

The appellant imported inch boards and three-inch plank, planed on both sides, and tongued and grooved. The collector assessed a duty of 25 per cent. on it, as a manufacture of wood, under paragraph 181. The appellant protested that it was free, under paragraph 676. The board of general appraisers found on the opinions of 24 witnesses out of 46 examined by them "that the merchandise is not commercially known as 'dressed lumber,' but has passed beyond that description by the processes of tonguing and grooving, which are additional to dressing," and affirmed the classification of the collector. The testimony of another witness to the contrary has been taken since. That this material is still lumber, and is bought and sold by the thousand feet, as lumber is, nearly all of the witnesses agree. That it is not akin to the articles of wood mentioned in paragraph 181 is quite apparent. That paragraph expressly refers to house or cabinet furniture of wood, wholly or partly finished; and then to manufactures of wood, without reference to the extent of finishing, thereby implying that these are referred to as finished. Manufactures of wood are articles made of wood, and completed into things different from what the wood of which they are made was before. *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240; *Maddock v. Magone*, 152 U. S. 368, 14 Sup. Ct. 588. Paragraph 676 does not refer either to sawed lumber or to dressed lumber, by itself, but, after naming sawed boards and plank,—which the two kinds of this importation are,—it mentions other lumber, rough or dressed, which must mean, as lumber is divided into two classes, rough and dressed, all other lumber whether rough or dressed. This is lumber dressed for use, and has not been made into anything beyond lumber so dressed. Articles used for kindred purposes, and which are completed things, having names of their own, and which would not be included under the general head of lumber, are expressly placed on the free list in this schedule, indicating an intention that all these should be free. Neither sawed nor dressed lumber is usually dealt in by those names, but by what it is wanted for; so this is not a question of trade names, but of what the material is. If it is dressed lumber in fact, it is free. *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. 279. The finding of the board of appraisers, upon conflicting evidence, is entitled to great weight, but they did not have all the witnesses before them, and the evidence and their finding fall short of really showing that these are completed manufactures of wood. Dressing them further by tonguing and grooving does not make them anything else. Classification reversed.

GANDOLFI et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 12, 1896.)

CUSTOMS DUTIES—LIQUIDATION ACT JUNE 22, 1874.

The act of congress of June 22, 1874, providing, in section 21, that "whenever duties upon any imported goods * * * shall have been liquidated and paid, and such goods * * * delivered to the owner, * * * such

settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, * * * be final and conclusive upon all parties," does not give rise to any presumption that the collector made a liquidation within one year after entry, nor require a liquidation to be made within one year, but only prevents a reliquidation after a year has elapsed from the entry.

In Error to the District Court of the United States for the Southern District of New York.

This is a writ of error by the defendants in the court below, brought to review a judgment of the district court, Southern district of New York, entered upon a verdict directed by the court, in favor of plaintiffs. The facts, as stated in the brief of counsel for plaintiffs in error, are as follows: "The action was brought to recover a balance of duties claimed to be due the United States upon the importation by plaintiffs in error of a quantity of cheese. The merchandise arrived at the port of New York, on the Olympia, November 11, 1891. On the same day, defendants made entry of said merchandise at the custom-house, presenting a pro forma invoice, in which the weight of the cheese was stated to be 1,984 pounds, and duty at the rate of six cents per pound on said weight, amounting to \$119.04, was then paid, and the merchandise was delivered to the defendants. The consular invoice was received by the collector on the 14th day of October, 1891. * * * The consular invoice showed the weight to be net 6,232 pounds. * * * The weigher's return was made December 10, 1891, and showed the weight to be 4,003 pounds net. Thereupon the merchandise was delivered to the defendants, and entered into consumption. Nothing further was done by the customs officials until March 7, 1893, when Mr. Esterbrook, chief of the liquidating department, wrote across the weigher's return as follows: 'In view of surveyor's letter dated March 2, 1893, this return is held to be void. Assess duty on triplicate invoice weight. Triplicate invoice, dated at Genoa, Sept. 29, 1891. Consular Number 557, March 7, 1893, Esterbrook's check.' Thereupon, and on the 7th day of March, 1893, liquidation of the entry was made, based upon the consular invoice and duty assessed upon 6,232 pounds of cheese, amounting to \$373.92. This action is brought to recover \$254.88, the difference between \$373.92 and \$119.04, the amount paid at the time of the entry." The entry has upon its back the official stamp of liquidation, "Entered and liquidated March 8, 1893."

W. J. Townsend, for plaintiffs in error.

Henry C. Platt, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Two assignments of error only have been argued or presented on the brief of plaintiffs in error, viz.:

1. That the collector had no power to liquidate the entry upon the triplicate invoice.

It is a sufficient answer to this objection that it nowhere appears to have been reserved by any exception taken at the trial, nor is it set forth specifically in the assignments of error. Moreover, under the statute in force at the time (Customs Administrative Act 1890, § 14), the decision of the collector as to rate and amount of duties is made final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent shall within 10 days after, but not before, such ascertainment and liquidation of duties, give notice in writing to the collector of his objections thereto. There is no suggestion here that any such protest or notice of objections was ever given.

2. It is urged that the action is barred by the statute of limitations.

Act June 22, 1874, § 21, provides as follows:

"Sec. 21. That whenever any goods, wares and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares and merchandise shall have been liquidated and paid, and such goods, wares and merchandise shall have been delivered to the owner, importer, agent or consignee, such entry and passage free of duty, and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent or consignee, be final and conclusive upon all parties."

This statute, in effect, provides that, when the collector has once liquidated the duties, he may not reliquidate them after a year from entry, where there is no fraud and there has been no protest. If the liquidation of the entry on March 7, 1893, which was proved in the case, was in fact a reliquidation, it would be within the prohibition of this statute. But there is nothing in the case to show that the duties were ever liquidated before March 7, 1893. There is no proof of any "final ascertainment and liquidation of the duties" by the collector, nor of any "stamping of such ascertainment and liquidation upon the entry," earlier than March 7, 1893; and these are the acts which constitute a liquidation under the statutes. *Davies v. Miller*, 130 U. S. 289, 9 Sup. Ct. 560.

Defendant, upon the trial, asked the court to instruct the jury that, in the absence of fraud, it is to be presumed, without proof, that the collector made a liquidation within one year after entry. Our attention is called to no statute or authority supporting this proposition. So far as appears, the collector may liquidate the duties when he pleases; but, having once liquidated them, he may not reliquidate if one year has elapsed since the entry of the goods. The judgment of the district court is affirmed.

J. C. HUBINGER BROS. CO. v. EDDY et al.

(Circuit Court, E. D. Missouri, E. D. May 22, 1896.)

No. 3,923.

TRADE-MARKS—INFRINGEMENT.

A label upon which appears, on a white background, in red and black letters, an advertisement of "Elastic Starch," made by the H. Co., with a large and prominent cut of a flatiron, used as a trade-mark for starch, is not infringed by another label, used as a trade-mark for starch, bearing, on a red background, in white, yellow, and black letters, an advertisement of "E.'s New Process Starch," with a picture of a colored woman holding up prominently a freshly-ironed shirt, underneath which, on a table, appears a small flatiron.

Hughes & Roberts, for complainant.
W. B. Homer, for defendants.

ADAMS, District Judge. The amended bill of complaint in this case shows that the complainant is the owner of a trade-mark, used in connection with its business of manufacturing and selling starch,