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Customs Administration and Law

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CUSTOMS ADMINISTRATION AND LAW

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DEVELOPMENT AND IMPORTANCE

THE United States Customs Court, a court of limited but exclusive jurisdiction,[1] was established by Congress on May 28, 1926, to supersede the tribunal known as the Board of General Appraisers.[2] It consists of nine judges, not more than five of whom may be from the same political party, appointed by the President, by and with the advice and consent of the Senate, who hold office during good behavior. One of the judges is designated by the President to act as Chief Judge. The court is divided into three divisions of three judges each, to hear and determine applications for the review of reappraisements of merchandise, protests against decisions of collectors, petitions for remission of additional duties[3] and such other matters within the jurisdiction of the court as may be assigned to them.[4]

Contrary to popular misconception, the United States Customs Court possesses no jurisdiction of a criminal nature except for the quasi-criminal proceedings implicit in its powers, coextensive with that of the District Courts of the United States, for preserving order, compelling the attendance of witnesses and the production of evidence.[5] Essentially the court was created to determine issues arising from the valuation and classification, within the framework of the federal tariff structure, of merchandise imported from foreign countries. The jurisdiction over this subject matter did not spring up simultaneously with the establishment of the court, however. It finds its origins amongst the first legislation enacted by the Congress of the United States, shortly after the National Government was formed, in the exercise of the constitutional powers "to lay and collect taxes, duties, imposts and excises" and "to regulate commerce with foreign nations."[6]

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* Judge of the United States Customs Court.

1. Puget Sound Freight Lines v. United States, 36 C.C.P.A. (Customs) 70 (1949) and cases cited therein.

2. 28 U.S.C. §§ 1581-83.

3. The first two paragraphs of 19 U.S.C. § 1489, which provided for the assessment of additional duties for undervaluation of imported merchandise and authorized remission thereof by the Customs Court upon satisfactory evidence that such undervaluation was "without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise," was stricken in 1953. 19 U.S.C. § 1489.

4. 28 U.S.C. §§ 251-55.

5. 28 U.S.C. § 1581.

6. U.S. Const. art. I, § 8.

The second act of the First Congress of the United States, was "An act for laying a duty on goods, wares, and merchandise imported into the United States."[7] The right of an importer to recover duties erroneously assessed, in an action against the collector of customs at the port of entry was confirmed by the Supreme Court of the United States in the case of *Elliott v. Swartwout*.[8] These actions were tried in the Circuit Courts of the United States (now the United States District Courts) with appellate jurisdiction vested in the Circuit Courts of Appeals (now the United States Courts of Appeals) and the Supreme Court of the United States.

As this judicial system developed, along with the general civil and criminal jurisdiction of these courts, it became apparent that it was both cumbersome and dilatory, and that, since these courts were of equal stature, decisions respecting imports at various ports throughout the rapidly growing nation, were lacking in uniformity. In an effort to overcome these defects of substance and procedure, and to enforce the constitutional dictate that "All duties, imposts, and excises shall be uniform throughout the United States," not alone in their imposition but as well in their application, Congress, in the Tariff Act of 1890,[9] created the Board of General Appraisers, a judicial tribunal,[10] consisting of nine members, with original jurisdiction over all controversies throughout the nation arising out of the administration of the Tariff Laws in relation to imported merchandise. The right of appeal to the Circuit Courts, where a trial might be had de novo, to the Circuit Courts of Appeal, and to the Supreme Court was preserved. This action contributed to a somewhat greater expedition in the disposition of customs litigation but failed to accomplish the object of uniformity of interpretation of customs statutes. Moreover delays in the final determination of these matters were still encountered.

Accordingly, in enacting the Tariff Act of 1909, Congress created a United States Court of Customs Appeals (now the United States Court of Customs and Patent Appeals)[11] to review all decisions rendered by the Board of General Appraisers in customs controversies. As previously noted, the Board of General Appraisers became the United States Customs Court in 1926. Generally speaking, the Court of Customs and

7. 1 Stat. 24 (July 4, 1789).

8. 35 U.S. (10 Pet.) 137 (1836).

9. Tariff Act of June 10, 1890, c. 586, 26 Stat. 131.

10. Stone v. Whitridge, 129 Fed. 33 (1904); Marine v. Lyon, 65 Fed. 992 (1895); United States v. Macy & Co., 13 Ct. Cust. App. 245 (1925); United States v. McConnaughey & Co., 13 Ct. Cust. App. 112 (1925); United States v. Kurtz, Stuboeck & Co., 5 Ct. Cust. App. 144 (1904).

11. See 19 U.S.C.A. § 169, historical note.

Patent Appeals is a court of last resort for the resolution of customs issues, for although review by the Supreme Court of the United States is authorized upon a writ of certiorari and is often sought, except for matters of considerable importance, affecting national or international interests, it is seldom granted.[12]

The Court of Customs and Patent Appeals is a court of record composed of a chief judge and four associates, appointed by the President, by and with the advice and consent of the Senate, who hold office during good behavior. The court is authorized by statute to sit at such times and places as it may fix by rule.[13] It usually hears appeals in the City of Washington, District of Columbia.

With the concentration of subject matter in but one trial and one appellate tribunal, singleness of viewpoint and the prompt determination of justiciable issues have resulted.

What is the nature of the jurisdiction of these two courts? How do conflicts arise? How are controversies resolved? Not many members of the legal profession are equipped to answer these questions. Indeed, one might venture to say that the great majority of lawyers are unaware of the very existence of these courts, and of the vast body of law which they have established. Their ignorance of this field bespeaks no lack of zealous application to the various facets of their chosen profession. Rather does it reflect an almost total absence of courses on Customs Law, in the curricula of our law schools, and the relatively infrequent occasions upon which the average lawyer is apt to encounter a customs issue.

Yet, though the numbers of those engaged in this practice are relatively few, it by no means follows that this is a minor or insignificant branch of the law. Matters of vital and fundamental importance, affecting almost every phase of daily living, having a direct bearing upon the economic and political state of the nation, and touching closely upon international relationships, are constantly being determined. There are involved questions of constitutional law, statutory construction, and interpretation of trade agreements and other pacts among the nations of the world, to an extent seldom equalled by any other court in the realm.

PROVISIONS AND PROCEDURES

The basic act which governs today's customs litigation is the Tariff Act of 1930 as amended[14] and modified by various reciprocal trade agree-

12. Of the 81 petitions for writs of certiorari filed in the Supreme Court of the United States since the Court of Customs Appeals (now the Court of Customs and Patent Appeals) was established, certiorari was denied in 68 instances. Thirteen cases were reviewed, of which eight were affirmed, five were reversed, and one was reversed and remanded.

13. 28 U.S.C. §§ 211, 213, 214.

14. 19 U.S.C. § 1001, 1201, 1332.

ments negotiated by the President in the exercise of authority conferred upon him by the Trade Agreements Act of 1934, as amended.[15] The title to the Tariff Act of 1930 recites that it is "An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor and for other purposes."[16] These are the objects by which the Customs Court must be guided in the resolution of issues before it.

For the purposes of the Tariff Act of 1930, as amended and modified, all merchandise imported into the United States is deemed to be the property of the person to whom the same is consigned[17] and the Government does not otherwise concern itself with questions of title, except and unless the consignee declares upon entry that he is not the true owner, and within ninety days from the date of entry produces the declaration of the true owner.[18]

Within five days after the entry of the vessel carrying imported merchandise, the consignee thereof (usually called the importer) is required to make formal entry at the Customhouse of the port through which the merchandise is brought into the country.[19] The details of entry are provided by statute.[20] The consignee may make entry for consumption, for warehouse,[21] for transportation in bond to his home city,[22] or for transportation to another port for exportation to a foreign country.[23] In the case of entry for consumption, the importer is required to deposit with the collector of customs the amount of duty which that official estimates is due.[24] The importer may not at that time question the decision of the collector nor avoid making the deposit of the full amount estimated. His liability for the payment of customs duties accrues when his goods arrive at the port of entry.[25] His right to relief from erroneous assessments does not ordinarily arise until after the entry has been finally liquidated.[26]

15. 19 U.S.C. § 1351. The General Agreement on Tariffs and Trade, popularly known as GATT, 82 Treas. Dec. 305 (1947), superseded prior agreements theretofore negotiated with the individual countries, who are its contracting parties. Among the more important supplementary protocols, are The Annecy Protocol of Terms of Accession, 84 Treas. Dec. 403 (1949) and The Torquay Protocol, 86 Treas. Dec. 121 (1951).

16. See 19 U.S.C.A. § 1001, historical note at 167.

17. 19 U.S.C. § 1483.

18. 19 U.S.C. § 1485(d).

19. 19 U.S.C. § 1484.

20. Ibid.

21. 19 U.S.C. § 1557.

22. 19 U.S.C. § 1552.

23. 19 U.S.C. § 1553.

24. 19 U.S.C. § 1505.

25. Mills & Gibb Corp. v. United States, 13 Ct. Cust. App. 72 (1952).

26. 19 U.S.C. § 1514.

Upon the making of the deposit and the filing of a bond to assure compliance with the law, the merchandise, except for certain packages designated for examination,[27] is released to the importer. A customs examiner makes an inspection of the designated packages for the purpose of finding a value, and describing the importation. The customs examiner is an employee of the appraiser, the officer charged by law with the duty of fixing a value for every item of imported merchandise by all reasonable means or ways in his power. He must likewise ascertain the quantities of the merchandise and whether or not it has been truly and correctly invoiced and is required to report his findings, together with a description of the merchandise, to the collector of customs to enable the latter official to make proper classification and assessment of duty.[28]

VALUATION

The determination of value is a complex procedure predicated upon statutory definitions and rules.[29] Under the statute, the value of imported merchandise is the foreign or export value whichever is higher. If neither a foreign nor export value exists or may be satisfactorily ascertained, then United States value must be found. If there is no United States value, cost of production in accordance with statutory formula is computed. In certain instances, as in the case of coal tar products or where the President, as a result of findings and recommendations of the United States Tariff Commission, deems it necessary to equalize costs of production between domestic and foreign merchandise, another basis of value, to wit, American selling price, is adopted.

Legion are the cases in customs jurisprudence analyzing and interpreting the value provisions of tariff statutes. For example, the present law defines foreign value as "the market value or the price at the time of exportation of such merchandise to the United States at which such or similar merchandise is freely offered for sale for home consumption to all purchasers in the principal markets of the country from which exported in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States."[30] The definition of export value is substantially the same as that for foreign value except that it is the value "for exportation to the United States" rather than the value "for home consumption."

Practically every element entering into the foregoing definitions has

27. 19 U.S.C. § 1499.
28. 19 U.S.C. § 1500.
29. 19 U.S.C. § 1402.
30. 19 U.S.C. § 1402(c).

been the subject of much litigation, judicial interpretation and decision. The courts have been called upon to construe, as applied to many different factual situations, such phrases as "time of exportation,"[31] "such or similar merchandise,"[32] "freely offered for sale,"[33] "all purchasers,"[34] "principal markets,"[35] "the country of exportation,"[36] "the usual wholesale quantities,"[37] "the ordinary course of trade,"[38] and "the costs, charges, and expenses incident to placing the merchandise in containers, packed ready for shipment to the United States."[39] Similarly, every element entering into United States value, cost of production and American selling price, has time and again been before the courts for construction.

Appeal for Reappraisement

Nevertheless, despite the complexity of the value provisions, the appraiser is required to find a value for all imported merchandise. His finding of value is not a final and conclusive determination, if, within thirty days after the appraiser's decision has been made known to the consignee, an appeal for reappraisement is filed by the consignee or his agent. This so-called appeal brings the appraiser's finding of value before the court for review. The collector may also note his disagreement with the appraiser's return by filing an appeal within sixty days after the appraiser has rendered his decision.[40] The case of a collector's appeal for reappraisement is the only instance in which the United States appears as a party plaintiff in customs litigation. In all other cases the Government, which is now represented by the Customs Section of the Civil Division of the Department of Justice, is the defendant.

An appeal for reappraisement is in the nature of a party's complaint in a valuation controversy. It is an informal document which need only allege that the party filing it thereby appeals from the appraiser's finding of value. No reason to support it need be incorporated and no basis for the appeal need be assigned. The appeal, which is filed with the collector or by him, is then forwarded together with the entry and accompanying papers, to the United States Customs Court and assigned to one of the judges thereof who, after hearing trial of the issues involved,

31. D.N. & E. Walter & Co. v. United States, 42 C.C.P.A. (Customs) 114 (1955).
32. United States v. Irving Massin & Bros., 16 Ct. Cust. App. 19 (1928).
33. Goodyear Tire & Rubber Co. v. United States, 11 Ct. Cust. App. 351 (1922).
34. United States v. American Glanzstoff Corp., 24 C.C.P.A. (Customs) 35 (1936).
35. United States v. Hallet & Carey Co., 68 Treas. Dec. 1286 (1935).
36. H.S. Dorf & Co. v. United States, 41 C.C.P.A. (Customs) 183 (1954).
37. United States v. Minkus, 21 C.C.P.A. (Customs) 382 (1934).
38. United States v. Nelson Bead Co., 42 C.C.P.A. (Customs) 175 (1955).
39. United States v. F.W. Woolworth Co., 22 C.C.P.A. (Customs) 184 (1934); United States v. International Commercial Co., 28 Cust. Ct. 629 (1952).
40. 19 U.S.C. § 1501.

is required to determine the value of the merchandise, using as the basis for his decision one of the values specified in the tariff act.[41]

Except when a judge is hearing trials in outlying ports, for the Customs Court is an itinerant court holding sessions throughout the United States, Alaska, Puerto Rico and Hawaii, the only instance in which he both hears and determines, sitting alone, is in the case of a trial of a reappraisement appeal. Even when holding court outside the port of New York, a judge is without power to decide alone the issues which he has heard. All cases other than reappraisement trials are decided by a bench of three judges at least two of whom must concur in the result. To each of the three divisions of the court is assigned certain schedules of the tariff act and the products covered thereby and issues relating to the subject matters assigned to each division come before it for hearing and determination.[42]

Owing to the many difficulties necessarily encountered in proving value in accordance with the precise statutory definitions thereof and particularly in view of the necessity of obtaining information in respect to foreign markets and commercial practices, the strict rules of evidence which otherwise are adhered to in all other customs trials, are relaxed in reappraisement hearings, to the extent that affidavits and depositions of persons whose attendance at court can not reasonably be compelled, price lists and catalogs, reports or depositions of consuls, customs agents, collectors, appraisers, assistant appraisers and other officers of the Government may be admitted into evidence.[43]

There is a presumption in every reappraisement trial that the value found by the appraiser is the true value of the merchandise and the burden rests upon the party who challenges its correctness to prove, not only that the appraiser's finding of value is erroneous but also that the claimed value, predicated upon a statutory basis, is correct.[44] A plaintiff in a reappraisement appeal is required to meet every issue implicit in the basis of value for which he contends.[45]

As a rule, the parties brief the issues involved in the case after the trial is had and the stenographic minutes are transcribed. The decision of the single judge, like every decision of the Customs Court, is required to be in writing and to be published.[46] Special statutory provisions, as

41. 28 U.S.C. § 2631.
42. 28 U.S.C. § 254.
43. 28 U.S.C. § 2633.
44. Ibid.
45. United States v. T.D. Downing Co., 20 C.C.P.A. (Customs) 251 (1932); United States v. Malhame & Co., 19 C.C.P.A. (Customs) 164 (1931).
46. 28 U.S.C. § 255.

interpreted by the courts, make mandatory findings of fact upon which the conclusions of the single judge rest.[47]

The single judge is required to find a value for the importation notwithstanding any invalidity in the original appraisement and despite the lack of samples or evidence supplementing the official papers.[48] His decision is subject to review within thirty days by a division of the United States Customs Court, other than the one to which the single judge is assigned, upon the filing of an application for review.[49] This is the only instance in which the court exercises any appellate jurisdiction.

The appellate division after considering the record made before the single judge and briefs filed by the parties and hearing oral arguments "on the part of any of the interested parties requesting to be heard," may affirm, reverse, modify or remand.[50] Its decision is required to be in writing, predicated upon findings of fact and conclusions of law and may be reviewed, upon questions of law only by the Court of Customs and Patent Appeals which sits in Washington, D.C.[51] The decisions of the latter court are final unless set aside, or modified by the Supreme Court of the United States.

Post-Appraisement Procedure

Once the appraisement of imported merchandise becomes final and the value thereof has been conclusively determined, all of the papers relating to the entry are forwarded to the collector for liquidation. Liquidation has been described as the formal computation by the collector of all assessments, charges, duties and fees which he finds to be due the Government in connection with each importation of merchandise.[52]

No time limit is imposed by statute within which the collector is required to liquidate any entry. Owing to delays encountered in ascertaining values as the result of investigations in foreign countries and the difficulties involved in the conversion of foreign currencies into United States dollars, a considerable period of time often elapses between the date when merchandise is imported and the date when liquidation occurs.

The time of liquidation fixes the right of the importer with respect to the accrual of most causes of action. Any importer, consignee or agent of the person paying any fee, charge or exaction, may, within sixty days

47. 28 U.S.C. § 2635. Kuttroff, Pickhardt & Co. v. United States, 12 Ct. Cust. App. 261 (1924).

48. 28 U.S.C. §§ 2631, 2636. United States v. Fischer, 32 C.C.P.A. (Customs) 62 (1944); United States v. F.W. Woolworth Co., 22 C.C.P.A. (Customs) 184 (1934).

49. 28 U.S.C. § 2636.

50. Ibid.

51. 28 U.S.C. § 2637.

52. United States v. B. Holman, Inc., 29 C.C.P.A. (Customs) 3 (1941).

after, but not before the date of liquidation, protest any decision of the collector which is or may be embodied in his liquidation.[53] A protest like a notice of appeal for reappraisement, is an informal document[54] which, in fact and in effect constitutes the importer's complaint. No hard and fast rules for the legal sufficiency of a protest are specified. It must however, be sufficiently definite so as to call to the attention of the collector the objection in the mind of the protestant, to enable the former to consider and pass upon the same.[55] It may take the guise of a letter,[56] a written statement or a printed form.[57] It must be signed but the signature need not be in ink and may even be typewritten.[58]

The collector is allowed ninety days from the date of the filing of a protest in which to review his decision. He may reverse, modify or affirm but in any event he loses all jurisdiction over the subject matter at the expiration of ninety days from the date the protest is filed and, if he has not acceded to the importer's demands, he must transmit the protest, the entry, all papers and whatever samples or exhibits he may have, to the United States Customs Court for trial.[59]

The protest is the importer's only pleading and every allegation contained therein is deemed to be controverted whether or not the collector files an answer thereto. The collector may, if he so desires, make answer to the protest explaining or justifying the action complained of. Frequently he transmits a copy of the appraiser's report containing a description of the merchandise. If the collector's answer is filed within the ninety-day period during which he has jurisdiction to review his decision, it may be considered as part of the record in the case.[60] Answers filed after the ninety day period has elapsed are untimely and not competent evidence.[61]

CLASSIFICATION

A substantial portion of the business of the United States Customs Court is devoted to the hearing and determination of issues raised by

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chandise and the rate of duty applicable thereto, may be ascertained. In

53. 19 U.S.C. § 1514.

54. Wells Fargo & Co. v. United States, 7 Ct. Cust. App. 346 (1916).

55. United States v. Sheldon & Co., 5 Ct. Cust. App. 427 (1914); Kilburn Mill v. United States, 26 C.C.P.A. (Customs) 54 (1938).

56. Scholtz & Co. v. United States, 48 Treas. Dec. 588 (1926).

57. Fujimoto & Co. v. United States, 3 Cust. Ct. 269 (1939).

58. American Express Co. v. United States, 34 Treas. Dec. 395 (1918); Fritzsche Brothers v. United States, 16 Treas. Dec. 331 (1908).

59. 19 U.S.C. § 1515.

60. United States v. Albers Bros. Milling Co., 35 C.C.P.A. (Customs) 119 (1948); M. Pressner & Co. v. United States, 26 C.C.P.A. (Customs) 186 (1936).

61. Oakland Food Products Co. v. United States, 32 C.C.P.A. (Customs) 28 (1944).

way of protest to the end that the proper classification of imported mer-
every action initiated by protest there is a presumption that the collector's classification is correct[62] and that he has found the existence of every fact essential to sustain that classification.[63] The presumption is not evidence however and may not be weighed against evidence.[64]

If a plaintiff makes a prima facie case establishing all of the material issues, the burden of going forward with controverting evidence shifts to the United States defendant and the question becomes one of fact or of law or both without regard to the presumption of correctness attaching to the collector's finding. The burden of a plaintiff in a classification suit is twofold. He must first establish that the collector's action is erroneous and then introduce evidence to sustain the classification which he claims is proper.[65]

As the Tariff Act of 1930 enumerates thousands of items in its dutiable and free list schedules, it becomes apparent that the subject matter before the Customs Court is almost infinite in its variety. Oftentimes it involves proof of highly scientific and technical procedures, of methods of manufacture of a vast group of products, the names by which they were known either commonly or in the trade and commerce of the United States at the time the Tariff Act became law and the use and/or uses to which they are ultimately applied. A mere recital of the chapter headings of the schedules of the Tariff Act tellingly reveals the many and various products which have been the subject of tariff legislation and which have or may become open to judicial review.[66]

Despite these many specific enumerations, the presence in the act of so called "basket clauses" or "catchall provisions" such as "Articles or wares not specially provided for, if composed wholly or in chief value of platinum, gold or silver . . .," "Manufactures of wood or bark, or of

62. United States v. G. Klein & Son, 42 C.C.P.A. (Customs) 73 (1954).

63. United States v. I. Magnin & Co., 21 C.C.P.A. (Customs) 77 (1933).

64. United States v. Ignaz Strauss & Co., 37 C.C.P.A. (Customs) 48 (1949).

65. W.T. Grant Company v. United States, 38 C.C.P.A. (Customs) 57 (1950).

66. Schedule 1 provides for Chemicals, Oils, and Paints; Schedule 2, for Earths, Earthenware and Glassware; Schedule 3, for Metals and Manufactures of; Schedule 4, for Wood and Manufactures of; Schedule 5, for Sugar, Molasses and Manufactures of; Schedule 6, for Tobacco and Manufactures of; Schedule 7, for Agricultural Products and Provisions; Schedule 8, for Spirits, Wines and Other Beverages; Schedule 9, for Cotton Manufactures; Schedule 10, for Flax, Hemp, Jute, and Manufactures of; Schedule 11, for Wool and Manufactures of; Schedule 12, for Silk Manufactures; Schedule 13, for Manufactures of Rayon or Other Synthetic Textiles; Schedule 14, for Papers and Books; and Schedule 15, for Sundries. 19 U.S.C. § 1001. Schedule 16, which is the Free List, covers items which are permitted to be entered without payment of duty, many of which are crude or unmanufactured articles or articles not produced in the United States. 19 U.S.C. § 1201. Within each schedule are listed innumerable items of merchandise, some by name, others by class description, or according to their designated uses.

which wood or bark is the component material of chief value, not specially provided for," "All manufactures, wholly or in chief value of vegetable fiber, except cotton, not specially provided for,"[67] and the like; provisions for unenumerated articles whether manufactured or unmanufactured and/or their classification in accordance with their similarity to enumerated items,[68] a host of new products, unknown to science, industry, the public at large or the legislature when the present law was enacted, create problems of classification both administratively and judicially. The difficulties of reconciling them with statutory language now twenty-six years old points out the need for new tariff legislation more in keeping with present times, nomenclature, technologies and uses.

Particularly onerous in this connection is the burden encountered in attempting to establish commercial designation of an article so as to bring it within, or cause its exclusion from the scope of a given tariff provision. A presumption exists that Congress has provided for every enumerated article in accordance with its name in commerce and trade. In the absence of proof to the contrary however, it is presumed that the meaning of a term is the same both commercially and commonly and common meaning, as of the time of the passage of the law, must be ascertained. If it is claimed that the commercial meaning differs from the common understanding, such fact must be established by evidence that at, and prior to the time the present act became a law (June 17, 1930) there existed in the trade and commerce of the United States, a designation for the article, differing from that by which it is commonly known and that such commercial designation was uniform, definite and general throughout the United States.[69] Witnesses competent to give such evidence by reason of experience in buying and selling on a wholesale level and on a nationwide basis, at and prior to June 17, 1930, are becoming less and less available. As their numbers diminish, so are the instruments for obtaining the proper classification of imported merchandise curtailed.

Within this and other limitations deriving from the antiquity of the present law (and no other prior tariff legislation has remained unchanged on the statute books for so long a period)[70] classification of every imported article must nevertheless be made by the collector of customs at the port of entry and, whenever his action is challenged by protest and not reversed by him, the United States Customs Court must inquire

67. 19 U.S.C. § 1001, paras. 397, 412, 1023.

68. 19 U.S.C. § 1001, paras. 1558-59.

69. United States v. Fung Chong Co., 34 C.C.P.A. (Customs) 40 (1946); United States v. Armand Schwab & Co., 30 C.C.P.A. (Customs) 72 (1942).

70. See Trade Agreements Act of 1934, 19 U.S.C. § 1351, which has modified some of the language of the basic law. The existence of the trade agreements has to a certain extent eliminated the need for major tariff revision.

into its correctness. As a consequence many interesting, fascinating and even amusing questions come before the court for determination.

When does an infant become a child?[71] Is an anthology of verse susceptible of authorship and if so, who is its author?[72] Are frogs' legs meat, fish or fowl?[73] Is a singing mechanical bird in a cage a musical instrument?[74] Are fish livers drugs?[75] Is a platinum fox a silver fox?[76] Is a tomato a vegetable?[77] Are kumquats oranges?[78] These are but a few of the questions for which legal and reasonable answers must be found. Neither are these trivialities nor a puerile splitting of hairs, for substantial monetary considerations frequently hinge upon the outcome.

The decision of the Customs Court in a classification case is reviewable both on the facts and on the law, by the United States Court of Customs and Patent Appeals,[79] whose judgment is final, unless set aside or modified by the Supreme Court of the United States.[80] Finality having become a fact, the collector must reliquidate the entry, if the importer has prevailed, and thereupon refund whatever duties have been erroneously assessed and paid.

The principle of res adjudicata does not obtain in customs jurisprudence.[81] Though the subject matter and the parties be the same in successive suits, since each arises from a different importation, the right to a new and separate adjudication is recognized. Neither is the Government bound to apply to pending cases or new importations the rule of law pronounced in a decided case. If either party possesses the belief that the proof of additional facts or even the reargument of the issues will bring about a different result, he is privileged to present the matter to the court if protest has been filed. He may, during the course of such trial, upon proof that the merchandise and the issues are the same in all material respects, incorporate the record as made in the prior trial. Subject to the right of counsel to reexamine or crossexamine any witnesses who may have testified in that action and who are within the

71. United States v. Best & Co., 24 C.C.P.A. (Customs) 220 (1936).

72. Oxford University Press, N.Y., Inc. v. United States, 33 C.C.P.A. (Customs) 11 (1945).

73. Atalanta Trading Corp v. United States, 42 C.C.P.A. (Customs) 90 (1954).

74. J.C. Robold & Co. v. United States, 43 Treas. Dec. 18 (1923).

75. Geo. S. Bush & Co. v. United States, 42 C.C.P.A. (Customs) 190 (1955).

76. United States v. O. Brager-Larsen, 36 C.C.P.A. (Customs) 1 (1948).

77. Nix v. Hedden, 149 U.S. 304 (1893).

78. United States v. Fung Chong Co., 34 C.C.P.A. (Customs) 40 (1946).

79. 28 U.S.C. § 2638.

80. 28 U.S.C. § 2601.

81. United States v. Stone & Downer Co., 274 U.S. 225 (1927); United States v. Boone, 38 C.C.P.A. (Customs) 89 (1951).

jurisdiction of the court, an incorporated record becomes part of the evidence in the new case.[82]

It is not always the practice to retry identical issues. As a rule if there are many importations of like merchandise, the classification of which would ordinarily be the same, the parties are apt to make a test case of the question and suspend all other suits until the test case is decided. If the importer prevails and the Government decides to accede to the court's decision, it will usually concede, by stipulation, the applicability of that decision to the suspended case. Where the Government prevails, counsel for the importer usually abandons his suspended cases. However, suspension of a case does not make either action mandatory. Counsel in requesting suspension do not ordinarily agree to abide the event.

Although thousands of cases are forwarded to the court by the collectors of the various ports of entry throughout the country, its calendars are so arranged that a trial may be had within two months. The practice of suspension of cases to await the determination of test issues, contributes greatly to the expeditious disposition of the volume of business of the court.

Petitions for Remission, American Manufacturers' Protests

Two additional phases of the jurisdiction of the Customs Court require mentioning in this discussion. The first of these consists of petitions for the remission of additional duties assessed against imported merchandise by reason of undervaluation upon entry.[83] Upon the filing of a petition for remission after final appraisement, but not more than sixty days after liquidation, the importer was required to establish by satisfactory evidence that "the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise."[84] The burden thus imposed was a negative one, requiring petitioner to establish an absence of an intention to defraud. It was not essential that bad faith be affirmatively shown, rather, unless satisfactory evidence of good faith was produced, the court was required to deny the petition.

The other is a proceeding seldom availed of and even less frequently successfully concluded, referred to as an American manufacturer's protest.[85] This is the right of an American manufacturer to make known his

82. Rule 20, Rules Of The United States Customs Court.

83. See note 3 supra.

84. United States v. Westerfield, 40 C.C.P.A. (Customs) 115 (1953); United States v. Balfour, Guthrie & Co., 39 C.C.P.A. (Customs) 199 (1952).

85. Formerly 19 U.S.C. § 1352, it precluded the right of an American manufacturer to file protest concerning any imported article with respect to which a foreign trade agree-

objection to the appraised value or the classification of any imported merchandise. The proceeding has for its purpose the protection of American industry against the competition of imported products. The steps which must be taken to initiate the action as defined by statute,[86] are exceedingly complicated which serves to explain why the proceeding is seldom instigated. When it is, the American manufacturer becomes the plaintiff, the importer becomes the real defendant, and the United States, against whom the action is brought, is in effect a nominal party, not vitally concerned with the outcome of the action. If the protest is sustained, the Government benefits to the extent that subsequent importations are increased in value or classified at a higher rate of duty. If the protest is overruled, the action of the Government official in making appraisement or in classifying the commodity in dispute is affirmed.

This in brief is the story of customs practice and procedure with emphasis slanted more heavily upon the business of the United States Customs Court than upon the administrative steps required to be taken in entering imported merchandise. To those unfamiliar with the practice, it must appear as a maze of complexities and technicalities despite the lack of formal pleadings. This indeed is so, and yet to those who are engaged in it, and who acquire a familiarity with its terms of art, there is a fascination which transcends the drudgery of its detail. The very variety of the subject matter prevents settled procedures from becoming routine. New issues, new approaches, new constructions, make of this practice a living, growing, flourishing branch of the law.

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ment had been negotiated. The section was amended by Act of June 16, 1951 to restore this right.

86. 19 U.S.C. § 1516.