required him to do. That the record had been lying in the clerk's office about a year, during which some sixty cases had been docketed. That the bond was now filed, as prescribed by the rule, and that the case ought to be docketed as of the day the record was deposited in the office.

Mr. Seward, for appellees, united in the application.

This motion was made on the 9th of March, when the court took time to consider.

On the 12th, Mr. Chief Justice TANEY announced the decision of the court as follows:—

On consideration of the motion made in this cause, on the 9th instant, by *Mr. Blunt*, of counsel for the appellant, to direct the clerk to docket this case as of the time when the transcript of the record was received by him, and to which *Mr. Seward*, of counsel for the appellees, assented, this court consider the practice established by the decision in *Owings* v. *Tiernan*, 10 Pet., 447, and do not wish to disturb it;[1] whereupon it is now here ordered by this court, that the said motion be, and the same is hereby, overruled.

Cornelius W. Lawrence, Plaintiff in error, *v.* Gilbert Allen and Samuel C. Paxton.

By the fifth section of the tariff act passed on the 30th of August, 1842, (5 Stat. at Large, 555,) a duty of thirty per cent. is imposed on "India-rubber oil-cloth, webbing, shoes, braces or suspenders, or any other fabrics or manufactured articles composed wholly or in part of India-rubber."

In the ninth section, among other articles declared to be exempt from duty, is, "India-rubber in bottles or sheets, or otherwise unmanufactured."

By these sections, the duty of thirty per cent. is payable upon shoes made of India-rubber in Brazil, although they are made by the same process as bottles or sheets, provided they come to this country in a condition to be worn without further material labor on them here, and were actually worn in this form, and provided they were called, in the language of commerce, "India-rubber shoes"; and of these two facts the jury ought to judge.

The articles come within the letter of the law, and the act of 1842 was framed with a desire to tax whatever might compete with our own manufactures.

When India-rubber is made into a shape suitable for use, it may be considered a manufactured article. Originally, it was made into the shape of boots, to
*786] be used *and worn in Brazil, and afterwards into shoes; but not intended to be sent abroad as a raw material.

The fact, that the material of which these shoes are made is used for other articles of manufacture after their importation, does not change this view of the subject.

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1 Followed. *Selma &c. R. R. Co.* v. *Louisiana Nat. Bank*, 4 Otto, 254; *Edwards* v. *United States*, 12 Id., 576; s. c., 1 Morr. Tr., 389.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

It was an action of assumpsit, commenced by Allen and Paxton, the defendants in error, in the Supreme Court of the State of New York, for the purpose of recovering back from the plaintiff in error, collector of customs for the port of New York, certain moneys exacted by him, as collector, for duties upon a quantity of common India-rubber shoes, imported into the port of New York in September, 1845, by the defendants in error, from Para, in Brazil.

Under the provisions of the act of Congress of the 2d of March, 1833, the suit was removed into the Circuit Court of the United States for the Southern District of New York.

The declaration contained the common money counts, to which the defendant pleaded the general issue.

The cause was tried in May, 1847, and, under the instructions of the court, the jury found a verdict for the plaintiffs below for $2,908.60.

A great deal of evidence was adduced upon the trial by the plaintiffs, to show the manner in which the shoes are made in Brazil, and their use as an article of commerce. Much of this testimony was objected to as inadmissible. A part of it is transcribed, because it is referred to in the opinion of the court.

The plaintiff's counsel then called, as witnesses, James E. Smith, Amory Edwards, George G. Wales, and William H. Edwards, who, being sworn, severally testified that they were acquainted with the articles now the subject of controversy, and with other articles of India-rubber imported from Para; that they had been at Para, and were acquainted with the process of producing or making India-rubber; that the juice or sap of the trees, when collected, is about the color and consistency of milk, and is called milk; that it is placed in a vessel of convenient size; that moulds of clay, or of wood covered with clay, in the shape of a shoe, or bottle, or other shape, and to which a handle is attached, are dipped in the milk, and immediately held in the heat and smoke of a fire made of a peculiar kind of nut, which dries the milk and gives it a dark color; that this process is repeated several times, until the coating is sufficiently thick, when the article is taken from the mould, by breaking the clay of which it is made, or with *which it is covered, and the pieces of clay are taken [*787
out; that shoes and bottles are then generally stuffed with straw, and that the article is then ready for sale and exportation; that bottles are made in two or three minutes;

that it takes somewhat longer, say about five minutes, to prepare a shoe; there must be a new mould for every bottle;—the foot-shaped mould is the best form for dipping. The shoe shape is the most convenient mode of making India-rubber. The stuffing of the shoe is done by the parties who buy them in Para for exportation. The shoes are sometimes shipped in bulk, and sometimes stuffed. The term, India-rubber shoes, comprehends all kinds of shoes made of India-rubber, both manufactured and unmanufactured; that the price of India-rubber shoes, in Para, has varied greatly since 1826; that the great demand for India-rubber, of late years, in the United States, for dissolving for manufacturing purposes, has raised the price in Para; that no such things as suspenders are made in Para; that nothing is made there in a more manufactured state than the square sheets; that India-rubber shoes are sometimes sold and shipped at Para without being stuffed with straw.

Much evidence was also introduced by the defendant, the object of which was to show that the articles were known, in commerce, by the name of "India-rubber shoes," and were bought and sold in the market as imported, without any alteration of any consequence.

The counsel for the defendant then prayed the court to decide the law of the case, and to instruct and charge the jury, as follows:—

First. That in construing and applying the provisions of the tariff law of August 30, 1842, to the present case, the terms used therein are to be understood in their known commercial sense, as used and understood in the ports of the United States prior to, and at the date of, said law.

Secondly. That as all "India-rubber shoes," imported from foreign countries, are, by the said provisions, subject to thirty per cent. duty, the true and only inquiry in the present case is, whether, in a commercial sense, and among commercial men dealing therein, the articles in question were imported into, and usually known and bought and sold in, the ports of the United States, prior to and at the date of the law, under the name and denomination of "India-rubber shoes."

Thirdly. That if the jury shall be satisfied, from the evidence, that the articles in question were imported into, and usually known and bought and sold in, the ports of the United States, prior to the 30th of August, 1842, under the name and denomination of "India-rubber shoes," then they
*788] are liable, *under the law, to a duty of thirty per cent. *ad valorem*, and the jury should be instructed to find for the defendant; and that, in the case stated, the jury

should be instructed to find for the defendant, notwithstanding they should also be satisfied, from the evidence, either,—

1st. That the term "India-rubber shoes," as used in commerce, includes all other kinds of shoes made in whole or in part of India-rubber, as well as these; or,

2d. That "India-rubber shoes," in a more finished condition, and of a better quality, were imported from England, France, or other countries, prior to 1842, and were then, and are now, known in the markets; or,

3d. That some additional labor is usually applied to these articles, or is necessary to fit them for convenient use as shoes; or,

4th. That these articles are extensively used by manufacturers in the United States for the purpose of being made, in whole or in part, into other articles; or,

5th. That no more or other kind of labor is required to make these articles than is required to make India-rubber in bottles, or sheets, or other kinds of India-rubber, which, by the seventh article of the ninth section, is entitled to admission as free.

It being insisted, on the part of the defendant, that neither of these circumstances, nor all of them combined, can nullify the explicit terms of the preceding fifth section, by which all kinds of "India-rubber shoes" are subjected to the thirty per cent. duty, nor make free these articles, provided they are and were known in commerce under the name "India-rubber shoes."

But his honor, the presiding judge, refused so to decide the law of the case, or so to instruct the jury; and, on the contrary, the said judge did then and there decide, and did then and there charge and instruct the said jury, that the case, in the view taken thereof by the court, entirely depended on the true legal construction of the tariff act of August 30, 1842, and involved no question of fact for the jury; that India-rubber, when used, in whole or in part, in the manufacture of oil-cloth, webbing, shoes, braces, or suspenders, or any other fabrics or manufactured articles, was, by the tenth article of the fifth section of this law, subjected to the duty of thirty per centum *ad valorem*, specified in the clause relating to these fabrics, contained in said tenth article; that, by the seventh article of the ninth section of said act, India-rubber, in bottles or sheets, or otherwise unmanufactured, is declared to be exempt from duty; that, by virtue of this clause, India-rubber existing in the particular forms enumerated therein, and existing in any other form in [*789
which it may be imported, is free from duty, if *un-

manufactured; that, as these two clauses were both in the mind of the legislature when treating of India-rubber, they are to be construed together; and that, so construed, the fair conclusion is,—and such the said judge decided to be the true legal interpretation of said provisions,—that Congress, in laying the duty, had special reference to the manufactured article in a finished state, and intended to allow India-rubber to come in as free, whatever might be its form, if it had not been brought, by manufacture, into a finished state; that, as it was not pretended that the goods in question were shoes manufactured out of the material called India-rubber, and as it was admitted by all the witnesses that they were brought into the form of a shoe in the process of making the material called India-rubber, they were not "India-rubber shoes," within the meaning of the tenth article of the fifth section, but were to be regarded as raw material and as unmanufactured, within the meaning of the seventh article of the ninth section; that the goods in question were, therefore, entitled to be admitted free of duty; that the plaintiffs having protested in writing against the payment of any duty thereon, and the collector having, notwithstanding, illegally exacted a duty of thirty per centum *ad valorem* thereon, the plaintiffs were entitled to recover back the moneys so exacted, except so far as the same had been refunded by way of drawback; and that the jury would, therefore, render a verdict for the amount of such remaining moneys, with interest thereon to the day of trial, in favor of the said plaintiffs.

And thereupon the said defendant, by his counsel aforesaid, then and there excepted to the whole of the said decision, charge, and instruction of the said judge, and particularly to those parts thereof wherein the said judge decided and held that the said case involved no question of fact for the jury, and wherein the said judge instructed and charged the jury, as matter of law, that the goods in question were entitled, under the act of Congress above referred to, to be admitted free of duty; and wherein the said judge also instructed and charged the said jury, as matter of law, that the plaintiffs were entitled to recover back the moneys exacted by the defendant as duties on the said goods; and the said defendant, by his said counsel, did also then and there except to the aforesaid refusal of the said judge to decide the law of the case, and to instruct and charge the said jury in conformity with the prayer of the counsel of the said defendant, hereinbefore contained.

And the said defendant, by his said counsel, thereupon then and there further excepted to the decision of the said judge, in admitting as evidence against the defendant the deposition of *Samuel K. Appleton, and the parts thereof particularly objected to by the said counsel, as hereinbefore mentioned; and in admitting as evidence against the defendant the testimony of James E. Smith, Amory Edwards, George C. Wales, William H. Edwards, and John L. Ripley, hereinbefore particularly objected to by the said counsel; and did also further except to the decision of the said judge in excluding the instructions of the Comptroller of the Treasury, hereinbefore mentioned. [*790

Upon this exception, the case came up to this court.

It was very elaborately argued in print by *Mr. Butler* and *Mr. Toucey*, (Attorney-General,) for the plaintiff in error, and *Mr. J. Prescott Hall* and *Mr. Curtis*, for the defendants in error. These arguments would, of themselves, fill a hundred pages, and the Reporter finds it difficult to select parts of them. He is therefore reluctantly compelled to omit the whole.

Mr. Justice WOODBURY delivered the opinion of the court.

This was a writ of error to reverse a judgment in the Circuit Court for the Southern District of New York. That judgment was rendered in favor of Allen et al., the original plaintiffs, in a suit to recover back the amount of duties which Lawrence, the defendant, as collector of the port of New York, had demanded and received on the importation of certain boxes of India-rubber shoes, in September, A. D., 1845, and which the importers claimed to be by law free. The duties therefore, paid under protest; and at the trial, the court, were, among other things, ruled, that, on the facts proved, these shoes were not, in point of law, subject to any duty; and, consequently, a verdict was returned for the plaintiffs below for the amount which had been paid to the collector, and interest.

The facts proved or admitted, which appear material, were, that these shoes consisted wholly of India-rubber, and in different sizes, suited for men, women, and children; that no other work had been expended on them except to dip the moulds or lasts into the milky liquid, as procured from the India-rubber trees, and then dry them over a fire, — performing this process several times, till a proper thickness was obtained. A small ornament was afterwards drawn on some of them, and a coarse stuffing inserted in others, and in this condition they had for many years been imported, and worn without any essential change or addition here, unless in some instances slightly to trim and stretch them on a last. It was also proved that shoes, made in part from India-rubber and in part from cloth or leather, of a thinner and lighter fabric, had been sometimes imported from Europe, and for several years had been extensively manufactured in this country.

*791] *The law which governs the question whether these shoes ought to pay a duty of thirty per cent. *ad valorem*, or be admitted free, is the act of Congress of August 30, 1842 (5 Stat. at L., 555). In its fifth section, thirty per cent. is imposed "on India-rubber oil-cloth, webbing, *shoes*, braces or suspenders, or other fabrics or manufactured articles, composed wholy or in part of India-rubber." And in the ninth section, among other articles declared to be "exempt from duty," is "*India-rubber, in bottles or sheets, or otherwise unmanufactured.*"

The court below entertained an opinion, that the clause in this law imposing a duty of thirty per cent. on India-rubber shoes referred to those made in a finished state from that material, after being altered in Brazil from its liquid condition to the more solid state, and to the forms of sheets, shoes, bottles, &c., and that this alteration was not a manufacture, though into a shape designed for use without any material change, and hence, that shoes so made and imported were not dutiable. This view was, undoubtedly, correct to a certain extent, and in some aspects of the subject; but in others it seems to us to involve some errors, which we think ought to be corrected, and which require more extended explanations because overruling the judgment below. Thus, although this act of Congress clearly meant to impose a duty of thirty per cent. on shoes imported, which had been made in part from India-rubber after it had been hardened and fashioned into some crude shape in South America, yet we have no doubt it might likewise intend to impose this duty on shoes made abroad wholly from India-rubber while in its liquid state, and especially if, when so made, such shoes were in a condition to be worn without further material labor on them here, and were made to be so worn, and were in this form often actually worn.

It is our opinion, therefore, that the jury should have been so instructed; and if they were satisfied those shoes had been thus made to be so worn, and, in the language of commerce, if such shoes were called "India-rubber shoes," no less than those made here or in Europe in part from India-rubber and in a more finished form, that the duty of thirty per cent. ought to have been paid on them.

Some of our reasons for this opinion are briefly these.

The articles imported in this case manifestly come within the letter of the clause imposing a duty of thirty per cent. on

"India-rubber shoes." They are "India-rubber shoes." Being thus provided for as shoes, the subsequent clause, making certain articles free which were unmanufactured, and not enumerating shoes among them, cannot be presumed to embrace or refer to any thing already provided for. *United States* v. *Clarke*, 5 *Mason, 30. Indeed, these shoes [*792 were more emphatically India-rubber shoes, than those made only in part of that material, as are most, if not all, of those manufactured in this country and in Europe. Again, to remove difficulty in many cases whether an article should come under the description of those liable to duty, there it is added, in the first clause, taxing them, "manufactured articles composed wholly or in part of India-rubber"; and, in this way, the duty extends to any shoes, if a manufactured article, whether they be like these, composed wholly of India-rubber, or, like most others, composed only in part of it.

Much more do the shoes in this case appear to come within this provision in the act of Congress imposing the duty of thirty per cent., when we examine the spirit and object of that provision. To ascertain these with some degree of certainty, it may be useful, in the first place, to advert a moment to the past, as well as subsequent, legislation of Congress on this subject.

The import of India-rubber, in any form, into this country, does not appear to have attracted attention in the revenue laws, as a separate and specific article, till 1832. Before that, and especially in the tariff acts of 1828, 1824, 1816, all of which are usually conceded to have looked to protection as well as revenue, India-rubber is not enumerated *eo nomine* as free or dutiable, and hence was taxed generally, from twelve and a half to fifteen per cent., among the non-enumerated articles (3 Stat. at L., 310; 4 Stat. at L., 29 and 590). But in 1832, when the policy had become changed to reduce an overflowing revenue, by leaving free such unmanufactured articles as furnished raw materials to our own manufacturers, and such manufactured articles as did not compete with any made here, the act of July 14th, 1832, § 3, exempted from duty entirely "India-rubber" (4 Stat. at L., 590). In 1833, a like policy, for a like reason, was pursued, and so in 1841, by expressions in the former period placing "India-rubber" among the articles free from duty (4 Stat. at L., 630), and in the latter, making "India-rubber" still excepted from duty, though several articles before free were then taxed (5 Stat. at L., 563).

But in 1842, when the policy of the government again became adapted to protection no less than revenue, the act

now under consideration was shaped so as to tax whatever might compete with our own manufacturers, and to admit free only articles in such shape or form as were not calculated to rival our own. Now before 1842, it is well known that the making of shoes in part from India-rubber, so as to be water-proof, had been invented, patented, and extensively practised in this country. Consequently, such a protective
*793] tariff as that introduced in *1842 would be likely to tax any foreign fabric which was, in any considerable degree, a rival to the article made here for a similar use. And, consequently, a foreign-made shoe, whether "composed wholly or in part of India-rubber," was meant to be taxed thirty per cent., if, in either case, it was in a form suited to be used as water-proof, was so designed and so used, and this form would rival the shoe made here for a like purpose.

In construing statutes, it is not only our duty to give effect to all the words used in their ordinary sense, but to eviscerate, if possible, their true spirit and intent from all the connected circumstances, attendant or subsequent as well as preceding. *Bond* v. *Hoyt*, 13 Pet., 273; 1 Kent, Com., 461.

The statute applicable directly to the present case being, in some respects, awkwardly worded, the design of it on this subject has been made more explicit and clear by the subsequent act of July 30th, 1846, changing the forms of expression to describe the articles intended to be taxed. Thus, it is there provided, that a duty of thirty per cent. be imposed on "braces, suspenders, webbing, or other fabrics composed wholly or in part of India-rubber, not otherwise provided for." And, to prevent any misconception of the intention, it is added, under the same schedule and rate of duty, "shoes composed wholly of India-rubber."

It would also be very extraordinary if the spirit of the act of 1842, in its high protective policy, should not mean to tax the foreign India-rubber shoe made wholly of India-rubber, when it was, and still is, a most formidable and successful rival to the shoe made here in part of the same substance; when it was at first, and for many years, the only shoe used here as water-proof; and when, under all patents and improvements since in lightness and beauty, none seem able to surpass it now in durability, ease, and economy combined.

But it is contended that the India-rubber shoe, as made in Brazil and imported thence, is not a "manufactured article," and hence is not within the clause in the act of 1842 imposing a duty of thirty per cent. It may be conceded that this duty applies only to such an article. Yet what constitutes a manufactured article?

In some instances, and for some purposes, it may be one kind of process performed on what is found in a natural state, and in some, another kind. Thus the juice of the maple or of the cane is in some views manufactured when it is made into molasses or syrup, and in others, when again made into sugar or spirit from molasses. And so the juice of the grape is in one sense manufactured when converted into wine, and in another, *when made into brandy. And so is lye from ashes, when boiled down to potash or pearlash, manufactured into them. Here, the juice or sap of the India-rubber tree, while liquid or in its milky state, whether then called caoutchouc or some other name, is still a natural substance, and in its natural form; and, in one sense and to a certain extent, its being hardened and changed in color, no less than consistency and bulk, by fire and evaporation, whatever new form it may then be turned into, is a manufacture. It is so as much as butter or cheese is a manufacture from animal milk, or tar from turpentine, and rosin from tar. Yet from the words of the law, as well as its design, it is manifest that the India-rubber is not meant to be taxed as a manufacture, though so hardened and changed, unless, at the same time, it is put into a shape which is suitable for use, and adapted with a design to be used in a way that is calculated to rival some domestic manufacture here, rather than merely to furnish a raw material in a more portable, useful, and convenient form for other manufactures here. In the latter case, within the policy and purpose of the tariff law yielding protection, it is "unmanufactured," or, in other words, not made abroad for use in its existing form except as a raw material, like pig-iron or pig-lead. But in the former case, within that policy and purpose, it is "manufactured," as it is made in a shape for use as a manufacture without being afterwards materially changed in form, and is designed to be so used, and hence comes in as a competitor with our own manufactures. [*794

After these, what requisite is wanting to bring it within the spirit, no less than the letter, of the provision imposing a duty? It has been changed, by fire and labor, in its color, consistency, and form, from its natural state as the milk of the India-rubber tree. It has been fashioned into an article of clothing, suitable and customary to be worn in its then shape. It is a rival to other shoes made here.

These elements would, on principles of common sense, seem to amount to a manufacture, and one, when imported from abroad, likely to be taxed.

Going to more technical definitions and to first principles, such a process to make the shoe is making an article by the hand, which was once the literal meaning of the word *manufacture* or *munu factum*, and in the more modern idea attached to the word, it is making an article, either by hand or machinery, into a new form, capable of being used, and designed to be used, in ordinary life.

Indeed, these India-rubber shoes were originally made in Brazil, not as a form of sending abroad a raw material to be used for other purposes. But they were prepared as a shoe,
*795] to *be worn in the shape as there finished, and for the purpose of excluding water. Travellers in Brazil described the use of India-rubber there first in the form of boots, because water-proof. 1 McCulloch's Dict., 311; Ure's Dict.

The shoe succeeded to the boot, and its export in sheets also, to be cut up to rub out pencil-marks, &c., gave to the substance itself the common name of India-ruber. Ibid.

In the form of the shoe, therefore, to be worn in Brazil or elsewhere, because water-proof, it was a manufacture, and one of such value for that purpose as to lead to a greatly in creased export of the article in that shape within the last twenty years.

And as the invention was made, here and abroad, of thinner and lighter shoes manufactured in part from it, and of extending the use of India-rubber to many new objects in dress and the arts, the demand for it, in a state as hardened and colored, without regard to form, enlarged rapidly.

Considering, too, that a mode of dissolving it here has been discovered, and of easily giving to it, afterwards, any desired shape, it may be that shoes, no less than sheets or slabs of India-rubber, in a hardened form, become often, when convenient, melted down or dissolved, to be used for other purposes. This might often be done with them, though a manufacture, as their value per pound would vary but little, if any, from India-rubber in the shape of sheets, as the raw material of which they were manufactured was the same, and as the expense of making them is similar,—one being done by several dippings, like a candle, and the other by several layers of the gum or milk.

But this occasional use of the shoes for other purposes than wearing as water-proof shoes would not alter their original character as a manufacture for the latter purpose, nor the importation and present character of them, as a manufacture for the same purpose.

Thus, the importation of cast-iron in kettles or handirons in a state to be so used, and frequently so used, would not be altered, as a manufacture of that kind, and as subject to pay the duty imposed on it in the tariff; because some of it, after imported, might occasionally be melted down and re-cast, and used for other or similar purposes.

Nor is the juice of the cane—converted into a different consistence and color abroad, and shipped here as molasses, ready to be used, and often used as such—any the less a "manufactured article," and any less subject to the duty on molasses, because some of it, after arriving in this country, may again be manufactured into sugar or spirit.

*A further illustration as to the distinction between the same article, put into a shape to be sold for use as it is, and into one not for use as it is, is that of melted iron. [*796

In that state it may be run in moulds, either for pots or for pigs, and, in the former case, fitted and sold to be used in that shape, and hence a manufacture; while, in the latter, sold to be made up afterwards into new and different forms, and hence, for some purposes, is then not regarded as a manufacture till so made up.

So lead may be melted into the shape of pigs or bars, for exportation and for foreign manufacture, or be run into weights, for use as weights, and then be regarded as already a manufacture for that purpose.

It is another evidence that shoes composed wholly of India-rubber were considered by Congress as a manufactured article, that they place them in that category in the tariff with other clearly manufactured articles, while they place in the category of those unmanufactured such articles as are not in a shape to be used much, if at all, without being made up into new forms. Thus it is with the India-rubber images of alligators and lizards imported. If bottles are an exception, they are specially enumerated in the tariff among the free articles, in order to be free, while shoes are not; and the former are so enumerated, because usually made up here into new shapes, for other purposes, before used; and when not so made up, are little employed in their original shape, and have no rival manufacture to be protected by taxing them. Had Congress intended that shoes, when wholly of India-rubber, should be considered as unmanufactured, and be free, it is difficult to conceive why it did not place them in that list, and declare them unmanufactured and free, rather than in the list of manufactured and dutiable articles, as it did both in 1842 and again in the revised act of 1846.

Finally, another circumstance exists, which appears to be a decisive indication that this very importation of shoes, though called in the invoice "unmanufactured," was meant mainly as shoes for use, to be worn in their existing condition, rather than to be dissolved and used for other purposes. It is, that several of the boxes were invoiced as shoes for "ladies," and others for "misses," or children, and which different forms or shapes would be useless, as well as more expensive, if the shoes were intended merely to be cut up or dissolved for other uses, and not to be worn by different sexes and ages, as "manufactured" shoes in their present shape.

In several analogous cases, as to teas, cotton bagging, and sugar, this court has held, that it is a proper fact for the jury *797] to *decide, whether the imported article is or is not known in commerce by the words or terms used in the tariff imposing the duty, and not a question of law, to be settled by the court, as was done here.[1] *United States* v. 112 *Casks of Sugar*, 8 Pet., 277; *Elliott* v. *Swartwout*, 10 Pet., 151, 153; *United States* v. *Breed*, 1 Sumn., 164; 9 Wheat., 438; *Curtis* v. *Martin*, 3 How., 106.

Unless it be admitted in this case, then, as most of the testimony proves, that these shoes were known in a commercial sense and use as India-rubber shoes,—no less than others, made in part from it,—we think the jury should return a verdict on that fact; and next, that the jury should have been further instructed, that, if these shoes had been made into their present shape in order to be worn as water-proof, when the purchasers pleased, and that it was customary so to wear them, they were within the meaning of the act of Congress on this subject, "manufactured," and liable to pay a duty of thirty per cent.

Without going into other questions raised at the trial, and without dwelling longer on this, our opinion is, that the judgment below must be reversed, and a *venire de novo* awarded; and the new trial be governed by the principles here settled.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court of the United States for the Southern District of New York in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded

[1] FOLLOWED. *Tyng* v. *Grinnell*, 2 Otto, 470.

to the said Circuit Court, with instructions to award a *venire facias de novo*, and that the new trial shall be conducted in conformity to the principles laid down in the opinion of this court.

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*ELEAZER F. BACKUS, PLAINTIFF IN ERROR, v. WILLIAM GOULD AND DAVID BANKS, WHO SUE AS WELL FOR THE UNITED STATES AS THEMSELVES. [*798

By the sixth section of the act of February 3d, 1831, entitled "An act to amend the several acts respecting copyrights," the penalty of fifty cents on each sheet, whether printed or being printed, or published or exposed to sale, is limited to the sheets in possession of the party who prints or exposes them to sale.

It does not apply to those sheets which he had published or procured to be published, whether they were found in his possession or not.[1]

THIS case was brought, by writ of error, from the Circuit Court of the United States for the Northern District of New York.

It was a *qui tam* action, brought by Gould and Banks against Backus, for an alleged invasion of their copyright in nine volumes of Cowen's Reports, and the first three volumes of Wendell's Reports.

On the trial, the affidavit of John L. Wendell was read, stating that he, the deponent, was the real plaintiff, and that Gould and Banks were merely nominal plaintiffs.

In 1838, Backus published a book entitled "A Digest of the Causes decided and reported in the Superior Court of the City of New York, the Vice-Chancellor's Court, the Supreme Court of Judicature, the Court of Chancery, and the Court for the Correction of Errors, of the State of New York, from 1823 to October, 1836, with Tables of the Names of the Cases and of Titles and References, being a Supplement to Johnson's Digest."

To the declaration, Backus pleaded *nil debet*.

Upon the trial, the plaintiffs proved themselves entitled to the copyright of the first, second, and fifth volumes of Cowen's Reports, and of the second volume of Wendell's Reports. And that from the above volumes the defendant had transferred, literally, one hundred and forty-two and a half pages; and they proved a sale by the defendant of five hundred copies of his work.

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[1] See Rev. Stat., §§ 4964–4970.