

BOUR et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1898.)

No. 2,272.

1. CUSTOMS DUTIES—CLASSIFICATION—DESIGNATION OF ARTICLE.

Where the evidence as to the commercial designation of an article is conflicting, the ordinary name given it in common speech, when proper under the definition given by the dictionaries, will govern in making classification.¹

2. SAME—PLACQUES.

Flat, rectangular porcelain panels decorated by means of paints known as mineral colors, as distinguished from oil and water colors, and completed by firing, are dutiable, under paragraph 85 of the tariff law of 1894, as plaques, and are not free, under paragraph 575, as "paintings in oil or water colors, * * * not otherwise specifically provided for, * * * and not made wholly or in part by stenciling or other mechanical process."

This is an appeal by Bour & Bouillon from the decision of the board of general appraisers affirming the classification for duty of certain imported merchandise.

Albert Comstock, for importers.

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

TOWNSEND, District Judge (orally). The articles in question are flat, rectangular porcelain panels, decorated by means of paints composed of powders mixed in oil or water, and known as mineral colors, as distinguished from oil and water colors. The decoration of these articles is then completed by a process of firing. The evidence is very strong that the articles are commercially known as plaques; but, in view of the finding of the board of general appraisers, as I understand that finding, that it is not satisfactorily shown that they are commercially known as plaques, I do not feel disposed to disturb that finding. The utmost, however, that can be claimed on behalf of the importers is that it has not been shown that these articles are commercially known as plaques. We are, then, brought to the question as to what they are in fact, and how they are known and designated in common speech. The testimony of the appellant himself and of his witnesses, and the ordinary understanding of people, as the court understands it, fortified by the dictionary definition, all seem to show that these articles are plaques in common speech. Webster says a plaque is "any flat, thin piece of metal, or clay, or ivory, or similar material, used for ornament, or for painting pictures on, * * * and hung upon the wall," or words to that effect. Inasmuch, therefore, as there is a conflict of testimony as to commercial designation, and as the whole evidence tends to show that these articles are, and are ordinarily known as, plaques, they are specifically provided for under paragraph 85 of the act of 1894, and were properly classified for duty at 35 per cent. ad valorem as "plaques, painted or otherwise decorated in any manner," and are not free, under paragraph 575 of said act, as

¹ For interpretation of commercial and trade terms generally, see note to Dennison Mfg. Co. v. U. S., 18 C. C. A. 545.

"paintings in oil or water colors * * * not otherwise specifically provided for, * * * and not made wholly or in part by stenciling or other mechanical process." The decision of the board of appraisers is therefore affirmed.

HUNTINGTON DRY-PULVERIZER CO. et al. v. ALPHA PORTLAND CEMENT CO. et al.

(Circuit Court, D. New Jersey. January 9, 1899.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Defendant had in use in its business 21 machines of a kind which had been held by the court, in a suit against another defendant, to infringe complainant's patent, an appeal in which case was pending. Defendant had large orders on hand, requiring the constant use of the machines, and had some 200 persons in its employ. Complainant was unable to furnish its patented machines to replace those used by defendant, except gradually, as they could be built; and their cost, if so supplied, involved the expenditure of a large sum. *Held*, it appearing that defendant was financially responsible for any profits and damages recovered by complainant, that a preliminary injunction against the defendant's use of the infringing machines would not be granted, nor would defendant be required, as a condition, to replace such machines by those of complainant as rapidly as the latter could be built.¹

This is a suit in equity by the Huntington Dry-Pulverizer Company and others against the Alpha Portland Cement Company and others for the infringement of the Huntington patent, No. 277,134, for a crushing mill. On motion for preliminary injunction.

Frederick S. Duncan, for complainants.

Charles Howson and Frederick S. Fish, for defendants.

KIRKPATRICK, District Judge. In the suit of Huntington Dry-Pulverizer Co. v. Whittaker Cement Co. (heard at this circuit) 89 Fed. 323, the court decreed the validity of the patent which is the foundation of the present complaint, and enjoined the defendants therein from the manufacture, sale, and use of the machines declared to be infringing. An appeal has been taken from this decree, which is still pending, and will no doubt be brought to hearing at the next March term of the circuit court of appeals. The defendants herein are users of some 21 of the infringing machines, and with them are engaged in the manufacture of Portland cement, extensively used in the trade, and for which they have large orders for future delivery. They are employing in and about their said business at this time some 200 or more persons. Financially they are said to be perfectly responsible, and able to answer in damages for any award which may be made against them. It is charged by the defendants, and practically admitted by the complainants, that the complainants have not been able at any time prior to the filing of their bill herein to furnish the defendants with their patented machines, nor can they do so now. This is partly owing to the com-

¹ As to infringement, generally, see note to Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co., 3 C. C. A. 572.