

ruptcy. It only allows that privilege to those who are paupers in fact, as they must be, indeed, if they cannot raise \$25 to pay the fees.

The argument is made at the bar that the petitioner needs his monthly salary of \$30 to pay his own and his family's living expenses, and that the salary is exempt under the state law. This may be true, but still the petitioner is not a pauper in the sense of the bankruptcy statute. It does not allow one to proceed under the pauper's oath simply because he and his family are unwilling to make the necessary sacrifice to pay the fees, he being himself the judge whether the sacrifice shall be made or not. The exemptions allowed by the bankruptcy statute are not intended to cover exoneration from, or excuse the payment of, the fees of the bankruptcy court, incurred by the petitioner to more effectually protect him from his debts, and secure him in the property exempted only because the act adopts the state exemptions as its own.

There being no minimum limit in the statute upon the amount one must owe to entitle one to file a voluntary petition in bankruptcy, petitions have been filed where the whole indebtedness is for living expenses, and ludicrously small; and this convenient interpretation of the statute in relation to the pauper's oath is a temptation to such debtors to resort to the bankruptcy court once a month, if need be, or if one chooses, and thereby avoid the payment of all living expenses, without any cost to the debtor himself. It cannot be that the beneficent provisions of the bankruptcy statute were intended to have this comical and demoralizing result, and for this reason, if no other, the court should be strict in disallowing the pauper's oath to those who are not really entitled to it. Ordered accordingly.

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SMITH et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 47.

1. CUSTOMS DUTIES—CLASSIFICATION—CROCUS.

Crocus, produced from the dross or residuum of burn pyrites, principally used as polishing powder, but to a considerable extent as a painter's color, is not dutiable under Tariff Act 1890 (26 Stat. 567, c. 1244) par. 133, as the dross or residuum from burnt pyrites, or as a nonenumerated article, under section 4, since it has been improved by manufacture, but is included, under paragraph 61, within the classification of paints or colors, whether dry or mixed.

2. SAME—TEST—PREDOMINANT USE—WHEN APPLIED.

The test of predominant use, as applied to the classification of an article for duty under Tariff Act 1890 (26 Stat. 567, c. 1244), is only resorted to where necessary to properly classify an article falling within two or more classifications, either of which, standing alone, would adequately describe it, and where the article is enumerated by reference to its use.

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

Albert Comstock and Everit Brown, for appellants.  
Henry L. Burnett, U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The importations in controversy were "crocus," an article which is produced from the dross or residuum of burnt pyrites treated by a process to eliminate the sulphur, and which is used principally as a polishing powder, but to a considerable extent as a painter's color. This appeal presents the question whether the importations should have been classified for duty under paragraph 61 of the tariff act of 1890 (26 Stat. 567, c. 1244), or under paragraph 133, or under those tariff provisions applicable to articles not enumerated or otherwise provided for in the act. Paragraph 61 subjects to duty "all other paints or colors." Paragraph 133 subjects to duty "iron ore, including \* \* \* the dross or residuum from burnt pyrites." The importations are clearly not within the designation of paragraph 133, because they have been advanced beyond the category there defined, into an article having a distinctive name and character, by a process of treatment which adapts them to a different use, although not exclusively so. Although they are not described by the specific name by which they are commonly called, they meet the description of a paint or color as fully as do many other articles enumerated under that general classification. Paragraph 61 is the concluding clause of the schedule in the act entitled "Paints, Colors and Varnishes"; and the preceding clauses of the schedule enumerate among other paints and colors such articles as "ochery earths," "sienna earths," "umber earths," "barytes," "whiting," and "oxide of zinc." Paragraph 61 is intended to prescribe the duty on all other paints and colors not specifically mentioned in the preceding clauses. As the importations are within the description of the paragraph, and are nowhere else enumerated in the act by their specific name, that paragraph supplies their appropriate classification for duty purposes. Being there enumerated by a general descriptive term, those provisions of the tariff act relating to articles not enumerated or not otherwise provided for cannot be resorted to for the purpose of ascertaining their proper classification.

If the importations were not capable of use as colors, they would not be dutiable under paragraph 61, because they would not have been colors in fact. But because they were adapted also for some other use, though that were the predominant use, they were none the less colors. The test of predominant use is only resorted to in those cases where it is necessary to find the proper location of a dutiable article which falls within two or more classifications, either of which, standing alone, would adequately describe it, and in those cases in which an article is enumerated by reference to its use. Thus, if a duty were imposed by the act upon "polishing powder," and another upon "colors," and there were no other provisions indicative of the legislative intent, the importations now in controversy would be described by both, and it would be appropriate to resort to that test; and, because the predominant use of crocus is as a polishing

powder, it would be more appropriately located for duty under that provision.

We concur in the conclusions reached by the court below (84 Fed. 158) and by the board of general appraisers. The decision of the circuit court is affirmed.

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MANITOWOC PEA-PACKING CO. v. WILLIAM NUMSEN & SONS.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1899.)

No. 573.

TRADE-MARKS—INJUNCTION—INNOCENT INFRINGEMENT.

An injunction will be granted restraining the use, however innocent of intended wrong, of a device accompanied with the name or nickname of a city in which defendants reside, as a trade label for his goods, where such label constitutes an infringement on the trade-mark of another, on goods of a like character.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

C. K. Offield, for appellant.

E. H. Bottum, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. This appeal is from an interlocutory order restraining the appellant, the Manitowoc Pea-Packing Company, pending the suit, "from using, as a trade-mark or brand, upon any canned or packed peas or other vegetables or fruits, the word 'Clipper,' or the words 'Clipper Brand,' whether in connection with, or without, the use of the words 'City' or 'Clipper City'; and from using as a trade-mark, label, designation, or print, upon any label or wrapper attached to any such goods, or upon any package of such goods, any of the words hereby restrained from use, or the delineation or representation of a ship or clipper under full sail, or in imitation or similitude thereof, until the further order of the court." Judge Jenkins, when granting this order, made the following statement of the reasons for his decision:

"I assume, upon the evidence presented, that the adoption by the defendant of the representation of a clipper ship under full sail, and of the words 'Clipper' and 'Clipper City Brand,' were adopted by it in ignorance of the prior adoption of the words 'Clipper Brand,' and of the representation of a clipper ship under full sail, by the complainant; although, considering their long use by the complainant, and the sale of its goods bearing those marks throughout many states of the Union, and the diligent search which the defendant insists it made before their adoption to ascertain if they infringed on any other's rights, and the placing of a ship under full sail in the mouth of the harbor, as it appears upon the picture, out of all proportion to the rest of the print, render the coincidence of the adoption of both the ship and the name by the defendant as somewhat remarkable. It is none the less true, however, that the adoption of these designations tends to create confusion, and to induce the public, particularly customers of retail dealers, to purchase the goods of the defendant as and for the goods of the complainant; and, however innocent the defendant may be of intentional simulation of the complainant's brand, the equitable principles which underlie the question of fair trade, and by