

such, some with the maker's or proprietor's name, and some without, some dry, some condensed, some semi-fluid or semi-solid, (thicker than ordinary molasses, as one of the witnesses describes it,) and some fluid, and of the further facts that different rates of duty had been from time to time assessed upon it under treasury rulings, and that both proprietary and nonproprietary malt extracts are manufactured in this country, it seems reasonable to infer that when congress imposed a duty upon malt extract, if fluid and in casks, at 20 cents a gallon; if fluid and in bottles or jugs, at 40 cents a gallon; and, if solid or condensed, at 40 per cent ad valorem,—it intended to cover all the known kinds of malt extract in all the known conditions in which it is imported. Certainly the language used in the tariff act, construed according to the ordinary rules of interpretation, supports such conclusion. The duty laid on medicinal proprietary preparations is exclusive of such as are elsewhere in the act specially provided for; and, although Johann Hoff's Malt Extract be a medicinal proprietary preparation, it is specially provided for by the term "malt extract," since it is as a malt extract that it is described, labeled, advertised, bought, and sold.

In our opinion, this case is not controlled by the decision of the supreme court in *Ferguson v. Arthur*, 117 U. S. 482, 6 Sup. Ct. 861. In that case the general provision as to calcined magnesia was, as the court held, by its terms applicable only to the single kind of magnesia that was sold in bulk by the pound, whereas the provisions of paragraph 338 of the act now under consideration are manifestly enlarged so as to cover malt extract in all conditions of consistency, and whether in bulk or in such smaller packages as are frequently characteristic of proprietary preparations. Moreover, in the *Ferguson* Case the paragraph touching proprietary preparations did not, in terms, exclude such preparations as were elsewhere specifically provided for.

The decision of the circuit court is reversed, and the classification of the board of general appraisers affirmed.

UNITED STATES v. WARNER.

(District Court, D. Washington, N. D. January 16, 1894.)

No. 690.

POST OFFICE—OBSCENE SEALED LETTERS.

The mailing of an obscene private sealed letter is not within the prohibition of Rev. St. § 3893, even as amended September 26, 1888, by inserting the word "letter;" for all the enumerating words are limited by the concluding words "or other publication." *U. S. v. Wilson*, 58 Fed. 768, followed.

At Law. Indictment of J. M. Warner for mailing an indecent letter in a sealed envelope, in violation of section 3893, Rev. St., as amended by Act Sept. 26, 1888, (1 Supp. Rev. St. [2d Ed.] 621.) Demurrer sustained.

Wm. H. Brinker, U. S. Atty.
A. R. Jones and C. W. Turner, for defendant.

HANFORD, District Judge. The question raised by the demurrer to the indictment in this case is whether the sending by mail in a sealed envelope of a personal written communication from one individual to another is a crime, cognizable in this court. The indictment is founded upon section 3893, Rev. St., which, as amended by Act Sept. 26, 1888, (1 Supp. Rev. St. [2d Ed.] 621,) reads as follows:

"Every obscene, lewd or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * whether sealed as first-class matter or not, are hereby declared to be non-mailable matter. * * * And every person who shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, * * * shall, for each and every offense, be fined. * * *

The supreme court of the United States in the case of *U. S. v. Chase*, 135 U. S. 255, 10 Sup. Ct. 756, gave an authoritative interpretation to this law, as it stood previous to the amendatory act of 1888, as follows:

"In the statute under consideration, the word 'writing' is used as one of a group or class of words,—book, pamphlet, picture, paper, writing, print,—each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated. It must therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written."

It is impossible to follow the rule of construction which the supreme court has applied to this statute, and yet hold that the word "letter," interpolated into it by the amendment, is not qualified by the general phrase "or other publication." It is also hard to give the amendment any effect, and yet hold that mere private letters of an indecent character are not within the inhibition of the statute. The question is therefore perplexing. I am unable to agree with Judge Ross, who, in passing upon the same question, in the case of *U. S. v. Andrews*, 58 Fed. 861, is reported as saying that:

"It is difficult to see how the intent of congress to exclude all letters of the character denounced could have been made plainer."

The opinion of Judge Morrow in the case of *U. S. v. Wilson*, 58 Fed. 768, contains a careful review of the history of legislation and of the authorities upon this subject, and, for reasons which to me appear to be sufficient, he sustained a demurrer to a similar indictment. After deliberation I am in doubt. I cannot say that the facts stated bring the case clearly within the intent and letter of the statute. The courts of the United States have no power to punish an act which is merely wrongful, nor, by construction, to include within the penal statutes offenses which are not plainly specified. Being conscious of having an actual doubt in this case,

which I consider that a reasonable mind may justly entertain, I am constrained to follow the decision of Judge Morrow in *U. S. v. Wilson*.

The demurrer is therefore sustained, and the indictment will be quashed.

UNITED STATES v. JARVIS.

(District Court, N. D. Washington. January 16, 1894.)

No. 703.

1. POST OFFICE—OBSCENE SEALED LETTERS.

The mailing of an obscene private sealed letter is not within the prohibition of Rev. St. § 3893, as amended September 26, 1888. *U. S. v. Warner*, 59 Fed. 355, followed.

2. SAME—EPITHETS ON ENVELOPE.

The word "notorious," when written on the outside of a letter, after the name of the person addressed, as follows, "Room 32, Pease House, Front St., City, The Notorious," is not "obviously intended to reflect injuriously on the character or conduct of another," and the mailing of such letter is therefore not within the prohibition of the statute.

At Law. Indictment of George Jarvis for mailing letters of an indecent character in sealed envelopes, upon the outside of which scurrilous epithets were written, in violation of the act of September 26, 1888, (1 Supp. Rev. St. [2d. Ed.] 621.) Demurrer sustained.

Wm. H. Brinker, U. S. Atty.

D. O. Finch, for defendant.

HANFORD, District Judge. The indictment contains several counts, each charging the defendant with having sent, by mail, a private sealed letter of an indecent character, in violation of the act of September 26, 1888, (1 Supp. Rev. St. [2d Ed.] 621.) In this case, as in the case of *United States v. Warner*, I hold that the offense is not indictable by reason of the indecent matter contained in the letter. The United States attorney claims, however, that by an allegation to the effect that upon the envelope of each letter there was written an epithet, to wit, the words "The Notorious," calculated and obviously intended to reflect injuriously upon the character of the person addressed, the case is brought within the first section of said statute, which reads as follows:

"That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter; * * * and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, * * * shall, for each and every offense, upon conviction thereof, be fined not more than five thousand dollars, or imprisoned at hard labor not more than five years or both, at the discretion of the court."

The superscription upon the envelope, as set forth in the indictment, after the name of the person, is as follows: "Room 32, Pease