BETWEEN:

HIS MAJESTY THE KING, on the Information of the Attorney-General of Canada ..... PLAINTIFF;

1936

Mar. 16
Nov. 18

AND

BILTRITE TIRE COMPANY .... DEFENDANT.

Revenue—Sales Tax—Excise Tax—Special War Revenue Act, R.S.C. 1927, c. 179, secs. 80, 81, 86, 95—"Manufacturer."

The defendant purchased in bulk lots, by the pound, old motor vehicle tires which could no longer be used as such, paying for them at so much per ton. These worn-out tires were treated and retreaded by defendant, the number and name of the manufacturer of the original tire remaining apparent on the side walls along with the serial number marked thereon by the defendant. These rebuilt tires were sold under the name Biltrite Tires to casual purchasers or wholesale dealers; the defendant also carried on a mail order business in such tires.

Held: That defendant is a manufacturer within the scope of the Special War Revenue Act, R.S.C. 1927, c. 179 and amendments thereto, and liable to pay the sales and excise taxes and licence fees provided in such Act.

ACTION by the Crown to recover from defendant certain money alleged due for sales tax, excise tax and licence fees on motor vehicle tires manufactured and sold by it.

The action was tried before the Honourable Mr. Justice Angers, at Ottawa.

F. B. Matthews for plaintiff.

Wilfrid Heighington, K.C., for defendant.

The facts are stated in the reasons for judgment.

ANGERS J., now (November 18, 1936) delivered the following judgment:

This is an action brought by His Majesty the King, on the information of the Attorney-General of Canada,

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against Biltrite Tire Company for the recovery of sales tax, excise tax and licence fees totalling $5,547.05 as follows:

Sales tax	$2,674 55	
Licence fees	6 00	
		$2,680 55
Excise tax	2,860 50	
Licence fees	6 00	
		2,866 50
		$5,547 05

[The learned Judge here referred to the pleadings.]

A statement of facts was filed to obviate the necessity of producing witnesses; it seems to me apposite to quote it verbatim:

1. Biltrite Tire Company is the trade name under which John J. Weston carried on in the City of Toronto during the years 1933, 1934 and 1935 a business of which he was the sole proprietor. The headquarters and main establishment were at 121 DeGrassi street in the said city and consisted of a series of connected frame buildings (one of them being plaster over lath). The firm employs at the present time in this building some nine men but, when business conditions were better, some twice that number were employed. There was also one other establishment, in the nature of a retail store, to which reference is made later. This store was located at 279 Queen Street East.

2. The company purchased, in bulk lots, by the pound, old and worn-out motor vehicle tires. The source of purchase was generally junk dealers or storage yards both in this country and in the United States. The system of purchase was simply to order the goods in carload lots and to pay for them at so much a ton. Any duty that was exacted upon the articles when brought into Canada was paid on entry. On receipt, the worn-out and old motor vehicle tires were placed in part of the buildings set aside for that purpose.

3. The company then took the tires and put them in a heater. Here, in sustained heat, all dampness was taken from the tires, both inside and out. This is an essential preparation for the subsequent steps that were taken.

4. The tire was next placed upon a rack where the holes or "blow-outs" in it were buffed and cleaned. Next, the tire was placed in a frame against which a sharp dented wheel revolved to cut off the old tread. The tire was then cemented on the inside and the holes patched with cord material. The tire was then cemented on the outside. Throughout this and all subsequent steps the sidewall of the tire was not dismantled or destroyed. The tire was then taken to another machine where "callendered-tread stock," a plastic rubber preparation, was applied to the top of the tire. The tire was then taken to what was termed the "cure-room," where it was placed first in an iron mould which was firmly clamped about it. The mould was in the shape of a wheel and the mould,

complete with its encased tire was placed flat on a press inside a large boiler. A number of tires, each in a clamp as stated, were piled one on top of the other until the boiler was filled with twenty tires or so. A lid was then placed upon the boiler and firmly sealed. Hydraulic pressure was then applied for an hour or an hour and a half. This had a squeezing effect upon the clamped tires, they were firmly held and cooked into a state in which the repairs to the holes and blow-outs, the cementing inside and without, and the new tread, were firmly and permanently affixed to the carcass, i.e. the fabric and side walls of the original tire. In no part of these steps, including the final one, was the numerical identification of the original tire destroyed. The name of the manufacturer of the original tire was still clearly marked upon its side walls upon which the defendant company also marked a serial number.

5. The tire was then ready for sale and laid in a rack as such. The tires were sometimes sold in quantities and sometimes as a single sale to casual purchasers. The retail store, heretofore mentioned, stocked these tires and sold them to such persons as applied to the store for that purpose. Attached hereto is some of the advertising literature of the company, and a dealer's discount sheet, all part of the company's ordinary advertising and business literature. The sale of accessories and parts is sufficiently covered in these documents.

Attached to this statement of facts and filed with it are three documents: (*a*) a dealers' discount sheet; (*b*) an order form; (*c*) a handbill advertising the defendant's wares.

The front page of the handbill is entirely devoted to tires and tubes; the other pages have reference to automobile parts and accessories.

On the front page we find, among others, the following statements, which offer some assistance in determining the nature of the defendant's business:

Biltrite Tires Have Made Tire History

Thousands of our newly treaded tires as listed here at these unusually low prices have withstood the test on all makes of cars and trucks, in all climates, over all kinds of roads, and under the most gruelling conditions and abuse. They surpass some of the best-known tires on the market and pile up mileage records never thought possible.

Every tire has been newly treaded with a heavy, strong, high tempered, deep, wide tread to give resistance to violent shocks, where the greatest resistance is needed. In such well-known makes as Goodyear, Firestone, Goodrich, etc. Scientifically designed with the most improved features that give these Super Safe High Speed Treaded Tires unsurpassed strength and endurance. Our low selling cost enables us to offer our many customers guaranteed tires of quality and outstanding appearance, never offered before.

On the same page appears what is called a "Guarantee Bond" of which it is perhaps expedient to quote the following extract:

Every tire sold by us, bearing our serial number, and listed under column "B," is guaranteed for the period of eight (8) months, and under

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column "C" and "CH" for twelve (12) months from date of purchase (except commercial or truck tires listed under "C," which are guaranteed for six (6) months).

The front page of the handbill further contains a list of prices of the different classes of "Biltrite" tires and tubes and certain observations concerning the terms of payment.

At the bottom of the page, next to the name of the company, are indicated the following addresses: Store, 279 Queen East; Mail Order Dept., 121 DeGrassi St., both in Toronto.

The "dealers' discount sheet" mentions the discounts allowed to dealers on tires and tubes and on accessories. The discounts on tires and tubes vary according to the quantity.

Under the heading "Dealers' Prepayment Plan" we find on this sheet the following conditions:

> When discounts are deducted or when tires and tubes are purchased in quantities for resale purposes the prepayment plan appearing on the list and on reverse of the order form does not apply and is hereby cancelled. The following is substituted:—
>
> All tire and tube orders of $50 and over are prepaid to any point in Ontario, Quebec, and the Maritime provinces. Orders to Manitoba, Saskatchewan are also prepaid if same exceed $100. Orders from Alberta and British Columbia are not prepaid, but customers in these provinces may deduct an extra 10 per cent from their order in lieu of transportation charges.

Immediately after this clause appears the name of the company followed by the words "Toronto, Ontario" and these addresses:

Mail Order Dept.	City Sales and Service
121 DeGrassi Street.	279 Queen St. East.

The order form proper offers no particular interest; on the back are printed the conditions relating to the "prepayment plan" (referred to in the clause of the "dealers' discount sheet" hereinabove quoted), the terms of payment, a notice dealing with the return of goods, etc., all of which have no relevance in the issue herein.

The facts, as we see, are simple. Perhaps it will be convenient to summarize them briefly.

The defendant purchases old tires, which can no longer be used as such, in carload lots, paying for them at so much per ton. These worn-out tires are treated and retreaded in the manner set forth in the statement of facts. The tire is first put in a heater to remove all dampness.

Following this operation, the holes in it are buffed and cleaned. The old tread is entirely cut off. The carcass or fabric of the tire is then cemented on the inside and on the outside. A new tread, consisting of a plastic rubber preparation, is applied and moulded on the top of the tire. The number and the name of the manufacturer of the original tire are not destroyed but remain apparent on its side walls along with the serial number marked thereon by the defendant.

The new or rebuilt tires were sold under the name Biltrite Tires either to casual purchasers or to wholesale dealers, as shown by the statement of facts and the documents attached thereto; the evidence also discloses that the defendant carried on a mail order department.

The period with which we are concerned is from the 23rd of October, 1933, to the end of July, 1935. The reason for using the 23rd of October, 1933, as starting point, according to a statement by counsel for plaintiff, is that a ruling was issued on that date by the Department of National Revenue, embodied in a circular, a copy whereof was filed as exhibit 1. The only relevant clause of this circular (No. 741-C), bearing date the 23rd of October, 1933, and addressed to Collectors of National Revenue, reads as follows:

> Persons who import or purchase in Canada, used tires which they retread and sell, are required to operate under sales and excise tax licences and the special excise tax would apply only on importation. Persons operating in this manner are required to account for the Excise Tax of 2 cents per pound on the finished tires produced, together with the Sales Tax of 6 per cent on the sale price.

A copy of a letter from the Commissioner of Excise to the defendant, dated November 27, 1934, was filed as exhibit 2; it is worded as follows:

> The Department has given the question of the retreading of tires further consideration and has now decided as follows in so far as the application of the tax to the retreading is concerned, the new ruling taking effect as from date of receipt of this notice:
>
> Circular No. 741-C of October 23, 1933, remains in effect.
>
> When a customer supplies worn tires to a retreader for retreading purposes, the following rulings apply:
>
> If the retreader is a small manufacturer such as those contemplated by Section 95, Subsection 2, of the Special War Revenue Act, it would not be necessary for him to be licensed nor to account to the Crown for either sales or excise taxes on the operation, though his purchase of supplies would be taxable. If his business is solely confined to the retreading of customers' tires but his status is not that of a small manufacturer

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within the meaning of Section 95, Subsection 2, of the Act, the excise tax would not apply, but he would be liable for the sales tax and would, of course, be required to hold a sales tax licence.

I do not think that this letter has any bearing on the present case.

The plaintiff's claim is based:

(*a*) with respect to the sum of $2,674.55 for sales tax, on section 86 of the Special War Revenue Act, R.S.C. 1927, chap. 179, and amendments;

(*b*) with respect to the sum of $6 for licence fees under Part XIII of the Act (consumption or sales tax), on section 95;

(*c*) with respect to the sum of $2,860.50 for excise tax, on section 80;

(*d*) with respect to the sum of $6 for licence fees under Part XI of the Act (Excise taxes), on section 81.

The material provisions of sections 86, 95, 80 and 81 read thus:

86. (1) There shall be imposed, levied and collected a consumption or sales tax of six per cent on the sale price of all goods,—

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

95. (1) Every manufacturer or producer shall take out an annual licence, for the purpose of this Part, and the Minister may prescribe a fee therefor, not exceeding two dollars.

80. (1) Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and sold, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned.

(*a*) . . . . . .

(*b*) in Schedule II, at the rate set opposite to each item in the said schedule.

Schedule II to which section 80 refers contains (*inter alia*) the following item:

3. Tires and Tubes—

(iii) Tires in whole or in part of rubber for automotive vehicles of all kinds, including trailers or other wheeled attachments used in connection with any of the said vehicles—...two cents per pound;

Inner tubes for use in any such tires.....three cents per pound.

81. The Minister may require every manufacturer or producer to take out an annual licence for the purpose of this Part, and may prescribe a fee therefor, not exceeding two dollars, and the penalty for neglect or refusal to obtain a licence shall be a sum not exceeding one thousand dollars.

At the trial counsel for plaintiff stated that a figure of $4,620.29 (in lieu of $5,547.05) had been agreed upon, the said amount including sales and excise taxes and licence

fees but no penalties; that, in order to avoid any possibility of double taxation, the Department had given credit for all taxes paid by the defendant on importations or purchases in Canada of any of its raw materials. In the circumstances the only question remaining for determination is whether the defendant was, during the period from the 23rd of October, 1933, to the end of July, 1935, a manufacturer or producer within the meaning of the Special War Revenue Act.

The defendant claims that he is merely a repairman; he denies being a manufacturer or producer.

The success or failure of the action rests on the interpretation to be given to the words "manufacturer" or "producer."

The word "producer" is defined:

In the *Oxford Dictionary*—

(1) One who or that which produces.

(2) One who produces (grows, digs, or manufactures) an article of consumption. Opposed to consumer.

In the *Imperial Dictionary*—

One who or that which produces or generates.

In the *Webster's New International Dictionary*—

(1) One who produces, brings forth, or generates.

(2) One who grows agricultural products, or manufactures crude materials into articles of use.

The word "manufacturer" is defined:

In the *Oxford Dictionary*—

(1) An artificer, an operative in a manufactory.

(2) One who employs workmen for manufacturing; the owner of a manufactory.

In the *Imperial Dictionary*—

One who manufactures; one who employs workmen for manufacturing; the owner of the manufactory.

In the *Webster's New International Dictionary*—

One who manufactures; specif.: (*a*) a factory operative. Obs. (*b*) an employer of operatives in manufacturing; the owner of a manufactory.

The word "manufacture" (as a verb) is defined:

In the *Oxford Dictionary*—

(1) To work up (material) into forms suitable for use.

(2) To make or fabricate from material; to produce by labour (now esp. on a large scale).

In the *Imperial Dictionary*—

(1) To make or fabricate from raw materials, and work into forms convenient for use, especially by more or less complicated processes; . . .

(2) To work up into suitable forms for use; . . .

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In the *Webster's New International Dictionary*—

(1) To make (wares or other products) by hand, by machinery, or by other agency; . . . to produce by labour esp., now, according to an organized plan and with division of labour, and usually with machinery.

(2) To work, as raw or partly wrought materials, into suitable forms for use; . . .

In the *Encyclopaedic Dictionary*

(1) To make or fabricate by art and labour from raw materials; to form by workmanship.

The word "manufacture" (as a noun) is defined:

In the *Oxford Dictionary*—

(1) (*a*) The action or process of making by hand.

(*b*) The action or process of making articles or material (in modern use, on a large scale) by the application of physical labour or mechanical power.

In the *Imperial Dictionary*—

(1) The operation of making wares of any kind, as cloth, paper, books, and whatever is used by man; the operation of reducing raw materials of any kind into a form suitable for use, by more or less complicated operations.

In the *Webster's International Dictionary*—

(1) A making by hand. Obs.

(2) The process or operation of making wares of any material products by hand, by machinery, or by other agency.

In the *Encyclopaedic Dictionary*—

(1) The act, process, or operation of manufacturing or making wares of any kind; the process of reducing raw materials to a form suitable for use, by operations more or less complicated.

The word "produce" (as a verb) is defined as follows:

In the *Oxford Dictionary*—

(3) To bring forth, bring into being or existence. (*a*) generally. To bring (a thing) into existence from its raw materials or elements, or as the result of a process. (*d*) To work up from raw material, fabricate, make, manufacture (material objects).

In the *Imperial Dictionary*—

To make; to bring into being or form; . . .

In the *Webster's International Dictionary*—

(3) To make economically valuable; to make, or to create so as to be, available for satisfaction of human wants.

(5) To give being or form to; to manufacture; make; . . .

In Words and Phrases Judicially Defined, Vol. 5, pages 4346 and 4347, we find, among others, the following definitions:

A manufacturer is one who is engaged in the business of working raw materials into wares suitable for use. *People* v. *New York Floating Dry Dock Co.* (N.Y.), 11 Abb. N.C. 40, 42; *Consumers' Brewing Co.* v. *City of Norfolk* (Va.), 43 S.E. 336.

A "manufacturer" is defined to be one who is engaged in the business of working raw materials into wares suitable for use; who gives new

shapes, new qualities, new combinations, to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms. He makes to sell, and stands between the original producer and the dealer and first consumer, depending for his profit on the labour which he bestows on the raw materials. *State* v. *Dupre*, 7 South. 727, 42 La. Ann. 561 (quoting *City of New Orleans* v. *La Blanc*, 34 La. Ann. 596, 597; *City of New Orleans* v. *Ernst*, 35 La. Ann. 746, 747); *State* v. *American Sugar Refining Co.*, 32 South. 965, 973, 108 La. 603.

Reference was made by counsel to certain decisions in which the words "manufacturer" and "producer" have been interpreted; it is, I think, apposite to note briefly those which, although not exactly in point, appear to be the most pertinent.

In the case of *The Minister of National Revenue* v. *Dominion Shuttle Co.* (1), in which the Crown was seeking to recover sales tax on "cross arms" made from lengths of lumber bought from a saw-mill and sold to a railway company, it was held:

Where goods are shipped from British Columbia as raw material, or prepared raw material, to a place in this province, the consignee who has to perform certain work to make them a finished product before they can be delivered to the consumer, is a manufacturer, and as such, is liable for the payment of the sales tax on the sale price, including costs of transportation.

The work performed by the defendant is described in the judgment as follows (p. 17):

The work on these lengths by defendant was: first, to cut them in lengths of 10 feet, or 8 feet; second, to creosote them, or dip them in creosoting oils to preserve them against the elements of the weather (for which defendants have a special plant); third, to round them or mill or dress the lumber to the rounded shape; fourth, to bore holes in them in order to insert the pin on which the insulator is placed; and after this work was done, they were sold to the Canadian Pacific Railway at the price, not based on so much a thousand feet, but based on so much per hundred "cross arms."

Defining the manufacturer, Archambault J. said (p. 18):

First, what is a manufacturer? There is no definition of the word "manufacturer" in the Act and it is practically impossible to find a definition which will be absolutely accurate, but from all the definitions contained in leading dictionaries, Corpus Juris, Encyclopedias, etc., the Court gathers that to manufacture is to fabricate; it is the act or process of making articles for use; it is the operation of making goods or wares of any kind; it is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.

This is exactly what the defendant company did. They received the raw material or prepared raw material, or lengths of lumber, and put

(1) (1934) R.J.Q., 72 S.C., 15.

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them through the processes already mentioned to make "cross arms" and sold them to the consumer.

The next case to which I shall refer is that of *His Majesty The King* v. *Vandeweghe Ltd.* (1). The respondents, Vandeweghe Ltd., were engaged in the business of wholesale dealers in, and dyers and dressers of, raw furs. They purchased raw furs or skins from trappers and other persons; they dressed and dyed these skins and sold them to furriers. The respondents urged that they did not cut nor trim the furs but that they confined their work to dressing and dyeing them.

The judgment of the Court was delivered by Duff, C.J. (now Sir Lyman Duff), who said (p. 248):

We are not able to agree with the view advanced by the respondents that these articles sold by them are not within the contemplation of s. 86. The words "produced" and "manufactured" are not words of any very precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe. S. 19BBB (1) gives us some assistance. Goods which are to be used in, or wrought into, or attached to, articles to be manufactured or produced for sale may still be "goods produced or manufactured" in Canada within the meaning of the section. And the matter is further elucidated by reference to ss. 4, which enumerates many exceptions.

In the case of *Versailles Sweets, Limited* and *The Attorney-General of Canada* (2), the head-note reads as follows:

By the Special War Revenue Act of 1915 as amended in 1921 and 1922, a tax is imposed on sales by manufacturers to consumers, the purchaser in each case to be given an invoice.

Held, that notwithstanding the difficulty of furnishing invoices of sales for very small amounts, and that in such cases the exact amount of the tax cannot be collected from the purchaser, the manufacturer of candy for sale over the counter at 30 cents and 40 cents per pound is liable for the amount of the prescribed tax on each such sale.

The appellant, Versailles Sweets, Limited, carried on a business which included a restaurant, an ice cream parlour and a candy shop; in the latter were sold, at retail, sweets purchased from manufacturers and others made in the appellant's own kitchen. The question which arose was whether the appellant was subject to sales tax under section 19BBB of the Special War Revenue Act of 1915. After quoting the relevant provision of section 19BBB, Duff, J. (now Sir Lyman Duff), (p. 467) states:

It is argued that "manufacturers" in this context does not include manufacturers who sell exclusively to consumers, within which description

(1) (1934) S.C.R., 244. (2) (1924) S.C.R., 466.

the appellant company admittedly would be included. It is pointed out that retailers—persons who sell by retail to consumers, who are neither wholesalers (that is to say, who do not sell to retailers) nor manufacturers —do not fall within the incidence of the section. Sales by them are not within the scheme of taxation established. It is argued that such a scheme naturally excludes all sales by persons, whether manufacturers or not, who sell exclusively to consumers; and in support of the contention that the scheme of the Act excludes them, the appellant calls attention to the circumstance that, in case of sales coming within the ambit of the section, the seller is obliged to furnish the purchaser with what is called an "invoice"; and moreover, that, having regard to the scale of the tax, it would be impossible, in the case of sales of sweets in small quantities to consumers, to collect the exact amount payable; and consequently that, in order to carry out the provisions of the Act, the seller in each case, if the Act applied to such sales, would be obliged to collect a sum greater than the tax.

Without denying the force of much of this argument, it does not, in my judgment, carry one to the point at which one is entitled to ascribe to the word "manufacturer" a less limited meaning than that which it naturally and ordinarily bears. The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington* v. *Attorney General* (L.R. 4 H.L. 100, at page 122):—

> I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

Lord Cairns, of course, does not mean to say that in ascertaining "the letter of the law," you can ignore the context in which the words to be construed stand. What is meant is, that you are to give effect to the meaning of the language; you are not to assume:

> any governing purpose in the Act except to take such tax as the statute imposes

as Lord Halsbury said in *Tennant* v. *Smith* (1892, A.C. 154).

Among other Canadian cases in which the meaning of the words "manufacturer" and "producer" has been considered are the following: *The Minister of Customs and Excise* v. *The Dominion Press Ltd.* (1); *His Majesty the King* v. *Fraser Companies Limited* (2); *His Majesty the King* v. *Karson* (3); *His Majesty the King* v. *Pedrick et al.* (4); *In re McGaghran* (5); *Rex.* v. *Woodhouse* (6); *His Majesty*

(1) (1927) S.C.R. 583; (1928) A.C. 340.
(2) (1931) S.C.R. 490.
(3) (1922) 21 Ex. C.R. 257.
(4) (1921) 21 Ex. C.R. 14.
(5) (1931) 40 O.W.N. 122.
(6) (1926) 31 O.W.N. 263.

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the King v. *Irwin Printing Co. Ltd.* (1); *Bank of Nova Scotia* v. *His Majesty the King* (2).

The definition of the words "manufacturer" and "manufacture" has been given some consideration in the courts of the United States; reference may be had with some benefit, to, among others, the following cases: *In re I. Rheinstrom & Sons Co.* (3); *State* v. *American Sugar Refining Company* (4); *State* v. *Hennessy* Co. (5). The three cases are interesting, but, seeing that these notes are already extensive, I will content myself with citing a passage from the judgment in *State* v. *American Sugar Refining Company (supra)* at p. 973:—

> So with sugar refining. It is as impossible to produce the refined product from the raw sugar, without the latter being liquefied, purified in the liquid state, and recrystallized into the final product, as it is to make steel from crude pig iron without liquefying the iron and subjecting it in that state to the processes necessary to produce the steel. And the sugar refiner who produces the refined product from the liquefied raw sugar, whether that raw material had ever before been crystallized or not, is as logically and as certainly a manufacturer as the producer of steel from the crude molten iron, whether that iron had ever before been crystallized into pigs or not. If one should import for remanufacture india-rubber shoes of crude manufacture, as was done by the importer in *Lawrence* v. *Allen*, 7 How. 785, 12 L. Ed. 914, and should melt them down and manufacture out of this material other and different india-rubber shoes, the latter would without question be manufactured articles, notwithstanding the material from which they were made had been at some prior time otherwise manufactured. So where a sugar refiner takes the raw product, of crude manufacture, melts it down, and makes out of it a new product, this new product is as much a manufactured article, made by the refiner's process, as was the original crude article. The raw material in such case completely loses its identity in the process of remanufacture, and an absolutely new and different article is formed.

Then follows a series of definitions of the word "manufacture" gathered from various decisions, all of which offer some interest and are to a large extent illustrative.

See also *Chattanooga Plow Company* v. *Hays* (6); *State* v. *J. J. Newman Lumber Company* (7).

Another case to which I wish to refer briefly is that of *The Mayor, etc., of Guildford* v. *Brown* (8). At page 258 of the report, Ridley J. says:—

(1) (1926) Ex. C.R. 104.
(2) (1930) S.C.R. 174.
(3) (1913) 207 Fed. Rep. 119; (1915) 221 Fed. Rep. 829 at 833.
(4) (1902) 32 Southern Rep. 965 at 973.
(5) (1924) 230 Pacific Rep. 64.
(6) (1911) 140 Southwestern Rep. 1068.
(7) (1912) 59 Southern Rep. 923
(8) (1915) 1 K.B. 256.

In *Gamble* v. *Jordan* (1913), 3 K.B. 149, it appeared that the flock was taken out of a cover and was to be put back in the same cover, and the Court held that it was impossible to say that, if you take out the contents of a mattress and put them back again, that amounts to the manufacture of a mattress. I think, however, that it is manufacturing a mattress if you take flock out of an old and put it into a new cover. The facts in *Gamble* v. *Jordan* (1913), 3 K.B. 149, are clearly distinguishable from those in the present case.

In the same case, Avory J., referring to *Gamble* v. *Jordan*, states:—

Phillimore J. at the end of his judgment said this: "The appellant was not making, and did not have flock in his possession for the purpose of making, bedding. I desire to confine myself to the case where a man takes flock out of a mattress and then simply replaces it without any addition whatever. If he were to add anything it would be quite another matter." Bankes J. said that the word "manufactured" meant bringing something into being and that the appellant in that case was not bringing a mattress into being by simply shaking up the contents and putting them back again. In my judgment in the same case I said this: "In one sense a new mattress may be made out of a secondhand one; new covering may be put upon old stuffing, or an old cover may be stuffed with new flock. Those are not the operations in question. In my opinion the answer to the question asked by the magistrate is that re-making or re-stuffing as described in this special case is not making any article of upholstery, cushions, or bedding within the meaning of the Act." Therefore I clearly indicated that if a man made a new mattress by putting old stuffing into a new cover that would be within the Act.

A case which is very similar to, not to say almost identical with, the present one was relied upon by counsel for defendant, namely *Skinner* v. *United States* (1). This was an action by which Skinner was seeking the refund of a manufacturer's excise tax paid on retreaded tires. The tax in question had been imposed and paid under section 602 of the Revenue Act, 1932, which is worded as follows:—

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

(2) Inner tubes (for tires) wholly or in part of rubber, 4 cents a pound on total weight, to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

The District Court, Southern District of Ohio, Western Division, before whom the case was heard, held (*inter alia*) that a person retreading tires by the addition of rubber to old carcasses was not a manufacturer or producer within the meaning of the statute imposing a tax upon articles

(1) (1934) 8 Fed. Supp., 999.

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sold by a manufacturer, producer or importer, but was a repair-man. I think I had better quote from the decision of Nevin, D.J., the following passage (p. 1003):

> The court is of the opinion that section 602 of the Revenue Act of 1932 was meant to apply only to newly manufactured tires and that it does not include retreaded tires, such as are involved in the instant case, and that, in holding that it does include such retreaded tires, the Commissioner of Internal Revenue has exceeded the authority granted him under the act, and that such an interpretation is not a proper interpretation of the act. The fact that retreaded tires were known in the automobile industry for a great many years preceding the Revenue Act of 1932 (a fact which is sworn to positively in this case and not in any way controverted or contradicted by the defendant) would certainly tend strongly to indicate that, if Congress had intended to include retreaded tires within the provision of this section, it would have plainly so stated. It appears that, in order to retread the tires, plaintiff has to add rubber to the old carcasses and thereby increase their weight, as hereinbefore indicated. With this weight added, a tax on the basis of the total weight (Regulation 46, Revenue Act 1932, c. II, art. 20) of the retreaded tire, places a larger tax burden on the plaintiff than on the manufacturer of the new tire, and yet the record shows without contradiction that the retreaded tire is in effect a secondhand tire or, as stated, "a makeshift" and must of necessity be sold for very much less on the market than a new tire would bring. The court is of the opinion that plaintiff is not a manufacturer or producer within the meaning of the statutes and regulations. He is, as stated by the witness Roper in the record (page 9), "a repairman," and should be classified, and by the court is classified, as such.
>
> All of the facts in this case, in the opinion of the court, tend strongly to show beyond any question that the language of section 602 with reference to tax on tires has reference wholly and solely to new tires and not such as are under consideration in the instant case.

After giving the matter careful thought and consideration, I must say with all due respect that I feel unable to agree with this decision of the District Court of the Southern District of the State of Ohio. I have reached the conclusion that the defendant, Biltrite Tire Company, is a manufacturer within the scope of the Special War Revenue Act and that it is liable to pay the sales and excise taxes and the licence fees above mentioned. The defendant has a factory, it makes tires and it sells them; this is all that is needed to bring the defendant within the ambit of the Act.

The essential elements of manufacture exist. I do not think that it is necessary that a manufactured article be made wholly or even in part of new material. Neither is it necessary, in my opinion, that it be made entirely of raw material.

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The fact that the name of the manufacturer of the original tire is not destroyed seems to me totally immaterial.

There will be judgment in favour of plaintiff against defendant for $4,620.29 and penalties as provided by section 106 of the Act.

The plaintiff will also be entitled to his costs against the defendant.

Judgment accordingly.