco; the boundaries of the city and county being co-extensive with the former boundaries of the county. In that act consolidating the city and county, provision was made for funding the then existing debt of the city and of the county of Sacramento, and provision was made in the act for the purpose of liquidating, funding, and paying the claims against the city and county of Sacramento hereinafter specified. "The treasurer shall cause to be prepared suitable bonds for the county of Sacramento, not exceeding the sum of six hundred thousand dollars, and for the city of Sacramento not exceeding one million six hundred thousand dollars, bearing interest at the rate of six per cent. per annum, from the first day of January, 1859." St. 1858, p. 280, § 37. Then it provides for raising a fund for the payment of the interest, and ultimate extinguishment, of that