

seem, therefore, to be clearly the duty of the clerk to certify to the fact when forwarding the original account; and this is required of him by the instructions from the attorney general. See page 265, Register of Department of Justice for 1886. The charge therefor is allowed.

10. Exceptions are also taken to the folio fee charged for entries upon the record showing approval of bail bond, for entries showing the continuance of the trial of cases from day to day, for entering orders of the court allowing the district attorney extra compensation in certain cases, and making certified copies of these orders, to be attached to the original and duplicate accounts of the attorney. These entries were all made in order to preserve, upon the record proper, evidence of the action of the court in these several particulars, and they clearly come within the provision of the fee bill, and the proper statutory fee is therefore allowed for making the same, as well as for making the certificates to accompany the reports of the attorney. The fee charged for attaching the seal must be disallowed.

Of the total sum sued for, there is disallowed, for the reasons stated, the sum of \$14.55, leaving a balance due of \$314.50, for which judgment will be entered in favor of the plaintiff.

CRUIKSHANK v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

No. 58.

1. CUSTOMS DUTIES—CLASSIFICATION—"BIRD PEPPERS."

Sierra Leone "chillies" or "bird peppers," whole, but in a dried state, are exempt from duty, as spices not edible, under paragraph 560 of the tariff act of 1890, and are not dutiable as Cayenne pepper unground, under paragraph 326. 54 Fed. 676, reversed.

2. SAME—DEFINITIONS.

"Edible," as used in paragraph 560, is to be taken in its common meaning. 54 Fed. 676, reversed.

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

Comstock & Brown, (Albert Comstock, of counsel,) for appellant.
Edward Mitchell, U. S. Atty., (Thos. Greenwood, Asst. U. S. Atty., of counsel,) for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal by the importer from a decision of the United States circuit court for the southern district of New York, affirming a decision of the board of United States general appraisers to the effect that certain merchandise imported by the appellant into the port of New York was subject to duty. 54 Fed. 676. The appellant imported certain "chillies" or "bird peppers," whole, but in a dried state, a product of Sierra

Leone, and they were classified and subjected to duty by the collector under paragraph 326 of the tariff act of 1890. That paragraph reads as follows:

"Spices, ground or powdered, not specially provided for in this act, four cents per pound; Cayenne pepper, two and one-half cents per pound, unground; sage, three cents per pound."

The importer protested, insisting in his notice that the importations were exempt from duty under paragraph 560 of the free list, which reads as follows:

"Drugs, such as barks, beans, berries, balsams, buds, bulbs and bulbous roots, excrescences such as nut galls, fruits, flowers, dried fibers and dried insects, gums, grains and gum resin, herbs, leaves, lichens, mosses, nuts, roots and stems, 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 board of general appraisers affirmed the decision of the collector, and from that decision the importer appealed to the circuit court. The board of appraisers found, as matters of fact, that Cayenne pepper is a preparation from the dried fruit of various species of capsicum, and that the bird peppers or chillies in question were a species of capsicum of the kind largely used in the manufacture of Cayenne pepper, and that they were edible. They decided, as matter of law, that the term "edible" in paragraph 560 applies to spice as well as to the numerous other articles enumerated in that paragraph, and that, as the importations in question were a spice which was edible, the claim of the importers was not well taken. There was no evidence before them tending to show that the importations were edible. Upon the appeal by the importer to the circuit court, new evidence was introduced. The circuit court adopted the conclusions of the board of appraisers.

The evidence in the record shows that the genuine Cayenne peppers are a product of Cayenne, South America; that chillies and bird peppers are used largely by manufacturing druggists for making capsicum plasters and other medicinal preparations, and also by spice dealers for making the article commercially known as "Cayenne pepper," in which the ingredients are capsicum, rice flour, and other mixtures; that they are not known commercially as unground Cayenne pepper; that there is a Cayenne pepper prepared in South Africa, and imported in small quantities into this country, which is not ground. The Encyclopedia Britannica describes Cayenne pepper as follows:

"Cayenne pepper is manufactured from the ripe fruits, which are dried, ground, mixed with wheat flour, and made into cakes with yeast. The cakes are baked hard, until like biscuit, and then ground and sifted. The pepper is sometimes prepared by simply drying the pods, and pounding them fine in a mortar."

The evidence also shows that pepper made from the genuine Cayenne peppers is almost unknown to the trade in this country, and there is no evidence to show that the genuine Cayenne peppers

are ever imported into this country. The evidence taken in the circuit court shows very conclusively that dried chillies or bird peppers are not eatable. They cannot be taken into the mouth without blistering or burning it, and they cannot be masticated without producing strangulation.

The term "unground" pepper does not aptly describe the dried peppers imported by the appellant. It is used in paragraph 326 in contradistinction to "ground or powdered." By paragraph 580 of the same tariff act dried fruits not elsewhere specially provided for are free of duty. The importations in question are undoubtedly spices, as well as drugs, and, although they might properly be regarded as dried fruits, they are not exempt from duty by paragraph 580 because they are more specifically enumerated as spices. But paragraph 580 is of some value as showing the intention of congress to put the general class to which the importations belong upon the free list. The term "unground Cayenne pepper" appropriately describes a partly prepared commercial article which has not been advanced to its final condition by being ground or powdered. The term fits the article mentioned in the Encyclopedia Britannica, and imported into this country from South Africa in small quantities, as shown by the testimony in the record. This view is strengthened by an inspection of previous tariff acts, by which it appears that congress, in laying duties on Cayenne pepper, has uniformly treated it as of two kinds, imposing the higher duty upon the ground, or finally advanced, article. By the act of March 2, 1861, (12 Stat. 183,) the duty was imposed as follows: "On Cayenne pepper, 3 cents per pound; on ground Cayenne pepper, 4 cents per pound." By the act of August 5, 1861, (12 Stat. 292,) the duty was imposed "on Cayenne pepper, 6 cents per pound; on Cayenne pepper, ground, 8 cents per pound." By the act of July 14, 1862, (12 Stat. 547,) duty was imposed on "Cayenne pepper, 12 cents per pound; ground, 15 cents per pound." By the act of July 14, 1870, which was reproduced in the Revised Statutes in 1874, and continued in force until the act of 1890 was passed, no distinction was made between ground and unground Cayenne pepper. Thus, from 1870 until the tariff act of 1890, both the ground and the unground article were dutiable as "Cayenne pepper." The present act revives the earlier classification, and lays a duty on Cayenne pepper by enumerating it as a "spice, ground or powdered," and a lower duty on the unground, by its specific name. It is not open to doubt that importations like those in controversy would not have been subject to duty from 1861 to 1890 as Cayenne pepper, because it is to be assumed that congress used that term in its commercial signification, and intended to impose the duty only on the commercial article of Cayenne pepper in one or both of its two recognized forms.

As the importations have never been known in trade and commerce as "Cayenne pepper, unground," and that term, in its ordinary sense, does not appropriately describe them; and as it is plain that congress had always, previous to the present act, applied the term "unground" to Cayenne pepper to describe a variety of the

commercial article which was not advanced to the ground or powdered state; and as the word "unground," as used in paragraph 326, is to be presumed to mean what it always meant in previous tariff legislation,—we conclude that the importations were not the unground Cayenne pepper which congress has intended to subject to duty. It is not material that they can be converted into the dutiable article by mixing them with other ingredients, and subjecting them to the various processes bestowed upon that article, or even by advancing them a single step in the process of preparation. The law deals with them as they are, and not as they can be made to be.

It remains to consider whether the protest of the importer properly specified the objection to the classification of the merchandise. Paragraph 560 exempts from duty "drugs, such as barks, beans, berries, * * * spices, * * * vegetables, * * * woods used expressly for dyeing, * * * any of the foregoing which are not edible." If such spices as he imported are excluded from paragraph 560 because they are not within the category, "any of the foregoing which are not edible," the objection is fatal. It is not claimed for the appellee that chillies and bird peppers are "edible," in the ordinary meaning of the term. The learned judge who decided the case in the circuit court was of opinion that spices were within the category of edible things, and that congress must have meant to exclude from the exemption all spices edible in the sense in which spices are edible,—as a sauce, a condiment, or a relish. But the evidence which was before the circuit court, although not before the board of general appraisers, shows very clearly that chillies and bird peppers in their dried state, whole, are not edible in any sense. Even when ground, the powder is mixed with other ingredients before it can be used as a condiment, and as thus prepared it is one of the most pungent condiments known.

We cannot suppose that congress intended to admit spices free of duty, and at the same time to exclude from the exemption all spices which are edible in the sense in which every spice is edible. Such legislation would be absurd. If there are any spices which are non-edible, the importations, according to the evidence, belong in that class. There is no necessity, and certainly no propriety, in placing a strained and violent meaning upon the phrase, "any of the foregoing which are not edible." Many of the articles enumerated in the paragraph are those having well-known edible qualities. Thus, there are beans, buds, bulbous roots, fruits, dried fibers, grains, gums, herbs, leaves, nuts, and vegetables, all of which include esculent varieties. Many of the other enumerated articles in the paragraph are not edible in any sense, such as dried insects, gum resin, lichens, mosses, seeds of morbid growth, and woods used expressly for dyes. It is reasonable to suppose that congress used the term "edible" in its ordinary sense, and intended to exclude from the exemption such of the enumerated articles as are edible according to common understanding. It may be that there are spices fit to be eaten as food, and which fall within the excluded

category. However that may be, we must conclude from the evidence in the record that those like the importations are not. It follows that the protest was sufficient.

The decision of the circuit court and of the board of appraisers is reversed.

Appeal of SLATTERY.

(Circuit Court, S. D. Ohio, W. D. December 30, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—MATCH BOXES.

Tin match boxes, containing high-grade matches, and used to protect them from dampness and accidental ignition, and being of the usual quality and shape, and like those in which similar matches are sold abroad, will be considered as designed for the bona fide transportation of the matches, and not dutiable under section 19 of the act of June 10, 1890.

Appeal from Board of General Appraisers' Decision. Reversed.
Chas. H. Grosvenor and John A. Slattery, for appellant.
John W. Herron and Henry Hooper, for appellee.

SAGE, District Judge, (orally.) The appraiser at Cincinnati assessed duty, under section 19 of the act of June 10, 1890, upon certain match boxes, which were claimed by the importers to be only holders, and the usual and necessary coverings for a quantity of matches imported, and not dutiable. This assessment was confirmed by the general appraisers, and the question is now before the court on appeal. It appears from the testimony taken under the appeal that the goods were imported from Bryant & May, Limited, London, by the appellant. Some of the boxes which contained the matches are made of wood or paper, and some of tin. The testimony is that the principal use of the metal boxes is for safety; that, if a match contained in a wooden or paper box should be ignited, the entire box would probably burn, and possibly set fire to anything it might come in contact with, while a tin box would smother a starting conflagration. Instances are given where a part of the matches in tin boxes were burnt, while the remainder were intact in the same boxes. It is further in testimony that tin boxes protect from dampness more effectually than wood or paper boxes, and that there is nothing unusual in the form or quality of the tin boxes in which the matches in question were imported, and that they have no other use than as a covering for the matches. It also appears that such boxes have been used for the covering of matches imported into the United States for many years; one witness specifying that, to his knowledge, they have been so imported and offered for sale for eight years last past.

I find the facts to be in accordance with this testimony, and that the metal boxes used in this instance are not unusual articles or forms, nor were they designed for use otherwise than in the bona fide transportation of such matches to the United States. It is not practicable to transport matches, especially by water, in large

quantities in bulk, because of the great danger of fire. The matches involved in this case are of high grade and quality, and it appears, further, from the testimony, that they are usually sold in England in the same kind of boxes as those in which they were shipped to this country.

Upon the authority of *Oberteuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. 462, and *Magone v. Rosenstein*, 142 U. S. 604, 12 Sup. Ct. 391, the finding and order of the general appraisers is reversed, and the appeal sustained.

WIMPFHEIMER et al. v. ERHARDT.

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

CUSTOMS DUTIES—CLASSIFICATION—FUR WASTE, ETC.

Articles of merchandise imported in the years 1889 and 1890, and known to trade and commerce, respectively, as "fur waste," "hares' combings," "hares' waste," "hares' dags," and "coney's dags," were not dutiable at the rate of 20 per cent. ad valorem, under the provision for "hatters' fur, not on the skin," contained in paragraph 450 (Tariff Ind., New) of Schedule N of the tariff act of March 3, 1883, (22 Stat. 513,) but were dutiable at the rate of 10 per cent. ad valorem, under the provision for "waste, all not specially enumerated or provided for in this act," contained in paragraph 493 (Tariff Ind., New) of the aforesaid Schedule N, (22 Stat. 514.)

At Law. Action to recover duties paid under protest. Verdict directed for plaintiffs.

Plaintiffs imported in the years 1889 and 1890, from a foreign country into the United States, at the port of New York, certain articles of merchandise, invoiced as "fur waste," "hares' combings," "hares' waste," "hares' dags," and "coney's dags." These articles were classified for duty as "hatters' fur, not on the skin," under the provision for such fur contained in paragraph 450 of Schedule N of the tariff act of March 3, 1883, (22 Stat. 513;) and duty at the rate of 20 per cent. ad valorem, the rate fixed by that provision, was exacted thereon by the collector of that port. Against this classification and this exaction, plaintiffs duly and seasonably protested, claiming that these articles were not "hatters' fur, not on the skin," but were "waste, not specially enumerated or provided for," and were therefore dutiable at the rate of 10 per cent. ad valorem, as such waste, under the provision for "waste, all not specially enumerated or provided for in this act," contained in paragraph 493 of the aforesaid Schedule N, (22 Stat. 514.) Thereafter, plaintiffs made due and seasonable appeals to the secretary of the treasury, and, within 90 days after adverse decisions were made by him thereon, duly brought suit to recover the amount, with interest thereon, of all duty exacted in excess of duties at the rate of 10 per cent. ad valorem. Upon the trial it appeared that skins of coney's and hares, from which one kind of hatters' fur is obtained, as taken from these animals, were first split open and stretched; that these skins, after being split open and stretched, were cleaned of blood, or any other foreign matter that might be upon them; that they were then plucked or pulled of the outer growth on the fur thereon, consisting of coarse hairs; that they were then subjected to a process of brushing, from which process was obtained what was invoiced and commercially known as "fur waste;" that they were then subjected to a process of "carroting,"—a treatment by means of a preparation of quicksilver and acid,—so that the fur thereon might felt; that they were afterwards dried and brushed, and what was then brushed from the skins of hares was invoiced and commercially known as "hares' combings;" that they were then put through a machine that cut the fur off, and cut the pelts