

UNITED STATES v. WOTTON et al.

(Circuit Court of Appeals, First Circuit. December 6, 1892.)

No. 30.

1. CUSTOMS DUTIES—CLASSIFICATION—"PLUCKED" CONEY SKINS.

"Plucked" coney skins—that is, such as have had the hair removed from them—are not dutiable as "dressed furs or skins," within Tariff Act 1890, par. 444, but are entitled to entry free, under paragraph 588, as "fur skins not dressed in any manner." 50 Fed. Rep. 693, affirmed.

2. SAME—DETERMINATION OF CLASSIFICATION.

The actual character and condition of the skins when imported, and not the use to which they are subsequently to be put, determine their classification. U. S. v. Schoverling, 13 Sup. Ct. Rep. 24, followed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

At Law. "Plucked coney skins" were imported by James A. Wotton and William C. Wotton, as Wotton Bros., and were entered at the port of Boston, and appraised by the collector as subject to a duty of 20 per centum ad valorem, as hatters' furs, or dressed fur skins. Wotton Bros. appealed to the board of United States general appraisers, which reversed the action of the collector, and held the importation entitled to free entry under tariff act of October 1, 1890, (paragraph 588,) as a "fur skin, not dressed in any manner." The collector, under the customs administration act, appealed to the circuit court, which affirmed the decision of the board. 50 Fed. Rep. 693. The United States, on application of the attorney general, appeals. Affirmed.

Frank D. Allen, U. S. Atty., and Henry A. Wyman, Asst. U. S. Atty.

Richard Olney and Gerrard Irvine Whitehead, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

WEBB, District Judge. This case presents the question of the proper classification under the tariff law of October 1, 1890, of an importation of goods called by the importers "hatters' furs." They were plucked coney skins. All that had been done to them after being taken off the animal was to open them, cut off the legs, ears, and other useless parts, clean and stretch them, and pluck the long hair from them. They were then properly denominated "plucked coney skins," and were in condition to be dressed for use in making various garments, or to have the fur cut off and manufactured into hats.

The evidence is that, although coney skins are principally consumed in the manufacture of hats, they are also employed, like other fur skins, for trimming, and various garments; the extent of this latter use varying with fashion. At the time of this importation more coney skins than usual were appropriated to articles of dress. Before they could be so manufactured, the skin or pelt must be treated in a way to be converted into leather, and be made soft and flexible. This process is by every witness recognized as "dressing," and is in-

differently called "dressing the skin" or "dressing the fur." For the manufacture of hats this treatment of the pelt is not necessary, and would be a waste of labor and expense. It is then to be ascertained and determined what, under the tariff act, these goods in fact were. This is not concluded by the name given to them by the importer, unless it is found that they were in commerce so generally known by it as to make that name their proper commercial designation. They were not dressed coney skins, nor dressed coney fur skins. They would not be regarded as dressed furs by any furrier or dresser of furs. They were not "furs prepared for hatters' use," but material from which such furs could be prepared, just as they were raw materials which could be converted into dressed skins, or dressed coney fur skins, or dressed coney furs, or dressed coney,—as one might choose to speak of them,—fitted to be made into garments. Plucking out the long hair was, it is true, one step in preparing the fur for the hatter, but it was also a not uncommon step in preparing them to be made up into various articles of dress.

The evidence adduced is voluminous, and somewhat conflicting. These goods are quite generally said by fur dressers to be raw or undressed coney skins. Witnesses whose business has been for years plucking fur skins disclaim the trade of fur dressing. Men of the largest experience testify that, if an order were given them to "dress the fur upon a lot of skins," they would not understand what was meant. Plucking may be and is done both before and after the skins are dressed, and dressed skins are plucked or unplucked, according to the variety of skin and the demand of fashion. Many witnesses, when compelled to explain what is meant by "dressed fur on the skin," though confessing that the expression is unfamiliar to them, say that they should think it would apply to these goods. In so testifying they seem rather to be striving to find a meaning for the terms than to be explaining words well known and thoroughly understood by them. Hatters and manufacturers of hatters' furs testify that the terms "dressing" and "dressed furs" are not employed in speaking of hatters' furs. The testimony to prove that the cost of the skins is increased by plucking affords no assistance in solving the questions presented in this case. It needed no witness to satisfy the court that labor of any kind upon them involves expense. But whether they are dutiable or not is not by congress made conditional on their cost.

The act of October 1, 1890, (26 St. p. 567,) contains three paragraphs, under some one of which these goods must be classified, namely: (444) "Furs, dressed on the skin, but not made up into articles, and furs not on the skin, prepared for hatters' use, twenty per centum ad valorem;" (587)—in the free list,—"furs undressed;" (588)—also in the free list,—"fur skins of all kinds not dressed in any manner." These are all the provisions of the act about which there can be any question. The similitude section is inapplicable; that relates only to nonenumerated articles. These furs are enumerated, if held to come under any of the paragraphs quoted. And that they do come under some one of them is not controverted. The difference is in regard to which of the paragraphs of the statute is ap-

plicable to these goods. The statute speaks of furs and fur skins generally. It specifies no particular fur, with the single exception of "furs not on the skin, prepared for hatters' use," and even there no mention is made of the animal bearing the fur. Nor, with the same exception, does it refer to the use for which the furs are intended. Paragraph 444 manifestly intends furs so dressed that they are in condition to be made up into what are popularly known as "fur goods," like caps, capes, mantles, muffs, etc. That such dressing means curing and leathering the pelt is plain, and these are "furs dressed on the skin." Can there be any doubt that they are dressed fur skins? In the opinion of the court, this language of paragraph 444 shows the meaning of "undressed," and "not dressed in any manner," as used in paragraphs 587 and 588. They are all to be construed as indicating the leathering of the pelt.

And these coney skins, which may be adapted to the class of fur manufactures above referred to, or may have the fur upon them taken from the pelt, and fully "prepared for hatters' use," are to be classified for duties, according to their actual character and condition when imported into the country. In determining that classification, the use to which they will be ultimately put is not to be considered. If it were, goods in all respects precisely alike would at one time be subject to a duty of 20 per centum ad valorem, and at another be entitled to free entry. *U. S. v. Schoverling*, (Nov. 7, 1892,) 13 Sup. Ct. Rep. 24. But, as said by Mr. Justice Story in *Bacon v. Bancroft*, 1 Story, 341, the terms of tariff laws are to be construed in accordance with commercial usage and understanding. Recognizing this rule of interpretation, and keeping in view the evidence that these skins can be dressed and "made up into articles," the court still holds, upon all the evidence, that, according to general commercial usage and understanding, they are to be classified as "fur skins not dressed in any manner." If any doubt on this point were entertained, the course of departmental rulings in regard to similar goods, under successive tariff acts, and the fact that in this act of October 1, 1890, congress retained the exact terms that had been so ruled upon, would lead the court to the same result.

Judgment of the circuit court affirmed.

Ex parte MOSES.

(Circuit Court, E. D. Pennsylvania. December 27, 1892.)

No. 32.

WITNESS—SUBPOENA DUCES TECUM — AUTHORITY OF CLERK — PATENT OFFICE INTERFERENCE PROCEEDINGS.

Rev. St. § 4906, providing that, on the application of any party to a contested case pending in the patent office, the clerk of any federal court shall issue a subpoena for a witness commanding him "to appear and testify," does not include an authority to issue a subpoena duces tecum.

Rule to show cause why an attachment should not issue against George Stuart for contempt in refusing to produce certain letters in

obedience to a subpoena duces tecum issued by the clerk in an interference proceeding pending in the patent office. Rule discharged.

The subpoena was issued under Rev. St. § 4906, which reads as follows: "Sec. 4906. The clerk of any court of the United States, for any district or territory wherein testimony is to be taken for use in any contested case pending in the patent office, shall, upon the application of any party thereto, or of his agent or attorney, issue a subpoena for any witness residing or being within such district or territory, commanding him to appear and testify before any officer in such district or territory authorized to take depositions and affidavits, at any time and place in the subpoena stated; but no witness shall be required to attend at any place more than forty miles from the place where the subpoena is served upon him."

Jones, Carson & Phillips, for the motion.
Archibald R. Dewey, opposed.

DALLAS, Circuit Judge. Under section 4906 of the Revised Statutes, a subpoena was issued by the clerk of this court, commanding George Stuart to appear and testify before an officer in this district authorized to take depositions and affidavits, at a time stated in the subpoena, and at a place not more than 40 miles from the place where the subpoena was served upon said George Stuart. In this subpoena a clause of duces tecum was inserted, commanding also the production of a certain letter. The subpoena is under the seal of this court, and the testimony to be taken is for use in a contested case pending in the patent office. The witness has duly appeared and testified; but, upon a ground and for reasons which need not be particularly mentioned, but which would not constitute a justification of his refusal if a lawful subpoena in that behalf had been duly served upon him, he has declined, and still declines, to produce the letter referred to. He disclaims, through his counsel, any disrespect to the court, or intended contempt of its process, and seeks only an adjudication upon the question of the regularity and sufficiency of the subpoena, as to the duces tecum clause. To this he is entitled. If the writ is not lawful, disobedience is not a contempt. Rev. St. § 725.

The authority to issue any subpoena such as has been issued in this instance is, and must be, wholly statutory. It is derived from, and is dependent solely upon, the section of the Revised Statutes which I have mentioned. In the absence of that section, any subpoena, either to testify or to produce a document, could not, in aid of a proceeding in the patent office, be lawfully issued by the clerk of this court. It, and it alone, casts the duty upon the clerk to issue a subpoena; and in charging him with the performance of that duty it expressly defines and limits its extent, and, of course, restricts his power within the same boundaries. The language of this legislation is not general or indefinite; it is particular and specific,—“the clerk * * * shall * * * issue a subpoena for any witness, * * * commanding him to appear and testify.” It is not admissible that, from these words, a duty and authority to issue a subpoena commanding, under penalty, the production of documents, should be implied. This is unquestionable upon general principles; but in this matter the intent of congress that such an implication of power should not be assumed is quite obvious. In this connection it has said nothing whatever

about a subpoena duces tecum, but, in dealing with the subject of depositions under a *dedimus potestatem*, it has plainly and expressly distinguished a subpoena to testify merely from a subpoena duces tecum. I must presume that the distinction was in mind in the passage of section 4906, as well as in the enactment of sections 868 and 869, and that, if in the former, as in the latter, it had been intended to authorize a subpoena duces tecum, that intention would have been expressed. The rule for attachment is discharged.

UNITED STATES v. RAND.

(Circuit Court of Appeals, First Circuit. November 29, 1892.)

No. 24.

1 CLAIMS AGAINST UNITED STATES—JURISDICTION OF CIRCUIT AND DISTRICT COURTS—COMPTROLLER'S DECISIONS.

Act March 3, 1887, (24 St. p. 505,) giving the circuit and district courts concurrent jurisdiction of claims against the United States, contains a proviso that it shall not be construed as giving those courts jurisdiction to hear and determine "claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." Rev. St. § 269, directs the first comptroller of the treasury "to superintend the adjustment and preservation of the public accounts subject to his revision;" and section 191 provides that "the balances which may from time to time be * * * certified to the heads of departments by * * * the comptrollers of the treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government, and be subject to revision only by congress or the proper courts." *Held*, that the disallowance of a circuit court commissioner's fees by the first comptroller of the treasury is not within the proviso, as the decision of the comptroller is conclusive only within the executive department. *Rand v. U. S.*, 36 Fed. Rep. 671, overruled. *Harmon v. U. S.*, 43 Fed. Rep. 560, followed.

2. SAME—DISALLOWANCE—RES JUDICATA.

The disallowance, by a district court, of a claim against the United States for fees, for supposed want of jurisdiction to pass upon the merits, is not a bar to a subsequent petition for the allowance of the claim, after determination that the court has jurisdiction.

3. UNITED STATES COMMISSIONERS—DOCKET FEES.

Under Rev. St. § 847, providing that the commissioner shall receive "for issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services," the commissioner is entitled to docket fees earned before the passage of the deficiency appropriation bill of August 4, 1886, which contained a proviso "that for issuing any warrant or writ, or for other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees;" since such proviso was intended as an amendment to section 847, and was prospective in its operation. *U. S. v. Ewing*, 11 Sup. Ct. Rep. 743, 140 U. S. 142, and *U. S. v. Wallace*, 6 Sup. Ct. Rep. 408, 116 U. S. 398, followed.

SAME—FEES FOR RECOGNIZANCES AND WARRANTS FOR COMMITMENT.

Rev. St. § 1014, provides that proceedings for the examination of persons charged with offenses against the United States are to be conducted "agreeably to the usual mode of process against offenders in such state;" and Rev. St. Me. c. 133, § 10, provides for the recognizance of the party upon any adjournment of the examination, and for his commitment if no sufficient sureties are offered, or his offense is not bailable. *Held*,