

La., in various shipments, on or about November 9 and 19, 1923, respectively, and charging adulteration in violation of the food and drugs act. The article was labeled in part: (Can) "Bell-Can Brand Chum Salmon * * * Packed By Bellingham Canning Company So. Bellingham, Wash."

Adulteration of the article was alleged in the libels for the reason that it consisted wholly or in part of a filthy, decomposed and putrid animal substance.

On May 20, 1926, the Bellingham Canning Co., South Bellingham, Wash., having appeared as claimant for the property and having consented to the entry of a decree, judgment of condemnation was entered, and it was ordered by the court that the product be delivered to the Buttnick Mfg. & Investment Co., to whom the claimant had sold its interest, upon the execution of a bond in the sum of \$7,000, conditioned in part that it be sorted under the supervision of this department, and the unadulterated portion released and the remainder destroyed.

W. M. JARDINE, *Secretary of Agriculture.*

14416. Alleged misbranding of Smack. U. S. v. 24 $\frac{7}{8}$ Gallons of Smack. Tried to the court. Judgment for claimant. (F. & D. No. 18820. I. S. No. 17752-v. S. No. C-4430.)

On December 4, 1924, the United States attorney for the Eastern District of Wisconsin, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel and on October 28, 1925, a stipulation amending said libel, praying seizure and condemnation of 24 $\frac{7}{8}$ gallons of Smack, remaining in the original unbroken packages at Milwaukee, Wis., alleging that the article had been shipped by the Smack Co., from Chicago, Ill., June 9, 1924, and transported from the State of Illinois into the State of Wisconsin, and charging misbranding in violation of the food and drugs act. The article was labeled in part: "Smack * * * Flavor Manufactured By The Smack Company—Chicago, Ill."

It was alleged in the libel that the article was misbranded, in that the analysis showed it to be an artificially colored and artificially flavored sirup, in imitation of another article, to wit, a genuine grape product.

On January 21, 1926, the Smack Co., Chicago, Ill., having appeared as claimant for the property, the case came on for trial before the court, and judgment dismissing the libel was entered as will more fully appear from the following opinion (Geiger, D. J.):

"The Government seized an interstate shipment of 'Smack,' a product with respect to which this preliminary statement may be made. It is manufactured synthetic concentrate, which the Government says is, and is intended to be, a base for a beverage imitative of grape juice. Some time prior to the institution of this proceeding, the product had received attention from the Government because it was shipped under labels bearing the name 'Grape Smack' associated on the label with a picture of a cluster of grapes. At that time the product was similarly advertised in trade journals. After the condemnation of that label by the enforcement officials in a proceeding in court, the manufacturer, the claimant here or its predecessor, ceased that practice, and the article is now advertised, labeled and shipped as 'Smack.'

"Upon the present hearing the Government offered proof of the foregoing—which offer was received subject to later consideration of competency or the like—and also introduced proof tending to show the following:

"That an analysis of the product in question discloses the presence of certain ingredients or constituents, among them water, sugar, tartaric acid, ash, vanillin, and others said to contribute severally to physical properties, flavor, color or the like. The Government witness, upon his direct examination, also testified to the presence of approximately 5 per cent of grape juice; but, I believe, upon his cross-examination failed to sustain that position when he admitted that his conclusion was based wholly upon finding in the product certain ingredients also present in natural grape juice, such as tartaric acid and ash. This infirmity of his testimony seemed to me to be conclusive against the Government when claimant denied the introduction of natural grape juice, but asserted that the ingredients testified to by the Government witness arose not upon the introduction of natural grape juice, but through synthetic introduction as a part of the formula for the entire synthetic product. The Government witness likewise testified that the beverage prepared from this base resembled grape juice in its fluid consistency, color, and taste—indicating the particular synthetic elements capable of producing color and taste, respectively.

"It was, and it must be conceded that the term 'Smack' is arbitrary and not at all representative of any known product, its consistency, ingredients, its food or other qualities, place of manufacture, or the like. It is distinctive within all the positive and negative tests recognized in the administration of the food law, and in its consideration by the courts. U. S. v. Coca Cola Co., 241 U. S., 265, p. 286.

"The name, so the lexicons tell us, has as its synonyms taste, savor, flavor, tang, tincture; also touch, tinge, dash, spice, infusion, sprinkling, little, small quantity.

"Therefore, the name at most would indicate that the product contained a 'smack' of something. This thought, however, need not be pursued because the Government does not contend that the name or the label, as now constituted, is misrepresentative in having a tendency to deceive or to inculcate the belief that any particular known article of food is comprehended. Nor in the proofs adduced is there any basis to find that the product, since the condemnation of the former label, has been sold or offered for sale as 'any other food product, mixture, or compound.' In other words, the case is not within the doctrine of *Weeks vs. U. S.*, 245 U. S. 618. Therefore, the Government's case, in its most favorable light, is reduced to this: May an article put out, offered, or shipped, under a name arbitrary, not in the slightest degree representative or misrepresentative, be excluded from interstate commerce because in its color, aroma, taste, and fluid consistency, it or the product developed from it, may prove, is, or may be designed to be, imitative of other known products. Clearly, if the Government's position can be maintained, then the name or branding can be eliminated from consideration in every instance where synthetic products having truly arbitrary, nonrepresentative names, may be the subject of shipment. Nonbranding may become misbranding. This strikes me as being true both of food and drugs. The susceptibility of being found to have color, taste, or consistencies like that or those of known food products would not only bar arbitrarily distinctive names as affording protection, but would require, if the articles are to be shipped at all, a statement not only accurately designating the product imitated, but also assurances possibly of the perfection and either the singleness or the scope of imitation. If a synthetic product could disputably be urged to have the flavor, or a smack of more than one known product, fairness to the law should require statement of the justifiably possible range of imitation. The thought was suggested upon the trial of this case when, after hearing the Government's proof, claimant's representative, during recess, purchased several bottles of different kinds of grape juice on sale at drug stores, and in court pointed out a range of colors and other attributes upon comparison with each other and with 'Smack' as developed from claimant's concentrate.

"It is well known, for example, that different varieties of the same fruit have different flavors, consistencies, and other properties or attributes, either in their natural state or upon being subjected to varying processes in preparation for consumption. It is likewise well known that as between different varieties of fruits, flavors, colors and the like seem to appear in common. It is difficult at times to distinguish jellies. Juices expressed from grapes vary as widely and as fundamentally in the attributes of color, taste, and aroma as the grapes themselves; and, as is well known, some of them in their natural state approach very closely to and are quite indistinguishable from the natural juices of other fruits. As above indicated, if a distinctive name given to a wholly synthetic product must still have added to it some statement or legend because of the susceptibility of its being mistaken for some natural product, the query arises respecting the reduction of this legal obligation to concrete terms. Counsel for the Government insisted in argument that claimant here would not be satisfying the law if in addition to the word 'Smack,' it added 'A Wholly Synthetic Beverage,' and it seemed to think that the law would be satisfied if the product were marked 'Imitation.' Manifestly, this could serve no purpose unless a further statement indicating the subject of imitation were added. And if such statement were added, the producer and seller would still be obliged at his peril, against his will, and perhaps, contrary to the fact, to represent what might be said to be the genuineness and the perfection or the scope of his imitation.

"In the Coca Cola case supra, the court clearly points out the considerations involved in determining distinctiveness of name, saying:

"Thus, soda water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either misleading or false, as it is in fact distinctive. But unless the name is truly distinctive, the immunity cannot be enjoyed; but it does not extend to a case where an article is offered for sale "under the distinctive name of another article." Thus, that which is *not* coffee, or is an imitation of coffee, cannot be sold as coffee; and it would not be protected by being called "X's Coffee." Similarly, that which is not lemon extract could not obtain immunity by being sold under the name of "Y's Lemon Extract." The name so used is not "distinctive" as it does not properly distinguish the product; it is an effort to trade *under the name of an article of a different sort*. So, with respect to mixtures or compounds, we think that the term "another article" in the proviso embraces a different compound from the compound in question. The aim of the statute is to prevent deception, and that which appropriately describes a different compound cannot secure protection as a "distinctive name."

"A "distinctive name" may also of course be purely arbitrary or fanciful and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive."

"Therefore the clause of the statute: 'If it be an imitation of or offered for sale under the distinctive name of another article' seems to me to deal first with imitations, that is, things patterned after, or a copy of, or made in simulation of another article and, as such, offered or put out as the genuine; second, articles, whatever they may be, whether imitation or not, which are put out under the distinctive name of another article. The statute condemns the use of means which being used arouse the belief that one thing is really another."

"It is my judgment that the limitations of the statute are such that the case before us is not comprehended; and this view necessarily excludes from the case the testimony dealing with the former practices of the claimant."

"A decree dismissing the libel may be entered."

W. M. JARDINE, *Secretary of Agriculture*.

14417. Misbranding of cottonseed cake. U. S. v. Whitesboro Oil Mill. Plea of guilty. Fine, \$10 and costs. (F. & D. No. 19726. I. S. No. 22700-v.)

On March 12, 1926, the United States attorney for the Eastern District of Texas, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Whitesboro Oil Mill, a corporation, Whitesboro, Tex., alleging shipment by said company, in violation of the food and drugs act, on or about January 5, 1925, from the State of Texas into the State of Kansas of a quantity of cottonseed cake which was misbranded. The article was labeled in part: (Tag) "Choctaw Chief Brand * * * Guaranteed Analysis Protein not less than 43%, * * * Crude Fiber not more than 12% * * * Manufactured By Choctaw Cotton Oil Company * * * Ada, Oklahoma."

Analysis by the Bureau of Chemistry of this department of a sample from the shipment showed that it contained 39.68 per cent protein and 12.67 per cent crude fiber.

Misbranding of the article was alleged in the information for the reason that the statements, to wit, "Guaranteed Analysis Protein not less than 43% * * * Crude Fiber not more than 12%," borne on the labels were false and misleading, in that the said statements represented that the article contained not less than 43 per cent of protein and not more than 12 per cent of crude fiber, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it contained not less than 43 per cent of protein and not more than 12 per cent of crude fiber, whereas the said article contained less protein and more fiber than represented, to wit, approximately 39.68 per cent of protein and approximately 12.67 per cent of crude fiber.

On May 19, 1926, a plea of guilty to the information was entered on behalf of the defendant company, and the court imposed a fine of \$10 and costs.

W. M. JARDINE, *Secretary of Agriculture*.