

Mich. 542, in which the writ was quashed as void because it did not describe the goods taken. The identical question involved in this case was also passed upon in *Gray v. Dean*, 136 Mass. 128. In that case the value of the replevied property was below the minimum amount of which the court had jurisdiction. The superior court proceeded to make an order for the return of the property, and the supreme court held it to be erroneous.

The cases relied upon by the defendant do not support his contention. In *People v. Tripp*, 15 Mich. 518, the writ of replevin was not served a sufficient time before the return-day, and the justice declined to proceed, and a discontinuance was entered. This was within the very words of the statute. There was no evidence that the court did not originally have jurisdiction of the case. In *Forbes v. Judge*, 23 Mich. 497, the service of the writ was set aside as having been made after the return-day. This was held, in effect, to amount to a discontinuance; but there was no evidence in that case that the court did not have jurisdiction to issue the writ. In *Fleet v. Lockwood*, 17 Conn. 233, the writ was abated for want of a bond for prosecution, and a judgment that the plaintiff return the goods and chattels replevied was held to be correct, but no question was made concerning the jurisdiction.

We are clear in the opinion that there was no power in the court to order a return of the property after it had been delivered to the plaintiff, or to assess the plaintiff's damages, or to pass upon the question of title as between the parties. As it seems to be conceded that no action will lie upon the bond, (section 8352,) except after an execution returned unsatisfied, it follows that the defendant must seek his remedy by an action against the officer, or against the plaintiff in replevin.

An order will be made vacating the judgment for return and the order assessing damages, as having been improvidently made, and the case will be dismissed for want of jurisdiction.

WEAVER & STERRY, Limited, v. SALTONSTALL, Collector.

(Circuit Court, D. Massachusetts. April 29, 1889.)

CUSTOMS DUTIES—ENTRY AND APPRAISAL.

The duty should be assessed only on the quantity of the goods arriving in port, and not on the quantity appearing by the invoice to have been shipped. The last paragraph of Rev. St. § 2900, forbidding the assessment of duties on an amount less than the invoice value, refers only to the price, and not to the quantity.

At Law.

Action by Weaver & Sterry, Limited, against Leverett Saltonstall, collector of customs.

C. P. Searte, for plaintiff.

T. H. Talbot, Asst. U. S. Atty., for defendant.

COLT, J. Under the agreed statement of facts it appears that the plaintiff, between February and August, 1887, imported into the port of Boston, from Italy, 1,800 boxes of castile soap; that the soap, after its arrival and entry at the custom-house, was submitted to an examination by a weigher in the service of the custom-house, who reported the weight to be 70,286 pounds, whereas the invoice made at time of the shipment of the soap from Italy shows the weight at the time of exportation to have been 72,983 pounds. The plaintiff claimed that the duty should be exacted only upon the value and amount as shown by the weigher's return to have been actually imported, but the defendant exacted a duty upon the entire value and amount of soap as stated in the invoice to have been shipped, and declined to make any allowance for loss of weight due from the voyage. This suit is brought to recover the excess of duties so exacted by the collector. It seems to me that the courts have determined this question in favor of the importer. In principle, I cannot distinguish this case from *Marriott v. Brune*, 9 How. 619; *U. S. v. Southmayd*, Id. 637; *Austin v. Peaslee*, 20 Law Rep. 443; also reported in full in Boston Daily Advertiser, of Sept. 30, 1857. In *Marriott v. Brune* it was held that the true construction of the law is to assess duty only upon the quantity of sugar and molasses which arrives in port, and not upon the quantity which appears by the invoice to have been shipped. This doctrine was affirmed in *U. S. v. Southmayd* and in *Austin v. Peaslee*. The last paragraph of section 2900, Rev. St., forbidding the assessment of duties upon an amount less than the invoice value, is substantially the same as the proviso contained in section 8 of the act of 1846, (9 St. at Large, 43.) In *Marriott v. Brune* it is held that the decision is not inconsistent with the proviso in section 8 of the act of 1846, because the proviso refers only to the price, and not to the quantity. Such being the construction put upon the law by the supreme court and the circuit court for this circuit, the collector should have assessed duties only upon the quantity of soap which arrived in port, and not upon the quantity which appears by the invoice to have been shipped; and the plaintiff is entitled to a judgment for the excess of duties so exacted. Judgment for plaintiff.

SYKES v. MAGONE.

(Circuit Court, S. D. New York. April 8, 1889.)

1. CUSTOMS DUTIES—MANUFACTURES—NON-ENUMERATED ARTICLES—SIMILITUDE.

The similitude either in material, quality, texture, or the use to which it may be applied, that a non-enumerated manufactured article must bear to an enumerated article chargeable with duty in order to subject the former article to the same rate of duty which is levied and charged on the latter article, must be a substantial similitude, not merely an adaptability to sale as a substitute for the latter article, but representing either its employment, or its effects in producing a result.