

and cosmetics insofar as they are required to be labeled. See §§ 403, 502, and 602 of the Act.

"It is this inescapable conjunction of food, drugs and cosmetics in the prohibition of § 301 (k) that calls for a consideration of the phrase 'or the doing of any other act,' in the context of the rest of the sentence and with due regard for the important fact that the States are also deeply concerned with the protection of the health and welfare of their citizens on transactions peculiarly within local enforcing powers. So considered, 'the doing of any other act' should be read with the meaning which radiates to that loose phrase from the particularities that precede it, namely 'alteration, mutilation, destruction, obliteration, or removal' of any part of the label. To disregard all these considerations and then find 'a clear meaning' is to reach a sum by omitting figures to be added. There is nothing in the legislative history of the Act, including the excerpt from the Committee Report on which reliance is placed, to give the slightest basis for inferring that Congress contemplated what the Court now finds in the statute. The statute in its entirety was of course intended to protect the ultimate consumer. This is no more true in regard to the requirements pertaining to drugs than of those pertaining to food. As to the reach of the statute—the means by which its ultimate purpose is to be achieved—the legislative history sheds precisely the same light on the provisions pertaining to food as on the provisions pertaining to drugs. If differentiations are to be made in the enforcement of the Act and in the meaning which the ordinary person is to derive from the Act, such differentiations are interpolations of construction. They are not expressions by Congress.

"In the light of this approach to the problem of construction presented by this Act, I would affirm the judgment below.

"MR. JUSTICE REED and MR. JUSTICE JACKSON join in this dissent."

2255. Misbranding of Manning's Whoa Liniment, Bi-Lax Capsules, Manning's Fumigating Powder, Manix, Formula for Catarrh of the Bladder, Formula for Relief of High Blood Pressure, Formula for Relief of Coughs, and Formula for Asthma. U. S. v. Donald R. Manning (Manning Herb House). Plea of guilty. Sentence of 30 days in jail on count 1 and 3 years' probation on counts 2 to 8, incl.; probation revoked, and defendant fined \$750. (F. D. C. No. 14280. Sample Nos. 41257-F, 46492-F, 46493-F, 52069-F, 52071-F, 52074-F, 52076-F, 52077-F.)

INFORMATION FILED: April 3, 1945, Northern District of Alabama, against Donald R. Manning, trading as the Manning Herb House, Bessemer, Ala.

ALLEGED SHIPMENT: On or about August 31 and October 19, 1943, and February 21, 1944, from the State of Alabama into the States of Illinois, Massachusetts, and Mississippi.

PRODUCT: Analyses disclosed that *Manning's Whoa Liniment* consisted essentially of a petroleum distillate containing small portions of mustard oil, camphor, clove oil, and capsicum; that the *Formula for Catarrh of the Bladder* consisted of ground buchu leaves and leaves of the *Prunus* species, probably peach; that the *Formula for Relief of High Blood Pressure* consisted of coarsely ground mistletoe herb; that the *Bi-Lax Capsules* consisted essentially of blue mass (mercury derivative) 0.42 grain per capsule, aloe, soap, and capsicum; that *Manning's Fumigating Powder* consisted essentially of plant material, including cubeb and potassium nitrate; that the *Formula for Relief of Coughs* consisted of a mixture of the powdered pod and seed tissues of St. John's Bread, together with the ground leafy twigs of arbor vitae; that the *Manix* consisted of two immiscible layers, the upper layer consisting essentially of fish oil and the lower layer consisting essentially of extracts of plant drugs, glycerin, sugar, and water; and that the *Formula for Asthma* consisted essentially of plant material, either in solution or suspension, and water.

NATURE OF CHARGE: *Manning's Whoa Liniment*. Misbranding, Section 502 (a), certain statements in an accompanying circular entitled "True Testimonial Booklet" were false and misleading. These statements represented and suggested that the article would be efficacious in the cure, mitigation, treatment, and prevention of the following conditions: Inability to stand for more than 15 minutes, condition requiring the patient to lie flat on the back and to have his meals in bed, rheumatism, stiffness in both legs, difficulty in walking, aching from the ovaries to the toes, inability to stoop, pain in the side, headache, stiffness and soreness in the joints, aching joints, toothache, and bad corns. The statements represented and suggested also that the article would be

efficacious to enable a person with aching neck, head, and legs, to walk and work in comfort. The article would not be efficacious for such purposes.

Bi-Lax Capsules. Misbranding, Section 502 (a), the label statement "One capsule daily as a palliative relief for disorder of stomach and bowels" was false and misleading, since the article would not be efficacious as a relief for disorder of the stomach and bowels. Section 502 (e) (2), the article was not designated solely by a name recognized in an official compendium, and it was fabricated from two or more ingredients, one of which was blue mass, a preparation of mercury; and the label of the article failed to bear a statement of the quantity or proportion of mercury contained in the article and a statement that blue mass is a preparation of mercury. Further misbranding, Section 502 (f) (2), the labeling of the article failed to bear adequate warnings against use in those pathological conditions where its use may be dangerous to health, since the article was a laxative and its labeling failed to warn against its use in the presence of abdominal pain, severe vomiting, or other symptoms of appendicitis; and its labeling failed also to bear adequate warning against unsafe dosage or methods or duration of administration, since it contained blue mass, a preparation of mercury, and prolonged or frequent use of amounts in excess of the prescribed directions, may cause serious mercury poisoning; and its label failed to warn of the danger of mercury poisoning resulting from such uses, and, further, the labeling of the article failed to warn that frequent and continued use of a laxative may result in dependence on a laxative to move the bowels.

Manning's Fumigating Powder. Misbranding, Section 502 (a), certain label statements were false and misleading, since they represented and suggested that the article would be efficacious in the cure, mitigation, treatment, and prevention of hay fever, catarrh, and the similar conditions indicated and suggested by the abbreviation "etc." The article would not be efficacious for such purposes. Further misbranding, Section 502 (b) (2), the label of the article bore no statement of the quantity of the contents.

Formula for Catarrh of the Bladder, Formula for Relief of High Blood Pressure, Formula for Relief of Coughs, and Formula for Asthma. Misbranding, Section 502 (a), the statements in the labeling "Catarrh of the Bladder," "For Relief of High Blood Pressure," "For Relief of Coughs," and "Asthma," were false and misleading, since the products would not be effective for the purposes represented and suggested.

DISPOSITION: October 18, 1945. A plea of guilty having been entered, the court imposed a sentence of 30 days in jail on count 1 relating to *Manning's Whoa Liniment* and placed the defendant on probation for a period of 3 years on the remaining 7 counts.

Subsequent to the sentence, a complaint was filed against the defendant by the probation officer, charging violation of the probation. On November 15, 1946, after a hearing, the court ordered the probation revoked and sentenced the defendant to pay a fine of \$750. Thereupon, the defendant filed an appeal to the Circuit Court of Appeals for the Fifth Circuit, which, on May 28, 1947, handed down the following decision, affirming the action of the District Court in revoking the probation:

McCord, Circuit Judge: "On October 18, 1945, on plea of guilty, Donald R. Manning was convicted on eight counts of an information charging him with unlawfully introducing in interstate commerce a number of packages containing drugs which had been misbranded, all in violation of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 352 (a). Manning was sentenced to thirty days imprisonment under count one, and on the other counts was placed on probation for a period of three years.

"On November 13, 1946, the probation officer filed a complaint charging that Manning had violated the conditions of his probation. The matter came up for hearing on November 15, 1946, and Manning moved for a more definite and formal complaint setting out the charges against him. The motion was denied, but there was filed a statement which recited: 'Violations of Conditions of Probation: 1 Practicing medicine without a license during period from May 1, 1946, to August 31, 1946. 2. On or about May 9, 1946, used the mails to defraud Charles Ebel of Box 117, Cherokee, Ala. 3. On or about August 26, 1946, used the mails to defraud M. T. Hanson, Repton, Ala. 4. On or about August 26, 1946, used the mails to defraud Olive Harold of Box 369, Bay Minette, Ala.' The hearing was continued until November 22, 1946, and was then conducted before

the district judge that had originally placed Manning on probation. Testimony for and against Manning was received, and at the conclusion of the hearing the district judge revoked Manning's probation,⁹ fined him \$750.00, and committed him to the custody of the Attorney General for a period of one year. From the order revoking the probation, Manning has appealed.

"Appellant contends that he was entitled to have in advance a list of adverse witnesses and a more particular specification of the charges against him than was furnished; that there were no conditions of probation pronounced at the time he was placed on probation; and that the evidence at the hearing was not sufficient to justify revocation of probation on either of the theories: (1) that he was using the mails to defraud, (2) that he was practicing medicine without a license, or (3) that he was not leading an honest life as required by the alleged conditions of probation.

"As to appellant's allegations that the complaint against him was not specific enough, it is sufficient to say that a proceeding for revocation of probation is not one of formal procedure 'either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion.' *Burns v. United States*, 287 U. S. 216; *Escoe v. Zerbst*, 295 U. S. 490; *Dillingham v. United States*, 76 F. 2d 35.

"A probationer may not have his probation revoked unless it is made to appear that he has failed to comply with the terms and conditions of his probation. *Mankowski v. United States*, 148 F. 2d 143, 144. Appellant accordingly asserts that no terms or conditions of probation were included in the judgment placing him on probation. This contention is without basis or merit. Since September 21, 1939, there has been in the District Court of the Northern District of Alabama a standing order imposing general conditions of probation.¹⁰ Not only did this order apply to Manning's case, but the conditions in the order were specifically called to his attention in a written statement, of which he received a copy, and for which he gave his receipt in writing.¹¹

"There is no merit in appellant's contention that the evidence was not sufficient to justify revocation of his probation. Action of a trial judge in revoking probation is an exercise of broad discretionary power, and on appeal the question is simply whether there has been an abuse of discretion. *Burns v. United States*, 287 U. S. 216; *Pritchett v. United States*, 67 F. 2d 244. There is abundant evidence in this record from which the trial judge could, and did, conclude that Manning, in the conduct of his herb business, was holding himself out to ignorant people as a doctor; that he was purporting to diagnose ail-

⁹ In revoking the probation, the trial judge stated: "As I see the evidence in this case, I think this man is engaged in a business which constitutes a fraud on the general public. I think he is out there practicing medicine, and I think it should be stopped. And I think he is selling these alleged herb medicines to ignorant people * * * and he is liable to cause them to die from want of proper medical care. * * * It is really based on three things. In the first place, I think he is practicing medicine without a license, and I think he is making a diagnosis of ailments, and, as I said, preparing medicine and representing it will cure. In addition to that, he has signs advertising to Negroes and very ignorant people. I think he is holding himself out to them as a doctor, * * * he is using a stethoscope, and I think under all the facts in this case he is practicing medicine.

As I say, I think it is a fraud on the public which should not be tolerated. They were after him, according to the records that have been furnished me from the Probation Department, about practicing in Georgia without a license. Under his own statement, he was practicing in Georgia without a license, and he has come over here and is making a lot of money out of it. I am revoking his probation, first, on the theory that he is practicing medicine without a license. Second, on the theory he is using the mails to defraud. And, third, on the theory he is not leading an honest life as required by the conditions of probation. In other words, I think he is in a dishonest business and I think it is a fraud on the general public. * * *

¹⁰ This standing order on probation conditions was not included by appellant in his record on appeal, but this court directed that it be sent up. This order provides, among other things, that a probationer must: "6. Conduct himself or herself honorably, work diligently at a lawful occupation and support his or her dependents, if any, to the best of his or her ability. 9. Not violate any law; local, state or national."

¹¹ The written notice of conditions which Manning received advised him of the general conditions of probation: "The general conditions of probation are as follows: (a) Refrain from the violation of any state and federal penal laws. (b) Live a clean, honest, and temperate life. * * *" Manning admitted that he had received the copy of the conditions of probation. The Court: "I want to ask you if you signed those conditions at the time I placed you on probation in this case?" Manning: "Yes, sir, I did."

ments and was prescribing medicines for their cure; that the medicines which he prescribed and sold by mail were not beneficial, but were, in many instances, absolutely worthless and harmful to the patient; and that Manning was not leading an honest life, but was perpetrating a fraud on the public.

"It may be, as appellant contends, that the evidence on the probation revocation hearing would not be sufficient to support a conviction under federal laws for using the mails to defraud or under Alabama law for practicing medicine without a license. But proof sufficient to support a criminal conviction is not required to support a judge's discretionary order revoking probation. A judge in such proceeding need not have evidence that would establish beyond a reasonable doubt guilt of criminal offenses. All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation. *Campbell v. Aderhold*, 36 F. 2d 366; *United States v. Hanson*, 49 F. Supp. 355.

"Manning was given a full, fair, and comprehensive hearing before the trial judge. The record, instead of showing abuse of discretion on the part of the trial judge, discloses a sound exercise of judicial discretion and fully supports the order revoking appellant's probation.

"The judgment is affirmed."

2256. Misbranding of phenobarbital tablets, thyroid tablets, sulfathiazole tablets, sulfanilamide tablets, and sulfanilamide and sodium bicarbonate tablets. U. S. v. Mills Sales Company of New York, Inc., and David Jacoby. Pleas of guilty. Fine of \$1,125 against each defendant. (F. D. C. No. 17862. Sample Nos. 96241-F, 2761-H, 5893-H, 18248-H, 22662-H, 24366-H, 28276-H, 28935-H.)

INFORMATION FILED: May 8, 1947, Southern district of New York, against the Mills Sales Company of New York, Inc., New York, N. Y., and David Jacoby, president of the corporation.

ALLEGED SHIPMENT: Between the approximate dates of May 9, 1944, and April 6, 1945, from the State of New York into the States of Virginia, New Jersey, Iowa, Arkansas, Alabama, Oregon, Idaho, and Indiana.

LABEL, IN PART: (Bottles) "Phenobarbital Tablets * * * Allen Laboratories Distributors, New York, N. Y. * * * To be used only by or on the prescription of a physician," or "Certified Brand Thyroid Tablets" [or "Sulfathiazole Tablets," "Phenobarbital Tablets," "Sulfanilamide Tablets," or "Sulfanilamide and Sodium Bicarbonate Tablets"] * * * To be used only by or on the prescription of a physician * * * Certified Drug & Chemical Co., Distributors New York, N. Y."

NATURE OF CHARGE: Misbranding, Section 502 (f) (1), the labeling of the articles failed to bear adequate directions for use, in that the bottles containing the articles bore no labeling containing directions for use.

DISPOSITION: June 25, 1947. Pleas of guilty having been entered, the court imposed a fine of \$1,125 against each defendant.

2257. Misbranding of Tescum Powders. U. S. v. Edna Bertha Bramley (Tescum Co.). Pleas of guilty. Fine, \$175 and costs. (F. D. C. No. 21450. Sample Nos. 18119-H, 24889-H.)

INFORMATION FILED: May 27, 1947, Northern District of Ohio, against Edna Bertha Bramley, trading as the Tescum Co., at Cleveland, Ohio.

ALLEGED SHIPMENT: From on or about September 10, 1945, to on or about January 8, 1946, from the State of Ohio into the States of Illinois and Texas.

PRODUCT: Analysis disclosed that the product was a white, unflavored powder consisting essentially of sugars, ammonium chloride, and tartar emetic, with a trace of gold and sodium chloride.

LABEL, IN PART: (All packages) "Tescum Powders Tescum produces temporary nausea or vomiting in most cases and should not be used indiscriminately or continuously. Dosage: No more than one powder in liquid every other day * * * Caution: Too frequent use or over dosage will cause intense nausea and may be dangerous"; (on some packages) "Chronic Alcoholism is medically recognized as a disease, in this case consult a physician."

NATURE OF CHARGE: Misbranding, Section 502 (a), the statements on the labels of some of the packages were false and misleading. These statements repre-