

asphaltum imported by the Trinidad Asphalt Company was entitled to be entered free of duty.

Henry C. Platt, Asst. U. S. Atty.  
Avery D. Andrews, for defendant.

WHEELER, District Judge. The tariff law of 1894 puts on the free list: "390. Asphaltum and bitumen, crude or dried, but not otherwise manipulated or treated." According to the findings and evidence, the substance in question came, crude, from an asphalt lake, holding water mechanically like a sponge, and so tenaciously that intense heat, with stirring, is required for drying it within any practicable time. This was exposed in a vessel to such heat from steam pipes, and from steam jets which stirred it. Thereby the water was expelled, and, incidentally and necessarily, some volatile oils also. This expulsion of the water left the material purer and finer. This provision of the law is understood to leave all asphaltum free that is not manipulated or treated otherwise than is necessary and proper for drying it. According to Webster's Dictionary to dry is "to free from water, or from moisture of any kind, and by any means"; and according to the Century Dictionary, "to prepare and expose to the sun or any heat in order to free from moisture." This process seems to come entirely within these definitions. In allowing the drying, the law allowed also the consequences of the drying; and if one of them was refining, that, too, was allowed. The drying must have been permitted with the intention of letting the material be changed, as that would change it; and no change effected by that should be held to take away its free character. Decision of appraisers affirmed.

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MACKIE v. ERHARDT.

(Circuit Court of Appeals, Second Circuit. December 17, 1896.)

CUSTOMS DUTIES—CLASSIFICATION—"THOMPSON'S PRUNE WINE."

"Thompson's Patent Prune Wine," compounded principally of raisins and prunes crushed in water and fermented, with some alcohol afterwards added to prevent souring, and containing between 14.6 and 16.28 per cent. of alcohol at the time of importation, was dutiable as an "alcoholic compound," under Schedule A (Tariff Index, New, par. 103) of the act of March 3, 1883, and not as a nonenumerated manufactured article, under Rev. St. § 2513. 59 Fed. 771, affirmed.

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

This was an action at law by Schuyler Mackie against Joel B. Erhardt, late collector of the port of New York, to recover back an alleged excess of duties paid under protest on certain importations, made during the summer of 1889, of the so-called "Thompson's Patent Prune Wine." The collector classified the same as an "alcoholic compound," and assessed the duty at the rate of two dollars per gallon for the alcohol contained therein, and 25 per cent. ad

valorem under Schedule A (Tariff Index, New, par. 103) of the act of March 3, 1883, which reads as follows:

"103. Alcoholic compounds, not otherwise specially enumerated or provided for, two dollars per gallon for the alcohol contained and 25 per centum ad valorem."

Against this classification the plaintiff duly protested, claiming the importations to be dutiable under the provisions of section 2513, Rev. St. U. S., as amended by the tariff act of March 3, 1883, at 20 per cent. ad valorem, as a nonenumerated manufactured article. The importer duly appealed to the secretary of the treasury, who affirmed the assessment of duty by the collector. From the testimony of the manufacturer, taken by deposition, it appeared that the prune wine in question was manufactured in Dublin, Ireland, by crushing raisins and prunes in water, allowing the resulting compound to ferment, drawing the liquid into casks, and depositing the same in bonded warehouse, where a certain amount of alcohol was added to the mixture by the British excise or customs officers at the cost of and on behalf of the manufacturer; that about 6 per cent. of alcohol was evolved by the fermentation of the raisins and prunes, and that this amount, together with the alcohol added by the British excise officers, was necessary to prevent the compound from further fermenting and becoming sour and unmerchantable; that the prune wine would not be a salable article without the presence of the alcohol contained therein. It also appeared from the testimony that the liquor was never used as a beverage in the nature of wine, but was employed exclusively in mellowing and aging whiskies and other liquors. On the trial it was proved by the chemist's reports furnished to the appraiser that the amount of alcohol contained in the merchandise as imported varied between 14.6 per cent. and 16.28 per cent. by weight, and by volume between 18.9 and 20 per cent. The court held that the collector's classification was correct, and directed a verdict for defendant. See 59 Fed. 771. The plaintiff brought error.

Stephen G. Clarke, for plaintiff in error.

Wallace McFarlane, U. S. Dist. Atty., and James T. Van Rensselaer, Asst. U. S. Dist. Atty., for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. We conclude that the ruling of the trial judge in this case should be affirmed upon the authority of *Smith v. Rheinstrom*, 13 C. C. A. 261, 65 Fed. 984, decided by the circuit court of appeals for the Sixth circuit. According to that decision, importations quite similar to those in the present case, and containing about the same percentage of alcohol, were properly classified as an "alcoholic compound," because falling within the meaning of that term by common acceptance. We do not feel justified, upon doubtful considerations of the true meaning of the term, to place a different construction upon it. The judgment is affirmed.

## IMPERIAL CHEMICAL MANUF'G CO. v. STEIN et al.

(Circuit Court of Appeals, Second Circuit. December 8, 1896.)

## INFRINGEMENT OF PATENTS—RIGHT TO ACCOUNTING—LACHES.

The mere fact that, for several years, sales of an infringing hair dye were made by a dealer in New York City, where the patent owner resided, without protest, held not to constitute laches preventing an accounting, where there was nothing to show actual knowledge of such sales, and where the advertisements, labels, etc., did not disclose the nature or ingredients of the dye. 69 Fed. 616, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by the Imperial Chemical Manufacturing Company against Joachim Stein and others for alleged infringement of letters patent No. 305,057, for a process and compound for dyeing hair. The circuit court sustained the patent, found infringement, and granted an injunction, but refused an accounting on the ground of laches in bringing the suit. 69 Fed. 616. Complainants appeal from the part of the decree refusing an accounting.

Arthur v. Briesen, for appellant.

Hayes & Greenbaum (Samuel Greenbaum, of counsel), for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The circuit court decreed for the complainant, adjudging the validity of the patent in suit, and that it had been infringed by the defendants; but, while granting a perpetual injunction against the defendants, the court refused the complainant an accounting for damages or profits, upon the theory that there had been such laches on the part of the owner of the patent in asserting the rights secured thereby as to preclude such relief. From that part of the decree denying the accounting, the complainant has appealed; and the question now involved is whether such laches on the part of the owner of the patent were shown as to make it inequitable to require the defendants to respond for their past acts of infringement.

The patent was for a process of dyeing hair and the chemical preparations constituting the dye bath. It was granted September 16, 1884. Immediately upon the issue of the patent, the title became vested in Maria Louisa Kellogg. She continued to be the owner until March, 1890, when she sold and transferred the patent to the complainant. That corporation commenced the present suit in June, 1891. By their answer to the bill of complaint, the defendants, besides alleging the invalidity of the patent, because of want of novelty, denied infringement, and specifically asserted that the preparation made and sold by them had been manufactured and sold for many years previously by one Shaw, their assignor and predecessor in business, and that as made and sold by Shaw and by themselves it was composed of different ingredients, and effected a