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Appellant : Lawrence

Respondent : Allen

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Lawrence v. Allen

48 U.S. (7 How.) 785

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SYLLABUS

By the fifth section of the Tariff Act passed on 30 August, 1842, 5 Stat. 555, a duty of thirty percent is imposed on "India rubber oil cloth, webbing, shoes, braces or suspenders, or any other fabrics or manufactured articles composed wholly or in

part of India rubber."

In the ninth section, among other articles declared to be exempt from duty is "India rubber in bottles or sheets, or otherwise unmanufactured."

By these sections, the duty of thirty percent is payable upon shoes made of India rubber in Brazil, although they are made by the same process as bottles or sheets, provided they come to this country in a condition to be worn without further material labor on them here, and were actually worn in this form, and provided they were called, in the language of commerce, "India rubber shoes," and of these two facts the jury ought to judge.

The articles come within the letter of the law, and the act of 1842 was framed with a desire to tax whatever might compete with our own manufactures.

When India rubber is made into a shape suitable for use, it may be considered a manufactured article. Originally it was made into the shape of boots, to be used

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and worn in Brazil and afterwards into shoes, but not intended to be sent abroad as a raw material.

The fact that the material of which these shoes are made is used for other articles of manufacture after their importation does not change this view of the subject.

This was an action of assumpsit commenced by Allen and Paxton, the defendants in error, in the supreme court of the State of New York, for the purpose of recovering back from the plaintiff in error, collector of customs for the port of New York, certain moneys exacted by him as collector for duties upon a quantity of common India rubber shoes imported into the port of New York in September, 1845, by the defendants in error, from Para, in Brazil.

Under the provisions of the Act of Congress of 2 March, 1833, the suit was removed into the Circuit Court of the United States for the Southern District of New York.

The declaration contained the common money counts, to which the defendant pleaded the general issue.

The cause was tried in May, 1847, and under the instructions of the court the jury found a verdict for the plaintiffs below for $2,908.60.

A great deal of evidence was adduced upon the trial by the plaintiffs to show the manner in which the shoes are made in Brazil and their use as an article of commerce. Much of this testimony was objected to as inadmissible. A part of it is transcribed because it is referred to in the opinion of the court.

The plaintiffs' counsel then called as witnesses James E. Smith, Amory Edwards, George G. Wales, and William H. Edwards, who, being sworn, severally testified that they were acquainted with the articles now the subject of controversy and with other articles of India rubber imported from Para; that they had been at Para, and were acquainted with the process of producing or making India rubber; that the juice or sap of the trees, when collected, is about the color and consistency of milk, and is called milk; that it is placed in a vessel of convenient size; that moulds of clay, or of wood covered with clay, in the shape of a shoe, or bottle, or other shape, and to which a handle is attached, are dipped in the milk, and immediately held in the heat and smoke of a fire made of a peculiar kind of nut, which dries the milk and gives it a dark color; that this process is repeated several times until the coating is sufficiently thick, when the article is taken from the mould by breaking the clay of which it is made or with

which it is covered, and the pieces of clay are taken out; that shoes and bottles are then generally stuffed with straw, and that the article is then ready for sale and exportation; that bottles are made in two or three minutes; that it takes somewhat longer, say about five minutes, to prepare a shoe; there must be a new mould for every bottle; the foot-shaped mould is the best form for dipping. The shoe shape is the most convenient mode of making India rubber. The stuffing of the shoe is done by the parties who buy them in Para for exportation. The shoes are sometimes

shipped in bulk and sometimes stuffed. The term "India rubber shoes" comprehends all kinds of shoes made of India rubber, both manufactured and unmanufactured; that the price of India rubber shoes in Para has varied greatly since 1826; that the great demand for India rubber of late years in the United States for dissolving for manufacturing purposes has raised the price in Para; that no such things as suspenders are made in Para; that nothing is made there in a more manufactured state than the square sheets; that India rubber shoes are sometimes sold and shipped at Para without being stuffed with straw.

Much evidence was also introduced by the defendant the object of which was to show that the articles were known in commerce by the name of "India rubber shoes," and were bought and sold in the market as imported, without any alteration of any consequence.

The counsel for the defendant then prayed the court to decide the law of the case and to instruct and charge the jury as follows:

First. That in construing and applying the provisions of the tariff law of August 30, 1842, to the present case, the terms used therein are to be understood in their known commercial sense, as used and understood in the ports of the United States prior to and at the date of said law.

Secondly. That as all "India rubber shoes" imported from foreign countries are by the said provisions subject to thirty percent duty, the true and only inquiry in the present case is whether, in a commercial sense and among commercial men dealing therein, the articles in question were imported into and usually known and bought and sold in the ports of the United States prior to and at the date of the law under the name and denomination of "India rubber shoes."

Thirdly. That if the jury shall be satisfied from the evidence that the articles in question were imported into and usually known and bought and sold in the ports of the United States prior to 30 August, 1842, under the name and denomination of "India rubber shoes," then they are liable

under the law to a duty of thirty percent *ad valorem,* and the jury should be instructed to find for the defendant, and that in the case stated, the jury should be instructed to find for the defendant notwithstanding they should also be satisfied from the evidence either

1st. That the term "India rubber shoes," as used in commerce, includes all other kinds of shoes made in whole or in part of India rubber, as well as these, or

2d. That "India rubber shoes," in a more finished condition and of a better quality were imported from England, France, or other countries prior to 1842 and were then and are now known in the markets, or

3d. That some additional labor is usually applied to these articles, or is necessary to fit them for convenient use as shoes, or

4th. That these articles are extensively used by manufacturers in the United States for the purpose of being made in whole or in part into other articles, or

5th. That no more or other kind of labor is required to make these articles than is required to make India rubber in bottles or sheets or other kinds of India rubber which, by the seventh article of the ninth section, is entitled to admission as free.

It being insisted on the part of the defendant that neither of these circumstances, nor all of them combined, can nullify the explicit terms of the preceding fifth section by which all kinds of "India rubber shoes" are subjected to the thirty percent duty, nor make free these articles, provided they are and were known in commerce under the name "India rubber shoes."

But his honor the presiding judge refused so to decide the law of the case or so to instruct the jury, and, on the contrary, the said judge did then and there decide and did then and there charge and instruct the said jury that the case, in the view taken thereof by the court, entirely depended on the true legal construction of the Tariff Act of August 30, 1842, and involved no question of fact for the jury; that India rubber, when used in whole or in part in the manufacture of oil cloth webbing, shoes, braces, or suspenders, or any other fabrics or manufactured articles, was,

by the tenth article of the fifth section of this law, subjected to the duty of thirty percentum *ad valorem* specified in the clause relating to these fabrics contained in said tenth article; that by the seventh article of the ninth section of said act, India rubber, in bottles or sheets or otherwise unmanufactured, is declared to be exempt from duty; that by virtue of this clause, India rubber existing in the particular forms enumerated therein and existing in any other form in which it may be imported is free from duty if

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unmanufactured; that, as these two clauses were both in the mind of the legislature when treating of India rubber, they are to be construed together; and that, so construed, the fair conclusion is -- and such the said judge decided to be the true legal interpretation of said provisions -- that Congress, in laying the duty, had special reference to the manufactured article in a finished state, and intended to allow India rubber to come in as free, whatever might be its form, if it had not been brought, by manufacture, into a finished state; that as it was not pretended that the goods in question were shoes manufactured out of the material called India rubber, and as it was admitted by all the witnesses that they were brought into the form of a shoe in the process of making the material called India rubber, they were not "India rubber shoes" within the meaning of the tenth article of the fifth section, but were to be regarded as raw material and as unmanufactured within the meaning of the seventh article of the ninth section; that the goods in question were therefore entitled to be admitted free of duty; that the plaintiffs having protested in writing against the payment of any duty thereon, and the collector having, notwithstanding, illegally exacted a duty of thirty percentum *ad valorem* thereon, the plaintiffs were entitled to recover back the moneys so exacted except so far as the same had been refunded by way of drawback, and that the jury would therefore render a verdict for the amount of such remaining moneys, with interest thereon to the day of trial, in favor of the said plaintiffs.

And thereupon the said defendant, by his counsel aforesaid, then and there excepted to the whole of the said decision, charge, and instruction of the said judge, and particularly to those parts thereof wherein the said judge decided and

held that the said case involved no question of fact for the jury, and wherein the said judge instructed and charged the jury, as matter of law, that the goods in question were entitled, under the act of Congress above referred to, to be admitted free of duty, and wherein the said judge also instructed and charged the said jury as matter of law that the plaintiffs were entitled to recover back the moneys exacted by the defendant as duties on the said goods; and the said defendant, by his said counsel, did also then and there except to the aforesaid refusal of the said judge to decide the law of the case, and to instruct and charge the said jury in conformity with the prayer of the counsel of the said defendant hereinbefore contained.

And the said defendant, by his said counsel, thereupon then and there further excepted to the decision of the said judge in admitting as evidence against the defendant the deposition of

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Samuel K. Appleton, and the parts thereof particularly objected to by the said counsel, as hereinbefore mentioned, and in admitting as evidence against the defendant the testimony of James E. Smith, Amory Edwards, George C. Wales, William H. Edwards, and John L. Ripley, hereinbefore particularly objected to by the said counsel, and did also further except to the decision of the said judge in excluding the instructions of the Comptroller of the Treasury hereinbefore mentioned.

Upon this exception, the case came up to this Court.

MR. JUSTICE WOODBURY delivered the opinion of the Court.

This was a writ of error to reverse a judgment in the Circuit Court for the Southern District of New York. That judgment was rendered in favor of Allen, the original plaintiffs, in a suit to recover back the amount of duties which Lawrence, the defendant, as collector of the port of New York, had demanded and received on the importation of certain boxes of India rubber shoes, in September, A.D. 1845, and which the importers claimed to be by law free. The duties were therefore paid

under protest, and at the trial the court, among other things, ruled, that on the facts proved, these shoes were not in point of law subject to any duty, and consequently a verdict was returned for the plaintiffs below for the amount which had been paid to the collector and interest.

The facts proved or admitted which appear material were that these shoes consisted wholly of India rubber, and in different sizes, suited for men, women, and children; that no other work had been expended on them except to dip the moulds or lasts into the milky liquid as procured from the India rubber trees and then dry them over a fire -- performing this process several times till a proper thickness was obtained. A small ornament was afterwards drawn on some of them and a coarse stuffing inserted in others, and in this condition they had for many years been imported and worn without any essential change or addition here unless in some instances slightly to trim and stretch them on a last. It was also proved that shoes made in part from India rubber and in part from cloth or leather of a thinner and lighter fabric had been sometimes imported from Europe, and for several years had been extensively manufactured in this country.

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The law which governs the question whether these shoes ought to pay a duty of thirty percent *ad valorem* or be admitted free is the Act of Congress of August 30, 1842, 5 Stat. 555. In its fifth section, thirty percent is imposed "on India rubber oil cloth, webbing, shoes, braces or suspenders, or other fabrics or manufactured articles, composed wholly or in part of India rubber." And in the ninth section, among other articles declared to be "exempt from duty" is "India rubber in bottles or sheets or otherwise unmanufactured."

The court below entertained an opinion that the clause in this law imposing a duty of thirty percent on India rubber shoes referred to those made in a finished state from that material after being altered in Brazil from its liquid condition to the more solid state, and to the forms of sheets, shoes, bottles &c.;, and that this alteration was not a manufacture, though into a shape designed for use without any material

change, and hence that shoes so made and imported were not dutiable. This view was undoubtedly correct to a certain extent and in some aspects of the subject, but in others it seems to us to involve some errors which we think ought to be corrected and which require more extended explanations because overruling the judgment below. Thus, although this act of Congress clearly meant to impose a duty of thirty percent on shoes imported, which had been made in part from India rubber after it had been hardened and fashioned into some crude shape in South America, yet we have no doubt it might likewise intend to impose this duty on shoes made abroad wholly from India rubber while in its liquid state, and especially if, when so made, such shoes were in a condition to be worn without further material labor on them here, and were made to be so worn, and were in this form often actually worn.

It is our opinion, therefore, that the jury should have been so instructed, and if they were satisfied those shoes had been thus made to be so worn, and, in the language of commerce, if such shoes were called "India rubber shoes," no less than those made here or in Europe in part from India rubber and in a more finished form, that the duty of thirty percent ought to have been paid on them.

Some of our reasons for this opinion are briefly these.

The articles imported in this case manifestly come within the letter of the clause imposing a duty of thirty percent on "India rubber shoes." They are "India rubber shoes." Being thus provided for as shoes, the subsequent clause making certain articles free which were unmanufactured, and not enumerating shoes among them, cannot be presumed to embrace or refer to anything already provided for. *United States v. Clarke,* 5

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Mason C.C. 30. Indeed, these shoes were more emphatically India rubber shoes than those made only in part of that material, as are most, if not all, of those manufactured in this country and in Europe. Again, to remove difficulty in many cases whether an article should come under the description of those liable to duty,

there it is added in the first clause, taxing them, "manufactured articles composed wholly or in part of India rubber," and in this way the duty extends to any shoes if a manufactured article, whether they be, like these, composed wholly of India rubber, or, like most others, composed only in part of it.

Much more do the shoes in this case appear to come within this provision in the act of Congress imposing the duty of thirty percent when we examine the spirit and object of that provision. To ascertain these with some degree of certainty it may be useful in the first place to advert a moment to the past as well as subsequent legislation of Congress on this subject.

The import of India rubber, in any form, into this country, does not appear to have attracted attention in the revenue laws, as a separate and specific article, till 1832. Before that, and especially in the tariff acts of 1828, 1824, and 1816, all of which are usually conceded to have looked to protection as well as revenue, India rubber is not enumerated *eo nomine* as free or dutiable, and hence was taxed generally, from twelve and a half to fifteen percent, among the non enumerated articles, 3 Stat. 310; 4 Stat. 29 and 590. But in 1832, when the policy had become changed to reduce an overflowing revenue, by leaving free such unmanufactured articles as furnished raw materials to our own manufacturers, and such manufactured articles as did not compete with any made here, the Act of July 14, 1832, 3, exempted from duty entirely "India rubber," 4 Stat. 590. In 1833, a like policy, for a like reason, was pursued, and so in 1841, by expressions in the former period placing "India rubber" among the articles free from duty, 4 Stat. 630, and in the latter, making "India rubber" still excepted from duty, though several articles before free were then taxed, 5 Stat. 463.

But in 1842, when the policy of the government again became adapted to protection no less than revenue, the act now under consideration was shaped so as to tax whatever might compete with our own manufacturers, and to admit free only articles in such shape or form as were not calculated to rival our own. Now before 1842, it is well known that the making of shoes in part from India rubber, so as to be waterproof, had been invented, patented, and extensively practiced in this country. Consequently such a protective tariff as that introduced in

1842 would be likely to tax any foreign fabric which was in any considerable degree a rival to the article made here for a similar use. And consequently a foreign-made shoe, whether "composed wholly or in part of India rubber," was meant to be taxed thirty percent if in either case it was in a form suited to be used as waterproof, was so designed and so used, and this form would rival the shoe made here for a like purpose.

In construing statutes, it is not only our duty to give effect to all the words used in their ordinary sense, but to eviscerate, if possible, their true spirit and intent from all the connected circumstances, attendant or subsequent as well as preceding. *Bond v. Hoyt,* 13 Pet. 273; 1 Kent's Com. 461.

The statute applicable directly to the present case being in some respects awkwardly worded, the design of it on this subject has been made more explicit and clear by the subsequent Act of July 30, 1846, changing the forms of expression to describe the articles intended to be taxed. Thus it is there provided that a duty of thirty percent be imposed on "braces, suspenders, webbing, or other fabrics composed wholly or in part of India rubber, not otherwise provided for." And to prevent any misconception of the intention it is added, under the same schedule and rate of duty, "shoes composed wholly of India rubber."

It would also be very extraordinary if the spirit of the act of 1842, in its high protective policy, should not mean to tax the foreign India rubber shoe made wholly of India rubber when it was, and still is, a most formidable and successful rival to the shoe made here in part of the same substance; when it was at first, and for many years, the only shoe used here as waterproof; and when, under all patents and improvements since in lightness and beauty, none seems able to surpass it now in durability, ease, and economy combined.

But it is contended that the India rubber shoe, as made in Brazil and imported thence, is not a "manufactured article," and hence is not within the clause in the act of 1842 imposing a duty of thirty percent. It may be conceded that this duty

applies only to such an article. Yet what constitutes a manufactured article?

In some instances and for some purposes, it may be one kind of process performed on what is found in a natural state, and in some another kind. Thus the juice of the maple or of the cane is in some views manufactured when it is made into molasses or syrup, and in others when again made into sugar or spirit from molasses. And so the juice of the grape is in one sense manufactured when converted into wine, and in another

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when made into brandy. And so is lye from ashes, when boiled down to potash or pearl ash, manufactured into them. Here, the juice or sap of the India rubber tree, while liquid or in its milky state, whether then called caoutchouc or some other name, is still a natural substance, and in its natural form, and, in one sense and to a certain extent, its being hardened and changed in color, no less than consistency and bulk, by fire and evaporation, whatever new form it may then be turned into, is a manufacture. It is so as much as butter or cheese is a manufacture from animal milk, or tar from turpentine, and rosin from tar. Yet from the words of the law as well as its design, it is manifest that the India rubber is not meant to be taxed as a manufacture, though so hardened and changed, unless at the same time it is put into a shape which is suitable for use and adapted with a design to be used in a way that is calculated to rival some domestic manufacture here, rather than merely to furnish a raw material in a more portable, useful, and convenient form for other manufactures here. In the latter case, within the policy and purpose of the tariff law yielding protection, it is "unmanufactured," or, in other words, not made abroad for use in its existing form except as a raw material, like pig iron or pig lead. But in the former case, within that policy and purpose, it is "manufactured," as it is made in a shape for use as a manufacture without being afterwards materially changed in form, and is designed to be so used, and hence comes in as a competitor with our own manufactures.

After these, what requisite is wanting to bring it within the spirit, no less than the letter, of the provision imposing a duty? It has been changed, by fire and labor, in

its color, consistency, and form from its natural state as the milk of the India rubber tree. It has been fashioned into an article of clothing, suitable and customary to be worn in its then shape. It is a rival to other shoes made here.

These elements would, on principles of common sense, seem to amount to a manufacture, and one, when imported from abroad, likely to be taxed.

Going to more technical definitions and to first principles, such a process to make the shoe is making an article by the hand, which was once the literal meaning of the word manufacture, or *manu factum,* and in the more modern idea attached to the word, it is making an article, either by hand or machinery, into a new form, capable of being used, and designed to be used, in ordinary life.

Indeed, these India rubber shoes were originally made in Brazil not as a form of sending abroad a raw material to be used for other purposes. But they were prepared as a shoe, to

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be worn in the shape as there finished, and for the purpose of excluding water. Travelers in Brazil described the use of India rubber there first in the form of boots, because waterproof. 1 McCulloch's Dict. 311; Ure's Dict.

The shoe succeeded to the boot, and its export in sheets also, to be cut up to rub out pencil marks &c.;, gave to the substance itself the common name of India rubber. *Ibid.*

In the form of the shoe, therefore, to be worn in Brazil or elsewhere because waterproof, it was a manufacture, and one of such value for that purpose as to lead to a greatly increased export of the article in that shape within the last twenty years.

And as the invention was made, here and abroad, of thinner and lighter shoes manufactured in part from it, and of extending the use of India rubber to many new objects in dress and the arts, the demand for it, in a state as hardened and colored, without regard to form, enlarged rapidly.

Considering too that a mode of dissolving it here has been discovered, and of easily giving to it afterwards any desired shape, it may be that shoes, no less than sheets or slabs of India rubber in a hardened form, become often, when convenient, melted down or dissolved to be used for other purposes. This might often be done with them, though a manufacture, as their value per pound would vary but little, if any, from India rubber in the shape of sheets, as the raw material of which they were manufactured was the same, and as the expense of making them is similar -- one being done by several dippings, like a candle, and the other by several layers of the gum or milk.

But this occasional use of the shoes for other purposes than wearing as waterproof shoes would not alter their original character as a manufacture for the latter purpose, nor the importation and present character of them as a manufacture for the same purpose.

Thus the importation of cast iron in kettles or hand irons in a state to be so used and frequently so used, would not be altered, as a manufacture of that kind and as subject to pay the duty imposed on it in the tariff, because some of it, after imported, might occasionally be melted down and recast and used for other or similar purposes.

Nor is the juice of the cane -- converted into a different consistence and color abroad, and shipped here as molasses, ready to be used and often used as such -- any the less a "manufactured article" and any less subject to the duty on molasses because some of it, after arriving in this country, may again be manufactured into sugar or spirit.

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A further illustration as to the distinction between the same article, put into a shape to be sold for use as it is, and into one not for use as it is, is that of melted iron.

In that state it may be run in moulds, either for pots or for pigs, and, in the former case, fitted and sold to be used in that shape, and hence a manufacture, while in

the latter sold to be made up afterwards into new and different forms, and hence, for some purposes, is then not regarded as a manufacture till so made up.

So lead may be melted into the shape of pigs or bars for exportation and for foreign manufacture, or be run into weights for use as weights and then be regarded as already a manufacture for that purpose.

It is another evidence that shoes composed wholly of India rubber were considered by Congress as a manufactured article that they place them in that category in the tariff with other clearly manufactured articles, while they place in the category of those unmanufactured such articles as are not in a shape to be used much, if at all, without being made up into new forms. Thus it is with the India rubber images of alligators and lizards imported. If bottles are an exception, they are specially enumerated in the tariff among the free articles in order to be free, while shoes are not, and the former are so enumerated because usually made up here into new shapes, for other purposes, before used, and when not so made up are little employed in their original shape, and have no rival manufacture to be protected by taxing them. Had Congress intended that shoes, when wholly of India rubber, should be considered as unmanufactured, and be free, it is difficult to conceive why it did not place them in that list, and declare them unmanufactured and free, rather than in the list of manufactured and dutiable articles, as it did both in 1842 and again in the revised act of 1846.

Finally, another circumstance exists which appears to be a decisive indication that this very importation of shoes, though called in the invoice "unmanufactured," was meant mainly as shoes for use, to be worn in their existing condition, rather than to be dissolved and used for other purposes. It is that several of the boxes were invoiced as shoes for "ladies," and others for "misses," or children, and which different forms or shapes would be useless, as well as more expensive, if the shoes were intended merely to be cut up or dissolved for other uses and not to be worn by different sexes and ages as "manufactured" shoes in their present shape.

In several analogous cases, as to teas, cotton bagging, and sugar, this Court has held that it is a proper fact for the jury to

decide whether the imported article is or is not known in commerce by the words or terms used in the tariff imposing the duty, and not a question of law, to be settled by the court, as was done here. *United States v. 112 Casks of Sugar,* 8 Pet. 277; *Elliott v. Swartwout,* 10 Pet. 151, 35 U. S. 153 ; *United States v. Breed,* 1 Sumner 164; 22 U. S. 9 Wheat. 438; *Curtis v. Martin,* 3 How. 106.

Unless it be admitted in this case, then, as most of the testimony proves, that these shoes were known in a commercial sense and use as India rubber shoes no less than others, made in part from it, we think the jury should return a verdict on that fact, and next that the jury should have been further instructed that if these shoes had been made into their present shape in order to be worn as waterproof when the purchasers pleased, and that it was customary so to wear them, they were, within the meaning of the act of Congress on this subject, "manufactured," and liable to pay a duty of thirty percent.

Without going into other questions raised at the trial, and without dwelling longer on this, our opinion is that the judgment below must be

Reversed and a venire de novo awarded, and the new trial be governed by the principles here settled.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court of the United States for the Southern District of New York in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said circuit court with instructions to award a *venire facias de novo* and that the new trial shall be conducted in conformity to the principles laid down in the opinion of this Court.