In re KERBY-DENIS CO.

(District Court, E. D. Wisconsin. May 13, 1899.)

1. BANKRUPTCY—PRIORITY OF CLAIMS—LIENS.
Where a statute of the state creates a lien in favor of employés performing certain kinds of labor, but provides that such lien shall not continue in force unless a statement thereof is filed within 30 days, and action begun within 3 months, holders of such liens, perfected according to the statute, against the bankrupt employer, are entitled to payment in full out of the proceeds of the property affected, in preference to claims for labor of the same kind which have not been preserved as the statute directs, although both classes of claims are equally within the description of claims for "wages," as to which the bankruptcy act declares that they shall "have priority, and be paid in full out of bankrupt estates." Section 64 (30 Stat. 563).

2. SAME—PREFERENCES—DISSOLUTION OF LIENS.
A lien for the wages of labor, created by such a statute and preserved in force according to its directions, is not a preference within the meaning of the bankruptcy act, nor is it among the classes of liens which are dissolved by an adjudication in bankruptcy under the provisions of section 67, subds. c and f, of the bankruptcy act (30 Stat. 564).

In Bankruptcy. On review of an order of the referee in bankruptcy directing the payment pro rata of certain labor claims against the estate of the bankrupt, and denying priority of payment to such of the said claims as were secured by a lien created and perfected according to the statutes of the state.

W. C. McLean, for lien creditors.

T. W. Spence, for trustee in bankruptcy.

SEAMAN, District Judge. The question certified by the referee is, in effect, whether the lien given by the state statute remains operative after the intervention of proceedings in bankruptcy. Its solution depends upon a sound construction of the existing bankruptcy enactment, without regard to any seeming hardship or inequality in the circumstances of the instant case. All the claims covered by the order of the referee are for labor performed within the time and for amounts entitled to priority as directed by section 64 of the act (30 Stat. 563), "and to be paid in full out of bankrupt estates." The aggregate amount is about $15,000, of which about $7,000 is represented in liens filed and adjudged, and the remaining $8,000 were claims for which liens could have been obtained when the petition was filed in bankruptcy, but no liens were in fact filed or perfected. The property attached for the liens came to the hands of the trustee under a stipulation that the proceeds should be subject to an adjudication here of the rights of the parties, and such proceeds, with all realized from other property of the bankrupts are insufficient to pay in full both lien claimants and preferred claims, without reference to general indebtedness. The statutes of Michigan establish the liens in question as existing rights in favor of persons performing labor in manufacturing lumber, shingles, etc., to be paramount over all other claims or liens (3 How. Ann. St. §§ 8427a–8427p), but provide that the indebtedness shall not remain a lien on the products un-

less statement thereof is filed with the clerk of the county within 30 days after completion of the labor, and, further, that action must be commenced within 3 months. The lien is created by the statute, and not by the acts of filing the claim and bringing suit, which merely preserve or keep it in force. It is of a class uniformly regarded with favor, and so recognized by the bankruptcy act of 1867 and the decisions thereunder. A distinction is asserted under the present act that it makes no direct provision for such liens, but declares the invalidity of preferences obtained by various means in broad terms which include liens of this character. I am clearly of opinion that these statutory liens are not within the inhibited liens or preferences named in the act. The provisions which are cited to defeat them are subdivisions c and f of section 67, but the settled rules of construction, under the maxim, "Noscitur a sociis," exclude such application. The one relates exclusively to "a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession," where the intention appears to give or obtain fraudulent preference; and the other to "levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent." In each the term "lien" is limited to such as are created through legal process, whereby a preference is obtained by the action or consent of the parties, and it cannot be extended to include the liens in question, which are expressly created by the state statute through the performance of the labor. The subsequent acts of notice and suit are mere matters of procedure to preserve and enforce the lien, and are in no sense the source of the preference. It is true that no provision is found in the act in express terms preserving liens of this character, but their recognition in that view is clearly apparent by the first clause of section 67, as follows: "Liens. (a) Claims which for want of record or for other reason would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against the estate." There being no provision to the contrary, I am of opinion that the liens afforded by the state statute are undisturbed by the present act, and that decisions as to their force under the act of 1867 are, generally speaking, applicable as well under the present act. The liens being valid, the claimants were at liberty to proceed for their enforcement in accordance with the state law up to the time possession of the property was taken in bankruptcy, and, unless the court of bankruptcy otherwise directed and provided for their ascertainment and enforcement, could proceed to judgment. The trustee in bankruptcy received the property to which the liens attached subject to their payment if found to be valid, and on the view stated the liens must be paid out of the proceeds derived from its sale, thus leaving the sum which then remains in his hands, including that derived from other property, to constitute the estate or assets for payment of "debts which have priority," as declared by section 64. The claims which are proved merely as labor claims, and not preserved as liens by filing the

requisite statement with the clerk of the county, cannot be recognized as liens within the state statute, for the reasons well stated in the opinion of Judge Dyer in this court, under the act of 1867, in Re Brunguest, 7 Biss. 208, Fed. Cas. No. 2,055. With the lien kept alive and identified as the statute directs, I have no doubt this court could furnish a remedy equivalent to the action in the state court; but, as the lien depends exclusively upon the statute, and is destroyed by the failure to file, no authority exists for its restoration, and certainly this court cannot revive it to the prejudice of claimants who have complied with the statute. The claims so presented can be paid only out of the estate of the bankrupt, namely, the assets which remain in the hands of the trustee, and they are payable therefrom in the order of priority prescribed by section 64. The order of the referee must be modified in accordance with this opinion. So ordered.

Appeal of SCHULTZ.

(Circuit Court, E. D. Pennsylvania. June 21, 1899.)

No. 54.

CUSTOMS DUTIES—ACIDS—COAL-TAR PREPARATION.

A coal-tar preparation, not a color or dye, from which crystal carbolic acid is made by "refining," and which is employed in the manufacture of disinfectants and some kinds of soap, is admissible free from duty, as an acid, within Act Oct. 1, 1890, par. 473, which relates to "acids used for medicinal, chemical, or manufacturing purposes," and not dutiable under paragraph 19, which relates to "all preparations of coal tar, not colors or dyes, not specially provided for."

Ingham & Newitt, for petitioners.
James M. Beck, for the United States.

DALLAS, Circuit Judge. The government claims that the merchandise in question is a coal-tar preparation, not color or dye, not specially provided for, and the appellant claims that it is an acid used for mechanical, chemical, or manufacturing purposes, not specially provided for. It has been charged with duty under this provision of the act of October 1, 1890: "19. All preparations of coal tar not colors or dyes, not specially provided for in this act, twenty per centum ad valorem." The importer contends that it falls within the provision of the free list, as follows: "473. Acids used for medicinal, chemical, or manufacturing purposes, not specially provided for in this act." Unquestionably, this merchandise is a product of coal tar, not a color or dye; but it may nevertheless be an acid used for mechanical, chemical, or manufacturing purposes, and, if it be, it should have been classified as such. Matheson v. U. S., 18 C. C. A. 143, 71 Fed. 394. Whatever it may be, there can be no doubt respecting its use. The evidence conclusively shows that crystal carbolic acid is made from it, and whether the method by which this is accomplished be called a chemical or a manufacturing one is, under

the terms of the provision, immaterial. It certainly is one or the other, and perhaps may be said to be both. In addition to this use, which is its principal one, it is also employed to a not insignificant extent in the manufacture of disinfectants and of some kinds of soap. But the more serious question is, is it an acid? The single witness examined on behalf of the government says that it is not; the three chemists produced by the appellant say that it is. The weight of the evidence does not, however, depend solely upon which side has produced the greater number of witnesses, and I have felt it to be incumbent upon me to carefully examine and consider all the testimony. It appears that the government's expert is of opinion (1) that, speaking broadly and of the substance as an integral whole, it is not an acid; and also (2) that it is a composite liquid, which, although it potentially embodies an acid, comprises certain other constituents, which must be eliminated before a true acid is brought into existence.

1. As to the first of these propositions, he agrees that down to a quite recent time, which he is unable to fix with any definiteness, the identical article now involved was held by all chemists to be an acid; but he says that it could not in October, 1890, have been so regarded, because a certain discovery had then been made which disclosed that its classification as an acid had been erroneous. I do not think this evidence can be given controlling effect in the interpretation of the statute. It is not supported in any way, and the witness' assertion that the discovery referred to by him was generally known to chemists, and that the consequence which he ascribes to it was generally recognized by them, must, I think, in view of all the evidence, be regarded as a mistaken one. All of the chemists called by the appellant still pronounce this substance to be an acid; the trade so designates it to this day, and the literature of the science, so far as it has been produced, continues to treat of it as such. The preponderance of the evidence, therefore, is plainly to the effect that this merchandise, which for a long time was admittedly regarded as an acid by those competent to determine its nature, is not differently regarded now.

2. The word "acids," as it is used in the act of congress, is inclusive of crude, as well as of refined, acids. The witnesses on both sides speak of the conversion of the substance in question into crystal carbolic acid as being accomplished by "refining," and of the product as a refined carbolic acid. That the crude material contains about 12½ per centum of foreign substances (some of which are themselves acids) is of no consequence. Before, as well as after, refinement, the stuff is substantially an acid. The removal of undesirable elements is probably incident to every refining process, but the thing refined is not thereby transformed; it is merely purified. The decision of the board of general appraisers is reversed.

ROESSLER & HASSLACHER CHEMICAL CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 1, 1899.)

No. 2,342.

1. CUSTOMS DUTIES—CLASSIFICATION—CRUDE ARTICLES.
An article may be crude for the purposes of classification under the tariff laws, by reason of the use to which it is applied, where it is crude in the sense that it is unrefined, although it may be the result of some manufacture.

2. SAME—ZINC DUST.
Zinc dust, which is partially oxidized atoms of zinc, unrefined, and is ordinarily obtained as a by-product in the refining of zinc, and used in dyeing, is entitled to free entry, under paragraph 386 of the tariff act of 1894, as an article in a crude state used in dyeing, not specially provided for, and is not dutiable, under section 3, as a nonenumerated manufactured article, nor under paragraph 174 and section 4, as assimilated to zinc in pigs and blocks.

This is an appeal by the importers from the decision of the board of general appraisers holding certain imported merchandise to be dutiable.

Comstock & Brown, for the importers.
D. Frank Lloyd, for the United States.

TOWNSEND, District Judge. The merchandise in question is zinc dust imported in 1894. The collector assessed it for duty at the rate of 20 per cent. ad valorem, under section 3, Act Aug. 27, 1894, as a nonenumerated manufactured article. The board of general appraisers, reversing the collector, held that it should have been assessed at one cent per pound, as assimilated to zinc in blocks or pigs, under paragraph 174 for zinc in blocks or pigs, and section 4, which is the similiter section of said act. The importer appeals, and claims that the merchandise is entitled to free entry, under the provisions of paragraph 386 of said act, as an "article in a crude state, used in dyeing, * * * not specially provided for."

In the treatment of zinc ore, it is first roasted in order to desulphurize it, and the product is then mixed with finely-divided carbon, and baked in a furnace, where the contents are raised to a heat sufficient to cause them to vaporize. The vapor then flows out into vessels, and as it cools becomes pig zinc. A certain portion of this vapor so comes in contact with the outer air that each atom of zinc unites with the oxygen therein, and becomes a core of zinc surrounded by oxide of zinc, and in this form it is received into other vessels, called "prolongs." Some of this material is preserved, and, after being sifted and protected from further exposure to the air, is put up and sold as zinc dust, the article in controversy in this case. In one factory, some of the furnaces make only zinc dust; in other factories, they consider it an accidental and objectionable by-product, the larger portion of which goes back into the retorts, to be ultimately converted into pig zinc.

The whole contest in this case turns on whether this is a manufactured article or an article in a crude state. The evidence sufficiently