Issued August 30, 1910.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 498, FOOD AND DRUGS ACT.

In the case of the United States ex rel. Alsop Process Company, petitioner, vs. James Wilson, Secretary of Agriculture, a mandamus proceeding in the Supreme Court of the District of Columbia to restrain the Secretary of Agriculture from publishing and circulating Food Inspection Decision No. 100 of the United States Department of Agriculture relative to flour bleached by the Alsop Process, and to compel cancellation of said decision.

On or about January 23, 1909, the Alsop Process Company filed in the Supreme Court of the District of Columbia a petition for a writ of mandamus directed to the Secretary of Agriculture alleging in substance that relator is a corporation engaged in the business of manufacturing and selling machinery and apparatus used by millers for the bleaching of flour by so-called Alsop Process (giving a description of said process), and further, that the Secretary of Agriculture caused hearings to be held to determine whether flour bleached by the Alsop Process was adulterated within the provisions of the Food and Drugs Act of June 30, 1906, and after hearing the evidence for and against flour thus bleached, decided that, in his judgment, flour so bleached was adulterated within the meaning of the aforesaid act, and that the Secretary of Agriculture, without warrant or color of law, published and caused to be published the said decision designated as Food Inspection Decision No. 100, which publicly condemned as adulterated within the meaning of the Food and Drugs Act flour bleached by relator's process to the great damage of its business. The petition prayed that the Secretary of Agriculture be commanded to revoke and cancel and annul said decision and not to deliver or circulate additional copies thereof.

Upon the filing of the petition the court issued a rule directed to the Secretary of Agriculture as respondent requiring him to show cause by a certain date therein named why the prayer of said petition should not be granted.

Respondent duly answered said petition and to this answer the relator filed a demurrer. The case came on for hearing upon the questions raised by the above-mentioned pleadings and the court

overruled relator's demurrer. The following is the opinion of the court delivered by Mr. Justice Stafford:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA EX REL. ALSOP PROCESS COMPANY, *Petitioner*, *vs.* JAMES WILSON, SECRETARY OF AGRICULTURE, *Respondent*.	At Law. No. 51348.

OPINION OF THE COURT.

By STAFFORD, J.

This is a petition for a writ of mandamus. A rule to show cause was issued which the respondent has answered and to this answer the petitioner has demurred. The case was heard upon the demurrer and would have been disposed of at the time had it not been that the court understood that the parties desired that an opinion should be filed dealing fully with all the points involved. The case has been left undisposed of in the hope that opportunity would be found to prepare such an opinion, but the pressure of other duties having thus far prevented, and no likelihood appearing that the same can be done within the next few days, it is thought best to dispose of the case without answering categorically the numerous points made in the brief of the petitioner. After all what the case amounts to is this. The Secretary of Agriculture has made up his mind that bleached flour is obnoxious to the provisions of the pure food act and has made that opinion public, announcing at the same time that after six months, during which time the manufacturers and dealers will have an opportunity to adjust themselves to the situation, he will call upon the respective district attorneys to proceed against violators of the law. The petitioner claims to be the owner of a patent on the bleaching process and to be injured by the announcement of this opinion and intention. He is not the owner of any flour; he merely owns the patent and makes and sells the machinery. He says that the Secretary did not proceed according to the provisions of the pure food law in making up his mind; that he had no right to tell the public what opinion he had formed, nor what course he intended to pursue; that if he is going to recommend prosecutions at all he is bound to do so at once and not wait six months. He therefore asks this court, by the great writ of mandamus, to command the Secretary to vacate his decision, to take back what he has said, and hereafter to proceed strictly according to the law. The mere statement of the proposition seems to furnish its own answer and to render an elaborate opinion unnecessary. This court cannot change the fact that the Secretary entertains this opinion, nor the fact that he intends to call on the district attorneys to test the case in the courts. It cannot command him not to make his opinion and intention known and if it could it would be useless for he has already made it known, and the petitioner itself is making the fact still more widely known by this proceeding. The merits of the real question, namely, whether flour subjected to the bleaching process may be sold without violating the pure food law, is one that will ultimately be determined by the courts. In the meantime the Secretary is not violating any law in having an opinion and in telling the public what it is.

The demurrer is overruled.

WENDELL P. STAFFORD,
Justice.

The said Alsop Process Company stood upon its demurrer and prosecuted an appeal from the aforesaid judgment to the Court of Appeals for the District of Columbia. The case was then heard by said court on appeal and the judgment of the lower court was affirmed.

The following opinion by Mr. Justice Robb was rendered by the appellate court:

UNITED STATES OF AMERICA EX RELATIONE ALSOP PROCESS COMPANY, *Appellant*, *vs.* JAMES WILSON, SECRETARY OF AGRICULTURE. } No. 2021.

This is an appeal from the Supreme Court of the District overruling the demurrer of the relator to an answer of the defendant, appellee here, to a rule to show cause why a mandamus should not be issued against him.

In its petition the relator states that it is a corporation of the State of Missouri engaged in the manufacture of flour bleaching machinery, which is sold throughout the United States and elsewhere and is extensively used by millers for bleaching flour. The process for which this machinery is designated is known as the "Alsop Process" and is covered by patent which is owned by the relator. The bleaching of flour by this process is accomplished by the passage of pure air through a flaming discharge of electricity and the application of the resultant gaseous medium to the freshly milled flour as the latter passes through an agitator. The flour thus treated, the relator states, has no substance mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, is not deprived of any valuable substance, nor has it been mixed, colored, or treated in any manner whereby inferiority is concealed, and contains no deleterious ingredient or other element injurious to health. The relator further states that prior to November 18, 1908, the Secretary of Agriculture inserted, or caused to be inserted, in certain milling journals and other periodicals throughout the country a notice to the effect that a hearing would be held on the subject of bleached flour at the Department of Agriculture on November 18, 1908, at which time the relator says it was present by a duly authorized officer and by an attorney, and that the hearing was also attended by many millers from various parts of the country; that this hearing was continued five days, and testimony for and against said process was introduced; that the attorney for the relator conducted the case for the millers favoring the bleaching process; that the relator's manager gave extended testimony at this hearing; that the entire proceedings were transcribed by a stenographer and made accessible to the public generally. This hearing, the relator avers, was without color of authority of law. The petition further states that on the 10th of December, 1908, the said Secretary of Agriculture unlawfully, arbitrarily, and oppressively, and without color or right of law, issued the following bulletin:

"F. I. D. 100. Issued December 10, 1908.

United States Department of Agriculture,

OFFICE OF THE SECRETARY,

BOARD OF FOOD AND DRUG INSPECTION.

FOOD INSPECTION DECISION 100.

BLEACHED FLOUR.

"Flour bleached with nitrogen peroxide, as affected by the Food and Drugs Act of June 30, 1906, has been made the subject of a careful investigation extending over several months.

"A public hearing on this subject was held by the Secretary of Agriculture and the Board of Food and Drug Inspection, beginning November 18, 1908, and continuing five days. At this hearing those who favored the bleaching process and those who opposed it were given equal opportunities to be heard.

"It is my opinion, based upon all the testimony given at the hearing, upon the reports of those who have investigated the subject, upon the literature, and upon the unanimous opinion of the Board of Food and Drug Inspection, that flour bleached by nitrogen peroxide is an adulterated product under the Food and Drugs Act of June 30, 1906; that the character of the adulteration is such that no statement upon the label will bring bleached flour within the law; and that such flour cannot legally be made or sold in the District of Columbia or in the Territories; or be transported or sold in interstate commerce; or be transported or sold in foreign commerce except under that portion of section 2 of the law which reads:

"* * * Provided that no article shall be deemed misbranded or adulterated within the provisions of this act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; * * *

"In view of the extent of the bleaching process and of the immense quantity of bleached flour now on hand or in process of manufacture, no prosecutions will be recommended by this Department for manufacture and sale thereof in the District of Columbia or the Territories or for transportation or sale in interstate or foreign commerce, for a period of six months from the date hereof.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *December 9, 1908.*"

The promulgation and circulation of this bulletin, the relator states, has worked irreparable harm and injury to it, and in effect deprived it of its property without due process of law "in that since the issuance and promulgation of said unlawful decision aforesaid by the respondent herein, and by reason thereof your petitioner has been unable to sell its patented process and apparatus aforesaid, the prospective purchasers of said patented process and apparatus aforesaid, refusing to buy and install the same for fear that they or their customers will, upon the recommendation of the Secretary of Agriculture, be prosecuted for manufacturing or selling an adulterated food product in violation of the provisions of said Food and Drugs Act, June 30, 1906." The petition closes with a prayer that the writ of mandamus issue to compel the Secretary of Agriculture to withhold recommendation of prosecutions against manufacturers of and dealers in flour bleached by said Alsop Process; to revoke, cancel and annul said decision of said Secretary, and not to deliver or circulate additional copies thereof, and that the Secretary of Agriculture be commanded to proceed relative to the subject of bleached flour in strict conformity with said Food and Drugs Act and the regulations of the Department promulgated thereunder.

A rule to show cause was issued. In the answer filed by the Secretary he states "that it does not appear by the said petition that the said relator has any right, title, or interest in the matters affected by the judgment and action of your respondent referred to in the said petition, and is not a party to nor legally interested in the proceedings in which said judgment and action of your respondent have been made." He admits the relator owns the patent known as the "Alsop Process" for bleaching flour, but claims that its patented rights are wholly collateral to the right of said Secretary of Agriculture to decide whether flour bleached by the use of nitrogen peroxide is deleterious and adulterated within the meaning of said Food and Drugs Act; that the patenting of said process confers no right on relator and gives it no status to compel the respondent to change or revoke his decision that flour so bleached is adulterated. The answer denies that the effect of flour by the use of said process is as stated in the petition; on the contrary, the answer states "that the flour which is bleached is reduced and lowered in its quality and strength; that the said flour is so artificially colored as to conceal inferiority, and that it contains a poisonous and deleterious ingredient which has been added, and that the said flour is deleterious and injurious to

health." The respondent in his answer further says "that the bleaching of the said flour is effected by nitrogen peroxide, and that the resultant product is deleterious and is adulterated within the meaning of the aforesaid Food and Drugs Act approved June thirtieth, 1906"; that for many months prior to November 18, 1908, the respondent had made an exhaustive inquiry into the character, composition and purity of bleached flour and had caused the matter to be investigated exhaustively by the Bureau of Chemistry of his Department, and "that from all the evidence adduced it was conclusively established that flour bleached with nitrogen peroxide was adulterated within the meaning of said Food and Drugs Act"; that in the exercise of abundant caution, however, the Secretary decided to renew the investigation and to consider the matter more fully before finally deciding under the authority of said Act whether said bleached flour was adulterated; that accordingly he issued a notice for said public hearing; that this hearing was entirely advisory; and that the millers and manufacturers and others who attended did so voluntarily. The result of this hearing, the Secretary says, was to put him in possession of further and additional evidence relative to the subject; that this hearing was authorized both impliedly by the provisions in said Food and Drugs Act and expressly by the provisions of the Agricultural Appropriation Act of Congress of May 23, 1908; that after due consideration he decided that flour bleached by the use of nitrogen peroxide is adulterated within the meaning of said Food and Drugs Act and forbidden by the terms of said Act, and that he thereupon announced and published said decision of December 10, 1908; that this decision in no wise mentioned or in any way relates to the relator, and that, therefore, it has no status to seek any relief or redress in connection therewith. The Secretary in his answer denies the averments of the petition that his action was without right or color of law, denies the jurisdiction of the court to grant the writ, and states that he "passed no judgment upon the machinery of the relator, and has no jurisdiction over the same, nor concern therewith. The said relator is not an owner of bleached flour nor a manufacturer of the same. The judgment of the said respondent has to do only with the bleached flour, the product itself, and has no jurisdiction over or concern in one of the kinds of process by which the said product may be secured. And respondent submits that the claims of the said relator are wholly collateral, and that its petition fails to show any legal damage."

To this answer a demurrer was filed, which was overruled, and, relator choosing to stand upon its demurrer, final judgment was entered, and this appeal taken.

The first question to be disposed of is whether the interest of the relator in the subject matter involved is of such a nature as to entitle it to maintain this proceeding. The decision of the Secretary of Agriculture, which is here sought to be challenged, is to the effect that flour bleached by nitrogen peroxide is an adulterated product under said Food and Drugs Act. Neither the relator nor its process is mentioned in this decision. The relator is neither the owner nor the manufacturer of bleached flour. Its sole excuse for attempting to stay the hand of the Secretary is that since the promulgation of this decision by the Secretary it has been unable to sell its patented process and apparatus owing to the fear of prospective purchasers that upon the recommendation of the Secretary they will be prosecuted for manufacturing or selling an adulterated food product.

Whilst it is true that there is a distinction between cases where the extraordinary aid of mandamus is invoked merely for the purpose of enforcing or protecting a private right and cases where the purpose of the application is the enforcement of a purely public right, the people at large being the real party in interest (High on Extraordinary Remedies, Parg. 430; 26 CYC 404 and cases there cited), it has never been held, at least to our knowledge, that such an indirect and collateral interest as is here shown will sustain a petition for the writ.

Union Pac. R. R. Co. *v.* Hall, 91 U. S. 343, and Board of Liquidation *v.* McComb, 92 U. S. 531, in our opinion, do not sustain appellant's contention that it has a suffi-

cient interest to entitle it to institute this proceeding. In the former case it was held that merchants in Iowa having frequent occasion to receive and ship goods over the Union Pacific Railroad Company might, without the intervention of the Attorney-General of the United States, institute a proceeding under an act of Congress which conferred upon the proper circuit court of the United States jurisdiction to hear and determine all cases of mandamus to compel said railroad company to operate its road as required by law. It will thus be seen that a duty was laid upon the railroad company to operate its road in the interests of the public. Its failure in that regard wrought a direct injury to the merchants who were permitted to institute proceedings. The court went no further than to hold that the writ of mandamus may be issued at the instance of a private relator in all cases "where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest," and also "in case of applications to compel the performance of duties to the public by corporations." In the latter case the relator was the holder of bonds directly affected by the funding act, the carrying out of which he sought to have restrained.

We have carefully examined the other cases cited by relator on this point, and find that they go no further than the cases above reviewed.

The relator as a corporate entity has no interest in the enforcement of duties owing by the Secretary to the public. It seeks to arrest the operations of an Executive Department of the Government solely because the indirect effect of the promulgation of an opinion by the head of that Department has been to cause millers to cease purchasing relator's machinery. In all the cases relied upon by relator mandamus was granted to secure to the relators rights which they were entitled personally to enjoy. Measured by this test, it is apparent that the relator has no such interest in the subject matter of this controversy as to entitle it to the writ. Being neither an owner nor a manufacturer of bleached flour, its legal rights were not involved or invaded by the action of the Secretary. It is a mere volunteer in this proceeding and as such is without standing.

There is some analogy between a suit in equity for the abatement of a public nuisance and the present case. Yet it is well settled that such a suit will not be sustained unless the complainant shows special, direct, and material damages; Georgetown *v.* Alexandria Canal Co., 12 Peters, 91; Irwin *v.* Dixon et al., 9 How. 9; State of Penna. *v.* Wheeling Bridge Co. et al., 13 How. 518; Miss. & Mo. R. R. Co. *v.* Ward, 2 Black, 485. In the case last cited it was said: "A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in chancery, prosecuted on behalf of the Crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damages, he cannot be heard."

The rule permitting private parties, whose rights are directly jeopardized, to maintain mandamus to compel a public duty is a salutary one, but it should not be enlarged to such an extent as to permit interference with the operations of the Government by those whose rights are only remotely and indirectly affected.

Having determined that the relator's interest in the subject matter involved is too remote to entitle it to institute this proceeding, it becomes unnecessary to consider any other question.

The order is, therefore, affirmed, with costs.

CHAS. H. ROBB,
Associate Justice.

AFFIRMED.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *June 25, 1910.*