

tion is not in a proper sense "malt extract" at all. It will be seen by the following comparison that every argument applicable to "Henry's Calcined Magnesia" applies with equal or greater force to "Hoff's Malt Extract:"

**Henry's Calcined Magnesia.**

It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last one hundred years, and has a peculiar value in the market.

That the article in question is a medicinal preparation there can be no doubt. The circular sets forth its virtues as a remedy in disease, and calls it a "medicine."

It has a character of its own, distinct from the ordinary calcined magnesia, which must arise from the special mode of manufacture.

Henry's article is not the ordinary calcined magnesia, dutiable by the pound, but something is done to that ordinary calcined magnesia by the Henrys which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although the base of it is magnesia calcined.

The court does not lose sight of the distinctions pointed out by the counsel for the collector, based upon the changed language of the tariff, since the decision of the Ferguson Case; but it seems to the court, in view of the principle there enunciated and of the conceded facts that the article in question contains but 12 per cent. of malt extract, and is a proprietary medicine put up by a secret formula, that it is more appropriately assessed under paragraph 75 than under paragraph 338. Immutability of the law is a wise maxim of political economy which is too often lost sight of by the legislative power both state and national. Frequent alteration, whether by the legislature, or by those who interpret the law in the first instance, unsettles business and retards prosperity. By adopting a reasonable uniformity of construction the courts, as far as possible, should see to it that commerce is not vexed by unnecessary changes. For fifteen years the merchandise in question has entered our ports as a proprietary medicine. No reason exists for a change now.

The decision of the board is reversed.

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**WOOTTON v. MAGONE.**

(Circuit Court, S. D. New York. November 17, 1892.)

**CUSTOMS DUTIES—ASPHALT MASTIC—CLASSIFICATION UNDER THE TARIFF ACT OF MARCH 3, 1883.**

Asphalt mastic, an article produced by crushing an asphaltum mined or quarried in rough chunks, often called "rock," and by melting and mixing together such crushed asphaltum and a natural mineral bitumen gathered in the island of Trinidad or elsewhere, and by afterwards casting for transportation the mixture so obtained in molds into loaves or cakes, is not

free of duty as crude asphaltum, under the provision for "asphaltum and bitumen, crude," contained in the free list (Tariff Ind., New, par. 643) of the tariff act of March 3, 1883, (22 U. S. St. p. 517), but is dutiable at the rate of 10 per cent. ad valorem under the provision for "all nondutiable crude minerals, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, not specially enumerated or provided for in this act," contained in Schedule A (Tariff Ind., New, par. 95) of the same tariff act, (22 U. S. St. p. 494.)

**At Law. Action by** ——— **Wootton, executrix of Edwin H. Wootton, against Daniel Magone, collector of the port of New York, to recover back customs duties. Judgment on verdict for defendant. Statement by LACOMBE, Circuit Judge:**

During the years 1886, 1887, and 1888 the plaintiff's testator, Edwin H. Wootton, imported from France into the United States at the port of New York certain articles which were invoiced as "mastic d'asphalte" and "asphalte en pains," and entered as "asphalte crude." These articles, having been returned by the local appraiser as "crude minerals, advanced by manufacture," were classified for duty at the rate of ten per cent. ad valorem, under the provision for "All nondutiable crude minerals, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, not specially enumerated or provided for in this act," contained in schedule A (Tariff Ind., New, par. 95) of the tariff act of March 3, 1883, (22 U. S. St. p. 494.) and duty at that rate was exacted thereon by the defendant as collector of customs at that port. Against this classification and this exaction, the plaintiff's testator protested, claiming that these articles were crude asphaltum, and, therefore, free of duty, under the provision for "asphaltum and bitumen, crude," contained in the free list (Tariff Ind., New, par. 643) of the aforesaid tariff act, (22 U. S. St. p. 517.) Thereafter the plaintiff's testator made due appeals to the secretary of the treasury, and, within ninety days after adverse decisions had been made by him thereon, brought this case to recover the duty exacted upon these articles.

Upon the trial it appeared that these articles were bought and sold in the markets of this country under the name of "asphalt mastic," and consisted of loaves or cakes of an asphaltum, to which a natural mineral bitumen had been added; that this asphaltum was a fine oolite stone or carbonate of lime naturally impregnated with from 7 to 10 per cent. of mineral pitch, and was mined or quarried in rough chunks, often called "rock;" that the principal asphaltum mines in Europe were Seyssel, (ain Mons Gara,) in France, Rayusa, in Italy, (Sicily,) Travers, in Switzerland, and Limmer, in Germany; that the natural mineral bitumen of the kind added was black and viscous, and was gathered in the island of Trinidad, where its chief deposit was found, and in various other parts of the globe; that the asphaltum so mined or quarried as aforesaid was crushed; that the bitumen gathered as aforesaid was put into large melting pots, and the crushed asphaltum emptied in; that this bitumen and this crushed asphaltum were melted and mixed together, and afterwards, for transportation, cast in molds into loaves or cakes of the shape of a short section of a cylinder, constituting the articles of the kind in suit; that such articles, broken up into small pieces, a certain amount of refined bitumen, and from 40 to 50 per cent. of grit or very coarse sand, were boiled together for a certain length of time to a certain degree of heat, and the compound so formed was then taken from the fire, and used for laying sidewalks, cellar floors, roofs, and for other like purposes; that, except in combination with other substances, and after some such manipulation as described, there was no use to which such articles as those in suit could be applied; that articles similar to these in suit, and produced in Germany, in substantially the same way, from asphaltum mined or quarried there and Trinidad bitumen, were worth about half as much again as the value of such asphaltum as mined or quarried and the value of raw Trinidad bitumen taken together. Both sides having rested, defendant's counsel moved the court to direct a verdict for the defendant on the ground that the articles in suit were not crude asphaltum.

Comstock & Brown, (Stephen G. Clarke, of counsel,) for plaintiff.  
Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (orally.) I am inclined to grant the motion on the ground that the phraseology of the particular paragraph referred to (paragraph 95) is somewhat different from other paragraphs which have in other suits been held inapplicable to articles elsewhere enumerated by reason of the use of general or special words. The tariff act of 1883, taken together, provides, in the first place, (paragraph 215,) that certain crude articles shall pay one rate of duty, and (paragraph 638 and elsewhere in free list) that certain other crude articles shall not pay duty; in some instances by general enumeration, in others by special reference. Then there is a general paragraph, (paragraph 95,) providing that all crude materials which, by reason of the fact that there is no duty provided for them, or that they are on the free list under some general or special name, shall pay a certain rate of duty if they have been advanced in value or condition by refining, grinding, or other process of manufacture. There seems to have been in this case certainly a process of manufacture in the way of boiling; and, if requested, I would leave it to the jury to say if, under the evidence, it has been advanced in value or condition. I am free to say that I do not think there could be any dispute upon the fact that there has been some advance in value, since labor has been put upon it. It is a perfectly fair inference with regard to the French product that there was an advance in value, although no evidence has been offered except as to the German product.

Plaintiff's Counsel. I do not think it is worth while to trouble the jury on that point.

LACOMBE, Circuit Judge. As to the question of an advance in condition, I should leave that to the jury if it were a point to be determined irrespective of value, because an article may be "changed" in condition and yet not "advanced" in condition. If the question of value were entirely out of the case, I would leave it to the jury under a charge that they must be satisfied by the evidence not only that the articles were changed in form, but that the change had been itself an advance. But from the testimony here as to the value of the German article, and from the fact that in the French manufacture both capital and labor had been applied to the raw material, it would seem idle to submit any question as to whether there has been any advance in value.

Plaintiff's Counsel. I claim that what has been done was done for convenience in transportation, and that the mere process of putting it together is not a "manufacture," within the meaning of the act.

LACOMBE, Circuit Judge. I shall rule against you on that question of law, and direct a verdict for the defendant.

## In re CRUIKSHANK.

(Circuit Court, S. D. New York. March 6, 1893.)

1. **CUSTOMS DUTIES—CLASSIFICATION—SIERRA LEONE BIRD PEPPER.**  
Sierra Leone bird pepper unground is dutiable under paragraph 326 of the tariff act of October 1, 1890, at 2½ cents per pound, as Cayenne pepper unground, and is not within paragraph 560 of the free list exempting from duty "spices, vegetables, seeds aromatic and seeds of morbid growth, weeds, woods used expressly for dyeing; any of the foregoing which are not edible, and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially provided for in this act."
2. **SAME—DEFINITIONS.**  
"Foregoing" in paragraph 560 refers to all the articles therein enumerated.
3. **SAME.**  
"Edible," as applied to spices, in paragraph 560, means spices which are eaten as a sauce or condiment and not as a food product capable of sustaining life.

Appeal by the Importer from a Decision of the Board of United States General Appraisers affirming a decision of the collector of the port of New York. Affirmed.

Statement by COXE, District Judge:

The decision of the board is as follows: "The merchandise in question is invoiced as Sierra Leone bird pepper. The appraiser returned the same as Cayenne pepper unground, and the collector assessed duty upon it at two and one half cents per pound, under paragraph 326, Act October 1, 1890. The appellant claims in his protest that the merchandise is entitled to free entry as spices not edible, in a crude state, and not advanced in condition by refining or grinding or any other process. Cayenne pepper is a preparation from the dried fruit of various species of capsicum. The bird pepper or chilles in question are a species of capsicum, and we find from the testimony of witnesses who appeared before us that it is of a kind largely used in the manufacture of Cayenne pepper. Without giving further consideration to what class of merchandise congress intended to cover by the term 'Cayenne pepper unground,' we hold that the claim of the importer that the merchandise in question is a spice which is not edible is not well taken. The protest is accordingly overruled, and the action of the collector stands." Subsequently the board made a further return as follows: "First. They find that the merchandise subject of this proceeding is a spice, and that it is edible. Second. They find that the said merchandise is in a crude state, and not advanced in condition by refining or grinding or any other process." The provision of the new tariff act under which the importation was classified by the collector is subdivision b of paragraph 326. It reads as follows: "Cayenne pepper, two and one half cents per pound, unground." Paragraph 560 of the free list under which the importer insists his merchandise should have been classified, so far as it is applicable to the present controversy, reads as follows: "Spices, vegetables, seeds aromatic, and seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing, which are not edible and are in a crude state, and not advanced in value or condition, by refining or grinding, or by other process of manufacture, and not specially provided for in this act." The importer insists that the merchandise in question is a spice unground, not edible, and in a crude state. After the board made its last return, additional evidence was taken in this court.

Albert Comstock, for importer.

Thomas Greenwood, Asst. U. S. Atty, for collector.