

This was an appeal by Stern, Leerberger & Stern from a decision of the board of general appraisers, sustaining the refusal of the collector of the port of New York to entertain the protest of the importers against a reliquidation of duties. The importations were made at various dates in 1891 and 1892. Protests were made against the collector's liquidaion of duties on these importations, and, pursuant to specific decisions of the board of general appraisers, reliquidations were made, in all the cases, on January 11, 1894. A protest against such reliquidation was filed by the importers on January 20, 1894, which the collector refused to entertain, because filed too late, claiming that a reliquidation, pursuant to a decision of the general appraisers, does not extend the time for lodging a protest.

Stephen G. Clarke, for plaintiffs.

H. D. Sedgwick, Asst. U. S. Atty.

WHEELER, District Judge. These importers appear to have got such a decision upon an appeal to the board of general appraisers that they did not apply to the circuit court for a review, but left it for transmission to the collector. Upon reliquidation this second appeal has been taken. If this appeal includes anything not covered by the former appeal, it is, as to that, altogether too late. If not, it was ended by the disposition made of that, which the statute makes absolutely conclusive. 26 Stat. 137, 138, § 14. The case of Robertson v. Downing, 127 U. S. 607, 8 Sup. Ct. 1328, relied upon for the importers, arose under a different statute, and involved no question as to a second appeal from a collector's decision, but only, in this respect, to the time of taking the first. Decision of appraisers affirmed.

UNITED STATES v. PARK et al.

(Circuit Court, S. D. New York. December 5, 1896.)

No. 1,766.

CUSTOMS DUTIES—DEFICIENCY IN QUANTITY.

A report by the assistant appraiser that, upon examination of certain imported merchandise, he found a deficiency in the quantity called for by the invoice, is proper and sufficient evidence on which to base an allowance for such deficiency in estimating the duties.

This was an appeal by the government from a decision of the board of general appraisers which reversed the decision of the collector of the port of New York, refusing to make an allowance for an alleged deficiency in a quantity of cigars imported by Park & Tilford, and ordered a reliquidation. The vessel's manifest, the bill of lading, invoice, and entry called for "8 cases, 31,000 cigars." The assistant appraiser, who examined the goods, returned on the invoice: "In case No. 3,991 I find 1,100 cigars short, as noted. Case not full; in bad condition." The collector, however, on the

ground that no satisfactory proof of short shipment, or of having been lost or destroyed by accident during the voyage, had been furnished, as required by article 922, Treasury Regulations of 1892, refused to make any allowance for the deficiency, and assessed duty on the full amount of the invoice. The importers protested, claiming an allowance under Rev. St. § 2921.

James T. Van Rensselaer, Asst. U. S. Atty.
W. Wickham Smith, for defendants.

WHEELER, District Judge. The packages all came, but the examiner reported, and the appraiser returned, that the number of cigars called for by the invoice was 1,100 short. From this the board of general appraisers found that the number was so in fact short, and that the amount of duties should be lessened accordingly. The protest raised this question of shortage; and it was one affecting the amount of duties, on which an appeal lies to that board under section 14 of the customs administrative act (26 Stat. 137). The principal question made is as to whether there is any evidence to support this finding; and *Merwin v. Magone*, 17 C. C. A. 361, 70 Fed. 776, is relied upon to show that there was not. In that case the question was whether there was any evidence to support a finding the other way, and not whether there was any evidence of shortage. Here, the examiner and appraiser were government officials, charged to ascertain and report about this, and their report showed that, on opening the packages, a deficiency was "found on examination by the appraisers." This was not only some evidence, but was the statutory evidence, on which an allowance is required to "be made in estimating the duties." Rev. St. § 2921; *Robertson v. Bradbury*, 132 U. S. 491, 500, 10 Sup. Ct. 158. No further proof could be necessary, for the merchandise must have been in the custody of customs officials from the time of entry, which would show that what was examined was what was imported, and that none was lost after importation, and before examination. The statute seems to be based upon this presumption. Decision of general appraisers affirmed.

UNITED STATES v. TRINIDAD ASPHALT CO.

(Circuit Court, S. D. New York. December 15, 1896.)

No. 2,490.

CUSTOMS DUTIES—FREE LIST—DRIED ASPHALTUM.

Asphaltum, from an asphalt lake, holding water mechanically and so tenaciously that intense heat, with stirring, is necessary for drying it, and which has accordingly been exposed in a vessel to heat from steam pipes, and from steam jets which stirred it, thereby expelling the water, and, incidentally and necessarily, some volatile oils also, is entitled to free entry as "asphaltum * * * dried but not otherwise manipulated or treated," under paragraph 390 of the act of 1894.

This was an application in behalf of the United States to review a decision of the board of general appraisers holding that certain

asphaltum imported by the Trinidad Asphalt Company was entitled to be entered free of duty.

Henry C. Platt, Asst. U. S. Atty.
Avery D. Andrews, for defendant.

WHEELER, District Judge. The tariff law of 1894 puts on the free list: "390. Asphaltum and bitumen, crude or dried, but not otherwise manipulated or treated." According to the findings and evidence, the substance in question came, crude, from an asphalt lake, holding water mechanically like a sponge, and so tenaciously that intense heat, with stirring, is required for drying it within any practicable time. This was exposed in a vessel to such heat from steam pipes, and from steam jets which stirred it. Thereby the water was expelled, and, incidentally and necessarily, some volatile oils also. This expulsion of the water left the material purer and finer. This provision of the law is understood to leave all asphaltum free that is not manipulated or treated otherwise than is necessary and proper for drying it. According to Webster's Dictionary to dry is "to free from water, or from moisture of any kind, and by any means"; and according to the Century Dictionary, "to prepare and expose to the sun or any heat in order to free from moisture." This process seems to come entirely within these definitions. In allowing the drying, the law allowed also the consequences of the drying; and if one of them was refining, that, too, was allowed. The drying must have been permitted with the intention of letting the material be changed, as that would change it; and no change effected by that should be held to take away its free character. Decision of appraisers affirmed.

MACKIE v. ERHARDT.

(Circuit Court of Appeals, Second Circuit. December 17, 1896.)

CUSTOMS DUTIES—CLASSIFICATION—"THOMPSON'S PRUNE WINE."

"Thompson's Patent Prune Wine," compounded principally of raisins and prunes crushed in water and fermented, with some alcohol afterwards added to prevent souring, and containing between 14.6 and 16.28 per cent. of alcohol at the time of importation, was dutiable as an "alcoholic compound," under Schedule A (Tariff Index, New, par. 103) of the act of March 3, 1883, and not as a nonenumerated manufactured article, under Rev. St. § 2513. 59 Fed. 771, affirmed.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action at law by Schuyler Mackie against Joel B. Erhardt, late collector of the port of New York, to recover back an alleged excess of duties paid under protest on certain importations, made during the summer of 1889, of the so-called "Thompson's Patent Prune Wine." The collector classified the same as an "alcoholic compound," and assessed the duty at the rate of two dollars per gallon for the alcohol contained therein, and 25 per cent. ad