DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 424. Argued April 23, 1930.—Decided May 5, 1930.

1. Upon review of a judgment forfeiting contraband property under § 25, Title II of the Prohibition Act, the sufficiency and effect of the evidence are not open if the trial was to the judge without written waiver of a jury. P. 396.
2. The word "manufacture" may be used to express the whole process by which an article is made ready for sale on the open market. *Id.*
3. The purpose of the Prohibition Act was to suppress the entire traffic that it condemns, and it should be liberally construed to that end. P. 397.
4. Decisions under the revenue acts have little weight as against legislation under the 18th Amendment. *Id.*
5. Empty barrels and bottles, corks, labels and cartons offered for sale in such mode as purposely to attract purchasers who want them for the unlawful "manufacture" of intoxicating liquor for sale are designed for that manufacture within the meaning of § 25, Title II of the Prohibition Act, and are subject to seizure and forfeiture. *Id.*

34 F. (2d) 30, affirmed.

CERTIORARI, 280 U. S. 548, to review a decision of the Circuit Court of Appeals affirming a decree of forfeiture under the Prohibition Act.

Mr. Ward Bonsall, with whom *Messrs. John S. Pyle* and *John W. Dunkle* were on the brief, for petitioner.

Practically every article included in the libel in this case comes within the term *empty containers,* being such articles as empty barrels, empty bottles and corks, cartons, paper wrappers, paper bags, caps for bottles, labels, wrapping paper, empty jugs, empty demijohns, empty cans, cardboard, sealing wire, twine and cardboard cases, together with such utensils as are used in bottling, as dis-

tinguished from producing or manufacturing, such as siphons and filters, crimping machines and labeling machines.

The act or process of the manufacture of liquor is complete with its production and placing in the receiving tub, tank or cistern. The placing of the liquor in barrels, bottles, casks or kegs comes later, and is always separated from the manufacturing process by a greater or less but necessarily appreciable period of time.

When the National Prohibition Act was passed the distinction herein made was already in the laws of the United States and had been there for two generations. §§ 3247, 3267, Rev. Stats.

With such provisions showing that the process of "manufacture" ended with production, and did not include placing in containers, it is not to be supposed that the word "manufacture" would have any different meaning when used in the National Prohibition Act.

This case, begun by a seizure on May 10, 1928, was the first case of the kind in the United States, so far as counsel knows, and in spite of the fact that large numbers of barrel and bottle dealers, in every city in the country, have sold their goods continuously, both before and since the Eighteenth Amendment and the National Prohibition Act went into effect, to whatever purchasers presented themselves, undoubtedly to bootleggers among others, in exactly the same manner as the Feitler Bottle Company may have done.

As used in § 25, the term "property designed for the manufacture of liquor intended for use in violating this chapter" has a dual meaning, as follows:

(a) The property must be usable in the process of making liquor.

(b) The property must be intended by the owner to be so used by himself. *Kohler Co.* v. *United States,* 33 F.

(2d) 225, certiorari denied, 280 U. S. 598; *Street* v. *Lincoln Safe D. Co.,* 254 U. S. 88.

The Court of Appeals in this case did exactly what this Court, in the *Street* case, said should not be done, namely, by "inference and construction" they convinced themselves that Congress had expressed an intention to confiscate empty containers, and they did this by extending and enlarging provisions of law "which have ample field for other operation in effecting a purpose clearly indicated and declared." Cf. *United States* v. *63,250 Gallons of Beer,* 13 F. (2d) 242.

Certain articles possessed and used by bootleggers and moonshiners have been made contraband, namely, "property designed for the manufacture of liquor," but as yet bootleggers have not been made outlaws. It is still lawful to sell them other articles. They may lawfully buy, and others may lawfully sell to them, even knowing them to be bootleggers, such things as clothing, food, automobiles, houses, furniture, machinery, building materials, and all articles of lawful commerce and trade, even including bottles and empty containers. A dealer even under § 18, may sell to a bootlegger property usable in liquor manufacture if he does not do it for the purpose of illegal manufacture.

Containers made forfeitable were not empty containers, they were the containers having illicit liquor in them. Such containers are included in the second sentence of § 25 as forfeitable in the phrase "and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof."

Even if some of the seized articles are considered usable for liquor manufacture, yet seizure and forfeiture is improper in the absence of a proved intention on the part of the possessor that he himself will so use them.

(1) Under the National Prohibition Act the only possession for sale that justifies seizure and forfeiture is possession for sale of liquor. § 25.

(2) As to "property designed, etc.," the only possession that justifies seizure and forfeiture is possession of usable property with the intention on the part of the possessor that he himself will use such property in the illegal manufacture of liquor which he himself intends to use in violation of law. § 25.

(3) Possession for sale of "property designed, etc.," does not carry seizure and forfeiture as a penalty, either under § 18 or § 25, but, under § 18 and § 29, carries only a fine for first offense even when all the various elements of § 18 are fully proved.

(4) Possession for sale of property either not usable for manufacture (such as bottles) or not specifically intended and sold to be illegally used (which intention must be proved as an independent fact) carries not even a criminal penalty, much less a forfeiture penalty under § 25.

The case in hand falls within the last of these four classifications; or, at the worst, this being a forfeiture case in which criminal liability is not directly involved, it may possibly, as to a few of the articles, fall under the third classification, and cannot possibly carry forfeiture as a penalty. See *Hunter* v. *United States,* 279 Fed. 567; *Rossman* v. *United States,* 280 Fed. 950; *Nosowitz* v. *United States,* 282 Fed. 575; *United States* v. *Horton,* 282 Fed. 731; *Hammerle* v. *United States,* 6 F. (2d) 144; *Stroh Products Co.* v. *Davis,* 8 F. (2d) 773; *United States* v. *301 Cans of Acme Malt Extract,* 28 F. (2d) 213; *Kohler* v. *United States,* 33 F. (2d) 225.

Assistant Attorney General Sisson, with whom *Solicitor General Thatcher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Norman J. Morris-*

son, and *D. Heywood Hardy,* Special Assistants to the Attorney General, were on the brief, for the United States.

Since there was no written waiver of jury, the review is limited to questions of law presented by the record proper. Proof of design is consequently not reviewable. The libel being sufficient, the only question is whether the property may be usable for " manufacture of liquor intended " for illegal use, that is, whether it is used in, or after, the manufacture.

The policy of the National Prohibition Act is to make the term " manufacture " inclusive. Within the meaning of the Act, no article is to be considered manufactured until put into condition for sale upon the market for the purpose for which it was intended to be used.

The word " manufacture " has been given a variety of meanings by judicial construction. *Memphis* v. *St. Louis & S. F. R. Co.,* 183 Fed. 529; *Henderson* v. *George Delker Co.,* 193 Ky. 248; *People* v. *Roberts,* 145 N. Y. 375; *Schlitz Brewing Co.* v. *United States,* 181 U. S. 584; *In re Rheinstrom & Sons Co.,* 207 Fed. 119; *Central Trust Co.* v. *George Lueders & Co.,* 221 Fed. 829; *Phillips* v. *Byers,* 189 Cal. 665; *Nixa* v. *Lehmann,* 70 Kan. 664; *Rouda* v. *United States,* 10 F. (2d) 916; *United States* v. *One Lot of Intoxicating Liquor,* 25 F. (2d) 903; *Louisville* v. *Zinmeister & Sons,* 188 Ky. 570; *P. Lorrilard Co.* v. *Ross,* 183 Ky. 217; *Standard Tailoring Co.* v. *Louisville,* 152 Ky. 504.

The policy of Congress respecting the subject matter of the whole Act should be considered. *Richardson* v. *Harmon,* 222 U. S. 96. The purpose of both the Eighteenth Amendment and of the Act was " to stop the whole business " in so far as beverage liquor was concerned, *Grogan* v. *Walker & Sons,* 259 U. S. 80. The Act aimed to suppress " the entire traffic " in intoxicating liquor as a beverage, *United States* v. *Katz,* 271 U. S. 354. It is

comprehensive and discloses an intent fully to enforce the prohibition declared, *Donnelley* v. *United States,* 276 U. S. 505.

"Manufacture" was used in its most inclusive sense. It was intended to prohibit all manufacture, except for the permitted purposes, and to reach all states in the actual process up to and including the finished product in whatever condition that might be. The prohibition against possession of property designed for the manufacture of liquor was intended to reach all steps in the same process. Necessarily, it included the ultimate product as and when fashioned for sale or other disposition. This intention is emphasized by the descriptive phrase "liquor intended for use in violating this title." Such intended illegal uses undoubtedly meant (1) possession for beverage purposes, (2) transportation, (3) sale, and (4) export. That part of the process which prepared the article for any of these uses would, then, obviously be within the scope of manufacturing it (i. e., making it ready) for that particular use. And "having regard to the artifices which are used to promote the sale of intoxicants"—*Purity Extract Co.* v. *Lynch,* 226 U. S. 192—Congress undoubtedly anticipated that synthetic and imitation liquors would be bottled, labeled, and packed for a market in which they could, with some semblance of verity at least, be there extolled as the work of the old masters. Cf. *Woolner & Co.* v. *Rennick,* 170 Fed. 662.

"Liquor intended for use in violating this title" is equivalent to "liquor intended for illegal sale"—a class of liquor which no one will contend that Congress did not mean to abolish. And manufacture becomes, then, more than a mere making of liquor. *Carroll* v. *United States,* 267 U. S. 132, 154.

It is, furthermore, reasonable and sensible to assume that Congress used the word "manufacture" to include

the preparation of liquor for a trade which demanded bottled goods.

All acts necessary to prepare liquor for sale—from the assembling of the utensils and ingredients to the finishing of the product, bottled or barreled as the case may be, and labeled as desired—are included in the manufacture. Those things which a manufacturer customarily does before sale may reasonably be said to be manufacture.

Considering the control of liquor in previous legislation as a guide to legislative intent, *United States* v. *Katz,* 271 U. S. 354, it should be observed that barreling, bottling, marking, stamping, and labeling not only devolve upon the manufacturer, but they were not uncommonly treated by Congress as part of the process of preparing for the market. And as such an incident of manufacture, these acts were closely regulated and controlled.

Even the National Prohibition Act, in parts other than § 25, reflects the close association with which Congress viewed the actual making and the bottling, labeling, and packing of liquor. §§ 1, 4, Title II.

At least, § 25 should be liberally construed. § 3, Title II; *Donnelley* v. *United States,* 276 U. S. 505.

Decisions under the Tariff Act are not controlling.

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel for the forfeiture of alleged contraband liquors, property and material designed for the manufacture of contraband liquors, specifically described, and alleged to have been unlawfully held in violation of Section 25, Title II, of the National Prohibition Act. The District Court found that the allegations of fact contained in the libel were sustained and ordered a decree of forfeiture. The decree was affirmed by the Circuit Court of Appeals, 34 F. (2d) 30. A writ of certiorari was granted

by this Court but confined to the single question whether the property seized is forfeitable under Sec. 25, Title II, of the National Prohibition Act. 280 U. S. 548.

The property in question was containers, barrels, bottles, corks, labels, cartons, &c. By the statute it is "unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property." A search warrant may issue "and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order." Act of October 28, 1919, c. 85, Title II, § 25, 41 Stat. 305, 315. U. S. Code, Title 27, § 39. The argument for the petitioner, so far as it does not go beyond the limits set in granting the writ of certiorari, is that empty containers, bottles and the other apparatus described, cannot be used in or designed for the manufacture of liquor, because the manufacture is completed before that apparatus comes into play. There is a further argument that the containers were not designed in fact for the manufacture of liquor even if they could be, but the objection to this is that if the terms in which the writ was granted do not exclude it, the case having been tried without written waiver of jury, the sufficiency and effect of evidence are not open. *Commissioner of Road District No. 2* v. *St. Louis Southwestern Ry. Co.*, 257 U. S. 547, 562.

The argument for the petitioner cannot be helped by amplification. It is obviously correct if the word "manufacture" be taken in the strictest and most exact sense. But the word may be used in a looser way to express the whole process by which an article is made

ready for sale on the open market. *P. Lorrilard Co.* v. *Ross,* 183 Ky. 217, 223. As the purpose of the Prohibition Act was to "suppress the entire traffic" condemned by the Act, *United States* v. *Katz,* 271 U. S. 354, 357, *Donnelley* v. *United States,* 276 U. S. 505, 513, it should be liberally construed to the end of this suppression, and so directs. Title II, § 3, of the Act. Code, Title 27, § 12. The decisions under the revenue acts have little weight as against legislation under the afflatus of the Eighteenth Amendment. We are of opinion that the word was used in this looser way, and that if the empty containers and the other objects seized were offered for sale in such a mode as purposely to attract purchasers who wanted them for the unlawful manufacture, as we interpret the word, they were designed for that manufacture and could be seized.

Decree affirmed.

HOME INSURANCE COMPANY ET AL. *v.* DICK ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 232. Argued February 27, 1930.—Decided May 5, 1930.

A contract of fire insurance issued by a Mexican company, made and to be performed in Mexico, and covered in part by reinsurance effected there or in New York with New York companies licensed to do business in Texas, was assigned by the insured to a citizen of Texas who was present in Mexico when the policy issued and continued to reside there until after a loss had occurred. He then returned to Texas and sued on the policy in a Texas Court naming the Mexican company, which was never present in Texas and did not appear, as principal defendant, and the two New York companies, because of their reinsurance liability, as garnishees. The policy stipulated that no suit should be brought under it unless within one year of the loss; but a defense based on this was over-ruled by the Texas Supreme Court and recovery against the garnishees affirmed, by applying a Texas statute which forbade any agreement limiting the time for suit to a shorter period than two years