

The object of the indictment is, as said by the supreme court in *U. S. v. Cruikshank*, 92 U. S. 542:

"First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

The indictment in the present case does not answer either of these requirements.

Demurrer sustained.

UNITED STATES v. KENWORTHY et al.

(District Court, E. D. Pennsylvania. January 2, 1894.)

No. 3.

CUSTOMS DUTIES—APPRAISERS—VALUATION.

Under the tariff act of 1883 the appraisers were limited to determining the "market value" at the place from which the importation was made, and could not add thereto any commissions, or consider the cost of the particular goods, except as a means of determining market value.

At Law. Action against Kenworthy & Bro. to recover duties. New trial granted.

Ellery P. Ingham, for the United States.

Leonard Myers, for defendants.

BUTLER, District Judge. In 1884 the defendants imported a cargo of wool from Glasgow, and paid duty thereon according to the entry. The appraiser raised the value, placed the wool in a higher class and increased the duty accordingly. The defendants thereupon complained and demanded a "merchant appraisalment." The collector selected an experienced merchant, who with the appraiser re-examined the question. The merchant sustained the entry, finding the wool to be below 12 cents in value, as entered, while the appraiser placed it materially higher—subjecting it to an increased rate of duty. On report of this disagreement the collector adopted the appraiser's valuation. The importers appealed to the secretary of the treasury, who affirmed the collector's action.

While the law governing the subject is made intricate by the terms of the various sections of the several statutes applicable, it is nevertheless well settled by the decisions of the courts. The action of the collector when unappealed from, or affirmed, is final in so far as he has confined himself to a discharge of his proper duties under the statutes. When his acts are unlawful, or improper, they are not binding. On suit by the importers to recover improper exactions, or by the government to recover unpaid assessments (after appeal to the secretary) he may show that the action of the customs officers was unlawful or improper, that the importation was improperly classified, etc. The valuation when made in conformity with law is final. The subject has been so fully discussed in the several

cases which have arisen that nothing can profitably be added. See *Hilton v. Merritt*, 110 U. S. 97, [3 Sup. Ct. 548;] *Converse v. Burgess*, 18 How. 413; *Schlesinger v. U. S.*, 120 U. S. 264, [7 Sup. Ct. 546;] *Clinkenbeard v. U. S.*, 21 Wall. 65; *Earnshaw v. U. S.*, 146 U. S. 60, [13 Sup. Ct. 14.] The argument of plaintiff's counsel (in error) and his citation of authorities, in the case last named may be examined with profit in considering this question.

In the case before us it was the appraiser's duty and after him the collector's to ascertain the market value of the wool at Glasgow, and so appraise it. If they did this the importers must pay accordingly. The importers say, however, they did not, that they added commissions to this value, which the statute of 1883 expressly forbids. If an importer should deduct commissions from the actual market value of his merchandise it would be a fraud, and the customs officers of course might add or disregard it. There is nothing here, however, to justify suspicion of such fraud; on the contrary the appraiser exonerates them from any imputation of an attempt to impose on the government.

Is there evidence that the appraiser and collector added commissions to the market value? I believe there is. It seems reasonably clear from the appraiser's report (which the collector adopted) and the accompanying explanatory letter that he made such addition. It is urged that he merely used the commissions to make "market value." But we do not think the report and letter admit of this view. In the latter he says: "While I might have felt disposed to defer to his [the merchant's] greater experience and better judgment as to the quality of the wool, and the actual market value thereof, were these, without qualification, the only points to be considered;" and he then proceeds to state his views of the law, and to discuss the facts in the light of these views. He was wrong in supposing that his duties in this regard involved more than an ascertainment of the quality of the wool and its market value. What he says seems to show that instead of confining himself to ascertaining the market value of such wool at Glasgow, as the merchant did, he sought to determine what this particular cargo cost the defendants, after allowing them one of the two commissions which they were compelled to pay, under the peculiar circumstances attending the purchase. This was a mistake. If they had been compelled to pay four commissions instead of two they would have been so much the more unfortunate. But it would have interested themselves alone. The error arose from supposing the appraiser had anything to do with the subject. The importer's liability to the government is based on the actual market value of the merchandise without regard to its cost to the merchant, in commissions or otherwise. Of course this cost may be considered as an element in ascertaining the market value, but nothing more.

The court directed a verdict for the plaintiff pro forma reserving the defendant's point, for the purpose of enabling it to enter judgment for them, if this should seem proper on fuller examination. I now believe it is safer to grant a new trial, on the rule taken for that purpose, and let the question respecting the appraiser's and

collector's acts go to the jury, on the evidence now in and such other as may hereafter be produced, in case the government desires another trial.

KOHLER MANUF'G CO. v. BEESHORE.

(Circuit Court of Appeals, Third Circuit. December 4, 1893.)

No. 8.

1. TRADE-MARKS—INTENTION TO ADOPT.

Sales of a few dozen bottles of a medicinal preparation, with written labels affixed, bearing a name different from that previously used for such preparation, does not amount to use in such circumstances as to publicity, and to such length of use, as show an intention to adopt the written words as a trade-mark. 53 Fed. 262, affirmed.

2. SAME—REGISTRY AS EVIDENCE OF INTENTION.

Although registration of a trade-mark under the act of March 3, 1881, may not prevent the adoption of another device as a common-law trade-mark for the same article in domestic markets, such registry may be evidence, in a suit to restrain infringement of such common-law trade-mark, to show what complainant really claimed.

3. SAME—STATEMENT TO OBTAIN REGISTRATION.

In such suit, the statement filed to obtain registration, and attached to the affidavits on motion for a preliminary injunction, may be considered on the final hearing.

4. SAME—INFRINGEMENT.

"One Night Cure," used as a trade-mark for a cough remedy and for a corn remedy, is not infringed by the use of the words "Beeshore's One Night Cough Cure." 53 Fed. 262, affirmed.

5. SAME—INJUNCTION—QUACK MEDICINES.

Query, whether equity will intervene by injunction to protect the use of words claimed as a trade-mark, between owners of quack medicines.

6. SAME—WORDS MAKING FALSE ASSERTION.

It seems that an injunction should not be granted to protect the use of words, as the trade-mark of a medicinal preparation, which assert a manifest falsehood or physiological impossibility.

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

In Equity. Bill by the Kohler Manufacturing Company, of Baltimore city, against Ellsworth S. Beeshore, for infringement of a trade-mark. Bill dismissed. 53 Fed. 262. Complainant appeals. Affirmed.

Statement by SHIRAS, Circuit Justice:

During the year 1888 the firm of the Kohler Medicine Company, composed of Louis Yakel and Charles W. Greble, carried on the proprietary medicine business in Baltimore, Md. Among other preparations, the firm made and sold a cough remedy called "Rocky Mountain Cough Syrup." The formula for this medicine the firm had received from the estate of Dr. P. W. Kohler, together with formulas for other medicines, and also the right to use the name "Kohler" in connection with said remedies, and the business in which they were manufactured. The firm also purchased from the Kohler estate a quantity of the syrup which had been prepared by Dr. Kohler, and all the labels which he had on hand at the time of his death. The cough syrup thus purchased was bottled and labeled, and sold by the Kohler Medicine Company during the spring and summer of 1889, and when the stock was exhausted more syrup was made, and sold under the same label that had been