## The Pharmacist and the Law

### SCOPE AND APPLICATION OF THE FEDERAL FOOD AND DRUGS ACT.

In the May issue of the JOURNAL (p. 646) there was published a discussion of the recent decision of the United States Supreme Court interpreting the scope and application of the Federal Food and Drugs Act of June 30, 1906, by Charles Wesley Dunn, Esq., of the New York Bar.

Mr. Dunn desires to supplement his former remarks by the following:

I have received so many letters of inquiry relative to the Wisconsin decision that I find the effect thereof is not generally understood.

It must be borne in mind that the Supreme Court expressly reaffirms the doctrine established in the case of Savage v. Jones, 225 U. S. 501. It is necessary to read these two decisions together in order to correctly understand the attitude of the court.

As stated in the analysis sent you the court only condemns such state laws as frustrate or interfere with the operation of the act of Congress. The question naturally arising is—when does a state law frustrate or interfere with the National law? What is the practical application of this general doctrine? *Will any difference between a state and national law constitute such a conflict as will be condemned?*

Let us examine the facts in the two decisions in point.

In the Savage case above referred to the Indiana Feeding Stuffs law was in issue. This law required a statement of the ingredients contained in the feeding stuffs offered for sale and sold in Indiana. In the Federal Food and Drugs Act Congress has not required the statement of the ingredients, except in specific instances where morphine, etc., are present. Congress has therefore limited the scope of its requirements. That which the Indiana law required is not included in the National law. The court asks: "Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis?" The court further remarks: "Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare."

The court holds that the fact that Congress has not required the ingredients to be declared, has seen fit to circumscribe its legislation and to occupy a limited field cannot lead to the conclusion that Congress intended to supersede the exercise of the police powers by the State as to matters not covered by the Federal legislation. Such an intent cannot be implied unless the Act of Congress is in actual conflict with the State law.

The test is—the repugnance or conflict must be direct and positive, so that the two acts, National and State, cannot be reconciled or consistently stand together.

Applying this test to the facts the court finds that the Indiana Statute is valid, that the additional requirements are not in any way in conflict with the Federal act. That the State law can be sustained without impairing in the slightest degree the operation and effect of the Federal law. There is no question of conflicting standards or of opposition of State and Federal authority.

In the Wisconsin Corn Syrup cases, recently decided, the label in issue had been expressly approved as a proper and legal label under the Federal law. The Wisconsin law declared the label so expressly authorized under the Federal law unlawful and prohibited the sale of this product so labeled by expressly providing that this product could only be sold or offered for sale by bearing its exclusive label. The conflict between the National and State regulations is direct and positive and the two could not stand together, for, if the Wisconsin Statute is valid, then the label, legal under the Federal act, is illegal under the Wisconsin act when the product is sold or offered for sale in Wisconsin, though still in interstate commerce when so sold or offered for sale.

Let us take an illustration clearly showing a conflict which is direct and positive.

The Federal act permits the use of ben-

zoate of soda in catsup, or any food, if properly labeled to indicate that fact. Assume that the State law prohibits the sale or offering for sale of food containing benzoate of soda. Catsup containing benzoate of soda is shipped in interstate commerce to a retailer in a state who places the bottles of catsup on his shelves for sale at retail, properly labeled to conform to the Federal law. Can the State law prohibit the sale of this catsup? The answer must be no. The State and National regulations are surely in direct and positive conflict and to sustain the validity of the State law would mean the absolute denying to the retailer the legal right to sell this catsup, although it is still in interstate commerce, subject to and conforming to the act of Congress.

A conflict in standards of purity affords an open and shut example of a direct and positive conflict.

In considering the various differences in the labeling requirements the distinction or conflict is not always so clear.

Let us take for the purpose of illustration the net weight laws applying to drugs. The Federal Act is silent in this respect, making no requirement that the net contents be declared on the label. The New York Law, Chapter 80, Laws of 1912, requires such a statement in the case of all drugs—except as exempted—sold or offered for sale in New York. It cannot be doubted that the State of New York, assuming that there is no conflict with the National law, is entitled, in the exercise of its police power, to require such a statement. Such a situation appears to be on all fours with the situation disclosed in the Savage case, above. It can hardly be maintained that the two acts, National and State, cannot be reconciled and cannot consistently stand together. If the net contents is stated as required by the State law there will be no violation of the Federal law or no overriding of any express provision contained therein.

Turning now to the Gould amendment of the National law, requiring food to be labeled with a statement of the net contents. Congress has expressly provided that no penalty of fine, imprisonment or confiscation shall be enforced for a violation of these provisions as to domestic products prepared prior to 18 months after the passage, to wit, September 3, 1914.

Assume that various packages of Quaker Oats, for example, are shipped in interstate commerce to a retailer in North Dakota. The North Dakota law requires that the net contents be declared in the case of food sold in that State. The packages of Quaker Oats are not labeled to indicate the net contents. Is the State law invalid as a law in conflict with and repugnant to an act of Congress, in the light of the decisions of the court?

The distinction in this instance is not so apparent as in the illustrations given above.

Let us examine the situation. The National law requires the statement of the net contents as also the North Dakota law. So far as the affirmative requirements are concerned the laws are in harmony. While the North Dakota law is now in force and effect, Congress has declared that no penalty of fine, imprisonment or confiscation shall be enforced for any violation of the provisions of the Federal law as to domestic products until September 3, 1914. Is the repugnance or conflict so direct and positive that these two laws, National and State, cannot be reconciled or consistently stand together? Can it be said that Congress has denied to the State the power the State would otherwise have to regulate the sale of foods? Congress has not expressly declared that such goods shall be free from the incidental effect of a similar state law. Did Congress intend by virtue of this exemption to supersede the exercise by the State of its police power.

Congress creates a situation which for practical purposes is on the same footing as if there were no Federal law prior to September 3, 1914. Congress has acted but postpones the enforceable application of its enactment for some eighteen months. *Congress has expressly declared that the law enacted under its Constitutional power shall have no legal force for some eighteen months.* There can be no question that on and after September 3, 1914, the North Dakota law will be valid. Can it be said that during the interim the State law may be declared invalid as a conflicting law? The North Dakota law, if enforced, does not impair the operation of any affirmative provision of the Federal law. Making the same requirement these two laws can consistently stand together. The North Dakota law, therefor, is within its legitimate power and valid.

## ABSTRACTS OF LEGAL DECISIONS.

INFRINGEMENT OF PATENT—JURISDICTION. In a suit for injunction to restrain the infringement of the complainant's patent for an improvement in acetyl-salicylic acid, known in pharmacy as "aspirin," it appeared that the defendant conducted a mail order business. He resided in Windsor, Canada, from which place he solicited orders in the United States, and he there received orders and remittances in payment therefor, but all his goods were kept in a warehouse in Detroit, Michigan. He imported goods in bond to Detroit and paid the duties there. This warehouse was in charge of an employé who received and stored and cared for all goods, and on instructions from defendant filled all orders and made all shipments. It was held that the defendant had "a regular and established place of business" in Detroit, and that his employé in charge there was his "agent engaged in conducting such business" within the meaning of section 48 of the Judicial Code. Where he sold and had shipped from his warehouse articles alleged to infringe a patent, he was subject to suit for infringement in that district under said section by service on his agent. Preliminary injunction was granted.

*Smith v. Farbenfabriken of Elberfeld Co., C. C. A.*, 203 *Fed.* 476.

MISTAKEN SEIZURE—REVIEW AFTER FIVE YEARS DELAY.—In 1899, George Leuders & Co. imported a case of chemical compound under the name "Citroline," which was claimed by the appraisers to have been undervalued. They alleged that the merchandise was in fact "Ionone," a patented product then owned by Haarman & Keiner, which, mainly, if not entirely by reason of the patent, commanded a much higher price than "Citroline." A suit was then pending by Haarman & Keiner against George Leuders & Co. for infringement of the patent in which it was subsequently held that Citroline was not Ionone nor an infringement. Some years before the action was decided the case of Citroline had been seized, forfeited, and sold for undervaluation. It is now held that under these circumstances a delay of five years after the sale is not such laches as to debar the importer from maintaining a libel of review to reclaim the net proceeds of the property, which still remained in the registry of the court, the government having suffered no loss because of the delay.

*United States v. One Case Chemical Compound*, 203 *Fed.* 63.

TRADE-MARKS AND TRADE-NAMES. In a bill for an injunction to restrain the defendant from using the word "Telinko" as the name of a bitter wine, it appeared that J. Hollander gave A. Hollander permission to manufacture and sell wine according to a certain formula under his trade-name and trade-mark of "Telinko," but he did not give him an exclusive right nor part with his original rights. It was held that the registration of the trade-mark by A. Hollander could not deprive J. Hollander of his right to subsequently use the formula and trade-name, though the latter had gone out of business for a time, but without abandoning his rights.

*Friedman v. Hollander Bros. Drug Co., Pennsylvania Supreme Court*, 86 *Atl.* 194.

SALE OF NARCOTICS. Under Georgia Penal Code, 1910, section 459, one who sells morphine to another, not on the order or prescription of a licensed physician, dentist, or veterinary surgeon, is guilty of a misdemeanor, without reference to whether the seller be the proprietor of a drug store or merely the employé of such a proprietor. An instruction to the jury by a trial judge embodying this principle of law is held not to be subject to the criticism that it was argumentative, or contained an expression of an opinion, or was misleading or confusing.

*Oppenheim v. State, Georgia Court of Appeals*, 77 *S. E.* 652.

"FOOD" HELD TO COVER NON-ALCOHOLIC DRINKS. In proceedings under the Missouri Food and Drugs Law (Rev. St., 1909, sections 6592-6605), the defendant was charged with having in his possession, with intent to sell, a bottle filled with soda water, which was adulterated with saccharin, and with having in his possession, with intent to sell, a bottle filled with soda water, which was misbranded by having blown thereon the words "Phos-Ferrone Mfg. Co." The defendant's contention that the statute did not cover non-alcoholic drinks was not sustain-

ed. Section 6593 provides: "The term 'food,' as used in this article, shall include all articles used for food, drink, confectionery, or condiment by man or animal, whether simple, mixed or compound."

*State v. Tief, Missouri Supreme Court,* 154 *S. W.* 1133.

LIABILITY FOR INJURIES FROM BOTTLE EXPLOSION. Action was brought by an employé of a railroad news company against the company and a soft drink manufacturing company for the loss of an eye caused by the explosion of a soft drink bottle. The plaintiff had been supplied by the news company with several bottles of soft drinks, which were kept in an ice box in the smoker of the train on which he ran. After selling some fruit, he went to the ice box to get some of the bottles. Just as he raised the lid one of the bottles exploded, a piece of glass striking him in the eye, destroying the sight. He did not see what kind of a bottle it was that exploded, but it was a soft drink bottle. It was not seriously contended that there was any evidence to show negligence on the part of the news company. The negligence alleged on the part of the manufacturing company was in selling and delivering to the news company soft drinks in bottles too heavily charged or improperly charged or filled.

It was held that, in the absence of any direct testimony, or any fact or circumstance from which it could be reasonably concluded that the manufacturing company knowingly used defective bottles, it could not be held liable on that ground, even though the bottle which injured the plaintiff was defective, which the proof in the case utterly failed to show. The accident might have happened in one of several ways. The day was very hot, and the explosion might have resulted from the hot air coming in contact with the bottle. A piece of ice might have fallen against the bottle and caused it to explode; or the explosion might have occurred because the bottle was too heavily charged, or the bottle itself was defective. The evidence being equally consistent with any of these views, it followed that the plaintiff had failed to make out his case, and the defendants could not be held liable.

*Stone v. Van Noy Railroad News Co., Kentucky Court of Appeals,* 154 *S. W.* 1002.

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## ABSTRACTS OF U. S. TREASURY DECISIONS.

(T. D. 33192—G. A. 7432.) BROMINATED INDIGO PASTE—DUTIABLE AS COAL TAR COLOR. Protest was made against the assessment of duty on merchandise described on the invoice as "indigo in paste," "Ciba Blue G paste" and "Ciba Blue G D paste." The article consists of a combination of bromine and chlorine with synthetic indigo, and is used in dyeing cotton, wool and silk. The Board of General Appraisers hold that it was properly held dutiable as a coal-tar color under paragraph 15, tariff act of 1909, and not as indigo paste, that term being limited commercially to an indigo treated with sulphuric acid.

(T. D. 33377.) ESSENTIAL OILS. Oil of cypress, oil of cloves, oil of cardamom, and oil of pennyroyal, obtained by processes of distillation applied to the leaves or other natural forms of the cypress, clove, cardamom or pennyroyal plants, are held dutiable *eo nomine* as essential oils under paragraph 3, tariff act of 1909, in which a specific description of them appears.

*National Aniline and Chemical Co. v. United States, U. S. Court of Customs Appeals.*

(T. D. 33357, 33359.) ALIZARIN ASSISTANT AND CASTOR AND OTHER OILS. Appeals have been directed by the Treasury Department from the decisions of the Board of General Appraisers of March 26, 1913 (T. D. 33304), involving the classification of so-called alizarin assistant, and of February 28, 1913 (T. D. 33263), involving the classification of clove castor and other oil, the percentage of castor in the combination being 72 percent.