

"Any person who shall knowingly deposit or cause to be deposited for mailing or delivery anything declared to be unmailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mail, for the purpose of circulating" [in the case of the books, pamphlets, etc.] "or disposing," [in the case of the other things,] "or of aiding in the circulation or disposition of the same."

It will be seen that the matter declared unmailable is matter intended for or within reach of the public or a part of the public, the character of which can be ascertained by inspection. It must be a publication or an article or thing intended for the prevention of conception, or to produce abortion; or an article or thing intended or adapted for an indecent or immoral use; or a written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information where, how, of whom, by what means, any of these articles may be obtained or made; or a letter on the envelope of which, or postal-card upon which, the objectionable terms, language or delineations may appear. So, also, it is forbidden to carry such matter in the mail, or to deliver it. How can this prohibition be obeyed unless the matter is such as can be inspected, and, upon inspection, can be seen to be unmailable? So, also, the offense is mailing or receiving from the mail for the purpose of circulating or disposing of such unmailable matter. Apply the above. A sealed letter is not a publication. *Barrow v. Lewellin*, Hob. 62; *Fonville v. McNease*, Dud. (S. C.) 303; *Odger, Sland. & Lib.* 150; *Townsh. Sland. & Lib.* §§ 101, 108. Its character cannot be discovered on inspection, except by breaking the seal, which a post-master cannot do. It is not intended for the public. It does not, in itself, show a purpose of circulation. Its seal shows that it is intended to be private, and to be confined to the person to whom it is addressed. In my opinion the evidence does not bring this case within the section of the revised statutes. The jury will find defendant not guilty.

UNITED STATES *v.* COOK *et al.*¹

(*District Court, S. D. California.* October 15, 1888.)

PUBLIC LANDS—OFFENSES—FENCING—INDICTMENT.

An indictment for fencing public lands in violation of 23 St. U. S. p. 322, § 3, need not allege that defendant had not gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith, that being a matter of defense.

Indictment for Fencing Public Lands.

The District Attorney, for the United States.

Stephen M. White, for defendants.

Ross, J. In his brief filed in this case the district attorney concedes that, if it is necessary that the indictment should negative the proviso

¹ *Contra*, see *U. S. v. Felderwald*, 36 Fed. Rep. 490.

contained in the section of the statute upon which it is founded, the demurrer of the defendants should be sustained, inasmuch as the averments in that behalf are insufficient; but he insists that such negation is not necessary, and that therefore the averments respecting that matter should be disregarded as surplusage, and the demurrer be accordingly overruled. The indictment is based upon section 3 of the act entitled "An act to prevent unlawful occupancy of the public lands," (23 St. U. S. 322,) and reads as follows:

"That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine or confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: provided, this section shall not be held to affect the right or title of persons who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith."

The real question is whether the proviso is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts which constitute it. If it is, it is necessary that the indictment should negative the proviso; otherwise the latter is matter of defense to be shown by the defendant. *U. S. v. Cook*, 17 Wall. 168. Looking at the statute it is seen that the section to which the proviso is appended defines the acts which constitute the offense, and defines them completely, without any reference to the proviso, or to any matter contained in it. There is nothing in the proviso that enters into the offense condemned, but its sole office is to exempt from the operation of the section those persons who have gone upon, improved, or occupied such public lands under the land laws of the United States, claiming title thereto, in good faith. That that is a matter to be shown in defense seems to me to be clear. If the defendant comes within the exemption it is an easy matter for him to show it; whereas if the prosecution should be required to allege, and consequently to prove, that defendant did not go upon, improve, or occupy the land under the land laws, claiming title thereto, in good faith, it would be casting upon the government the burden of proving a difficult negative, and I think the statute was wisely so framed as to leave it to the defendant, if he falls within the exemption, to show the fact. As the averments in respect to the matter referred to were unnecessary, they may be disregarded as surplusage. It is not claimed that the indictment contains any other defects. Demurrer overruled.

HATCH *et al.* v. YOUNG.

(Circuit Court, D. Massachusetts. December 4, 1888.)

PATENTS FOR INVENTIONS — INFRINGEMENT — MACHINES FOR MAKING HEEL-STIFFENERS.

Letters patent No. 132,849, granted to S. Moore and H. Rogers, November 5, 1872, for improvements in machines for making heel-stiffeners for boots and shoes, the specification for which recites the use of "a stationary heel-shaped former-block; * * * a sliding bender, or follower, that presses the leather-board or blank around this block; and an under-slide, that presses in or crimps the bottom edge of the blank, to form the lip or flange, the follower moving up against the blank, and pressing it upon and around the former-block, and gripping the bent blank thereto, and the under-slide then moving against the bottom edge of the bent blank, * * * and pressing the edge under the bent blank to crimp it," are not infringed by machines made under letters patent No. 350,907, granted to William J. Young, October 12, 1886, in which the lip-turner is bolted to the frame, and in which the weighted arm or spring or crimper-slide of the former device is not found.

In Equity. Bill for infringement of patent.

Bill brought by Jesse W. Hatch and others against William J. Young.

W. A. Macleod, for complainant.

J. E. Maynardier, for defendant.

COLT, J. This suit is brought on letters patent No. 132,849, dated November 5, 1872, granted to S. Moore and H. Rogers, for improvements in machines for making heel-stiffeners for boots and shoes. The specification says:

"Our invention relates to the manufacture of heel-stiffeners from leather-board, and particularly to the method of forming the lip or flange upon each stiffener, and of producing a stiffener having a body contracting from the bottom to the top. In making such stiffeners we use a stationary heel-shaped former-block, (set so as to leave a space beneath it,) a sliding bender, or follower, that presses the leather-board or blank around this block, and an under slide, that presses in or crimps the bottom edge of the blank, to form the lip or flange, the follower moving up against the blank, and pressing it upon and around the former-block, and gripping the bent blank thereto, and the under slide then moving against the bottom edge of the bent blank, (such edge not being griped,) and pressing the edge under the former-block, to crimp it."

The claims in controversy are the first and third:

"(1) The combination of the stationary former-block, *b*, the slide-follower, *e*, and the crimper-slide, *g*, the follower and slide moving in right lines, and operating substantially as described."

"(3) The process herein described, of automatically, and by a continuous movement of the prime motor, shaping and setting to shape heel-stiffeners, by first gripping the body and then crimping the bottom edge, substantially as described."

The defendant's machine is found described in his patent of October 12, 1886, No. 350,907. In this machine the blank is operated upon by two sets of dies. The blank is partially formed in what is called the "preliminary machine," and then completed by the auxiliary machine, or finisher.