U. S. Treasury dept.

TREASURY DECISIONS

UNDER CUSTOMS AND
OTHER LAWS

VOL. 73

JANUARY–JUNE 1938

HENRY MORGENTHAU, JR.
Secretary of the Treasury

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1938

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that such values are represented by the prices mentioned in the second column of the aforesaid sheets marked respectively "A", "B", and "C". As to all other items involved, the dutiable values are the values found by the appraiser. Judgment will be rendered accordingly.

Toys, meccano

STONE & DOWNER CORP. *v.* UNITED STATES

Reappraisement 118119–A

No. 4203.—Invoice dated Liverpool, England, September 11, 1936.
Certified September 12, 1936.
From Meccano, Ltd.
Entered at Boston, Mass., September 24, 1936.
Entry No. 4221.

(Decided December 30, 1937)

Barnes, Richardson & Colburn (*Samuel M. Richardson* of counsel) for the plaintiff.

Joseph R. Jackson, Assistant Attorney General (*Webster J. Oliver*, special attorney), for the defendant.

SULLIVAN, Judge: In this action the plaintiff appealed from the decision of the appraiser that certain "Meccano Toys" and parts thereof were dutiable according to their home market value in England.

The plaintiff contends there was not any home market for this merchandise, and not any export value; that it is dutiable at its United States value, as specified in section 402 (e) of the Tariff Act of 1930.

The first question to be decided is whether or not there is a home market for this merchandise in England.

It appears from the testimony of plaintiff's witness Dobson that this merchandise was purchased in England from Meccano, Ltd., of Great Britain, by his company, Meccano Co. of America, Inc., and that the price paid therefor was the invoice value of the merchandise and no more.

It appears that the company to whom the British company formerly sold was called Meccano Co., Inc., in New York, and that such concern was owned by the British company, and was its exclusive American agent; that ultimately the American concern was bought out by A. C. Gilbert Co., Inc., of New Haven, and today "owns the Meccano Co. that imports British merchandise"; that A. C. Gilbert Co., Inc., "is the concern that makes the competitive toys called 'Erector sets'"; that finally the American company became Meccano Co. of America, Inc., the plaintiff in this case.

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On cross-examination it was disclosed that the witness had been in the employ of the British company for sixteen years; that the British company did not sell at its cost plus 10 per centum to its subsidiary in this country; that in January of 1929 the Meccano, Ltd., of London was separated from its subsidiary, Meccano Co., Inc., of the United States.

It appears from the testimony that this merchandise sold by Meccano, Ltd., of London, is sold in England and the United Kingdom, and in other countries; that the London company issues a catalog illustrating the entire line that it manufactures, including all items covered by these invoices; that the English company also publishes catalogs in other languages of their merchandise for sale to countries other than England and the United States.

The following testimony is quoted from the stenographic minutes of the trial:

X Q. Now in England, London and the United Kingdom is it not a fact that these Meccano sets are freely offered and sold throughout the United Kingdom?—A. Sold by whom?

X Q. By Meccano, Limited?—A. No, they do not freely offer for sale.

X Q. Don't they sell to the department stores and to toy stores who will buy in what they consider to be wholesale quantities?—A. No, sir.

It further appears that the English concern makes delivery and pays freight to destination on all orders accepted by them for two pounds and over, and that this merchandise is sold to its customers in the United Kingdom at a discount of 33⅓ per centum from list prices appearing in its catalog, less 2½ per centum cash discount. The witness elaborated somewhat on this testimony by then stating:

The list price is established in different countries by Meccano Limited, and they allow a discount of 33⅓ percent and 2 or 2½ percent, freight, duty and transportation charges of all kinds prepaid to destination. It is a fixed price controlled by Meccano. * * * The discount in each case has to allow for various sales promotion charges on the particular market. It is a closed market and they give a service to their dealers.

It appears that its customers in Great Britain and the United Kingdom are selected by it "in each locality." On this point the testimony is as follows:

X Q. But how many dealers are there in Great Britain and the United Kingdom to whom they sell?—A. I can't tell you. They only select a number in each locality.

X Q. It is your position, as I gather, that Meccano Limited will not sell to anybody?—A. Right.

X Q. Just to selected dealers of whom they approve?—A. Right.

X Q. Is the only basis for that selection the matter of credit?—A. No.

X Q. Matter of locality?—A. Partially.

X Q. In other words, they don't want to have competitors in one district?—A. Right.

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This testimony was brought out on cross-examination and indicates that while the merchandise is sold in England, it is sold to selected purchasers.

On redirect the witness testified:

R. Q. Do you know whether the prices at which Meccano Co.'s customers in England sell to the trade are fixed by Meccano, Limited?— A. Those prices are fixed in all cases.

R. Q. So when they sell, do they sell at the list price?—A. They must do so, yes.

It further appeared on recross-examination that the British company only sells to agents or wholesalers in the foreign market, and in the home market "to the selected ordinary retailer; only those whom they select."

It would seem from Mr. Dobson's testimony for the plaintiff that the market in England was not a free one in which any person could purchase. This is sustained by an affidavit in evidence as Exhibit 1, made by Mr. Hewitt, secretary of Meccano, Ltd., of Liverpool, England, as follows:

In England Meccano, Limited, restricts the sale of its products to selected retailers; it does not supply to jobbers. Not every dealer in toys can sell Meccano products. In order to do so, a dealer must first be approved as a Meccano retailer for his locality; and he must invest in a stock of Meccano products to an amount determined by Meccano Limited, the quantities and variety of such stock investment being approved by Meccano Limited, who also fix uniform prices at which their products are to be sold at retail. The sale of any Meccano products at prices other than those determined by Meccano Limited, if persisted in, would result in the stoppage of supplies on trade terms to the offending retailer.

Similar conditions exist with respect to the exportation of Meccano products to other countries, excepting only the United States.

All sales of said products for exportation to the United States are made to Meccano Company of America, Inc., which company exclusively owns the Meccano trade-mark in the United States together with the exclusive right to sell Meccano products in the United States, having purchased said right and trade-mark in January, 1930.

It further appears from this affidavit that the products sold to Meccano Co. of America are without any conditions as to the resale thereof; and the determination of selling-prices and terms and conditions of sale of Meccano products in the United States is solely within the discretion of Meccano Co. of America, Inc.

After Mr. Dobson testified the case was submitted. However, application for a rehearing was made and granted, and Mr. Dobson was recalled. He testified that sales of merchandise in the United States are without any restriction whatever; that they are "free and open sales" to "anybody in the trade who has the money to pay" and at one price irrespective of quantity; that the price at which sold in the United States includes the cost of packing. Evidently,

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the merchandise is not unpacked prior to its sale in the United States, but is ready for shipment to any purchaser in its packed condition as received from England.

The fact that sales are restricted in England is sustained by a special agent's report, Exhibit 3. The special agent made an investigation of these invoices, and received information from Meccano Co., Ltd., of England, the sellers thereof.

The prices at which the merchandise is sold in England are shown "in copies of the manufacturer's home market catalog and price list" attached to the report. The pricelist was effective July 1936.

The report shows that a trade discount of 33⅓ per centum is allowed to all purchasers from the list prices, also "an additional deferred discount, credited monthly, allowed to certain selected large customers of either 5% or 7½%, but the usual trade discount allowed is only the 33⅓%," and in addition a discount of "2½% for cash, monthly account"; that "Delivery is free anywhere in the United Kingdom on orders of £2 in value and over."

It appears from this report that "The merchandise is sold to the Meccano Company of America (the plaintiff herein) at factory cost plus 10%"; that "Shipments are confined to this one importer"; that "no discounts are allowed from the invoiced price"; that "cases are charged extra", and "Cost of packing (labor) included in the price", and that the merchandise is "delivered f. o. b. Liverpool." It further appears that "the importer has no financial interest in the manufacturer"; that "The identical merchandise is sold to countries other than the United States."

The sum and substance of the evidence in this case establishes that there was not a free open market in England for this merchandise to all purchasers. The weight of the testimony establishes that it was a restricted market in the respect that the British company, the shipper, selected its own customers. This may or may not be for financial reasons; but I think the reason that sticks out rather positively is to prevent competition between dealers or customers. In a specified locality the British Meccano Co. may sell to one customer and refuse to sell to another in the same locality, not by reason of financial ability, nor mercantile qualifications, but to prevent competition and the lowering of prices they themselves create for the sale of the article by their purchasers.

The catalogs in evidence indicate a varied assortment of toys, some being quite expensive, and others less so. Not desiring competition in their own trade they select customers in a locality, and require them to purchase a certain quantity of their merchandise, and then exact from such customers an agreement that they sell at a certain price. It therefore seems to me that such method of doing business causes a

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restricted market, and not within section 402 (c) which provides that the foreign value shall be the market value at the time of shipment to the United States "at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported".

I feel that this case is governed by the rule enunciated in *Goodyear Tire & Rubber Co.* v. *United States*, 11 Ct. Cust. Appls. 351, T. D. 39158, wherein the court stated (p. 353):

> In brief, the selected dealer and the selected jobber buy and sell the Goodyear product at a fixed price and if either sells for a price other than that fixed he loses his agency.

That is the combination which appears in the case at bar. The selected dealer must purchase at a certain price and sell at a certain price. The *Goodyear* case holds such to be a restricted market.

This rule was again enunciated in *United States* v. *Philipp Wirth*, 20 C. C. P. A. 94, T. D. 45705, wherein the court states (p. 96):

> Furthermore, the jobbers and dealers are required to resell at prices dictated and controlled by the manufacturer. They are prohibited from exporting. [Parenthetically that is not true in the case at bar.] It is upon these conditions only that the goods are sold to them. Obviously, then, the evidence discloses a controlled, not a free and open, market, and such restricted sales are not indicative of foreign value. [Words in brackets mine.]

This rule has not been changed by *United States* v. *Michele Diagonale*, 22 C. C. P. A. 517, T. D. 47497.

That case in my judgment is not applicable to the case at bar. The lower court there held it was a restricted market, but the holding was reversed on appeal for the reason that every dealer had to purchase at the restricted price; therefore, there was not any competition, but the court concluded that was not a restricted market.

While this rule has not been satisfactory, and has received some criticisms in later decisions, of course it is still the law, although there was a vigorous dissenting opinion by the late presiding Judge Graham. I feel it is not applicable to the facts in the case at bar for the very well-grounded reason that in this case the Meccano Co., Ltd., did not sell to every and all purchasers. It selected its purchasers; sold to them at a specific price; prohibited them from reselling at a price other than that given to them by the manufacturer at which to sell; and thus this case falls within the *Goodyear Tire & Rubber* case, *supra*.

I therefore find there was not a foreign market for this merchandise in England and that there was not an export market, as the plaintiff herein was the sole agent in the United States of the shipper, and, of course, could not create an export market. It therefore follows that this merchandise is dutiable according to its United

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States value, as found in section 402 (e) of the Tariff Act of 1930, which provides as follows:

> The United States value of imported merchandise shall be the price at which such or similar imported merchandise is freely offered for sale, packed ready for delivery, in the principal market of the United States to all purchasers, at the time of exportation of the imported merchandise * * *.

The testimony is not contradicted that the price at which the plaintiff sold in the United States was a free one to any and all purchasers in the condition as packed on the date of exportation.

It is not disputed that the allowances that should be made are in accordance with the rule enunciated in *United States* v. *Beer*, 15 Ct. Cust. Appls. 140, T. D. 42215. That decision holds, referring to section 402 (d) of the act of 1922:

> An analysis of section 402 (d) discloses that the United States value is the *price at which such* or similar *imported merchandise is sold* in the market. From this *price* are to be deducted the following allowances:
> First. Duty.
> Second. Cost of transportation and insurance.
> Third. Other necessary expenses.
> Fourth. Profits not to exceed 8 per centum.
> Fifth. General expenses not to exceed 8 per centum.

Each of these items has been deducted, probably not in the order enumerated, but at the close of the testimony they have all been deducted, and the profit of 8 per centum and general expenses of 8 per centum are as testified by the witness, there not being any dispute in regard thereto.

Now, the question arises whether the plaintiff has established a United States value.

There was offered in evidence Exhibit 2 as an aid to the court, in which is disclosed the character of the merchandise, the sales price, and the United States value.

Attached to the special agent's report are invoices of merchandise sold in England and in foreign countries with the exception of the United States. It is disclosed in such report that as to the sales made to restricted retailers in a particular locality of Great Britain, the following statement of conditions of sale is contained in the right-hand corner of each of the invoices:

Conditions of sale

> All goods are supplied on the understanding that they are to be re-sold by retail only and at the prices in our current price list without deduction. Your acceptance of them will be treated as an acknowledgment of these terms: otherwise they should be returned immediately.

Terms

> Statements rendered monthly. All items are subject (unless otherwise stated) to a cash discount of 2½% if paid on or before the 15th of the month following the date of this invoice, afterwards they are strictly nett.

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This very fully indicates that sales are restricted and are not open and freely offered as required by section 402 (c).

I therefore find from the facts in this case that the appraiser was in error in his appraisement of this merchandise on its foreign value. I find it should be appraised according to its United States value as set forth in section 402 (e) of said Tariff Act of 1930. Such value is ascertainable by taking the sales price in the United States, and making the deductions therefrom as provided in said statute.

On the hearing Exhibit 2 was received in evidence by consent. That exhibit sets forth the United States value of each item involved. Calculations by the court disclose such values to be correct, and I therefore find the United States value of each item to be as set forth in said Exhibit 2. A list of the items covered by this case, with the United States value of each is attached to my judgment herein, and marked schedule A.

Judgment will be entered for the plaintiff accordingly.

Schedule A

Invoice description	United States value U. S. dollars per each
Points ESPSR2	0.37
" ESPSL2	.37
Crossings ECA	.26
" ECR	.26
Points EPPR2	.35
" EPPL2	.35
Aeroplane Outfits No. 00	.43
" " " 0	.62
" " " 1	.98
" " " 2	1.51
Motor Car Outfits No. 1	1.11
" " " " 2	2.48
Speed Boats No. 3	1.33
" " " 4	1.48
" " " 5	1.51
" " " 3 Racer	1.51
Meccano Outfits B	.71
" " C	.97
" " D	1.30
" " E	1.97
" " F	2.82
Sets Dinky Toys No. 1	.24
" " " " 2	.24
" " " " 3	.24
" " " " 4	.24
" " " " 5	.24
only " " " 22F	.12
" " " " 50	.36
" " " " 51	.43
No. 1 Buffer Stops	.10
2E " "	.63
Prs Fencing with trees	.26
No. 1A Footbridges	.46
2 Goods Platforms	1.11

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Schedule A—Continued

Invoice description	United States value U. S. dollars per each
Island Platforms	0.56
Railway Accessories No. 1	.10
No. 2 Stations	.93
1 Signal Gantries	.41
Bxs Trees with stands	.20
Electrical Viaducts	.67
Bxs. Hedging	.35
E320 Royal Scot Train	7.06
Aeroplane Outfits No. 1	.98
No. 1 Motor Car Outfits	1.11
No. 2E Goods Platform	1.30
Pkts. Posters No. 2	[1] .93
" Poster Boards	[1] .44
No. 1 Railway Accessories	[2] .10
No. 2E Stations	1.06
Sets Dinky Toy No. 1	.24
" " " " 2	.24
" " " " 3	.24
" " " " 4	.24
" " " " 5	.24
" " " " 42	.19
" " " " 51	.43
" " " " 52A	[1] 1.48

[1] Per dozen. [2] Per each.

Ammonium sulphate

EASTERN COTTON OIL CO. *v.* UNITED STATES

Reappraisement 103717–A

No. 4204.—Invoices dated Hamburg, Germany, November 19, 1931.
Certified November 23, 1931.
From N. Jacobson & Co.
Entered at Norfolk, Va., December 29, 1931.
Entry No. 0542.

(Decided January 3, 1938)

Pickrell & McDonald for the plaintiff.

Joseph R. Jackson, Assistant Attorney General (*Daniel I. Auster*, special attorney), for the defendant.

BROWN, Judge: This appeal to reappraisement has been submitted for decision upon the following stipulation:

IT IS HEREBY STIPULATED AND AGREED as follows:

That the finding of dumping of ammonium sulphate from Poland, promulgated by the Secretary of the Treasury on August 13, 1932, in Treasury Decision 45848, has been vacated by the Secretary of the Treasury as of August 13, 1932, in Treasury Decision 49153 of September 7, 1937;

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Bamboo baskets

FRANK P. DOW CO., INC. *v.* UNITED STATES

Reappraisement 125771–A

No. 4351.—Invoice dated Canton, China, February 28, 1938.
Certified March 1, 1938.
From Yick Loong.
Entered at Los Angeles, Calif., April 4, 1938.
Entry No. 9756.

(Decided June 15, 1938)

Plaintiff not represented by counsel.
Webster J. Oliver, Assistant Attorney General (*Daniel I. Auster*, special attorney), for the defendant.

MCCLELLAND, Presiding Judge: This appeal to reappraisement has been submitted for decision by the parties hereto.

On the agreed facts, I find the export value, as that value is defined in section 402 (d) of the Tariff Act of 1930, to be the proper basis for the determination of the value of the merchandise here involved and that such value was the entered value. Judgment will be rendered accordingly.

Meccano toys

UNITED STATES *v.* STONE & DOWNER CORP.

Reappraisement 118119–A

No. 4352.—Invoice dated Liverpool, England, September 11, 1936.
Certified September 12, 1936.
From Meccano, Ltd.
Entered at Boston, Mass., September 24, 1936.
Entry No. 4221.

Second Division, Appellate Term

APPLICATION for review of decision of SULLIVAN, Judge (Reap. Dec. 4203)

[Remanded.]

(Decided June 17, 1938)

Charles D. Lawrence, Acting Assistant Attorney General (*Daniel I. Auster*, special attorney), for the appellant.
Barnes, Richardson & Colburn (*Samuel M. Richardson* of counsel) for the appellee.

Before TILSON, KINCHELOE, and DALLINGER, Judges

DALLINGER, Judge: This is an application for a review of a decision and judgment (Reap. Dec. 4203) rendered by Sullivan, Judge, on December 30, 1937, wherein he determined the dutiable value of certain "Meccano" toys imported from Liverpool, England, and

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entered at the port of Boston, Mass., on September 24, 1936, to be the United States value thereof, as set forth in the schedule which is annexed to said decision. The merchandise was appraised on the basis of the foreign value thereof.

At the hearing before the trial judge the plaintiff contended that there was no foreign or export value, and that the proper basis for determining the dutiable value of the merchandise was the United States value thereof.

The plaintiff's evidence at said hearing consisted of the testimony of Henry Hudson Dobson, president of the Meccano Co. of America, Inc., the owner and ultimate consignee of said merchandise; an affidavit of Walter Manning Hewitt, secretary of Meccano, Ltd., of Liverpool, England, which was admitted in evidence as Exhibit; 1 and a tabulation showing the United States values of all of the items of merchandise involved herein, which tabulation was marked in evidence as Exhibit 2.

The Government's evidence at said hearing consisted of a photostatic copy of a special agent's report with numerous documents annexed, which report was marked in evidence as Collective Exhibit 3.

The witness, Dobson, testified that his company actually paid to Meccano, Ltd., of Liverpool, the invoice value of the merchandise and no more; that in preparing Exhibit 2 he took the selling price in the United States of the different items involved herein and deducted therefrom 2.74 per centum for ocean freight and transportation charges; that he also deducted insurance, consular invoice fee, brokerage charges, 8 per centum for profit and 8 per centum for overhead; that his company actually incurred an overhead equal to at least 8 per centum of the selling price; that its profit was equal to at least 8 per centum; and that after making said deductions he divided the remainder by 170 in order to obtain a result which was minus duties.

On cross-examination the witness testified that the merchandise at bar is sold by Meccano, Ltd., in England and in other countries; that said company issues a catalog illustrating the entire line that it manufactures, including all of the items covered by the invoices herein; that said company also publishes catalogs in Holland, Belgium, France, and other countries, said catalogs being printed in the languages of the respective countries; and that said merchandise is not freely offered for sale to all purchasers.

Upon this point he testified in detail as follows:

X Q. But how many dealers are there in Great Britain and the United Kingdom to whom they sell?—A. I can't tell you. They only select a number in each locality.

X Q. It is your position, as I gather, that Meccano Limited will not sell to anybody?—A. Right.

X Q. Just to selected dealers of whom they approve?—A. Right.

X Q. Is the only basis for that selection the matter of credit?—A. No.

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X Q. Matter of locality?—A. Partially.

X Q. In other words, they don't want to have competitors in one district?—A. Right.

* * * * * * *

REDIRECT EXAMINATION BY MR. RICHARDSON:

R. Q. Do you know whether the prices at which the Meccano Co.'s customers in England sell to their trade are fixed by Meccano Limited?—A. Those prices are fixed in all cases.

R. Q. So when they sell, do they sell at the list price?—A. They must do so, yes.

R. Q. They must sell at the list price?—A. Right.

R. Q. That same situation exists in countries other than Great Britain?—A. Right.

R. Q. The agents are restricted in the price at which they can resell, and it is entirely restricted by Meccano?—A. That is right.

Subsequent to the first hearing a motion was made and granted for a rehearing. At the rehearing held on December 10, 1937, the witness Dobson was recalled. He testified that in compiling the tabulation of United States values in Exhibit 2, he took the date of shipment of the merchandise from Liverpool to Boston; that his company's sales of said merchandise in the United States were free and unrestricted to all purchasers throughout the United States; that the merchandise was completely packed as it came from England; that the sales price in the United States included the cost of packing; and that the deductions from the United States selling prices represented actual payments made.

On cross-examination he testified that the price at which his company sold the merchandise was the same regardless of the quantity sold; and that his company never sold any merchandise to the consumer but only to the jobber or retail dealer.

The testimony of the witness Dobson relative to the existence of a restricted market in Great Britain was corroborated by the affidavit of Walter Manning Hewitt, admitted in evidence as Exhibit 1. In said affidavit the affiant states as follows:

The principal business of Meccano Limited is the manufacture and sale at wholesale of mechanical and educational toys such as Meccano Constructional Toys, Motor Car Constructors, Aeroplane Constructors, Hornby Trains and Accessories, and Dinky Toys.

Meccano Limited does not freely sell its products or freely offer its products for sale in the ordinary course of trade either in England or for exportation to the United States or other countries.

In England Meccano Limited restricts the sale of its products to selected retailers; it does not supply to jobbers. Not every dealer in toys can sell Meccano products. In order to do so, a dealer must first be approved as a Meccano retailer for his locality; and he must invest in a stock of Meccano products to an amount determined by Meccano Limited, the quantities and variety of such stock investment being approved by Meccano Limited, who also fix uniform prices at which their products are to be sold at retail. The sale of any Meccano products at prices other than those determined by Meccano Limited, if persisted in, would result in the stoppage of supplies on trade terms to the offending retailer.

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Similar conditions exist with respect to the exportation of Meccano products to other countries, excepting only the United States.

All sales of said products for exportation to the United States are made to Meccano Company of America, Inc., which Company exclusively owns the Meccano trade-mark in the United States together with the exclusive right to sell Meccano products in the United States, having purchased said right and trade-mark in January 1930.

The sales of said products to Meccano Company of America, Inc. are without any conditions as to the resale thereof; and the determination of selling-prices and terms and conditions of sale of Meccano products in the United States is solely within the discretion of the Meccano Company of America, Inc.

We have carefully examined the special agent's report with its annexed documents (Collective Exhibit 3), which is the only evidence offered by the Government and which is confined entirely to identical merchandise, and find that it not only does not contradict the evidence offered by the plaintiff, but corroborates that testimony so far as it relates to a restricted and controled market for the merchandise at bar in the country of exportation.

Exhibit B forms part of said Collective Exhibit 3 and consists of numerous invoices covering sales of identical merchandise to that here involved. Clearly printed in the upper right corner of each of said invoices is the following:

CONDITIONS OF SALE

All goods are supplied on the understanding that they are to be re-sold by retail only and at the prices in our current price list without deduction. Your acceptance of them will be treated as an acknowledgment of these terms; otherwise they should be returned immediately.

Certainly sales made under such conditions are restricted sales. Not only are the conditions of resale prescribed, but a penalty is exacted for noncompliance therewith, to wit, the immediate return of the goods.

Upon this record it is established beyond any doubt that the merchandise at bar was not freely offered for sale to all purchasers in England at the time of exportation, but that all sales of such merchandise were restricted sales and the market was a controlled one. Hence, it follows that there was no foreign value for said merchandise within the meaning of section 402 (c) of the Tariff Act of 1930. *Goodyear Tire & Rubber Co.* v. *United States*, 11 Ct. Cust. Appls. 351, T. D. 39158; *United States* v. *Michele Diagonale*, 22 C. C. P. A. 517, T. D. 47497.

It is also evident that there is no export value for said merchandise since it is uncontradicted that the plaintiff was the sole agent in the United States of the exporting corporation. It is also uncontradicted that the prices at which the plaintiff sold the merchandise in the United States was the same to any and all purchasers at wholesale in the condition as packed on the date of exportation. Therefore, it

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would appear that the proper basis for determining the dutiable value of the merchandise in question is the United States value thereof.

Furthermore, we agree with the trial judge that, in the absence of any evidence to the contrary, the plaintiff in Exhibit 2 has fairly established said United States value in compliance with the provisions of section 402 (d) of the Tariff Act of 1930.

Counsel for the Government, however, states in his brief filed herein that it was the burden of the importer not only to prove that the appraised value was erroneous but to establish affirmatively some other definite value, and cites in support of that statement the cases of *United States* v. *Malhame & Co.*, 19 C. C. P. A. 164, T. D. 45276, and *Harry Garbey* v. *United States*, 24 C. C. P. A. 48, T. D. 48332.

We heartily agree with this statement of the law; and in this case the plaintiff has done precisely that. He has proved beyond any doubt that the appraiser erred in finding a foreign value for such merchandise under section 402 (c) of said tariff act, and he has proved a United States value for said merchandise, there being no export value thereof for the reason hereinbefore stated.

Counsel then proceeds to cite the case of *United States* v. *Gane & Ingram*, 24 C. C. P. A. 1, T. D. 48264, in support of the contention that the plaintiff must not only show that *such* merchandise was not freely offered for sale in the country of exportation but must also show that *similar* merchandise was not freely offered for sale in the country of exportation. We have carefully examined said case and are of the opinion that it does not support the contention of the Government. The cited case involved the question of the dutiable value of certain coal-tar products which had been assessed for duty under paragraph 27 of the Tariff Act of 1930 on the basis of the American selling price thereof, the claim of the importer being that there was neither an American selling price nor a United States value for either the merchandise there under consideration or for similar merchandise. In its opinion the Court of Customs and Patent Appeals said:

* * * all that the record actually discloses bearing upon the question of United States value, as defined by section 402 (e), *supra* (other than assertions of counsel during the trial which, however accurate they might have been, can not be accepted as evidence), is the statement of the witness to the effect that in his experience he had not known of any imported meta cresyl methyl ether "having been offered in this market."

We feel that this can not properly be accepted as substantial evidence to support the second finding of the appellate division—

that neither this merchandise nor any similar imported merchandise was freely offered for sale at the time of exportation in the usual wholesale quantities in the ordinary course of trade in this country.

It is quite true that there is no evidence showing that this or any similar merchandise was freely offered for sale, but the burden was not upon the Government to show the affirmative; it was upon the importer to show the negative.

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It is evident from this that the appellate court held that there was not sufficient evidence to support the finding of this court that neither the merchandise in question *nor* any similar imported merchandise was freely offered for sale.

In the instant case it appears from the papers that the appraiser appraised the merchandise on February 1, 1937, on the basis of foreign value. Inasmuch as the special agent's report (Collective Exhibit 3) is dated December 5, 1936, and was received here December 15, 1936, it is at least fair to assume that the appraiser must have based his findings of value upon an alleged foreign value of identical merchandise, since that is the only merchandise referred to in said report.

While it is true that under the Tariff Act of 1930 there exists a presumption of correctness in favor of the appraiser's action, that presumption was overcome when the plaintiff proved, as he did in this case, beyond the shadow of a doubt, that the sales of such merchandise were restricted sales; that the foreign market was a controlled market; and that consequently there existed for the merchandise no foreign value.

In other words, the burden of proof shifted to the Government to show that there was an unrestricted market for similar merchandise. The Government having failed to offer such proof, and having conceded that there exists no export value for such merchandise, the plaintiff was entitled to proceed to prove the existence of a United States value thereof, which latter value is established by the record.

But even if this were not so, the merchandise in question being trade-marked goods and therefore protected by copyright law, the trial judge might well have inferred that there could be no sale of similar merchandise either in the country of exportation or in the United States.

While, therefore, on the record before us, we are inclined to affirm the decision and judgment of the trial judge, nevertheless in view of the construction placed by counsel for the Government upon the language of the United States Court of Customs and Patent Appeals in the case of *United States* v. *Gane & Ingram, supra*, we are constrained to remand, and hereby do remand, this case to the trial judge for the purpose of receiving further evidence as to the existence or nonexistence of a possible foreign market value of similar merchandise.

We deem this disposition eminently fair since it is obvious that before the trial judge neither side raised the question as to whether or not there existed a foreign value for merchandise similar to that here involved, all the evidence submitted being directed solely to disproving the existence of a foreign value for "such" merchandise, as found by the appraiser.

Judgment will be rendered accordingly.

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UNITED STATES CUSTOMS COURT REPORTS

VOLUME 1

CASES ADJUDGED IN THE UNITED STATES CUSTOMS COURT JULY–DECEMBER 1938

[Including Certain June 1938 Decisions]

The United States Customs Court was formerly the Board of General Appraisers, the name being changed by the act of May 28, 1926. The court was transferred to the Department of Justice by section 518, Tariff Act of 1930 (U. S. C. title 19, sec. 1518). Earlier decisions appear in TREASURY DECISIONS, Volumes 1 to 73, inclusive; previous to that in Synopsis of Decisions, 1890, and following years.

For sale by the Superintendent of Documents, Washington, D. C. - - - - - - - Price $1.50 (Buckram)

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Toys, meccano

STONE & DOWNER CORP. *v.* UNITED STATES

Reappraisement 118119–A

No. 4455.—Invoice dated Liverpool, England, September 11, 1936.
Certified September 12, 1936.
Entered at Boston, Mass., September 24, 1936.
Entry No. 4221.

(Decided on remand [Reap. Dec. 4352] November 22, 1938)

Barnes, Richardson & Colburn (*Samuel M. Richardson* of counsel) for the plaintiff.

Webster J. Oliver, Assistant Attorney General (*Daniel I. Auster*, special attorney), for the defendant.

SULLIVAN, Judge: I think the facts as narrated by the witness and the affidavit, Exhibit 4, establish beyond doubt that, at the time of the exportation of the merchandise in question, there were not any similar articles being made in the foreign market, and I therefore find as a fact that at the time of such shipment there were not any similar articles being sold in the foreign market.

I therefore adhere to my original decision. A list of the items covered by this case, with the United States value of each, is attached to my judgment herein, and marked schedule A. Judgment will be rendered accordingly.

Schedule A

Invoice description	United States value per each
Points ESPSR2	$0.37
" ESPSI2	.37
Crossings ECA	.26
" ECR	.28
Points EPPR2	.35
" EPPL2	.35
Aeroplane Outfits No. 00	.43
" " 0	.62
" " 1	.98
" " 2	1.51
Motor Car Outfits No. 1	1.11
" " " 2	2.40
Speed Boats No. 3	1.33
" " 4	1.48
" " 5	1.51
" " 3 Racer	1.51
Meccano Outfits B	.71
" " C	.97
" " D	1.30
" " E	1.97
" " F	2.52
Sets Dinky Toys No. 1	.24
" " " 2	.24
" " " 3	.24
" " " 4	.24
" " " 5	.24
only " " 22F	.12
" " " 50	.38
" " " 51	.43

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Schedule A—Continued

Invoice description	United States value per each
No. 1 Buffer Stops	$0 10
2E " "	.63
Prs. Fencing with trees	.26
No. 1A Footbridges	.48
2 Goods Platforms	1.11
Island Platforms	.56
Railway Accessories No. 1	.10
No. 2 Stations	.93
1 Signal Gantries	.41
Bxs. Trees with stands	.20
Electrical Viaducts	.67
Bxs. Hedging	.35
E320 Royal Scot Train	7.06
Aeroplane Outfits No. 1	.98
No. 1 Motor Car Outfits	1.11
No. 2E Goods Platform	1.30
Pkts. Posters No. 2, per doz	.93
" Pester Boards, per doz	.44
No. 1 Railway Accessories, each	.10
No. 2E Stations	1.08
Sets Dinky Toys No. 1	.24
" " " 2	.24
" " " 3	.24
" " " 4	.24
" " " 5	.24
" " " 42	.19
" " " 51	.43
" " " 52A, per doz	1.48

Mushrooms

M. HAGEL *v.* UNITED STATES

Reappraisement 120377–A

No. 4456.—Invoice dated Warsaw, Poland, November 6, 1936.
Entered at New York November 21, 1936.
Entry No. 772402.

(Decided November 22, 1938)

Puckhafer & Rode (*John D. Rode* of counsel) for the plaintiff.
Webster J. Oliver, Assistant Attorney General (*Richard F. Weeks*, special attorney), for the defendant.

KEEFE, Judge: This reappraisement is brought by reason of advances by the appraiser upon dried mushrooms imported from Poland. The merchandise was invoiced at 6.625 Polish zlotys, packing, inland freight, insurance, and consular fee included. It was entered at 1.25 United States dollars per kilo, f. o. b. Gdynia, and appraised at 8 Polish zlotys net packed, causing an advance in value of 22 per centum.

The purchaser of the mushrooms testified at the trial that he had been engaged in the mushroom business for thirty years, during which time he had handled all types of mushrooms; that the market conditions of mushrooms depend upon the weather and the supply of crop; that he is familiar with three or four grades of mushrooms; that, in

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UNITED STATES CUSTOMS COURT REPORTS

VOLUME 2

CASES ADJUDGED IN THE UNITED STATES CUSTOMS COURT JANUARY–JUNE 1939

The United States Customs Court was formerly called the Board of General Appraisers, the name being changed by the act of May 28, 1926. The court was transferred to the Department of Justice by section 518, Tariff Act of 1930 (U. S. C., title 19, sec. 1518). Earlier decisions appear in TREASURY DECISIONS, Volumes 1 to 73, inclusive; previous to that in Synopsis of Decisions, 1890, and following years.

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REHEARING MOTION DENIED

JANUARY 30, 1939

No. 4514.—REAPPRAISEMENT 127244–A.—BOOKS.—*United States* v. *Fortunys*. Entered at New York. Reap. Dec. 4480. Motion by plaintiff.

Toyo cloth shoes (Japanese)

JAPAN IMPORT CO. *v.* UNITED STATES

Reappraisement 116490–A

No. 4515.—Invoice dated Kobe, Japan, May 12, 1934.
Entered at Los Angeles, Calif., June 21, 1934.
Entry No. 8081.

(Decided February 8, 1939)

Barnes, Richardson & Colburn (*Joseph Schwartz* of counsel) for the plaintiff.
Webster J. Oliver, Assistant Attorney General (*Daniel G. McGrath*, and *Daniel I. Auster*, special attorneys), for the defendant.

BROWN, Judge: In this case it appears from the record that there was a failure to designate one out of every ten packages. This under the authority of Reap. Dec. 4401 per McClelland, P. J., and *United States* v. *Davis, Sinai Kosher Sausage Factory*, 20 C. C. P. A. 305, T. D. 46087, and cases cited, vitiates the appraisement.

Judgment will therefore issue declaring the appraisement appealed from void, which will result in liquidation upon the entered value.

Toys, Meccano

UNITED STATES *v.* STONE & DOWNER CORP.

Reappraisement 118119–A

No. 4516.—Invoice dated Liverpool, England, September 11, 1936.
Certified September 12, 1936.
Entered at Boston, Mass., September 24, 1936.
Entry No. 4221.

Second Division, Appellate Term

APPLICATION for review of decision of SULLIVAN, Judge (Reap. Dec. 4455)

[Affirmed.]

(Decided February 8, 1939)

Webster J. Oliver, Assistant Attorney General (*Daniel I. Auster*, special attorney), for the appellant.
Barnes, Richardson & Colburn (*Samuel M. Richardson* of counsel) for the appellee.

Before TILSON, KINCHELOE, and DALLINGER, Judges

DALLINGER, Judge: This is an application for review of Reap. Dec. 4455 rendered by Sullivan, Judge, on November 22, 1938, wherein he

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adhered to his original decision, Reap. Dec. 4203, rendered December 30, 1937, finding the dutiable value of certain so-called Meccano toys to be the United States value thereof, as set forth in schedule A which was attached to and made part of both of said decisions.

This case was originally before us on an application for review of said decision Reap. Dec. 4203. In our decision (Reap. Dec. 4352) on said application, we remanded the case to the trial judge for the purpose of receiving further evidence as to the existence or nonexistence of a possible foreign value for similar merchandise. In our said decision we stated:

> We deem this disposition eminently fair since it is obvious that before the trial judge neither side raised the question as to whether or not there existed a foreign value for merchandise similar to that here involved, all the evidence submitted being directed solely to disproving the existence of a foreign value for "such" merchandise, as found by the appraiser.

In our said decision, we inadvertently stated that under the circumstances there present "the burden of proof shifted to the Government to show that there was an unrestricted market for similar merchandise." After mature consideration we are of the opinion that such burden still rested upon the importer and not upon the Government.

At the hearing on the remand before the trial judge on November 22, 1938, the importer offered the affidavit of Walter Manning Hewitt, which was admitted in evidence as Exhibit 4. The said affiant, already qualified by virtue of a previous affidavit admitted in evidence as Exhibit 1, further testified as follows:

> While there are manufacturers in Great Britain who produce merchandise having some degree of similarity to certain of the products of Meccano Limited, it is my opinion that there is no similar merchandise on the British market, whether produced in Great Britain or elsewhere, that would be readily accepted in place of Meccano products, nor any that could be said to be approximately the equal of Meccano products in appearance, utility, value, and general desirability.

The importer also offered in evidence the testimony of Henry Hudson Dobson, who had previously testified in the original case and was recalled. He testified that at the time of the importation of the instant merchandise he was the agent in the United States for Meccano, Ltd., of Liverpool, the exporter herein; that as such agent he was, and for the past twenty-six years had been, thoroughly familiar with the merchandise made by said Meccano, Ltd., and that it was an important part of his duty to familiarize himself with competing merchandise; that when he was in England during the Spring of 1937 he had made an exhaustive study of the whole toy industry of Great Britain at the British Industries Fair, which was an annual event usually held during the last two weeks in February, and at which every manufacturer of note displays his merchandise; that the

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toy industry occupied over three floors of the fair building; that as a result of his knowledge acquired in the course of his commercial career he was of the opinion that there was no merchandise in the British market similar to that manufactured by Meccano, Ltd., of Liverpool; and that such statement was based upon his knowledge of what would be considered commercially similar goods or competitive merchandise.

On cross-examination he testified that the exhibition of Meccano toys at the British Industries Fair included all of the articles in the instant cases; that he did not find any toys manufactured by other concerns which bore any similarity to those manufactured by Meccano, Ltd., of Liverpool; that in the case of the airplane outfits those manufactured by Meccano, Ltd., of Liverpool were made of metal stampings, die castings and machine parts, and were beautifully finished with the finest workmanship, whereas those manufactured by other companies were made of flimsy material, not finished at the edges, and cheaply painted; that in the case of speed boats the ones manufactured by Meccano, Ltd., of Liverpool differed from the boats manufactured by other companies both in appearance and quality, and were so designed as to be virtually unsinkable, whereas the speed boats manufactured by other companies were of an inferior type and would sink; and that in the case of all the toys those made by Meccano, Ltd., of Liverpool were easily distinguishable from those made by other concerns.

At the hearing before the trial judge no additional evidence was offered by the Government; but counsel for the Government in his voluminous brief filed herein raises what he conceives to be a new question for the consideration of the court, to wit, that where an exporter is the only producer of an article, thereby maintaining an exclusive market in the article, and where he prescribes certain definite rules, regulations, and restrictions as to use and resale or otherwise of said article, nevertheless the price obtained for such goods from those customers to whom he sells represents the price contemplated by Congress in its definition of foreign value in section 402 (c) of the Tariff Act of 1930.

We have carefully considered this novel contention of the Government and are not impressed with its soundness or validity. In our opinion such a construction of said section 402 (c) would at once eliminate the effect of all the numerous decisions of this court and of the Court of Customs and Patent Appeals regarding what constitutes a controlled market in the country of exportation.

We therefore find the following facts:

1. That the merchandise covered by this application for review consists of so-called Meccano toys made by Meccano, Ltd., of Liverpool.

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2. That there is neither a foreign nor an export value for such or similar merchandise.

3. That the proper basis for the determination of the value of the instant merchandise is the United States value thereof.

We therefore hold as a matter of law that the proper values of the instant merchandise are the United States values thereof as set forth in the schedule which is marked A and annexed to and made part of the decision and judgment of the trial judge, Reap. Dec. 4455, *supra*.

The said decision and judgment of the trial judge are therefore affirmed, and judgment will be rendered accordingly.

Drugs, etc.

UNITED STATES *v.* GUY B. BARHAM (YEE SING CO.)

Reappraisement 125996–A

No. 4517.—Invoice dated Hong Kong, November 30, 1937.
Entered at Los Angeles, Calif., January 3, 1938.
Entry No. 7234.

(Decided February 8, 1939)

Webster J. Oliver, Assistant Attorney General (*Daniel G. McGrath*, special attorney), for the plaintiff.

Harper & Harper (*Abraham Gottfried* of counsel) for the defendant.

BROWN, Judge: It appearing at the trial that the appraiser has here appraised in Canton currency when he should have appraised in Hong Kong currency, and the United States having appealed, the merchandise is now appraised in Hong Kong dollars at the same *per se* figures and amounts as noted by the appraiser in his appraisement. Judgment will be rendered accordingly.

REHEARING MOTION DENIED

FEBRUARY 7, 1939

No. 4518.—REAPPRAISEMENT 122159–A.—SILVER BRACELETS.—*Geo. S. Bush & Co., Inc.* v. *United States*. Entered at Seattle, Wash. Reap. Dec. 4479. Motion by plaintiff.

Canvas shoes, rubber soled (Japanese)

JAPAN IMPORT CO., INC. *v.* UNITED STATES

Reappraisement 118986–A

No. 4519.—Invoices dated Kobe, Japan, January 27, 1933.
Certified January 28, 1933.
Entered at San Francisco, Calif., March 1, 1933.
Entry No. 8478/A–B–C.

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