UNITED STATES v. BACHE et al.

(Circuit Court of Appeals, Second Circuit. February 9, 1894.)

No. 51.

CUSTOMS DUTIES—CLASSIFICATION—BREAKAGE OF GLASS IN TRANSIT.

Where window glass is broken in transit, so that part of it is useless except for remanufacture, the broken part is not admissible, under paragraph 590 of the free list, as broken glass, but the whole is dutiable as window glass, unless there is an abandonment to the government, under section 23 of the act of June 10, 1890. 54 Fed. 371, reversed.

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

Application by Semon Bache & Co. for a review of a decision of the board of general appraisers sustaining the action of the collector in the classification for duty of certain glass imported by them. The circuit court reversed the decision of the board. 54 Fed. 371. The United States appeal. Reversed.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

W. Wickham Smith, (Charles Curie and David Ives Mackie, on the brief,) for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Semon Bache & Co. imported from Europe into the port of New York, both before and after October 6, 1890, sundry invoices of glass, which were purchased in a sound condition, but a portion of which suffered damage by breakage during the voyage and before arrival in this country. This appeal relates only to that part of the glass which was imported after the tariff act of October 1, 1890, went into effect.

The collector assessed duty thereon as "common window glass," under paragraph 112 of that act, in accordance with the size as stated in the invoice. Against this classification the importers protested, upon the ground that upon the voyage of importation "considerable quantities of this glass became broken into pieces which could not be cut for use, and were, at the time of their arrival in this country, fit only to be remanufactured, and were, therefore, exempt from duty by virtue" of paragraph 590 of the same act, which included in the free list "glass, broken and old glass, which cannot be cut for use, and fit only to be remanufactured."

The board of general appraisers found the following facts:

"(1) The merchandise consists of window, cylinder, and other kinds of glass, of the particular description named in the several invoices and entries, contained in cases or packages, marked and numbered as shown by the accompanying papers in the appended list of cases.

"(2) A part of said merchandise was imported under the new tariff act, and since October 6, 1890, and a part of it under the tariff act of March 3, 1883, prior to the time when the present tariff law went into effect. But all of the merchandise was imported after August 1, 1890, when the act of June 10, 1890, known as the 'Customs Administrative Act,' went into effect.

"(3) Said glass was purchased in a sound and unbroken condition in the markets of the country whence exported, and a considerable quantity of it was damaged by being broken during the voyage, and before arrival at the port of New York, in such manner as to be unfit for any other use than to be remanufactured.

"(4) The importers in each case appeared before the board of general appraisers, and offered to produce evidence showing the amount of damage done to each package or case, and this evidence was held by the board to be irrelevant, and was excluded on the ground that allowances for damage of the kind under consideration were abolished by section 23 of said act of June 10, 1890.

"(5) There was no evidence of any offer on the part of the importers in any case to abandon any portion of the merchandise to the government, and we accordingly find there was no such offer."

The board sustained the action of the collector upon the ground that claims for the reduction of duties by reason of damage, and not total loss, which occurred in transit, were governed by section 23 of the act of June 10, 1890, commonly known as the "Customs Administrative Act," and that this section prohibits the board from taking action upon such claims. The circuit court, upon appeal, reversed the decision of the board of general appraisers.

The theory of the importers, which was sustained by the circuit court, is that those goods only are subject to duty which are imported,—that is, brought into this country; that in this case a portion of the invoiced goods had ceased to exist. As stated by the circuit court:

"This was no longer window glass, sixteen by twenty-four inches square. In its place was a quantity of broken glass. The character of the merchandise was entirely changed during the voyage. For tariff purposes, it was different merchandise. The glass schedule no longer described it. The language of the free list covered it with perfect accuracy."

The question in the case cannot be fully presented without a statement of the statutory system, since 1799, in regard to rebates of duties on account of damage to imported merchandise in transit. Section 2927 of the Revised Statutes, which was a substantial reproduction of a section of the act of 1799, is as follows:

"In respect to articles that have been damaged during the voyage, whether subject to a duty ad valorem, or chargeable with a specific duty, either by number, weight, or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage, so ascertained and certified, shall be deducted from the original amount, subject to a duty ad valorem, or from the actual or original number, weight, or measure, on which specific duties would have been computed.

"No allowance, however, for the damage on any merchandise, that has been entered, and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may on examining the same prove to be damaged, shall be made, unless proof to ascertain such damage shall be lodged in the custom house of the port where such merchandise has been landed, within ten days after the landing of such merchandise."

Had this section been in existence at the date of the importation, it would hardly be contended that the duty upon glass damaged during the voyage by breakage, should not be estimated in accordance with its provisions, rather than by the provision in the

free list in regard to "glass broken," which had been in existence since 1857. The statutory system applicable to damaged merchandise in transit had been a continuous, and was a general, one, which made complete allowances for such damage, but required proof of the claims to be made and lodged within a specified time in the customhouse of the port where such merchandise was landed.

It could hardly be supposed that allowances for broken glass were not to be regulated according to the general system, which had existed for 90 years, unless specially excepted; and the provision placing upon the free list importations of broken glass, i. e. of glass invoiced as such, was not intended to create a special exception. By section 23 of the act of June 10, 1890, the following provision was made in regard to the subject of duties upon damaged goods:

"That no allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon; but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned: provided, that the portion so abandoned shall amount to ten per centum or over of the total value or quantity of the invoice; and the property so abandoned shall be sold by public auction or otherwise disposed of for the account and credit of the United States under such regulations as the secretary of the treasury may prescribe."

This section prohibited allowance for damage, unless, within a specified time, the importer should abandon to the United States his damaged goods, in which event he would be relieved from payment of duties on the portion so abandoned, provided it amounted to 10 per centum or over of the total value or quantity of the invoice. This provision is also general. It prescribed the prerequisites for damage allowance, and is applicable to all articles, except those which are or may be specially excepted, as is now the case, with respect to damage upon imported wines and liquors, by the provisions of paragraph 336 of the act of October 1, 1890. This modification or alteration of section 2927 does not change the fact that thus far, under the tariff acts, allowances for damage have been regulated by a general system. It is not to be supposed that it was the intention of the legislature to take one article out of the general system, unless such intention is clearly manifest. The mere statutory provision by which imported broken glass is duty free does not, in our opinion, modify the system in respect to the article of damaged glass.

The cases of Marriott v. Brune, 9 How. 619, Lawrence v. Caswell, 13 How. 488, and U. S. v. Nash, 4 Cliff. 107, in which it was held that, if the quantity or the weight stated in the invoice has been diminished by leakage or by loss on the voyage, the duty is chargeable on the quantity or the weight actually imported, are not conclusive with respect to the duties to be imposed upon damaged goods, where the allowance for damage is especially regulated by statute.

The decision of the circuit court is reversed.

In re ROSENWALD et al.

(Circuit Court, S. D. New York. January 6, 1894.)

CUSTOMS DUTIES—CLASSIFICATION — SUMATRA LEAF TOBACCO UNSTEMMED—EXAMINATION OF.

Certain Sumatra leaf tobacco, unstemmed, imported from Bremen, Germany, June 25, 1890, consisting of fifty-four bales, packed in the usual way, and divided into seven plantation lots, of which merchandise nine bales, being one in six of the whole importation, and in two instances two bales from each plantation lot, were examined by the United States examiner and appraiser at the port of New York by opening each of the nine representative bales, and drawing from different parts of each bale ten "hands" of the tobacco, carefully examining such hands as to fineness of texture and the quality of the tobacco, weighing each of such hands to ascertain where the leaves of the tobacco ran more than 100 to the pound or less, the classification of the merchandise by the collector and the liquidation of the entry being based upon the percentages of tobacco showing more or less than 100 leaves to the pound as applied to the sample bale, and also to the entire plantation lot represented by such bale or bales. All the percentages of tobacco thus shown to be of leaves requiring more than 100 to weigh a pound were assessed for duty by the collector at 75 cents per pound, under the provisions of Schedule F (Tariff Ind., New, par. 246) of the tariff act of March 3, 1883, and all the percentages showing leaves running less than 100 to the pound were assessed for duty at 35 cents per pound, under the same schedule and act, (paragraph 247.) Claimed by the importers' protest that there had been no legal examination of the tobacco sufficient to show that any part thereof was properly dutiable at 75 cents per pound, and that, consequently, all of the importation should bear a duty of only 35 cents per pound, under Tariff Ind., New, par. 247. The board of United States general appraisers affirmed the classification by the collector. *Held*, that the decision of the collector and of the board of general appraisers was erroneous, and that the examination of the tobacco was not sufficient to show any bale thereof to be dutiable at 75 cents per pound, and that, as a consequence, the whole of the importation should be subject to duty only at 35 cents per pound.

At Law.

Appeal by the importers from a decision of the board of United States general appraisers affirming the decision of the collector in the classification for customs duties of certain Sumatra leaf tobacco, unstemmed, imported into the port of New York, June 25, 1890. The examination of the tobacco by the United States examiner and appraiser was as above set forth in the syllabus to this case. The provision of the tariff act of March 3, 1883, under which the collector classified a part of the tobacco for duty, was in Schedule F, (Tariff Ind., New, par. 246,) as follows: "246. Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound." The provision under which the importers claimed in their protest was paragraph 247 of the same schedule, as follows: "247. All other tobacco in leaf, unmanufactured and not stemmed, thirty-five cents per pound." The testimony of the United States examiner was taken in the circuit court before a referee, under order of the court, and it was afterwards stipulated by counsel for the importers that all the leaves of the tobacco in the ten hands from each of the nine representative bales of tobacco examined were of the requisite size and fineness of texture to be suitable for wrappers, and that the percentages of light and heavy leaves (namely, leaves running more than 100 to the pound and less) were correctly given by the examiner. The testimony was also taken in behalf

of the government of several experienced dealers in the wholesale tobacco trade, showing that the examination made by the government officer was fully as thorough as the examination of similar unstemmed Sumatra leaf tobacco upon purchases and sales at wholesale in the trade dealing in that merchandise at the time of the passage of the tariff act of March 3, 1883, and since. The trade testimony also showed that the withdrawal of even 25 to 50 hands of tobacco from a bale, which commonly contained from 600 to 700 hands, would injure the commercial value of the bale as an original package. It appeared also that there was no transaction known to the tobacco trade where the character of the merchandise depended upon 85 per cent. thereof having certain requisites of size, fineness, and weight. No testimony was offered either before the board of general appraisers or in the circuit court in support of the importers' contention. On the trial in the circuit court it was contended by the United States attorney that the record and evidence showed that all the requirements of law in relation to the examination and inspection of this merchandise had been complied with; that every bale of the tobacco, upon entry, had been separately weighed by the United States weighers, and returns of such weight, giving the gross and tare, had been regularly made by such weighers; that more than one package in ten of the merchandise, namely one package in six, had been designated for examination by the collector, under section 2901 of the United States Revised Statutes, and was a full compliance with that provision of the law, the sending of any further packages of the merchandise for examination resting within the sound discretion of the collector, and the exercise of such discretion by an officer of the government being presumably correct, (citing Arthur v. Unkart, 96 U. S. 121;) that the examination of the tobacco by the examiner in drawing ten hands from each of the nine representative bales, as shown by the testimony and admitted by the stipulation, was thorough, as far as the hands and the leaves examined by him were concerned, and that the percentages of weights returned by the examiner in accordance with a table prepared for the use of such officers by the customs department of the government were correctly and truly given; that such examination of the merchandise, being equivalent to that usually made in trade, was sufficient to indicate the character of all the tobacco in the importation, (citing Sampson v. Peaslee, 20 How. 571; Yznaga v. Peaslee, 1 Cliff. 493; article 449, treasury regulations of 1884.) It was also claimed that the sufficiency of the examination of this tobacco was res adjudicata in this court, (In re Blumlein, 49 Fed. 232, per Wheeler, J.,) and that such decision of Judge Wheeler had not been reversed by the circuit court of appeals, which affirmed the judgment of the circuit court in that case, and did not overrule his finding that the examination of the tobacco was sufficient. U. S. v. Blumlein, 5 C. C. A. 142, 55 Fed. 383. The United States attorney also cited numerous decisions of the treasury department, running back a number of years, showing the continuous practice of determining the dutiable characteristics of merchandise by samples of representative packages, notably treasury decisions, synopsis 8299, as to the requisite examination of leaf tobacco; synopsis 3579, as to the tare of sugar; synopsis 4932, as to the tare on bales of hay; synopsis 5284, that Sumatra tobacco was to be allowed schedule tare because of easy damage to the leaf; synopsis 2658, weight of cigars to be ascertained by weighing two boxes in ten; synopsis 1664, tare by percentage on sugar in kegs; synopsis 3579, tare by representative packages; treasury regulations of 1884, art. 1467, as to determining weight of railroad iron from average; also section 2915, Rev. St. U. S., as to samples of packages of sugar in order to ascertain the true quality thereof; and article 979 of treasury regulations of 1884, relating to the sampling of sugar for examination and classification,—and it was argued that if the classification of sugar under the tariff act of March 3, 1883, which provided for different specific rates on sugars of different standards, covering a wider range of duties than that provided for leaf tobacco, could be determined from samples of at least one in ten, the determination as to the character and weight of leaf tobacco could be ascertained in like manner from a practical and commercial examination of not less than one package in ten. It was contended that the government was entitled to duties at the rate of 75 cents per pound on all of the tobacco

contained in three of the plantation lots, where the examination of the sample bale indicated that 85 per cent. or more of the tobacco was of the requisite size, fineness, and weight to be suitable for wrappers, under the provision of said Tariff Ind. (New,) par. 246. In behalf of the importers it was argued that the examination was entirely insufficient and illegal, and that all of the tobacco was dutiable only at 35 cents per pound.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

Curie, Smith & Mackie, (William Wickham Smith, of counsel,) for importers.

LACOMBE, Circuit Judge. I am not satisfied that the examination given was sufficient to answer the requirements of the statute. It should be such as to determine whether the tobacco has or has not the distinctive features which place it in one or other of the paragraphs imposing duty. About one-sixtieth of each bale was examined, with this result:

Plantation Lots.	Length.	Color.	Mks.	Bales Ordered for Examination.	Percentage.	
					35c.	75c.
2578/2589	Deli	Lankat	SL 1	2574	70	30
"		"		2584	50	70
2590/2593		"	SS 1	2590	10	90
2594/2596		"	SSL 1	2596	30	70
2597/2600		"	B 1	2600	20	80
2601/2612	Deli	my/a	S 1	2602	80	20
"		"		2612	10	90
2613/2616		"	SL 1	2616		100
2617/2626		"	SS 1	2626	10	90

There appear here too great variances, even in the tobacco from the same plantation, to warrant the assumption that the other 59-60 of the examined bale, as well as the contents of the unexamined bales, contain tobacco of both grades in the proportions found to exist in the trifling amount examined. It will not do to say that the examination was such as a merchant makes when buying tobacco, because the merchant in that case is looking only for such distinguishing characteristics as are known to trade. The statute has prescribed a duty test for tobacco wholly unknown to trade, and, to determine whether imported tobacco possesses the noncommercial characteristics which subject it to a higher duty, the examination should be full enough to insure accuracy, which this examination seems to have failed to do.

Decision of the appraisers reversed. All should be reliquidated at 35 cents, as the government has not by competent proof shown that any single bale of it was 75-cent tobacco.

HILLS et al. v. ERHARDT, Collector.

(Circuit Court, S. D. New York. October 10, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—"CANDIED CITRON."

Candied citron, being the rind or peel of the citron fruit prepared by pickling in strong brine, then cutting the fruit into halves or quarters, and soaking in fresh water to extract the brine, afterwards boiling in sugar syrup until the fruit is thoroughly saturated with the sugar, thereafter drying the same until the syrup has drained off, and then glazing the fruit with another preparation of sugar, the article when so finished and imported being in a soft and semitransparent condition, and packed in drums or boxes,—*held* properly dutiable as classified by the defendant, collector of customs at the port of New York, as "fruit in sugar," at 35 per cent. ad valorem, under Schedule G of the tariff act of March 3, 1883, (Tariff Ind., New, par. 302,) providing for "comfits, sweetmeats, or fruits preserved in sugar, spirits, syrup, or molasses, not otherwise specified or provided for in this act, and jellies of all kinds, thirty-five per centum ad valorem," and not duty free as "dried fruit," under the provision of the free list of said tariff act, (Tariff Ind., New, par. 704,) which is as follows: "Fruits, green, ripe, or dried, not specially enumerated or provided for in this act."

At Law.

Action brought by the plaintiffs, importers, against the defendant, collector of customs at the port of New York, to recover the amount of an alleged overpayment of duties on certain merchandise imported by the plaintiffs during the months of May, July, and September, 1889, which merchandise was classified for duty by the defendant collector, as "fruit in sugar," at 35 per centum ad valorem, under the provisions of Schedule G (Tariff Ind., New, par. 302) of the tariff act of March 3, 1883, which is as follows: "302. Comfits, sweetmeats, or fruits preserved in sugar, spirits, sirup, or molasses, not otherwise specified or provided for in this act, and jellies of all kinds, thirty-five per centum ad valorem." Against this classification the plaintiffs duly protested, claiming that their merchandise was duty free, as "dried fruit," under the provision of the free list of the same tariff act, (Tariff Ind., New, par. 704,) which is as follows: "704. Fruits, green, ripe, or dried, not specially enumerated or provided for in this act."

Thereafter plaintiffs duly appealed to the secretary of the treasury, who affirmed the decision of the collector. The present suit was duly commenced within the period provided by law for the recovery of the amounts of duties alleged to have been overpaid. On the trial it was shown by witnesses for the plaintiffs that the merchandise in question was prepared from the citron fruit grown in Italy; that the fruit, when gathered, was at once put into a strong pickle of brine, and kept therein often for a period of months; that, after such pickling, the fruit was cut into halves or quarters, and thoroughly soaked in fresh water, so as to entirely exclude the brine; that the next process was boiling the fruit in a syrup composed of sugar and water; that, after such boiling, the pieces of the rind or peel were placed upon shelves, so that the syrup might drain off, and leave the fruit comparatively dry; that the concluding process of manufacture was the glazing of the fruit by a further application of sugar, leaving the article in a soft, semitransparent condition, and thoroughly saturated with sugar, although none of the syrup remained in a liquid state in the packages or drums in which the merchandise was packed for the market. A number of witnesses were produced by the plaintiffs from the wholesale trade in this country dealing in this article, whose testimony tended to show that the goods were known in trade and dealt in as "candied citron" or "Leghorn citron," and were regarded as coming within the general class of "dried fruits," and designated under that class in certain well-known trade journals. Some testimony was also offered in behalf of the plaintiffs that the terms "comfits" and "sweetmeats" were restricted in trade to fruits or articles of confectionery, and did not include