

enacted by the state. But this legislation by congress applies only to liquors, and as to all other commodities the exclusive right of the United States to legislate concerning them in their relation to commerce is retained. It will be kept in mind that the state, by this legislation, is not taxing the property, imported by the petitioner, as it does other property within its limits, by a general and uniform tax rate, but that this tax is imposed for the privilege of selling the imported articles, and is, as to them, special and additional. A tax imposed on the assessed value of the cigarettes, after they have commingled with and become part of the common property within the state, would not be a regulation of commerce, and would not be subject to the objections alluded to; but a tax on a license to sell goods is simply a special tax on the goods so authorized to be sold. I reach the conclusion that said section 66, as amended in the act of the legislature of the state of West Virginia, passed February 21, 1895, entitled "An act to amend and re-enact sections one, two, sixty-six and eighty-four of chapter thirty-two of the Code," so far as it applies to cigarettes imported from another state into the state of West Virginia, and sold by the importer within said last-named state, in the original packages, is a burden upon commerce among the states, and to that extent in violation of the commercial clause of the constitution of the United States; and also that, so far as it relates to cigarettes manufactured in another state and by the manufacturer sent into West Virginia in the original packages, for sale by the agent of the manufacturer, and so sold in such packages by such agent, it is for the same reason inoperative and void.

It follows that petitioner must be discharged from the custody of the officers now detaining him, and it is so ordered.

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In re MYERS et al.

(Circuit Court, N. D. New York. July 1, 1895.)

**CUSTOMS DUTIES—ACT OF AUGUST 27, 1894—CEDAR.**

Lumber manufactured from the tree botanically known as "thuja gigantea," and commonly called "red cedar," or "canoe cedar," is not within the exception of "cedar \* \* \* and all other cabinet woods," in paragraph 676 of the tariff act of August 27, 1894, but is entitled to free entry under that paragraph.

This is an appeal by the importers from a decision of the board of United States general appraisers overruling a protest against the decision of the collector at Plattsburgh, N. Y., subjecting to duty certain importations of lumber popularly known as "red cedar."

Stephen G. Clarke, for importers.

W. F. Mackey, Asst. U. S. Atty., for collector.

COXE, District Judge. The collector classified the merchandise in question under paragraph 181 of the act of August 27, 1894, which is as follows:

"House or cabinet furniture, of wood, wholly or partly finished, manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem."

The importers protested, insisting that it should have been admitted free of duty under paragraph 676 of the same act, which is as follows:

"Sawed boards, plank, deals, and other lumber, rough or dressed, except boards, plank, deals and other lumber of cedar, *lignum vitae*, lancewood, ebony, box, granadilla, mahogany, rosewood, satinwood, and all other cabinet woods."

The board found that the imported lumber is from the wood of a tree known botanically as "*thuja gigantea*" and that it is popularly known as "red cedar," or "canoe cedar." It is soft, light and but slightly fragrant. It does not take a polish. It is not of the class of woods known as cabinet woods. The other woods mentioned in the exception are hard, expensive cabinet woods used in fine finishing work. If the exception to paragraph 676 refers to cabinet woods and only to cabinet woods it is manifest that the importation, not being a cabinet wood, is not within the exception. The board were inclined to sustain the protest upon this ground, but reached a different conclusion after construing the paragraph in the light of paragraph 219 of the act of October 1, 1890, the argument being that because in the prior act the word "cedar" included rough lumber such as railroad ties and telegraph poles, a similar meaning must be given to the paragraph in hand, and that it cannot be restricted to that species of cedar used as a cabinet wood. The clause in question is certainly ambiguous, and although much may be said in favor of the view taken by the board it is thought that the construction contended for by the importer is supported by more cogent and consistent reasoning. In arriving at the legislative intent it is not altogether safe to rely for guidance upon the act of 1890, it being common knowledge that its object was very different from that of the present act. An examination of the former act will show that practically the entire wood schedule has been transferred to the free list in the present act. It seems clear that it was the intent of congress to exempt from duty all the cheaper grades of woods, when rough, unmanufactured, or partially manufactured, and to levy duty only upon the boards, etc., of the finer and more expensive woods used in cabinet work. This was the broad scheme of the act of 1894. The construction of the board ignores this intent and levies a higher duty upon cedar boards than the act of 1890 and this, too, when similar boards of spruce and pine, used for the same purpose, are admitted duty free. It discriminates against the boards of one particular soft-wood tree without the suggestion of a motive for such legislation. When boards used for sidings, etc., are free, what possible reason could congress have had in singling out and laying duty upon these boards when sawed from one particular variety of tree? It is as difficult to find a plausible motive, as if congress had discriminated against the boards cut from coniferous trees. Again, two pieces of wood are cut from the same tree; the one pays 25 per cent. duty, the other enters free; one—a shingle—is used to protect the roof, the other the side of a dwelling house. The construction of the importers makes such a result impossible, gives force to every part of the paragraph and is in harmony with the general purpose of the law. It is proved without dispute that all the other varieties mentioned

in the exception are cabinet woods—the products of foreign countries—and the board finds that the cedar known as “cedrela odorata,” which is imported from the tropics, is a cabinet wood of the mahogany group and is capable of taking a high polish. It is a very significant fact that this cedrela, besides being a cabinet wood, is the only wood in the United States which is known as “cedar” pure and simple. All the other varieties have some qualifying term placed before them, such as white-cedar, Spanish-cedar, red-cedar, etc. Finding “cedar” thus associated with eight well-known cabinet woods the rule of *ejusdem generis* requires that the word should be construed as applying to that variety of cedar which is a cabinet wood. So construed the exception applies to hard, expensive, foreign cabinet woods and to these alone. That this is the true reading of the paragraph is made still more apparent by the use of the word “other.” When the lawmakers at the end of the paragraph refer to “all other cabinet woods” is it not clear that they supposed all the preceding varieties were cabinet woods and that they did not intend to include in this enumeration a wood that is no more a cabinet wood than is white pine or hemlock? Again, it is apparent from the act (paragraph 683) and similar provisions in the Canadian act of the same year (section 13, paragraph 739 of customs tariff, Canada) as well as from contemporaneous history, that the legislation of 1894 on this subject was entered into on both sides in a spirit of reciprocity. Neither country was to impose duty upon the coarser woods imported from the other. The construction of the board is at variance with this obvious intention. The importers’ contention is further strengthened by the construction placed upon a similar provision in the act of 1883 by the treasury department. It was held “that the provision for wood, namely, ‘cedar, lignum vitae, lancewood, ebony, box, granadilla, mahogany, rosewood, satin-wood, and all cabinet woods, unmanufactured,’ is construed as exempting from duty only such cedar as is fitted or intended for use as cabinet wood.” It will be noted that the paragraph quoted is not so explicit as the paragraph in controversy, in that it omits the word “other.” It was said at the argument that this construction of the treasury was acted upon for many years. In conclusion it is thought that the decision of the board is based upon a strict construction which leaves out of view the true intent and purpose of the law. To say the least, the construction which makes the word “cedar” include all the varieties of soft, coarse wood known by that name is a doubtful one. In such cases the doubt should be resolved in favor of the importer “as duties are never imposed on the citizen upon vague or doubtful interpretations.” *Hartranft v. Wiegmann*, 121 U. S. 609, 616, 7 Sup. Ct. 1240. The construction asked for by the importers makes the paragraph consistent in all its parts, is in harmony with the general purpose of the act and with the principles of international fair dealing. The decision of the board is reversed.

## BRUSH ELECTRIC CO. v. WESTERN ELECTRIC CO. (two cases).

(Circuit Court, N. D. Illinois. July 24, 1895.)

Nos. 21,545 and 22,211.

## PATENTS FOR INVENTIONS—INFRINGEMENT—ELECTRIC LIGHTS.

Letters patent No. 219,208, issued September 2, 1879, to Charles F. Brush, for an electric light regulator, consisting of two or more pairs or sets of carbons in an electric lamp in combination with mechanism to separate such pairs dissimultaneously or successively, are not infringed by lamps made under patents No. 418,758, No. 502,535, and No. 502,538, issued to Charles E. Scribner, since such lamps do not contain mechanism constructed to cause the dissimultaneous initial separation of the carbons.

Suits by the Brush Electric Company against the Western Electric Company to restrain the alleged infringement of a patent.

Henry A. Seymour, Offield, Towle & Linthicum, and Wm. B. Bolton, for complainant.

Barton & Brown, for defendant.

SHOWALTER, Circuit Judge. In each of these causes the ground of action is an alleged infringement of patent No. 219,208, for an electric lamp or light regulator, issued September 2, 1879, to Charles F. Brush; said patent being the property of complainant company. In cause No. 21,545, it is insisted that electric lamps made by defendant company pursuant to patent No. 418,758, issued to Charles E. Scribner January 7, 1890, and afterwards assigned to defendant company, infringe the said Brush patent. In cause No. 22,211, it is insisted that lamps made by defendant company pursuant to patent No. 502,535, and lamps made by defendant company pursuant to patent No. 502,538,—each of said last-named patents having been issued to said Charles E. Scribner August 1, 1893, and afterwards assigned to said defendant company,—also infringe said Brush patent. Prior to the first of these suits, the complainant commenced a suit in the federal circuit court at Toledo, Ohio, for an alleged infringement of said Brush patent by lamps made by this defendant company under said patent No. 418,758, and used or dealt in by the defendants in that suit. 43 Fed. 533. It appears that this defendant assisted the defendants in that suit by paying the expenses, or some part thereof, incurred therein by or on behalf of said defendants. But this defendant was not a party to the record in the Ohio litigation. The jurisdiction of that court did not extend to, nor could its decree in favor of complainant rendered pending the first of the causes in this court in any way conclude, this defendant company. The records here—even that in the first of the causes—contain a mass of evidence which was not before the court at Toledo. But I do not understand complainant's counsel to insist that either of these causes can be determined on the theory of a prior adjudication. He merely insists that the opinion of the court in the Ohio case may be determinative, not only of one, but of both the present causes.

There are seven claims in the said Brush patent. On the contention of complainant, an infringement of each of these numbered