63D CONGRESS, 1st Session. | SENATE. | REPORT No. 130.

MANUFACTURE OF SMOKING OPIUM.

NOVEMBER 22, 1913.—Ordered to be printed.

Mr. WILLIAMS, from the Committee on Finance, submitted the following

REPORT.

[To accompany H. R. 1967.]

The Committee on Finance, to whom was referred the bill (H. R. 1967) regulating the manufacture of smoking opium within the United States, and for other purposes, which has already been passed by the House of Representatives, recommend the passage of the same by the Senate, with the following amendment:

After the period on line 8, page 1, insert the following language:

Every person who prepares opium suitable for smoking purposes from crude gum opium, or from any preparation thereof, or from the residue of smoked or partially smoked opium, commonly known as "yen shee," or from any mixture of the above, or any of them, shall be regarded as a manufacturer of smoking opium within the meaning of this act.

This is a bill for the regulation of the manufacture of smoking opium within the United States. The reasons for its passage are plain, palpable, and obvious. In addition to the revenue arising, which alone would justify the bill, considering the character of the articles upon which the tax is imposed, there are other and incidental reasons which would recommend it. It will enable the Government of the United States to regulate the manufacture of a dangerous product, lessening the evils to public health and to public morals which flow from commerce in the product.

In regard to the amendment suggested by your committee, it is thought well to embody in the report the letter from a commissioner of internal revenue, dated July 9, 1913, the copies of the two letters accompanying it, and also a copy of the Supreme Court decision referred to in the letter of the collector.

The papers referred to are as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, July 9, 1913.

Hon. F. M. SIMMONS,
United States Senate, Washington, D. C.

MY DEAR SENATOR SIMMONS: Referring to your verbal request for a statement relative to the need of the proposed amendment to the bill H. R. 1967, recently passed by the House, I have the honor to advise you that the bill in

question is essentially similar to the act of October 1, 1890, except for an increase in the amount of tax imposed on smoking opium, and the bond to be given by the manufacturer, and for the dropping of the section relative to the stamping of imported opium, and substituting in lieu thereof the provision for the stamping of opium manufactured in this country under the provisions of the act with internal-revenue stamps.

In view of the recent decision of the United States Supreme Court in the Shelley case, a copy of which decision is herewith inclosed, it is found practically impossible to secure the conviction of the ordinary illicit manufacturer of smoking opium, for the reason that the evidence of such illicit manufacture is usually in the form of the utensils used, smeared with opium, or the catching of the offenders in the act of cooking opium. As in every case a certain amount of "yen shee" is added, as shown by the analysis, it is impossible to tell whether the opium found is derived from crude gum opium or from prepared smoking opium, and the difficulty of securing evidence that will meet the decision of the Supreme Court is apparent.

In this connection I am inclosing herewith copies of a letter received from the collector of customs for the port of New York and from the United States attorney for the southern district of New York supporting this statement.

A copy of the proposed amendment, which it is believed will meet the difficulty, is also inclosed, and I would urgently request that it be incorporated in the bill when presented to the Senate.

Respectfully,

W. H. OSBORN,
Commissioner.

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, June 19, 1913.

COLLECTOR OF CUSTOMS,
New York City.

SIR: Referring to your recent communication with reference to the situation which has arisen because of the decision of the Supreme Court in the case of the United States *v.* Alfred Shelley, I have the honor to advise that it seems to me, as the law now stands, that the provisions of the act of Ocober 1, 1890, relating to the manufacture of opium for smoking purposes can not as a practical matter be enforced. This result follows for the reason that since it is necessary to prove that crude opium has been used in the manufacture of opium for smoking purposes, there will rarely be a case where evidence to prove this fact can be obtained. This situation arises because of the peculiar circumstances surrounding the traffic in smoking opium. Among these circumstances is the one that every part of this traffic is carried on with such great secrecy as to make it most difficult to prove what is absolutely necessary; that is, that crude opium has been used. It is readily concealed and chemically difficult to detect and difficult to satisfy a jury beyond a reasonable doubt that it has been used. Of course, it goes without saying that those persons who are now making smoking opium will use some proportion of yen shee, thus making it most difficult to secure convictions. In the indictment which was passed upon by the Supreme Court in the Shelley case there were four counts, setting forth ways by means of which smoking opium could be manufactured. Certainly the provisions of existing laws should be so amended as to provide that upon each of these processes the tax contemplated by the act should be levied. This could be done by placing in the statute a section defining the manufacture of smoking opium to be the processes set forth in this indictment. It may of course be necessary to change the language somewhat, but each of these processes should be defined to be the manufacture of opium for smoking purposes.

In addition to this, there should be in any proposed amendment to the act some clear and unmistakable provisions showing that it is the intention of Congress that the product of any process which is employed may be taxed, irrespective of the fact that some of the materials used in that process may have already been subject to the tax.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

TREASURY DEPARTMENT,
UNITED STATES CUSTOMS SERVICE, OFFICE OF THE COLLECTOR,
New York, June 26, 1913.

THE SECRETARY OF THE TREASURY,
Washington, D. C.

SIR: This office has been advised that an amendment to the laws governing the traffic in smoking opium has been passed by the Senate and is likely to become a law through the action of the House within a short time.

In this connection, I inclose a copy of a communication from the United States attorney for the southern district of New York, in which he refers to the decision of the United States Supreme Court in the case of the United States *v.* Alfred Shelley, decided on May 16, 1913. I inclose herewith a copy of Justice Pitney's opinion and would recommend that the matter be referred to the appropriate committee of the House of Representatives, with a view of having the pending bill so amended as to prescribe a forfeiture of unstamped smoking opium, whether made out of yen shee, or otherwise.

The United States attorney for the southern district of New York is drafting a proposed bill, which will be forwarded at a later date.

The work of the customs authorities at this port and the Department of Justice in endeavoring to suppress the opium traffic has been most efficient, and the investigations have been extensive and have revealed a situation which is alarming from the standpoint of public morals, and in my judgment it would be of benefit to those in charge of the pending bill looking toward the suppression of the opium traffic to have the benefit of all data available at this port and the advice of the chief officers concerned in the investigation, if the department should so desire.

Respectfully,

JOHN PURROY MITCHEL,
Collector.

(T. D. 1855.)

Opium—Manufacture of opium—Decision of Supreme Court.

1. *Opium law a taxing act.*—Section 36 of the act of October 1, 1890, imposing a tax on opium manufactured in the United States for smoking purposes, was primarily designed as a taxing act.

2. *Primary manufacture of opium.*—The primary manufacture of opium for smoking purposes by treating crude opium in such manner as to convert it into a different form, rendering it fit for smoking, is subject to the tax prescribed.

3. *Mixture of yen shee not manufacture.*—The mere mixing of smoking opium with the residue of opium that has been smoked, known as "yen shee," and heating the same, is not a "manufacture of opium for smoking purposes" within the meaning of the statute.

4. *Construction of criminal statutes.*—The general principle is that criminal statutes ought not to be extended by construction.

5. *Judgment affirmed.*—The judgment of the district court, sustaining a demurrer to two counts of an indictment, affirmed.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., June 3, 1913.

The appended decision of the United States Supreme Court in the case of the United States *v.* Alfred Shelley is published for the information of internal-revenue officers and others concerned.

W. H. OSBORN, *Commissioner.*

SUPREME COURT OF THE UNITED STATES. No. 943. OCTOBER TERM, 1912.

United States, plaintiff in error, v. *Alfred Shelley.*

In error to the District Court of the United States for the Southern District of New York.

[May 26, 1913.]

Mr. Justice Pitney delivered the opinion of the court:

We have here under review a judgment of the district court sustaining a demurrer to two counts of an indictment for a violation of section 36 of the act of Congress approved October 1, 1890 (ch. 1244, 26 Stat., 567, 620).

This act is the so-called McKinley tariff law, and provided for the tariff duties to be paid upon articles imported from foreign countries and also for the collection of certain internal-revenue taxes. The tariff provisions are of course long since superseded. Section 36 reads as follows:

"That an internal-revenue tax of $10 per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes; and no person shall engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue."

The counts in question are the second and third counts of the indictment. The former of these avers (omitting formal matters) that, without having given bond, etc., the defendant "did engage in the manufacture of opium for smoking purposes in and by employing and using the process by means of which yen shee, which is the product or ashes which remains after prepared, or smoking, opium has been used and smoked by the smoker, is dissolved in water after having been permitted to remain in solution in water in any receptacle or vessel for a period of time; furthermore, by means of which the said aqueous solution of yen shee is strained and purified so as to remove from the said solution all matter which is foreign to such opium as may be contained in the said yen shee, such matter consisting of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes, and by means of which the said aqueous solution of yen shee thus strained and purified is heated and cooked in any receptacle or vessel for a period of time and until a product is produced as the result, among other things, of the evaporation of a part of the aqueous content of the said solution in the course of such heating and cooking, which said product thus remaining is smoking, or prepared, opium of an inferior grade, and which said product resembles in appearance and consistency thick molasses, and is opium for smoking purposes, against the peace of the United States and their dignity, and contrary to the form of the statute," etc.

The third count charges that the defendant, without having given bond, etc., "did engage in the manufacture of opium for smoking purposes, in and by employing and using a process by means of which a high-grade smoking opium is dissolved in water in any receptacle or container; and yen shee, which is the product of the partial combustion of smoking, or prepared, opium remaining when the smoker has used such smoking, or prepared, opium for smoking purposes, is in like manner dissolved in water, in any receptacle or container, and the said aqueous solution of yen shee is strained and purified so that all substances contained therein which are foreign to the opium content in the said solution, and to the water therein contained, are removed, and which said substances so removed consist of the product produced as the result of the partial combustion of prepared, or smoking, opium in the course of its use by the smoker for smoking purposes; and the said process is, further, that the said aqueous solution of yen shee thus strained and purified is mixed with the aforesaid solution of high-grade smoking, or prepared, opium, and the two solutions thus mixed and combined are heated and cooked in any receptacle or vessel over a slow fire until a product is produced by such heating and cooking and by the evaporation of a part of the aqueous content of the said combined solution, which has the consistency and appearance of thick molasses, and which said product is known as smoking, or prepared, opium, and which said product is opium prepared for smoking purposes; against," etc.

This indictment seems to have been framed with the object of indirectly reviewing Shelley *v.* United States (108 Fed., 88), where the Circuit Court of Appeals for the Second Circuit reversed a conviction that had been had in the district court under a previous indictment, upon grounds succinctly expressed in the opinion, as follows:

"It appears that, when smoking opium has been produced, it may be smoked more than once. That is to say, the residuum left after a first smoking may be simply heated and smoked again. If to this residuum (known as yen shee) some additional smoking opium is added each time it is reheated, the process of resmoking may be continued longer. We are of the opinion that the mere mixing of smoking opium with the residue of opium that has been smoked, and heating the same, is not a 'manufacture of opium for smoking purposes' within the meaning of the statute. The manufacture which the statute contemplates is complete when from the crude opium there has been produced the smoking opium, with which alone, as defendant contended, he operated, in its unsmoked and smoked condition. * * * We think there was error in the refusal to

charge that, if the jury found that defendant only mixed smoking opium with the residue which remains after smoking, his act was not a manufacture of opium for smoking purposes within the meaning of the statute."

It appears that the primary manufacture of opium for smoking purposes is done by treating crude opium in such manner as to convert it into a different form, thus rendering it fit for smoking. It is conceded that this manufacture is subject to the tax prescribed by section 36 of the act of 1890. And see Marks *v.* United States (196 Fed., 476). The counts now under consideration describe two processes by which the residuum of opium remaining after smoking (yen shee) may be reconverted into a form fit for smoking, in the one case by dissolving it in water, straining and purifying the solution so as to remove foreign matter, and then heating and cooking the refined solution, and thereby producing an inferior grade of smoking opium; the other process differs in that an admixture of smoking opium of a high grade is employed together with the yen shee.

In the argument counsel discussed the proper definition of the term "manufacturing," citing Kidd *v.* Pearson (128 U. S., 1, 20) and United States *v.* Knight (156 U. S., 1, 14), to which may be added Anheuser-Busch Association *v.* United States (207 U. S., 556, 559), which had to do with the drawback provision of the McKinley law (26 Stat., 567, 617, ch. 1244, sec. 25).

But, aside from the general principle that criminal statutes ought not to be extended by construction, we have here the additional consideration that this statute was primarily designed as a taxing act. Section 36 must be read in connection with the accompanying administrative provisions, which render it clear that the tax was designed to yield substantial revenue and not merely or primarily to prohibit the manufacture of smoking opium. It may easily be believed that (irrespective of constitutional limitations upon its power) Congress were undertaking to stamp out the practice of opium smoking, it might prohibit such processes of reclaiming as were charged against the defendant in the second and third counts of this indictment. But it is not so easy to believe, in the absence of clear language requiring such a construction, that in prescribing a revenue tax upon the manufacture of opium for smoking purposes it intended to subject the same substance more than once to the tax or to require surveillance over opium-smoking resorts—in which, it would seem, such treatment of the residuum might most readily be conducted—the same as over a factory or other establishment where the primary conversion of crude opium into smoking opium is conducted.

Of course the prohibition is not more extensive than the taxing clause; and so we are satisfied that the offenses charged in the second and third counts of this indictment are not within the denunciation of section 36 of the act.

Judgment affirmed.

Your committee also herewith appends copy of House Report No. 22, Sixty-third Congress, first session, which was filed to accompany H. R. 1967, and adopts the same as a part of this report.

The report referred to is as follows:

The Committee on Ways and Means, to whom was referred the bill (H. R. 1967) to amend sections 36, 37, 38, 39, and 40 of the tariff act of October 1, 1890, having had the same under consideration, report it back to the House with amendments as follows:

Amend title to said bill by striking from the title the words, "To amend the act of October first, eighteen hundred and ninety (Twenty-sixth Statutes, page fifteen hundred and sixty-seven)," and adding, after the words "United States," a comma and the words "and for other purposes."

Amend section 5, page 3, line 2, by substituting the word "by" for the word "or" after the word "opium" as first appearing in said line.

This bill is designed so to amend the internal-revenue act of October 1, 1890 (26 Stat., 567), as greatly to increase the tax on the manufacture of smoking opium in the United States.

The act of October 1, 1890, was intended as a revenue act pure and simple, and it appears to have been enacted with the object of placing a countervailing tax of $10 a pound on opium prepared for smoking manufactured within the United States, the import tax on such opium in 1890 being at the rate of $10 a pound.

It is proposed by H. R. 1967 so to amend the act of October 1, 1890, as to supplement the act approved February 9, 1909, and the proposed amendments thereto. The reason for this amendment is as follows:

The act approved February 9, 1909, prohibits the importation of opium except for medicinal purposes, and so makes it illegal for anyone to import crude opium into the United States and so to manufacture smoking opium. But it is possible for those desiring to do so to cultivate the poppy in several of the States (notably those on the Pacific slope), produce opium therefrom, and under the act of October 1, 1890, secure a license and manufacture such domestically produced opium into smoking opium for local consumption and interstate traffic. Owing to the high price which smoking opium now commands as the result of its legal exclusion from the United States, certain persons have declared their intention of producing opium in the United States and manufacturing it into smoking opium. Should this intention be carried out, it would be a direct defeat of the chief object of the act approved February 9, 1909, and the proposed amendments thereto and may be checked by so amending the act of October 1, 1890, as to impose a prohibitive internal-revenue tax on all smoking opium manufactured in the United States from domestic crude opium and by providing further that a bond be required of the prospective manufacturers so heavy as to be deterrent in its effect.

Section 1 of the proposed amendment is in wording almost identical with section 1 of the act which it is proposed to amend, the difference being that an internal-revenue tax of $200 per pound is to be levied and collected upon all opium manufactured in the United States for smoking purposes instead of $10 per pound.

The principal requirement of section 2 of the amendment is the bond of $100,000 as against the bond of $5,000 provided for in the original act.

Sections 3 and 4 are in the common form of internal-revenue statutes governing the stamping of receptacles and governing the engraving, issue, sale, and accountability of internal-revenue stamps.

Section 5 imposes a minimum penalty of $10,000 or imprisonment of not less than five years, or both, in the discretion of the court, for each and every violation of the preceding sections of the act and provides for the summary forfeiture and destruction of all smoking opium manufactured in the United States contrary to the provisions of the proposed bill.

It is of course perfectly obvious that H. R. 25240 is designed to prevent the manufacture of smoking opium within the United States.

A great many persons have seen in this proposed amendment an attempt on the part of the Federal Government to legalize the manufacture of smoking opium for revenue purposes, such persons arguing that the Federal Government should directly prohibit the manufacture of such opium within the United States. This argument, though plausible, is of course outside the question, as the Federal Government may only secure the prohibition sought for by an exercise of its taxing power.

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