

GABRIEL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 2, 1895.)

CUSTOMS DUTIES—LITHOPHONE—CLASSIFICATION.

Certain so-called "lithophone," a dry, white material, held to be dutiable at $1\frac{1}{4}$ cents per pound, as "white paint containing zinc, but not containing lead," under paragraph 60, and not at 25 per cent. ad valorem, as "all other paints and colors, whether dry or mixed," under paragraph 61, of the tariff act of 1890.

At Law. Appeal by importers from a decision of the board of United States general appraisers. Affirmed.

The importers contended that there was no such thing known in trade as a "dry paint," and that the article in suit was a color, and not a paint.

The assistant United States attorney quoted the term "paints, dry," from prior tariff acts, and contended that congress had used the words in legislation for 40 years, and, whether technically correct or not, traders knew what it meant in the market. *Twine Co. v. Worthington*, 141 U. S. 468, 471, 12 Sup. Ct. 55.

Stephen G. Clarke, for importers.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. This article is a white, dry material, for use in painting, containing zinc, but not containing lead. Paragraph 60 of the tariff act of 1890 provides for a duty on "white paint containing zinc, but not containing lead; dry," and "ground in oil." This seems to be the article of that paragraph, dry, which in common speech is called "paint," although not usable as such until it is mixed with oil. Decision affirmed.

WILLIAM J. MATHESON & CO., Limited, v. UNITED STATES.

(Circuit Court, S. D. New York. January 2, 1895.)

CUSTOMS DUTIES—CLASSIFICATION—SULPHOTOLUIC ACID.

Sulphotoluic acid, a remote derivative of coal tar, by combination with sulphuric acid, its dominant element being derived from coal tar, the chief use of the article being in the construction of coal-tar dyes by combining with a base, held properly classified for duty by the collector of the port of New York as a "coal-tar preparation," and dutiable at 20 per cent. ad valorem, under paragraph 19 of the tariff act of October 1, 1890, and not duty free, as an acid used for manufacturing purposes, under paragraph 473 of the free list of said tariff act.

At Law. Appeal by the importers from a decision of the board of United States general appraisers sustaining the classification and assessment of duties made by the collector of the port of New York upon certain sulphotoluic acid imported into the United States during the month of June, 1892, which was classified for duty, as a "coal-tar preparation," at 20 per cent. ad valorem, under Schedule A, par. 19, of the tariff act of October 1, 1890, which is as follows: "19. All preparations of coal-tar, not colors or dyes, not specially provided for in this act, twenty per centum ad valorem." Against this classifica-

tion the importers protested, claiming that the merchandise was duty free, as an acid used for manufacturing purposes, under paragraph 473 of the free list of the same tariff act, which reads as follows: "473. Acids used for medicinal, chemical, or manufacturing purposes, not specially provided for in this act." The local appraisers reported to the collector that the article was "a preparation of coal tar; also an organic acid." No testimony was taken before the board of general appraisers, who made their decision in the case, finding, among other things, that the merchandise was an organic acid, its peculiar and dominant element derived from coal tar; that it is a coal-tar preparation, not a color or dye, its chief use being in the construction of coal-tar dyes by combining with a base; that approximating 60 per cent. of coal-tar colors or dyes and coal-tar preparations are acids. The protest of the importers was overruled, and the collector affirmed. The case being appealed into the circuit court, the importers proceeded to take further evidence in that court before a referee, which evidence tended to show that this sulphotoluic acid was in reality a coal-tar preparation, being a remote derivative from coal tar. In re Roessler & H. Chemical Co., 49 Fed. 272; *Id.*, 4 C. C. A. 1, 56 Fed. 481. It was abundantly proved that this acid was used in the manufacture of coal-tar colors or dyes, and that such use constituted a recombination chemically of the acid in the production of such colors or dyes; also that there was no other commercial use for this acid. In behalf of the United States evidence was introduced showing that there were a very large number of acids known and extensively used commercially at the time of the passage of the tariff act which were not preparations of coal tar, nor in any way derived from that material; such as sulphuric acid, nitric acid, hydrochloric acid, and a large number of others. On the trial it was contended in behalf of the government that the provision for coal-tar preparations in paragraph 19 was more specific as applied to this particular article than the provision in the free list for acids used for manufacturing purposes.

Comstock & Brown, for importers.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. This importation is an acid prepared from coal tar, used in making coal-tar colors. By paragraph 19 of the tariff act of 1890, "all preparations of coal tar, not colors or dyes, not specially provided for," were made subject to a duty; and by paragraph 473 "acids used for medicinal, chemical, or manufacturing purposes" were free. If this acid had not been a preparation of coal tar, it would have been free. But it is not with colors and dyes in the specific exception of paragraph 19, nor specially provided for as a preparation of coal tar elsewhere, or more specially included among acids than it is there among coal-tar preparations. The wording of paragraph 19 seems to imply that exceptions of preparations of coal tar elsewhere would be made quite plain. Decision affirmed.

JAROS HYGIENIC UNDERWEAR CO. v. FLEECE HYGIENIC UNDERWEAR CO. et al.

(Circuit Court, E. D. Pennsylvania. December 18, 1894.)

No. 23.

1. TRADE MARK—"HYGIENIC."

The word "hygienic," as applied to underwear, cannot be monopolized under the guise of a trade-mark.

2. SAME—REQUISITES OF.

Not only priority is required in the appropriation of trade-marks, but the mark selected must be arbitrary, and not merely descriptive of the article to which it is applied or of some quality thereof.

3. RES JUDICATA—EVIDENCE—RECORDS.

Where the pleadings in a suit in equity show a prior proceeding to which the parties were privies, but in which no opinion was filed to explain the decree, the whole record of the former proceeding is good evidence in the latter for the purpose of showing that the preceding adjudication was upon the same subject-matter as the latter, and, as such, an estoppel thereto.

4. SAME—WHAT CONSTITUTES.

When it is shown that the subject-matter of a preceding suit was the same as that in issue, that the court had jurisdiction, that the parties to the second suit would have been concluded by a decree in the first, and that there was no technical or unsubstantial ground upon which the first suit could have been decided, the subject is *res judicata*.

Hearing on bill, answer, and proofs.

This was a suit in equity, charging infringement of certain trade-mark rights alleged to belong to the complainant. As originally filed, the bill of complaint also charged infringement of a certain patent. By amendment, all reference to the patent and charge of infringement thereof were subsequently withdrawn. The bill set forth an allegation of title in the complainant and its predecessors in the words "Hygienic," "Jaros Hygienic Wear," "Wool Fleece Knit," and in the symbol of the sun with projecting rays. It set forth that these four said trade-marks were registered in the patent office. It also set forth the publication of a book with photolithographic cuts of persons clothed in certain underwear, of advertising cards containing peculiar printed matter, and averred the use of a peculiar system of enumeration for designating different sizes and qualities of underwear. It charged that the defendant Rishel was the selling agent of the plaintiff, and, as such, became acquainted with the above-mentioned trade-marks; that he organized the defendant company, and began to infringe at various places, and more particularly in the city of Boston, through a company known as the "William H. Richardson Company." It averred the commencement of a suit by this complainant against the said company, and the granting of a preliminary injunction therein; further averring that the said suit was defended by the said defendants herein; and that, a motion having been made by them to dissolve said injunction, the motion was denied; and that the said injunction was still in force, and no further attempt to dissolve the same has been made. The bill particularized that the defendants had infringed complainant's right as follows: By the use of the word "Hygienic" as applied to underwear; by the use of a symbol resembling that of the complainant's, viz. that of the sun with projecting rays, surrounded by the words "Jaros Hygienic Wear"; by the use of the words "Wool Fleece Knit"; by the use of said pictures of persons clothed in said underwear; by the use of said peculiar system of numbers designating the quality of the fabric; by the use of advertising cards containing the same formula of construction, basis, advantages, and diseases indicated.

The answer, while admitting the registration of the said trade-marks, denied that such registration gave the complainant any right in the premises. It