

facts now presented, would have been my conclusions as to the propriety of a preliminary injunction, the motion to dissolve ought not to be sustained, because, under the bill, it may be at the final hearing the government will be entitled to a perpetual injunction.

The motion to dissolve is overruled.

CLARK v. WILSON.

(Circuit Court, S. D. New York. January 3, 1888.)

CONTEMPT—WHAT CONSTITUTES—ANSWER BEFORE REFEREE.

On a reference, after decree, to a master to ascertain how many infringing articles defendant had made, in answer to such a question, he stated, "None." Held, that he was not guilty of contempt in making the answer.

In Equity. Accounting before a master.

Alexander Clark sued James G. Wilson, defendant, for infringement of patent. Decree for plaintiff, and reference to a master.

A. J. Todd, for complainant.

Francis Forbes, for defendant.

LACOMBE, J. The decree refers the case to a master to ascertain, take, and report the number of (infringing) shutters made, used, or sold by the defendant prior to May 2, 1886; and defendant is thereby directed and required to attend before the master from time to time, as required, and to produce before him such books, papers, exhibits, statements, vouchers, and documents as he may be directed by said master to produce, and to submit to such oral or other examination as the master may direct. The parties being before the master, the latter directed defendant to produce a statement of the number of the infringing articles manufactured or sold by him during the period covered by this accounting as set forth in the decree; the statement to give also the prices at which such infringing articles were sold. The defendant presented a statement as follows: "Number of infringing articles manufactured and sold by me prior to May 2, 1886: None. [Signed] JAMES E. WILSON." The master submits to the court the question whether the defendant is to be adjudged guilty of contempt in making this statement, apparently on the theory that such a statement is inconsistent with defendant's former testimony, and with the defense he interposed to the suit. *Non constat*, however, that his present statement is untrue, and it would be a strange proceeding for the court to compel a party by a process of contempt to make a false return. The defendant's statement binds nobody. He is before the master, with all his books and papers, and it is the master, not the defendant, who is to take and state the account. When books or papers are withheld, or answers to pertinent questions refused, or the falsity of his statements is demonstrated, it will be time enough for the master to invoke the aid of the court.

CASADO *v.* SCHELL, Collector.*(Circuit Court, S. D. New York. December 22, 1887.)*

CUSTOMS DUTIES—GAUGING—EXPENSE OF—FEES.

Rev. St. U. S. § 2920, relating to the collection of duties, provides that, in all cases in which the invoice or entry does not contain the weight or quantity, or measure of merchandise, now * * * gauged the same, shall be * * * gauged * * * at the expense of the owner, agent, or consignee. In an action to recover gauger's fees paid by an importer, *held* that, where an importer or merchant does not accurately state the quantity of his goods, whether stated in known units employed in this country, or in known foreign units, and the result of the gauging shows that the gauging was necessary in order to determine the fact that the quantity was not accurately stated, the importer or merchant must bear the expense thereof.

This was an action to recover gauger's fees paid in 1857, 1858, and 1859, on importations of wine from Spain. The invoices stated the quantity in quarter-casks and octaves, and evidence introduced by the plaintiff tended to show that these were fractions of the pipe or butt, by which wines were bought and sold in Spain, and which, in the different Spanish ports, contained a definite number of gallons; that its capacity was not the same in all ports; but that the respective capacities of the Cadiz, Malaga, Barcelona, and other pipes was well-known to the trade, both there and here.

Almon W. Griswold, for plaintiff.

Stephen A. Walker, Dist. Atty., for defendant.

LACOMBE, J., (*orally*.) Irrespective, entirely, of the decision of Judge NELSON, the more recent deliverances upon the points now raised in this circuit, seem to be sufficiently conflicting to entitle this court to treat it substantially as a new question, and to determine it by a construction of the statute, unconstrained by any particular decision. Nor is there anything in the contention that the practical construction of the statute by the treasury department sustains the plaintiff's interpretation, because that department has construed the section differently at different times.

The statute referred to is that of 1846, which provides that "in all cases in which the invoice or entry shall not contain the weight or quantity, or measure of goods, wares, or merchandise, *now* [that is, at the time of the passage of that statute, and it appears and is not disputed that, at the time of the passage of that statute, wines of this character were measured]—weighed or measured or gauged, the same shall be weighed, gauged, or measured at the expense of the owner, agent, or consignee." What did congress mean by that particular piece of legislation? Before this act was passed, it appears that wines and liquors were measured and gauged, and that the gauger's fees were paid by the government. Congress evidently meant to make a change in that system of some kind, or it would not have enacted this section. The change which it has made may be either of two; that is to say, the section lends itself to either of two constructions. The one construction, which is practically that for which