Notice of Judgment No. 68. Issued June 2, 1909.

United States Department of Agriculture,

OFFICE OF THE SECRETARY,

BOARD OF FOOD AND DRUG INSPECTION.

NOTICE OF JUDGMENT NO. 68, FOOD AND DRUGS ACT.

MISBRANDING OF WHISKY.

(AS TO PRESENCE OF WHISKY.)

In accordance with the provisions of section 4 of the Food and Drugs Act of June 30, 1906, and of regulation 6 of the rules and regulations for the enforcement of the act, notice is given of the judgment of the court in the case of the United States *v.* 50 barrels of whisky, a proceeding of libel for seizure and condemnation of said goods under section 10 of the aforesaid act, lately pending, and finally determined by entry of a decree of forfeiture and condemnation on December 19, 1908, in the district court of the United States for the district of Maryland, wherein the Louisiana Distillery Company, Ltd., a corporation of New Orleans, La., was claimant. The so-called whisky was misbranded within the meaning of section 8 of the act, in that the barrels containing it were labeled and branded "Bourbon Whiskey," whereas, in fact, it was not Bourbon whisky, but a distilled product of fermented molasses, manufactured and produced in New Orleans, La.

INTERVENTION, CLAIM, EXCEPTION AND ANSWER OF THE LOUISIANA DISTILLERY COMPANY.

To the libel of the United States for seizure and condemnation of the so-called whisky, the Louisiana Distillery Company, the manufacturers and shippers of said whisky, intervened and filed its claim, exceptions, and answer, wherein, as matter of exception, it was alleged that the court was without jurisdiction of the proceeding, because it did not appear from the libel "that notice was given to any person whatsoever of any analysis or examination of the whisky attached under said libel before the libel herein was filed, as required by the act of Congress approved June 30, 1906."

The foregoing exception of the claimant having duly come on for hearing, and having been fully argued, the court overruled the exception and pronounced its ruling thereon as follows:

RULING OF THE COURT ON EXCEPTION TO JURISDICTION.

MORRIS, *District Judge* (orally): In this case, which is a libel for the seizure and forfeiture of 50 barrels of distilled spirits alleged to be misbranded contrary

to the provisions of the act of Congress of June 30, 1906, the libel does not allege that there had been any preliminary examination such as is provided for by section 4 of the act.

The claimant has excepted to the libel upon the ground that the court has no jurisdiction unless such a preliminary examination has preceded the seizure.

It is urged that the harshness of the proceeding in seizing goods alleged to be misbranded without giving the owner the opportunity of being heard as to their true nature is such that the court should if possible construe the law so as to require the examination as a prerequisite to seizure. Such seizures are not unusual, and it is plain that if the harshness were conceded, it would not justify the court in reading into the law a limitation which it does not contain. The act provides two different proceedings to enforce the provisions. One is by a criminal proceeding in personam; the other is by a proceeding in rem, by seizure of the offending thing itself, and forfeiture if found to be in violation of the law. In this latter case there is no provision for a preliminary examination. Section 10 of the act provides that any article of food, drugs, or liquor that is adulterated or misbranded, which is being transported from one State to another, shall be liable to be proceeded against and seized for confiscation by process of libel for condemnation. It is further provided that the proceedings of such libel cases shall conform as near as may be to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case. The libel alleges that fifty barrels of distilled liquor are now at a named place within the district, having been transported from the city of New Orleans, in Louisiana, to Baltimore, Maryland, branded "Bourbon Whiskey," which brand indicates a liquor containing all the congeneric substances obtained by distillation from a fermented mixture of grain, of which Indian corn forms the chief part, and confined to whiskey distilled in the State of Kentucky, and that the fifty barrels of distilled liquor in question, branded Bourbon Whiskey, are not whiskey at all but a distillate of molasses. The libel then prays that the fifty barrels of liquor may be proceeded against and seized for condemnation, in accordance with the act of Congress approved June 30, 1906, and prays the court to order process of attachment in due process of law, and that all persons having or pretending to have any right, title, or claim in said liquor may be cited to appear and answer the premises. This is according to the course of proceeding in libels in admiralty and in similar proceedings in rem for forfeitures for violation of the internal revenue laws. Such seizures are made in cases in which forfeiture of the goods is the penalty, without preliminary examination or proceedings of any kind, in cases of violation of the customs laws and the shipping regulations, as well as violations of the internal revenue laws.

The exception is overruled.

The case having duly come on for further hearing on the facts as alleged in the libel of the United States and the answer of claimant, and a jury having been demanded by the claimant, the issues were submitted to a jury upon testimony, argument of counsel, and the following instructions of the court:

INSTRUCTIONS OF THE COURT TO THE JURY.

The COURT: I will not call upon counsel for the United States to reply. The case as it is presented to the jury is a very clear one. I reject the only prayer offered by the defense. Really, that prayer concedes the misbranding of the liquor, and asks me to say to the jury that if they shall find that this was done

under the control and by the agents of the United States, the United States, which is the plaintiff in this case, is estopped from proceeding to condemn these goods and forfeit the goods for misbranding. That proposition I reject. Every one who deals with agents of the United States deals with them with the knowledge imputed to him of the restriction upon their authority. It seems to me it can not be successfully contended that any agent of the United States has authority to do a thing which is forbidden by law; and it is forbidden by this law passed in 1906, the Pure Food Law, to misbrand any goods which are intended to be or are actually transported from one State to another. Of course the gentlemen of the jury would know, or should know, that the United States has no authority, under the Constitution of the United States, to regulate the sale of goods within the limits of a State. It is only when they are transported from one State to another, and become a part of interstate commerce of the country, that the United States has the authority to pass laws regulating them. So this liquor, without infraction of any law so far as I know, might have been offered for sale and sold in Louisiana, unless there is some law of Louisiana which prohibits the misbranding of or misrepresentation with regard to the constituents of an article that is offered for sale. It is only, therefore, when these goods become a part of the interstate commerce of the country that this Pure Food Law of 1906 applies to them, that "misbranding" shall apply to the placing on the package of any statement which shall be false or misleading in any particular, and provides that any article misbranded, which is transported from one State to another for sale, is liable to confiscation. Therefore I do not think that anything that was done in the distillery in Louisiana, in New Orleans, in any way estops the United States or estops the authorities, or the agents of the United States in Maryland, from proceeding to condemn these goods upon the ground that they were misbranded. It would be destructive of the enforcement of many of the laws of the United States if the act of any agent of the United States could be set up as a defense against the explicit law; the explicit law in this case being that any goods that are misbranded shall be forfeited. If any gauger, at the request of a distiller or under a generally understood practice of the distillery, should misbrand an article of liquor, it would be utterly subversive of the law if that could be said to be a defense to the positive enactment of the act of 1906 that misbranding goods that are to be transported from one State to another shall be prohibited. I, therefore, reject that contention on behalf of the claimant of the goods in this case.

Then the jury come to consider what is the real issue which they are to determine, and that is whether these goods are whiskey as known to the trade and to the community generally, and to those who deal in whiskey. If it is not whiskey, of course the case is made out in favor of the United States. If the jury believes—and there is a great deal of testimony to that effect—that the word "whiskey" is applied only to a distillate made of grain, that is an end of the case, an end of the defence in the case, their verdict must be for the United States, because it is admitted in this case, and it is not a question of dispute, that this liquor is not made from grain, but is a distillate of molasses with a slight infusion of sulphuric acid.

But the jury might possibly find that it could be called whiskey. Then there is a second question, can it be called Bourbon whiskey? There is a great deal of testimony to show that "Bourbon whiskey," in its most general sense, is a whiskey made from grain of which corn is the larger constituent. If you find that this was not such a whiskey, then it is not Bourbon whiskey, and your verdict must be for the United States. Then there is testimony also to the effect that "Bourbon whiskey" as understood in the trade is confined to a whiskey made in Kentucky. If you find that to be the fact—and that is for you to decide

entirely on the testimony—if you find that in the trade and among those who deal and who are familiar with the article "Bourbon whiskey" implies that it is made in Kentucky, then of course that is an end of the case so far as the claimant is concerned, because it is admitted that this liquor was made in New Orleans.

I might say that a good deal has been said about the hardship and injustice of condemning an article which once has been branded by the gauger, but I do not think that that appeals very strongly to any one's sense of morality, because a gauger is not a man who is to decide what is the trade name of an article. He takes that largely from the distiller. He is not a dealer in liquor, nor is he a man of science who is to determine once for all, and incontestably, whether it is what it is branded, or something else.

I will now give you the instructions asked for by counsel for the United States. The first prayer is as follows:

The jury are instructed that if from the evidence they shall find the word "whiskey" as understood by scientific men, the liquor trade, and the public generally is confined to a distillate of grain, and shall further find that the contents of the barrels libeled in this case is a distillate of molasses, and that the said barrels were branded Bourbon whiskey, then the said barrels were misbranded, and their verdict must be for the libelant.

The second prayer has reference to the restricted meaning of "Bourbon whiskey," as applying to whiskey distilled in the State of Kentucky. It is as follows:

The jury are instructed that if they shall find from the evidence in this case that the phrase Bourbon whiskey as defined in the standard works of reference in use in this country, and as understood by scientific men, the liquor trade, and by the public generally, imports a liquor distilled in the State of Kentucky, and shall further find that the contents of the barrels libeled in this case were distilled in New Orleans, in the State of Louisiana, and shall further find that the said barrels were branded Bourbon whiskey, then the barrels were misbranded, and their verdict must be for the libelant.

The third prayer has reference to what you may find from the evidence is the more general acceptation of the words "Bourbon whiskey," and that does not necessarily require that it shall be made in Kentucky. The instruction is as follows:

The jury are instructed that if they shall find from the evidence that the phrase Bourbon whiskey as understood by scientific men, the liquor trade, and the public generally is confined to a distillate of grain made from the mixture of fermented grain, of which mixture corn constituted the greater part, and shall find that the contents of the barrels libeled in this case are a distillate of molasses, and shall further find that the said barrels are branded Bourbon whiskey, then the said barrels are misbranded, and their verdict must be for the libelant.

I do not think that there is anything that I need say to the jury further, except to remind you that there is no dispute at all as to the material out of which this distillate was made. The whole case, in my judgment, and I so instruct you, turns upon whether the general acceptation of the word "whiskey" imports that it is made from grain. Of course this liquor was not so made.

Further, in regard to Bourbon whiskey, if the term "Bourbon whiskey" implies that the article was made of corn in greater part—not made of molasses but made of grain of which corn was the greater part—then of course it was misbranded.

So, further, if you find that "Bourbon whiskey" is confined to whiskey made in Kentucky, and of grain, and that the larger constituent part must be corn, then of course this would not be "Bourbon whiskey," because it was not so made.

As to what the testimony has convinced you are the proper meanings, accepted by the trade and by scientific men, of "whiskey" and "Bourbon whiskey,"

these are facts to be found by you from the testimony, which I leave entirely to you. It is my duty to instruct you upon the law and to leave the facts to be found by you.

The jury having returned a verdict that the said whisky was misbranded, on December 19, 1908, the court rendered its decree thereon in substance and in form as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

UNITED STATES OF AMERICA
vs.
FIFTY BARRELS OF WHISKEY.

The claimant in this cause, having demanded trial by jury of the issues of fact joined hereinbefore, and the said trial by jury having been duly had, and the jury by its verdict having found that the articles libeled in this case were misbranded, in that they were branded "Bourbon Whiskey," and the pleadings and the said verdict of the said jury having been considered and due deliberation having been had,

It is ordered, adjudged, and decreed, this 19th day of December, 1908, that the articles in this case be, and they are hereby, condemned, and the marshal shall completely destroy the same on the eighth day of January, in the year 1909, or so soon thereafter as the said marshal can conveniently complete such destruction, provided, however, that the said article shall be delivered to the claimant thereof, if on or before the fourth day of January, 1909, the claimant shall have paid all the costs of these libel proceedings, and shall have executed to the United States of America a good and sufficient bond in the penal sum of four thousand dollars, with a surety or sureties to be approved by this court, or to the clerk thereof, conditioned that the said articles so libeled shall not be sold or disposed of contrary to the provisions of the Food and Drugs Act of June 30, 1906, or to the laws of any State, territory, district, or insular possession.

THOMAS J. MORRIS, *District Judge.*

The facts in the case were as follows:

Investigation by an inspector of the United States Department of Agriculture of the distillery of the Louisiana Distillery Company at New Orleans, La., disclosed that for several years prior thereto the distillery had produced no spirit made from grain mash, but only a product from molasses and water. Subsequent to this investigation, and during the month of November, 1907, evidence was procured that the Louisiana Distillery Company had shipped 50 barrels of whisky from New Orleans to A. L. Webb & Sons, Baltimore, Md., by whom they were received on the 16th day of that month. Each barrel was branded "Bourbon Whiskey." In addition to the evidence procured by the aforesaid inspector, the dump sheets in the possession of the collector of internal revenue for the New Orleans district disclosed that the so-called whisky was a product of fermented molasses. It was apparent, therefore, that the article was not Bourbon whisky, and that the branding of it as such was false, misleading, and deceptive within the mean-

ing of section 8 of the Food and Drugs Act. Accordingly, on November 25, 1907, the Secretary of Agriculture reported the facts to the United States attorney for the district of Maryland, who forthwith filed a libel for seizure and condemnation of the so-called whisky, with the result hereinbefore stated.

H. W. WILEY,
F. L. DUNLAP,
GEO. P. MCCABE,
Board of Food and Drug Inspection.

Approved:
JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *May 14, 1909.*