

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 301, FOOD AND DRUGS ACT.

ADULTERATION AND MISBRANDING OF VANILLA FLAVOR.

On or about October 26, 1907, the St. Louis Coffee & Spice Mills, St. Louis, Mo., shipped from the State of Missouri to the State of Kansas a consignment of a product labeled "Nectar Choice Flavor of Vanilla Sugar Colored For Flavoring Ice Creams, Cakes and Pastry, etc. St. Louis Coffee and Spice Mills, Manufacturers, St. Louis, Mo." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and as the findings of the analyst and report thereon indicated that the product was adulterated and misbranded within the meaning of the Food and Drugs Act of June 30, 1906, the Secretary of Agriculture afforded the St. Louis Coffee and Spice Mills, and the dealer from whom the samples were purchased, opportunities for hearings. As it appeared after hearings held that the said shipment was made in violation of the act, the Secretary of Agriculture reported the facts to the Attorney General, with a statement of the evidence upon which to base a prosecution. In due course a criminal information was filed in the District Court of the United States for the Eastern District of Missouri, charging the above shipment and alleging that the product was adulterated, in that it consisted of a liquid which did not contain any extract of vanilla, as described by Circular 19, Department of Agriculture, and by usages of trade and commerce, and was sold as and for vanilla flavor or vanilla extract, as these terms are understood in trade and commerce, but was in fact an imitation thereof and a substitute therefor, and was artificially colored to make it resemble vanilla extract of the standard established by the Secretary of Agriculture and the usages of trade and commerce and the science of food chemistry whereby its inferiority was concealed; and was misbranded, in that it was labeled "Nectar Flavor of Vanilla," which statement tended to deceive and mislead the purchaser, inasmuch as

the said liquid contained no extract of vanilla, as defined by Circular 19 of the Department of Agriculture and by the usages of trade and commerce, and was sold as and for vanilla flavor or vanilla extract as these terms are understood in trade and commerce, but was in fact an imitation thereof and a substitute therefor and had been artificially colored to make it resemble vanilla extract of the standard established by the Secretary of Agriculture and the usages of trade and commerce and the science of food chemistry whereby its inferiority was concealed.

On May 20, 1909, the defendant entered a plea of not guilty and demanded a jury trial, and, on May 21, 1909, after testimony had been submitted by both sides, the defendant filed a demurrer to the testimony, which was argued by counsel and submitted to the court. On May 22, 1909, the court rendered its opinion, sustaining the demurrer, in substance and form as follows:

DYER, J.

Since the adjournment of court on yesterday I have considered more fully the demurrer interposed by the defendant's counsel to the case as stated in the two counts of the information and the evidence offered by the Government in support thereof.

This is the first case arising under the Act of June 30, 1906, entitled "*An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes*," that has been presented to this court for determination.

For a violation of this statute penalties are imposed and it is made the duty of the United States attorney, when the Secretary of Agriculture shall report to him any violation of the act to cause appropriate proceedings to be commenced and prosecuted without delay for the enforcement of the penalties, etc.

The Secretary reported this defendant to the District Attorney and as a result the information now under consideration was filed in this court.

The proceeding is for a violation of the statute that imposes penalties, and by its terms declares each violation a misdemeanor. The information therefore should be as certain and definite as if the offense were charged in an indictment.

Judging by the well recognized requirement of pleading in such cases, do the counts or either of them state clearly and with sufficient certainty any offense against the statute under which the proceeding was commenced, and is now prosecuted?

The importance of and the great good to the public that will follow the enforcement of this act, can hardly be measured, and the delay taken by the order of adjournment yesterday was for the purpose of enabling the court to determine (with proper regard to the contention of the District Attorney on the one side and of defendant's attorneys on the other) its decision.

The first count in the information charges in substance "that by circular No. 19 of the United States Department of Agriculture, dated *June 26th, 1906*, the Secretary established certain standards of purity for food products as authorized by an Act of Congress of March 3, 1903. That said order No. 19 provided that "Vanilla extract is a flavoring extract prepared from vanilla beans," etc. The count then states "that in trade and commerce and the science of food chemistry, the words 'vanilla extract' signify an extract prepared from the 'vanilla bean, etc., etc.' and in trade and commerce the words 'vanilla extract' are synonymous with the words 'vanilla flavor' when placed on bottles containing a liquid to be used for flavoring purposes."

The information (after making the foregoing recitals) charges that the defendant on the 26th of October, 1907, unlawfully and knowingly shipped by the Missouri-Pacific

Railroad from St. Louis, Mo., to Kansas City, for sale in interstate commerce, a certain bottle labeled "*Nectar Choice Flavor of Vanilla*, sugar colored, for flavoring ice cream, etc." That the contents of the bottle were adulterated in violation of the Act of June, 1906, in that said bottle contained a liquid which did not contain any extract of vanilla, as defined by the Circular No. 19, and by the usages of trade and commerce, and was in fact an imitation and substitute therefor, etc.

By the word "adulteration" as used in the act, it is understood to mean "to corrupt, * * * impure by an admixture of a foreign or a baser substance." How can it be successfully claimed that the liquid in the bottle offered in evidence did not contain extract of vanilla, that it was therefore adulterated within the meaning of the statute?

The circular No. 19 issued by the Secretary of Agriculture was issued long before the enactment of the statute under which this proceeding is had, and for that reason, if for no other, cannot be considered in determining the question of the guilt or innocence of the defendant in this case.

By Section 2 of the Act of June 30, 1906, it is made an offense to introduce into any State, etc., any food or drugs *adulterated or misbranded*.

The first count charges that the bottle sent from St. Louis to Kansas City contained "adulterated liquid extract or flavor." It also charges that the liquid did not contain any extract from the "vanilla bean," but did have a vanilla *flavor*.

The court is now asked to say that "*Vanilla Extract*" and "*Vanilla Flavor*" as known to the trade, is one and the same thing, and that in dealing with the defendant in this case "extract" and "flavor" are synonymous in meaning, and that therefore if the defendant shipped a liquid which had the flavor of vanilla it was guilty of *adulteration* of the *extract* of vanilla, within the meaning of the statute.

Neither the Secretary of Agriculture nor the public generally can change the meaning of the words "extract" and "flavor." Without reference to the dictionaries and the definition of the words contained therein, it is known that "extract" is one thing and "flavor" another.

The evidence in this case has failed to convince the court that even among dealers the words "extract" and "flavor" are considered synonymous terms.

The information charges that there was an adulteration of the article, but fails to state in what particular and how it was adulterated. It states a conclusion without making the necessary averments from which the conclusion could be fairly reached.

Section 7 of the Act provides that an article shall be deemed to be adulterated when "In case of food:

"First: If it be an imitation of or offered for sale under the distinctive name of another article.

"Second: If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

"Third: If in package form and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

"Fourth: If the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular; provided, That any article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded, etc."

The information fails to charge that the article sold and delivered to the grocer in Kansas was mixed or packed in such a manner as to reduce or lower or injuriously

affect its quality or strength; nor does it charge that any substance was substituted for the article; nor does it charge that any valuable constituent was abstracted; nor does it charge that the article was colored in a manner whereby inferiority was concealed; nor does it charge that the article contained any added poisonous or other deleterious ingredient that would render it injurious to health.

It would seem that one or more of these things should be specifically charged in the information, and that the charge should be made with such particularity as to fairly inform the defendant of the act of violation complained of, and for which it is to answer.

The conclusion reached by the court is that the first count does not sufficiently charge an offense under the statute and that the evidence offered by the Government does not aid the defect.

The second count is similar in all respects to the first, as far as the recitals are concerned.

This count seeks to charge "misbranding" under Section 8 of the Act.

That section is as follows:

"Sec. 8. That the term "misbranded" as used herein shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced."

This count charges that the bottles were "misbranded" in violation of the Act of Congress of June 30, 1906, in this, to-wit:

"That said bottle contained a liquid in which there was no extract of vanilla as defined by the said Circular No. 19 of said Department of Agriculture, and by the usages of trade and commerce, and which was sold as and for vanilla flavor or vanilla extract, as these terms are understood in trade and commerce, but which was in fact an imitation thereof and a substitute therefor, and the contents of which bottle was artificially colored to make it resemble vanilla extract of the standard established by the Secretary of Agriculture, and the usages of trade and commerce, and the science of food chemistry whereby its inferiority was concealed, and was labeled as above set out to deceive and mislead the purchaser."

It will thus be seen that this count does not follow the words of the statute in charging the offense, but repeats the facts contained in the first count.

The charge in this, as in the first count, should be specific enough to fairly inform the defendant of the charge it is to meet. In my opinion, this count is insufficient.

There is nothing left for the court to do under this information but to direct the jury to return a verdict for the defendant, in this case, of not guilty.

NOTE.—See subsequent ruling of the same court in the case of *United States v. Edward Westen Tea and Spice Company*, Notice of Judgment No. 194.

This notice is given pursuant to section 4 of the Food and Drugs Act of June 30, 1906.

Decisions of United States District Courts and United States Circuit Courts of Appeal adverse to the Government will not be accepted as final until acquiescence shall have been published.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *April 26, 1910.*