

the identical words of the closely related section 1117 as applying only to the regular army. Both provisions apply alike to regulars and volunteers.

The opinion just expressed is confirmed by the use of the words "mustering into" in section 1117. Though this term is sometimes confused with "enlistment," yet it has some weight as an indication that a volunteer or militia force, rather than the regular army, is contemplated by its use. See 1 Winthr. Mil. Law, p. 760; 5 Stat. 9; 9 Stat. 60; 12 Stat. 274, 326, 339, 489, 620. It seems clear therefore, that section 1117 applies to the enlistment and mustering in of Malachi G. Burns. Most or all of the cases cited upon the brief of the district attorney were decided prior to the act of 1864, and are concerned with statutes of a scope quite different from that of section 1117.

The district attorney further contends that section 1117, if it originally applied to volunteers, has been restricted to the regular army by the act of congress of April 22, 1898. There is nothing in that act, however, to suggest an age limit in the volunteer army differing from that in the regular army. Moreover, there is no reference whatsoever in that act to the age of soldiers of "the army of the United States," so called, but only to the age of those persons who, as members of the "national forces," are liable to perform military duty when required by law to do so. These "national forces" obviously correspond to the enrolled militia of Rev. St. § 1625, and 1 Stat. 271, a force quite different from the "organized and active land forces of the United States" mentioned in section 2 of the act of April 22d, into which Malachi G. has been mustered. There is no indication that previous legislation upon the age limit is affected by the last-named act. If it be said that this construction of the statutes, which permits the parents or guardian of a minor to prevent his enlistment in the active military forces of the United States, unduly hampers the national government in the prosecution of the present war, it may be answered that the entire matter is within the control of congress, which can require military service from any citizen of the United States, whatever his age, and without the consent of any one. If the acts of 1864 and 1865, as amended by the act of 1872, are unwise, they can be repealed or modified at once.

Writ to issue.

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UNITED STATES v. ROTHSCILD et al.

(Circuit Court, S. D. New York. May 27, 1898.)

No. 2,684.

DUTY ON WRAPPER TOBACCO—PERCENTAGE SYSTEM.

Except for the purpose of imposing a penalty for importing a bale containing more than 15 per cent. of wrapper and less than 85 per cent. of filler, any percentage system is abandoned in the tariff act of 1897; and all wrapper tobacco, wherever found, and in whatever amount, is subject to the duty of \$1.85 per pound, provided in paragraph 213 of said act.

Appeal from a decision of the board of general appraisers reversing a decision of the collector of the port of New York touching the duty on certain wrapper tobacco found packed in bales of filler tobacco, but not exceeding 5 per cent. of each bale.

John S. Wise, for the United States.

E. R. Gunby, for importers.

LACOMBE, Circuit Judge. Amid the awkward, tortuous, and obscure phraseology of paragraph 246 of the act of 1883, one thing was manifest, namely, that, in determining whether any particular leaf tobacco should pay a lower or a higher rate, it would be necessary to calculate a specified percentage—of something. It became absolutely necessary, in order to apply the rule prescribed in the paragraph, to determine upon what base or on what unit such percentage should be calculated. In *Falk v. Robertson*, 137 U. S. 225, 11 Sup. Ct. 41, the court had to deal with an abnormal, if not a bogus, bale; and it is not surprising that the language used in the opinion was not practically of much use when normal commercial bales came under consideration. The necessity of finding a base number or unit available for such cases could not be overlooked. *U. S. v. Blumlein*, 5 C. C. A. 142, 55 Fed. 383. Such a unit was declared to be the bale, and it is understood that the conclusion upon that point reached in that case has not since been questioned. *Erhardt v. Schroeder*, 155 U. S. 124, 15 Sup. Ct. 45; *U. S. v. Rosenwald*, 14 C. C. A. 399, 67 Fed. 323. The McKinley tariff of 1890, however, concededly abandoned the practice of taxing according to percentages. Under that act it was wholly unnecessary to fix upon any base number or unit at all. Quite possibly, the percentage method was restored by the Wilson tariff of 1894, indirectly by the use of the words "commercially known"; but there seems much force in the suggestion that, when those words were dropped out of the Dingley tariff of 1897, the percentage system dropped with them. Of course, if the percentage system were abandoned, the necessity of determining a unit or base number ceased also, and the decisions in the cases cited would be no longer instructive.

Construing the phraseology of the act of 1897 without reference to the earlier statutes and decisions, the correct paraphrase of the paragraphs 213 and 214, so far as they relate to unstemmed leaf tobacco, may be stated thus:

"A duty of 35 cents per pound shall be paid on (A) all leaf tobacco not suitable for cigar wrappers, and not otherwise provided for.

"A duty of one dollar and eighty-five cents per pound shall be paid on (A) all leaf tobacco of any kind, and wherever grown, which may be packed or mixed with any other leaf tobacco which other tobacco is the product of any other country or dependency; (B) all leaf tobacco not suitable for cigar wrappers, which shall be found to be mixed or packed with more than fifteen per cent. of tobacco which is suitable for cigar wrappers; (C) all leaf tobacco suitable for cigar wrappers."

The language used in the act seems to indicate that the draftsman has tried to cut loose from earlier legislation and the decisions predicated thereon; and the case seems to be one where the language of

the later act may fairly be construed without much regard to the construction put upon earlier and much more intricate phraseology. I am strongly of the opinion that, except for the purpose of imposing a penalty on any one importing an abnormal bale (i. e. as the evidence shows, one with more than 15 per cent. wrapper, to less than 85 per cent. filler), any percentage system is abandoned in this tariff, and that all wrapper tobacco, wherever found, and in whatever amount, shall pay the higher rate. Inasmuch as the case will undoubtedly be appealed, it seems unnecessary to discuss the question presented at any greater length. Decision reversed, and collector sustained.

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DUNHAM et al. v. UNITED STATES.

(Circuit Court, D. Connecticut. June 20, 1898.)

CUSTOMS DUTIES—CLASSIFICATION—ROVINGS OF COTTON.

"Rovings" made of cotton, not commercially known as thread, but being in fact a cotton thread, were dutiable under paragraph 250 of the act of 1894, as "cotton thread in singles, not advanced beyond a condition of singles, by grouping or twisting two or more single yarns"; and not as manufactures of cotton not specially provided for, under paragraph 264.

This was an application by Austin Dunham & Sons for a review of the decision of the board of general appraisers in respect to the classification for duty of certain goods imported by them.

Comstock & Brown, for importers.

C. W. Comstock, for the United States.

TOWNSEND, District Judge (orally). The article in question is "rovings" made of cotton. It was assessed for duty under paragraph 264 of the act of 1894, as "manufactures of cotton not specially provided for"; and the importer protested, claiming that it was dutiable under paragraph 250 of said act, as "cotton thread in singles, not advanced beyond a condition of singles, by grouping or twisting two or more single yarns together." The board of appraisers sustained the classification of the collector, and overruled the protest, and the importer appeals.

This article is not commercially known as "thread." It is, in fact, a twisted sliver of cotton. If still further twisted, it would become yarn. The testimony of the importer that it is a cotton thread in fact is not denied by any of the witnesses called by the government, and his testimony is supported by the history of the manufacture of thread, by the dictionary definitions, and by the use of the term "thread" by congress in reference to manufactures of cotton cloth. If this article was not intended to be covered by this provision of the statutes for cotton thread, it does not appear that there would be anything on which this provision could operate. The decision of the board of general appraisers is reversed.