The Pharmacist and the Law

SCOPE AND APPLICATION OF THE FEDERAL FOOD AND DRUGS ACT.

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On April 7, 1913, the United States Supreme Court rendered a unanimous decision interpreting the Federal Food and Drugs Act of June 30, 1906, the practical significance of which can hardly be overestimated. Every manufacturer of and dealer in foods and drugs should carefully read this decision and note its operation on the conduct of his business.

The following brief analysis and explanation may serve to indicate the salient points of this decision of our highest court and its practical application.

The situation presented is as follows:

A wholesale grocer in Chicago, Illinois, shipped to a retail merchant in Oregon, Dane County, Wisconsin, a number of tin cans of "Karo Corn Syrup," enclosed in the usual wooden box or packing case. When the retailer received the goods at his store he took the cans from the box, placed them on the shelves for sale at retail and destroyed the wooden shipping box, as was customary. These cans were labeled to conform to the regulation made by the three Secretaries under the Federal Food and Drugs Act. The Wisconsin or state law, however, prescribed a different method of labeling for such a product, and permitted its sale or exposure or offering for sale only when so labeled, and the State labeling requirement conflicted with the Federal labeling requirement.

The question presented is: Must the labels on these cans, conforming to the Federal but not to the State law, be removed and the cans relabeled to conform to the State law before the retailer, *who was also the importer,* may lawfully sell or offer or expose for sale these cans at retail in Wisconsin?

The Supreme Court decides that the sale, and offering or exposing for sale of these cans by the importer, the retailer, is a part of interstate commerce within the purview of the Federal Food and Drugs Act. That inasmuch as the cans were labeled to conform to the Federal Food and Drugs Act, the Wisconsin law prohibiting the sale or offering or exposing for sale of these articles unless labeled in accordance with the Wisconsin Statute is an act in excess of its legitimate power and invalid.

To use the words of the Court:

"To permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal Statute which have accrued both to the Government *and the Shipper,* and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject."

The court only condemns state laws which conflict with the Federal law which "impose burdens upon or discriminate against interstate commerce" and interfere with or frustrate the operation of the acts of Congress. The power of the State to make regulations concerning the same subject-matter, reasonable in their terms and not in conflict with the acts of Congress, is recognized and reaffirmed.

The points established by the decision are as follows:

1. Articles remaining in the possession of the importer, received by him in interstate commerce, are within interstate commerce until sold by him and are, until such sale, subject to the Federal act. It makes no difference whether the retail containers have been taken out of the packing box by the importer or not. It is sufficient if the articles remain *unsold* in the hands of the importer. The importer may offer or expose for sale and sell the articles and the State law cannot interfere, if the articles conform to the Federal law. The article would only be divested of its interstate character *after the first sale by the importer within the State into which it was imported.* Therefore, as in the case decided, a shipment (conforming to the Federal law) in interstate commerce to the retailer who resells or offers for sale to the consumer is protected by and subject to the Federal act and the State law cannot interfere with such sale or offering for sale by the retailer.

2. The immediate container of the article intended for consumption by the public is the container which must bear the required label-

ing statements. The brands regulated are on the packages intended to reach the purchaser or consumer. As the court well remarks—"This is the only practical or sensible construction of the act." The label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress. To limit these requirements to the outside packing box "would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed."

The court dismisses the contention that inasmuch as the cans had been removed from the boxes in which they had been shipped in interstate commerce, they had, therefore, under the "original package" doctrine, passed from the jurisdiction of Congress, by pointing out that Congress has expressly determined the operation of the Federal act in the act itself.

3. The Court finally determines that the purpose of the Federal law is to protect the consumer. "The object of the statute is to prevent the misuse of the facilities of interstate commerce *in conveying to and placing before the consumer* misbranded and adulterated articles of medicine or food." The making certain of the purpose of the Federal law is extremely timely and significant in view of the fact that one of the arguments insistently advanced against uniformity of the National and State laws is that the purposes of the National and State laws, respectively, are separate and distinct. *The purpose, in each instance, is the same,—to protect the consumer.*

WHAT THIS DECISION MEANS TO THE MANUFACTURER.

1. *If the manufacturer ships his products in interstate commerce to a retailer in another state,* and the retailer resells to the consumer, the products being labeled to conform to the Federal law, the whole transaction would be in interstate commerce, subject to and protected by the Federal law, and the State labeling law could not interfere.

2. *If the manufacturer ships his products in interstate commerce to a jobber in another state and the jobber resells to a local retailer* the situation would be different. The sale by the retailer, in this instance, would be subject to the State law. The first sale by the importer, the jobber, would be subject to the Federal law, but the resale by the retailer would be subject to the State law.

3. *If the manufacturer ships his products in interstate commerce to a jobber in another State and the jobber reships the whole or part of these products in interstate commerce to a retailer in another State,* and the retailer resells to the consumer the situation will be the same as in No. 1, above. The shipment by the manufacturer to the jobber is an act of interstate commerce and subject to the Federal law, as is also the first sale by the jobber, the importer, to the retailer, and the reshipment by the jobber to the retailer in another state is itself an act of interstate commerce, and subject to the Federal law, as is also the first sale by the retailer, also the importer, to the consumer.

4. *If the manufacturer sells his products to the wholesaler or retailer* in the State of manfacture, such sale would be subject to the State law.

It will be noted, therefore, that if the State law is not in harmony with the Federal law, but is particularly burdensome, local manufacturers may be placed in a decidedly unfavorable position, in competing with goods shipped into the State protected by the Federal law.

It will be noted, also, that shipments in interstate commerce direct to the retailer for sale in States where the local law is not in harmony with the Federal law are likely to be greatly increased.

It should be borne in mind that the question of *adulteration* is not considered in this decision. There can be no doubt that a question of adulteration would be determined as the court determines the question of labeling.

CONCLUSION.

The need for uniform laws now exists, as never before, *an imperative need,* to facilitate and equalize the various methods of distribution of foods and drugs. It is no longer a question of striving for a commercial Utopia, in the attainment of which we are pleased to lend our support, as a commendable movement, it is now a question of fact—not of theory—for manufacturers, a question concerning the conduct of their business. Unless the State laws are made uniform with the Federal law, manufacturers will be compelled to readjust the conduct of their business to conform to the present situation.

ABSTRACTS OF LEGAL DECISIONS.

MAILABLE MATTER—MEDICINES CONTAINING MORPHINE AND ALLEGED TO BE A CURE FOR MORPHINISM.—Section 217 of the Criminal Code provides that all poisons and compositions containing poison are non-mailable, but that the Postmaster General may permit mailing under such rules and regulations as he may prescribe "as to preparation and packing" of any article previously declared to be nonmailable which are not outwardly or of their own face dangerous or injurious to life, health, or property. A prosecution was brought under this section for the alleged misuse of the mails in furtherance of a scheme to defraud in mailing matter intended to advertise the sale of a compound containing morphine for the cure of the morphine habit. It was held by the Circuit Court of Appeals that the authority of the Postmaster General to prescribe regulations for the mailing of poison or compositions containing poison not outwardly or of their own face dangerous or injurious to life, health, or property was limited to regulations as to the "preparation and packing" thereof. Post Office Department Order No. 2,923, therefore, which was promulgated February 23 1910, and prohibits the mailing of medicines containing poison except for transmission in the domestic mails from the manufacturer or dealer to licensed physicians, pharmacists, and dentists when enclosed in packages conforming to conditions prescribed, was held to be outside the jurisdiction of the Postmaster General, and invalid, and the indictment could not be sustained.

There was evidence in the case that morphinism might be treated by gradually reducing the quantity taken until no morphine was required, but that a person addicted to the morphine habit would not be expected to cure himself because he had not sufficient will power to gradually reduce the amount taken, and that the substance in the hands of an unrestrained habitué, unassisted by a physician, would not tend to cure and could not possibly cure the habit. It was therefore held error to refuse to charge that the fraud was not in the fact that morphine was employed in the treatment of the habit, but in the fact that the substance was falsely represented to be curative in itself. It was also held to be error to refuse to charge that the fact that the substance was labeled "Poison" in unmistakable characters, and gave public notice of the fact that the substance did contain morphine, was evidence to be considered in behalf of the defendants on the question as to their purpose in selling it to habitual consumers of morphine, that the purchasers were not deceived with reference to the fact that the substance contained morphine, and that the defendants' conviction should not depend on the opinion of medical men that the substance was not curative of the habit, but that if the jury found that whether the substance was remedial in character when exhibited as part of the treatment of morphinism was merely a matter of opinion among medical men the defendants must be acquitted.

Bruce v. United States, C. C. A., 202 *Fed.* 98.

WARRANTY—FERMENTATION OF. FRUIT-JUICE.—Action was brought by the purchaser to recover the purchase price of unfermented grape-juice sold with a warranty that the seller agreed to protect the purchaser against any fermentation. The plaintiff claimed that the defendant knew that it was proposed to use the grape-juice for the purpose of making soda water. This was denied by the defendant. Both parties knew that the juice was unconcentrated. The evidence showed that, when used to flavor bottle soda water, the soda water would sour in a short time, but just how soon did not appear. There was evidence that some mention was made at the time of the sale of using the juice as a flavor for soda water, but it was held that, in the absence of any evidence that the seller knew that the buyer expected to use it in making bottled soda water, or represented that when so used it would never ferment, this was not sufficient to give rise to an implied warranty that when so used it would not ferment. Testimony of witnesses familiar with processes of manufacturing and dealing in bottled unfermented grape-juice, that a warranty that unfermented grape-juice would not ferment while in sealed bottles, nor for a reasonable time after the bottles were opened, was held to be admissible as bearing on the intention of the parties.

Turlock Fruit-Juice Co., v. Pacific & Puget Sound Bottling Co., Washington Supreme Court, 127 *Pac.* 842.

INSECTICIDE ACT—MEANING OF "INERT."—In proceedings for the condemnation of a number of packages of "Roach Food" the question for determination was the meaning of the word "inert" in clause 3, par. 4, p. 8 of the Insecticide Act of 1910. That section provides that an insecticide, other than paris green or lead arsenate, shall be considered misbranded if it consists wholly or in part of "an inert substance or substances which do not prevent, destroy, repel or mitigate insects," unless the names and percentage amounts of such inert ingredients are stated on the label, or the names and percentage amounts of every ingredient having insecticidal properties and the total percentage of all inert ingredients are so stated. It was held that the word "inert," as so used, is not limited in meaning to a substance which serves no useful purpose in the compound, but includes any substance which is not in itself capable of killing or repelling insects, although it may be useful and used for the purpose of attracting them.

United States v. Thirty Dozen Packages of Roach Food, Maryland District Court, 202 *Fed.* 271.

CONDITIONAL SALE OF DRUG STOCK TO BE SOLD AT RETAIL.—A retail stock of drugs contained in a drug store was sold at the price of $2,000, to be paid in monthly installments of not less than $20 each, the stock to be sold by the purchasers at retail. On default of the purchasers to pay one of the installments, action of replevin was brought to regain possession of the stock. It was admitted by the parties that, through their mutual mistake, and the mistake of the scrivener who drafted the contract, a provision that the title should remain in the vendor until full payment of the purchase price, and upon default of the vendees the vendor should be entitled to possession, was omitted from the document. In considering the sufficiency of the complaint the court therefore treated this omitted stipulation as included. The contention in the case was as to the construction of the agreement. The seller contended that the contract made a conditional sale, and the ownership was his till the price was paid. The purchaser contended that the delivery of the goods with the provision that they should be sold by retail was inconsistent with a conditional sale; and that the title passed to the purchasers.

The court sustained the seller's contention. A sale of a stock of goods to be sold at retail authorizes the vendee to sell them in the regular course of trade at retail, and the purchaser will take title thereto. But where title is retained in the vendor, with the privilege to the vendee to sell the goods at retail, the sale of such a stock of goods in bulk is not authorized. It appeared that at least $200 worth of goods originally purchased under the conditional contract were still on hnad. As to that property, the vendor or his assignee was entitled to recover. As to the property after-acquired, the court expressed no opinion.

Andre v. Murray, Indiana Supreme Court, 101 *N. E.* 81.

ORDER FOR SODA FOUNTAIN—NECESSITY FOR ACCEPTANCE.—Action was brought for damages for the alleged breach of a contract for the sale of a soda fountain. The order was given to a traveling salesman of the seller, the order stating that the price was to be $300, payable by a cash payment of $25 and the balance in monthly installments, and that all orders were subject to the approval of the home office. The seller refused to accept it on the ground that the price should have been $350, and made out a new order at that price which the purchaser refused to sign, sending a check for $25, and demanding its return if his wishes were not acceded to. Pending negotiations, the seller cashed the check and subsequently sent the purchaser a draft for $25, which he cashed, writing the seller that he refused to accept it, but would sue for damages for failing to comply with the terms of his order. Upon the trial he claimed that he had credited the amount of the draft on his claim for damages. That was done, however, without the seller's consent. It was held that the clause as to the approval of the order by the home office was a reasonable one, and the order did not become a binding contract until such acceptance. No approval from delay could be inferred, and the plaintiff by his acceptance of the draft for $25 in effect rescinded his order. He was therefore held not entitled to damages.

Crowder v. Tolerton & Warfield Co., Supreme Court of Nebraska, 138 *N. W.* 151.

REGULATION OF SALE OF POISONS—LIMITATION ON POWER OF BOARD OF PHARMACY TO PROHIBIT SALE.—The validity of the conviction of a grocer of a violation of the California "poison act" of 1907, and of a resolution and regulation prescribed by the state board of pharmacy under and by virtue of certain provisions of the poison act by the sale of "ant poison," containing arsenic, was challenged. The poison act empowered the board to restrict or prohibit the retail sale of any poison by rules "not inconsistent with the laws of this state," and the schedule annexed to it contained a list at the head of which stood "arsenic, its compounds and preparations." The California pharmacy act of 1905 empowered the board "to regulate the sale of poisons." In 1909, section 16 of that act was amended, and it was provided that "the following drugs, medicines and chemicals may be sold by grocers and dealers generally without restriction." An enumeration of articles following concluded with "insect powder, fly paper, ant paper," etc., "when prepared and sold only in original and unbroken packages and labeled with the official poison labels." It was held that these acts were in pari materia, and must be harmonized, if possible, and that the board could not prohibit the sale of ant poison except by licensed pharmacists.

Ex parte Potter, California Supreme Court, 130 *Pac.* 721.

ABSTRACT OF U. S. TREASURY DECISIONS.

T. D. 1843. STANDARDS FOR DETERMINING SPECIAL TAX LIABILITY.

The Office of the Commissioner of Internal Revenue has compiled the various rulings defining the standards used in determining special tax liability of manufacturers of and dealers in flavoring extracts, soda-water sirup, etc., containing alcohol, and alcoholic compounds containing medicinal ingredients.

Section 3246, Revised Statutes, exempts apothecaries from the payment of special tax "as to wines or spirituous liquors which they use exclusively in the preparation or making up of medicines." Under this section no special-tax liability is incurred on account of the manufacture or sale of essences, extracts, and soft drink sirups which contain no more alcohol than is necessary to cut the oils or extract the desired active principles and hold them in solution, provided such products are nonpotable in the condition as put out by the manufacturer.

In order for a manufacturer or dealer to be exempt under Section 3246 from special-tax liability for the manufacture or sale of an alcoholic compound containing drugs or medicines. (1) Alcohol: The preparation must contain no more alcohol than is necessary for extraction, solution, or preservation. (2) Medicaments: As the minimum dosage each one ounce liquid of the preparation must contain approximately an average U. S. P. dose for an adult of some drug or drugs of recognized therapeutic value, either singly or in compatible combination. The exemption only applies to such compounds when sold for genuine medicinal purposes, and such compounds, as U. S. P. jamaica ginger, for example, sold as beverages, would involve the seller in special-tax liability as a liquor dealer.

Manufacturers using a formula which calls for drugs sufficient to conform to the standard mentioned are advised by the Office to be very careful to see that the ingredients and processes used are such that the full strength called for by the formula is present in the product.

Apothecaries are permitted by Section 3246 to carry in stock distilled spirits and wines and to use same in the preparation of tinctures and other U. S. P. preparations, and in the compounding of bona fide prescriptions without special-tax liability, provided the spirits or wine is compounded prior to sale with drugs sufficient in character and amount to so change the character of the alcohol as to render it unsuitable for use as a beverage. If not so compounded special-tax liability is incurred, even if compounded on a physician's prescription and for purely medicinal purposes.

In general, the decision concludes, exemption from liability to special tax, on account of filling physicians' prescriptions, is secured to apothecaries by having the prescription itself specify the precise nature and amount of the ingredients to be added to the com-

pound, resulting in its being unfit for beverage purposes.

T. D. 1842. DENATURED ALCOHOL.

The Commissioner of Internal Revenue has granted permission to use specially denatured alcohol formula No. 19 (to 100 gallons of ethyl alcohol add 100 gallons of ethyl ether) in the preparation of a collodion backing for gelatin films.

NOTICES OF JUDGMENTS UNDER THE FOOD AND DRUGS ACT, U. S.

No. 1869. *Misbranding of Succotash.* Burnham & Morrill Co., Portland, Me. Product prepared from soaked lima beans. Inconspicuous announcement. No claimant appeared. Condemned and forfeited. New Jersey.

No. 1870. *Misbranding of Cheese.* Davis Bros. Cheese Co., Plymouth, Wis. Container marked 23, indicating net weight of 23 pounds, actual net weight being 21.96 pounds. Undefended. Fine $25. Wisconsin E. D.

No. 1871. *Misbranding of Raspberry Vinegar.* Crown Cordial & Extract Co. Label indicated two dozen pints. Bottles contained 334 to 380 cubic centimeters. Decree consented to. Product released on payment of costs and filing of bond. Pennsylvania E. D.

No. 1872. *Adulteration of Tomato Catsup.* Huss Edler Preserve Co., Chicago, Ill. Products consisted in whole or in part of tomatoes containing yeasts, spores, bacteria, mold filaments, decayed tissue in excessive amounts, and bacterial debris. Product destroyed. New Jersey.

No. 1873. *Misbranding of Syrup.* Pacific Coast Syrup Co., Seattle, Wash. Label "Full Measure Tea Garden Drips—74% Sugar Cane Syrup—26% Corn Syrup Sugar." Units actually a mixture of sugar cane syrup and glucose, and did not contain 26% of corn syrup, but 30%. Product released on payment of costs and bond. Idaho.

No. 1874. *Misbranding of Cheese.* Ferbend & Co., Chicago, Ill. Deficiencyin weight. Shortage of 60 pounds in 77 boxes, or average deficiency of 3.6 percent. Released on payment of costs and bond. Alabama S. D.

No. 1875. *Misbranding of Cheese.* P. J. Schaefer Co., Marshfield, Wis. Deficiency of 32 pounds, or average of 3.7 percent for 40 boxes. Alabama S. D.

No. 1876. *Adulteration and Misbranding of Orange Flavor.* H. C. Schrank Co., Milwaukee, Wis. Label "Soda Water Flavor Orange True Fruit." Product a dilute orange flavor and not a genuine orange flavor as label indicated. Plea of guilty. Fine $50. Wisconsin E. D.

No. 1877. *Adulteration and Misbranding of so-called Peach Cordial and Cherry Cordial.* John O'Donoghue, Washington, D. C. Product consisted of sugar solutions containing a small amount of alcohol, artificially colored and flavored with artificial peach flavor and artificial cherry flavor. Decree consented to. Released. Columbia.

No. 1878. *Adulteration of Tomato Paste.* Sachem's Head Canning Co., Guilford, Conn. Analysis: Yeasts and spores, 80 per one-sixtieth milligram; bacteria, 800,000,000 per gram; mold filaments in 95 percent of the fields. Plea of guilty. Fine $50. Connecticut.

No. 1879. *Misbranding of Evaporated Milk.* Cache Valley Condensed Milk Co. (Inc.), Logan, Utah. Label "Contents not less than 26 percent T. S., 7.5 percent B. F." Product contained considerably less than these proportions of total solids and butter fat. California S. D.

No. 1880. *Adulteration and Misbranding of so-called Apple Cider.* Arbita Spring Water Co., New Orleans, La. Product a compound of apple product, commercial glucose or impure starch sugar, sodium benzoate, and saccharin. No claimant appeared. Product destroyed. Texas U. D.

No. 1881. *Alleged Adulteration and Misbranding of Alexandria Senna.* J. L. Hopkins & Co., New York, N. Y. Analysis: Ash, 19.20 percent; ash acid insoluble, 9.15 percent. Verdict, not guilty. New York S. D.

No. 1882. *Adulteration and Misbranding of Damiana Elixir.* Mihalovitch Co., Cincinnati, Ohio. Analysis: Alcohol by volume, 29.03 percent; total solids, 10.37 percent;

sugars, 9.45 percent; non-sugar solids, 0.92 percent; very little or no damiana. Undefended. Fine $25 and costs.

No. 1883. *Adulteration of Olives.* Alco G. Psiaki Co., Brooklyn, N. Y. Examination showed: (Lot No. 1). Appearance fair; passable, 26, 32.0 percent; wormy, 6, 7.4 percent; worm-eaten, 26, 32.0 percent; decayed, 23, 28.3 percent; total 81, 99.7 percent. (Lot No. 2). Appearance poor; passable, 13, 15.4 percent; wormy, 3, 3.5 percent; worm-eaten, 36, 42.8 percent; decayed, 32, 38 percent; total 84, 99.7 percent. Plea of guilty. Fine, $20. New York E. D.

No. 1884. *Misbranding and Alleged Adulteration of Vinegar.* Place Bros., Oswego, N. Y. Label "Cider Vinegar." Product a dilute solution of acetic acid or distilled vinegar and a product high in reducing sugars and foreign mineral matter which had been prepared in imitation of cider vinegar. Misbranding found. Release on payment of costs and bond. Massachusetts.

No. 1885. Facts as in No. 1884.

No. 1886. *Misbranding of Cottonseed Meal.* Stockyards Cotton & Linseed Meal Co., Kansas City, Mo. Product invoiced as "C/S Feed Meal," a product which contains not less than 41 percent of protein. Each sack contained but 21.27 percent protein. Allegation admitted. Release on payment of costs and giving bond. Missouri W. D.

IT'S THE HAMMER THAT COUNTS.

What is advertising, anyhow? If you are marketing a new soap, can you place an advertisement in the magazines tomorrow which will sell your soap for the next ten years? Not with a single advertisement. Not if you paid a million for it and William Shakespeare wrote that advertisement. It can't be done. You would sell some soap tomorrow and the next day, and you might be selling a little soap ten years from now, all on the strength of that one advertisement. But your sales would be steadily falling off all the time, instead of steadily increasing, which latter condition is the one you want to bring about.

An office man loses his health through working sixteen hours a day, and worrying the other eight. He is assured that, by going to a gymnasium, he can win back his health. He is all enthusiasm and wants to work sixteen hours a day in the gymnasium, and get back his health right away. But he soon learns that it cannot be done in that way; that he can only work a few minutes each day in the gymnasium, and that to get results he must keep this up with the utmost regularity day after day. He finds that regularity is what counts, and that he must hammer at it, day after day.

So it is with advertising. It's the hammer, hammer, hammer that counts. We believe we are safe in saying that an advertising campaign should be always spread out. If you have ten dollars to spend, the point is that you will get better results by spending a dollar a week for ten weeks than by spending the entire ten dollars for one advertisement. You have to hammer at it. Shakespeare couldn't write an advertisment, a single insertion of which will continue to build business for ten years. On the other hand, a bright office boy can write an advertisement which will build business if you print it once a week for ten years. It's the hammer, hammer, hammer that counts.—*W. S. Adkins in National Druggist.*