

## BUXBAUM et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

## CUSTOMS DUTIES—GOODS IN BOND—ABANDONMENT—CHANGE OF DUTIES.

When imported goods have remained in bond beyond three years, and are thereupon deemed abandoned to the government by virtue of Rev. St. § 2971, the rights and liabilities of the parties become fixed at once, and the government is entitled to retain from the proceeds of their sale, or to collect upon the bond, the amount of duties according to the then existing law, though a different rate of duty goes into effect before a sale actually takes place.

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

This is a writ of error to review a judgment of the district court, Southern district of New York, entered upon a verdict directed by the court in favor of defendants in error, who were plaintiffs below. The action was to recover damages for the breach of a warehouse bond given by plaintiffs in error (defendants below) to the United States on March 23, 1891.

Walter Carroll Low, for plaintiffs in error.

Henry D. Sedgwick, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Defendants, on March 23, 1891, imported 60 bales of hops into the port of New York, and duly entered the same at the customhouse. The duty at that time was 15 cents a pound, and the entry was liquidated April 2, 1891, at \$3,428.25. The entry being for warehouse, defendants executed the bond in suit, conditioned to be void in any one of these three events: (1) That the goods should be withdrawn within one year from date of importation, and duties paid; (2) or after one year, and within three, if so withdrawn, and duties paid, plus 10 per cent. added; (3) or if within three years they should be withdrawn for export. At various times down to and including February 23, 1893, parts of these hops were withdrawn, and duties paid thereon. A credit for decrease in weight was also allowed. Deducting these payments and credit from the liquidated amount of the duties, there remained still unpaid \$571.35. On March 23, 1894, the three years allowed by the bond expired, and the obligors became indebted to the United States to the extent of the damages sustained by the latter. Rev. St. U. S. § 2971, provides that "any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the government and sold under such regulations as the secretary of the treasury may prescribe, and the proceeds paid into the treasury." Section 2972 further provides that "the secretary of the treasury in case of any sale of merchandise remaining in public store or bonded warehouse beyond three years, may pay to the owner," etc., "the proceeds thereof, after deducting duties, charges, and expenses, in conformity with the provision relating to the sale of merchandise remaining in a warehouse for more than one year." This provision relating to goods remaining for more than one year—

**i. e. "unclaimed" goods**—will be found in section 2973. It provides for an appraisal and sale at public auction, and that "the proceeds of such sale, after deducting the usual rate of storage at the port in question, with all other charges and expenses, including duties, shall be paid over to the owner," etc. The bales of hops remaining after the three years were appraised, and thereafter sold in April, 1895. The net proceeds of the sale were credited on account of the bond, and for the balance due, with interest, verdict was directed. The Wilson act of 1894, which went into effect on the date of its passage, August 28, 1894 (U. S. v. Burr, 159 U. S. 78, 15 Sup. Ct. 1002), reduced the duty on hops to eight cents a pound. The main contention of plaintiffs in error is that the collector should have deducted from the proceeds of the sale duties on the goods sold only at the rate fixed by the act of 1894. The argument is as follows: Section 2972 provides that the secretary of the treasury may pay to the owner the proceeds of a sale of merchandise remaining in bonded warehouse beyond three years in conformity with the provisions relating to sale of unclaimed goods. Section 2973, which deals with unclaimed goods, provides for an appraisement of the goods to be sold. Article 816 of the treasury regulations provides that there shall be deducted from the proceeds of sale "duties at the same rate as if the merchandise had been regularly withdrawn for consumption," while article 817 provides that "duties will, in such cases, be assessed on the dutiable value found on appraisement at the rates chargeable at the time of such appraisement on ordinary entries for consumption, on importation." The difficulty with this argument is that duties are imposed upon imported merchandise, not by the secretary of the treasury, but by congress. When the three years limited in the statute and the bond expired, March 23, 1894, the rights and liabilities of the parties became fixed; the goods were "abandoned" beyond any further right to redeem; the United States were entitled to sell them, and thus secure reimbursement for the duties unpaid at the rate fixed by existing law, viz. 15 cents. The collector had no authority, under treasury regulations, to accept less or to exact more, and no statute conferring such authority is referred to. On the contrary, the tariff act of 1894 expressly provides (section 72) that "the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, \* \* \* but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modification had not been made." This certainly saved the right of the United States to the 15-cent duty, and also the liability of the bondsmen to pay at that rate.

It is further suggested that section 2971 was repealed by section 54 of the act of October 1, 1890. Nothing need be added to the opinion of the circuit court of appeals, Ninth circuit, on this point. *Anglo-California Bank v. Secretary of Treasury*, 22 C. C. A. 527, 76 Fed. 742.

The objection that it was not sufficiently proved that the entire merchandise remaining in the warehouse had been sold is without

merit. The several exceptions to admissions of testimony have not been argued, and need not be discussed; they, also, are unsound. The judgment of the district court is affirmed.

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## TALMAGE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

## CUSTOMS DUTIES—CLASSIFICATION—BENGAL RICE.

Patna or Bengal rice, from which both the outer and inner cuticle have been removed, is dutiable, under paragraph 193 of the tariff act of 1894, as cleaned rice, though containing from 3 to 5 per cent. of "rice polish," and a small percentage of broken grains of rice, and commercially known, prior to August 28, 1894, as uncleaned rice. 77 Fed. 826, affirmed.

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

W. Wickham Smith, for appellants.

Henry C. Platt, Asst. U. S. Dist. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In March, April, and May, 1895, the firm of Dan Talmage's Sons imported into the port of New York sundry invoices of Patna or Bengal rice, upon which the collector assessed a duty of  $1\frac{1}{2}$  cents per pound, under the provisions contained in paragraph 193 of the tariff act of August 28, 1894. The paragraph is as follows:

"Rice cleaned, one and one half cents per pound, uncleaned rice, or rice free of the outer hull and still having the inner cuticle on, eight tenths of one cent per pound; rice flour and rice meal and rice broken which will pass through a sieve known commercially as No. 12 wire sieve, one fourth of one cent per pound; paddy, or rice having the outer hull on, three fourths of one cent per pound."

The importers protested against the assessment upon the ground that the merchandise was uncleaned rice, and therefore dutiable, under the foregoing paragraph, at eight-tenths of one cent per pound, or that, if it was an unenumerated article, it was dutiable at the same rate by virtue of the provisions of section 4 of the same act (commonly known as the "similitude clause"), because it most resembled uncleaned rice in all material respects. The board of general appraisers sustained the collector, and the statement of facts which is contained in their opinion is conceded to be correct. From the decision of the circuit court (77 Fed. 826), which sustained the board of general appraisers, this appeal was taken by the importers.

By the board's finding of facts, it appears that Bengal rice contains from 3 to 5 per cent. of "rice polish," otherwise known as "rice dust," "rice flour," or "rice meal," and a small percentage of broken grains of rice, and prior to August 28, 1894, was known commercially as "uncleaned rice." The outer and also the inner or yellow cuticle had been removed from the rice; the latter process being accomplished by pestling in mortars, which is the most expensive