

## HUBBARD, Collector, v. SOBY.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

In Error to the Circuit Court of the United States for the District of Connecticut.

At Law. Action by Charles Soby against Charles C. Hubbard, collector of customs at the port of Hartford, to recover duties paid under protest on certain importations of tobacco. There was judgment for plaintiff. 49 Fed. Rep. 234. Defendant sued out a writ of error to the supreme court of the United States which was dismissed for want of jurisdiction. 13 Sup. Ct. Rep. 13. He now brings the case to this court. Judgment affirmed.

Geo. P. McLean, for plaintiff in error.

Lewis E. Stanton, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. This is a writ of error to the United States circuit court for the district of Connecticut to review a judgment recovered in that court against the collector of customs for the port of Hartford, for excess of duties paid on certain Sumatra leaf tobacco. The plaintiff below imported two plantation lots of such tobacco in a single shipment, but before duty was collected one lot was withdrawn for transportation to New York, where the duty was paid. The only question in the case was as to the proper rate of duty on the remaining lot. The points raised are substantially the same as those discussed in *Re Blumlein*, 55 Fed. Rep. 383, (decided at this session.) The importer contended that the unit of tobacco on which the percentage should be calculated was the entire importation, including both plantation lots. This proposition, for the reasons expressed in *Re Blumlein*, supra, we hold to be unsound. Of the plantation lot which remained in Hartford, about 83½ per cent. was of the requisite size, fineness, and weight specified in paragraph 246 of the tariff act of 1883. We concur with the learned judge who tried the cause in the conclusion that the entire lot was liable to duty only under paragraph 247. It will be noted that in our opinion in the *Blumlein* Case we decide that the proper unit is the commercial bale. In the case at bar the learned circuit judge held that the "quantity of tobacco in the Senembah plantation lot" was the proper unit. Examination of his opinion, however, discloses the fact that such holding was based on the proved fact that all the bales in the lot were of uniform grade. Where all the bales in a lot are thus uniform, the same result is reached, whether lot or bale be taken as the unit. Where they are not uniform, however, the circuit judge expresses the opinion that the unit must be found in some smaller quantity. There is no substantial difference, therefore, between the decision of the circuit judge in this case and that of this court in the *Blumlein* Case.

The judgment of the circuit court is affirmed, with costs.

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 UNITED STATES v. STRAUSS.

(District Court, S. D. Ohio, W. D. April 14, 1893.)

No. 1,719.

CUSTOMS DUTIES—ENTRY BELOW VALUE—ACTION FOR PENALTY.

One who is assessed with a penalty for entering dutiable goods at a sum below their actual value cannot, in an action for the penalty, defend on the ground that he intentionally omitted certain items from the entry in order to pay them separately under protest. He must either give notice, and ask for a reappraisalment, or take an appeal, as provided by law. Act June 10, 1890, §§ 13, 14; 2 Supp. Rev. St. 750.

At Law. Action by the United States against Henry Strauss to recover a penalty for undervaluation of dutiable goods. Judgment for plaintiff.

John W. Herron, U. S. Atty., and Henry Hooper, Asst. U. S. Atty., for the United States.

Harmon & Colston and Goldsmith & Hoadly, for defendant.

SAGE, District Judge. The agreed statement of facts is, in substance, as follows:

The defendant imported into the United States, from Cuba, six cases of cigars, which arrived December 4, 1890. On the 10th of December he made a consumption entry, and paid the duties thereupon. The value of the goods, as entered, was \$819. The surveyor of customs on the 13th of December appraised the cigars at \$819, as entered, and added the sum of \$148 for the case, packing, and charges, and the defendant paid the duty, and withdrew the goods. June 13, 1891, the surveyor and acting collector of customs caused said entry to be reliquidated, and a final liquidation made, which included in the value of said merchandise the boxes and packing charges, making the appraised value \$969; and the surveyor assessed a penalty thereon in accordance with the provisions of section 7 of the act of congress approved June 10, 1890, (2 Supp. Rev. St. U. S. p. 748,) which provides that, if the appraisement exceeds by more than 10 per cent. the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties, a further sum equal to 2 per centum of the total appraised value for each 1 per centum that such appraised value exceeds the value declared in the entry. The penalty, under this provision, in this case, is \$348.12, being the amount sued for. The defendant was notified of this reliquidation on the same day. On the 23d of June, 1892, he filed a protest with the surveyor, setting forth that the boxes and charges were intentionally omitted from said consumption entry; 'the omission being solely for the purpose of paying the duty on the value of the cigars, and excluding the value of the cases, boxes, and bands, with the intent to enter the same, and pay the duties thereon, under protest.' The additional duty of \$146.34 on the increased value, and on 24½ pounds additional weight, was paid on liquidation; but the penalty claimed under the statute was not paid at the time of the protest, nor has it been since paid. The defendant did not give notice to the collector of his dissatisfaction with such appraisement, and ask for a reappraisement by one of the board of general appraisers, or by the board of said appraisers, nor has any appeal been taken from the act of the surveyor of customs in said appraisement. The failure to give notice, and ask for a reappraisement, or to take an appeal from the act of the surveyor of customs, is fatal to the defense, which is that when the surveyor caused the entry to be liquidated the rate and the duties chargeable, together with all costs, charges, fees, and exactions, of whatever character, were decided by the surveyor and acting collector, and by him demanded of the defendant, and that the defendant then duly paid the same, and withdrew the cigars for consumption.

Section 13 of the act provides for a reappraisal if the collector shall deem the appraisal of any imported merchandise too low, which reappraisal shall be made by one of the general appraisers. The decision of the general appraiser, in cases of reappraisal, is made final and conclusive as to the dutiable value of the merchandise reappraised, against all parties interested, unless the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall within two days thereafter give notice to the collector, in writing, of such dissatisfaction, or unless the collector shall deem the appraisal too low. In either case it is made the duty of the collector to transmit the invoice, and all the papers appertaining thereto, to the board of three general appraisers which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the secretary of the treasury for such duty at that port or any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive.

Section 14 provides for an appeal within 10 days from the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all costs, charges, fees, and exactions, of whatever character, excepting on tonnage, and that in default of such appeal the decision of the collector shall be final and conclusive. The defendant has neglected to take any of the steps provided by law to review the action of the collector, which has now become conclusive and final. The judgment will be in favor of the United States, with costs.

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DIXON-WOODS CO. v. PFEIFER.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

PATENTS FOR INVENTIONS—VALIDITY—DESCRIPTION—GLASS ANNEALING.

Claim 1 of letters patent No. 258,156, issued May 16, 1882, to Cleon Tondeur, for an improvement in glass-annealing furnaces, was for "the combination of the bars, d, d', arranged side by side, and alternately between each other, the set, d, supporting the sheets of glass while the bars, d', are pushed towards the leer or flattening wheel, a, and the set, d', supporting the sheets of glass, and moving them onward and through the tunnel." The drawings show the bars raised some distance above the floor, and the specification states that a space of about one foot beneath the bars is desirable; also, that in transferring the glass one set of bars is raised and the other is lowered, in all about one inch. It was shown that the advantages which this device had over prior ones were due to the fact that the glass was held some distance above the floor, and moved in a horizontal plane. *Held*, that the bars, d, d', are bars which are above the floor, and in such relation to each other that the glass is carried forward in practically the same horizontal plane, even though the inventor did not precisely point out the advantages to inure from this arrangement, and was perhaps not aware to what the improvements effected by his device were due. 51 Fed. Rep. 292, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of New York.