## BURROUGHS v. ERHARDT.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 104.

CUSTOMS DUTIES—MONEY DEPOSITED WITH COLLECTOR—RECOVERY BACK.

Money deposited with the collector as security (additional to that of the importer's bonds) for payment of duties assessed, and actually applied to the payment of duties, cannot be recovered back, in the absence of a protest, even if the duties were wrongfully assessed.

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

This cause comes here upon writ of error sued out by the administratrix of plaintiff below to review a judgment of the circuit court, Southern district of New York, in favor of defendant below, the collector of the port of New York, upon a verdict directed in his favor by the circuit judge.

C. B. Barker, for plaintiff in error.

Arthur M. King, Asst. U. S. Atty., for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. It is practically not disputed that if the $6,000 in controversy was deposited with the collector to secure the payment of duties assessed upon plaintiff's merchandise, even though such duties may have been wrongly so assessed, it cannot be recovered back, since no protest was filed. The difficulty with the case is that, even upon the plaintiff's own evidence, this is precisely the purpose for which the deposit was made. Plaintiff testifies that it was deposited because the government officers "did not consider [his] bonds were sufficient to protect the government; they wanted additional security." The amended complaint avers that the deposit was made "as a guaranty of good faith in making entries for warehouse," and "as security to the United States against any loss in case the warehouse bonds were not sufficient to cover all the lumber." But the only object of the warehouse bond is to protect the government against failure to pay duties; the only possible loss consequent upon insufficient bonds would be a loss of duties. The bond is security placed in the hands of the government, from which, in the event of the importer's failure to pay duties assessed upon his goods, such payment may be obtained. The $6,000 in gold was manifestly deposited for a like purpose. We are unable to conceive of any theory upon which, assuming plaintiff's statements to be entirely accurate, a single dollar of it was to be paid for anything except duties. It was used up (except for the small balance returned) in making payments of duties assessed against plaintiff's goods, and, in the absence of any protest against the exaction of such duties, cannot be recovered back.

## In re E. W. RATHBUN & CO.

(Circuit Court, N. D. New York. July 6, 1898.)

CUSTOMS DUTIES—CLASSIFICATION—LUMBER.

White pine lumber in sticks measuring 6 by 12 inches is dutiable as "sawed lumber, not specially provided for," at two dollars per 1,000 feet, under paragraph 195 of the act of July 24, 1897, and not as timber "hewn, sided or squared (not less than eight inches square)," under paragraph 194. The parenthetical clause refers to the shape of the timber, and not to the number of square inches it contains, and excludes timber measuring less than 8 inches one way.

This is an application by the collector of customs at Oswego, N. Y., for a review of the decision of the board of general appraisers reversing the decision of the collector as to the rate of duty on certain pine lumber imported by E. W. Rathbun & Co. in November, 1897.

The collector imposed a duty of two dollars per 1,000 feet, board measure, under paragraph 195 of the act of July 24, 1897, which provides as follows:

"Sawed boards, planks, deals, and other lumber of whitewood, sycamore, and basswood, one dollar per thousand feet board measure; sawed lumber, not specially provided for in this act, two dollars per thousand feet board measure."

The importers protested, insisting that their merchandise should have been classified under paragraph 194 of the act, which is as follows:

"Timber hewn, sided, or squared (not less than eight inches square), and round timber used for spars or in building wharves, one cent per cubic foot."

The issue thus presented came on for hearing before the board of general appraisers which sustained the protest. The prevailing opinion is as follows:

"The merchandise consists of 1,452 feet white pine lumber contained in nine pieces 25 to 30 feet in length and measuring six by twelve inches. It was assessed for duty at $2 per 1,000 feet B. M., under paragraph 195, Act July 24, 1897, and is claimed to be dutiable as timber at one cent per cubic foot under paragraph 194. Paragraph 194 reads: 'Timber hewn, sided, or squared (not less than eight inches square), * * * one cent per cubic foot.' The collector reports that as this timber measures less than eight inches one way, the assessment of duty is made for the purpose of obtaining a decision from the board. Paragraph 194 says 'not less than eight inches square.' Eight inches square is 64 inches. The timber in question is 72 inches square and is not, therefore, excluded by the limitation. The protest is sustained accordingly."

One member of the board dissented. His opinion is as follows:

"I dissent from the conclusions of my colleagues in this case. In my opinion, the words 'not less than eight inches square' in the paragraph under which duty was assessed, have reference to squared timber, neither of the sides of which shall measure less than eight inches. Such, according to my understanding, is the meaning of these words in common speech and as used in the tariff act. They are as if reading: 'neither side of which shall be less than eight inches in width.' The distinction made in the tariff act between the phrases, 'inches square' and 'square inches' is clear and easily understood. Where the former is used (as in paragraph 194), it always refers to the dimensions and shape, but where the area or square measure is intended,