F. & D. Nos. 1841, 1742, 1416, 1344.
I. S. Nos. 10126-b, 19605-b, 10125-b, 405-b.
Issued April 18, 1911.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 806, FOOD AND DRUGS ACT.

MISBRANDING OF FLAVORING EXTRACTS—EXTRACT OF VANILLA, EXTRACT OF LEMON PEEL, AND "MAPLE FLAVO."

On or about October 29, 1909, Sally Gumpert and Harry Horowitz, doing business under the firm name and style of S. Gumpert & Co., shipped from the State of New York into the State of Texas two consignments of vanilla extract and a consignment of extract of lemon peel, the former of the vanilla extracts being labeled: "Extract of vanilla S. Gumpert & Co., New York"; the latter being labeled: "Ext. Vanilla Guaranty Legend Serial No. 4951. S. Gumpert Laboratory, 177-179 Hudson St. and 27-29-31 Vestry St., New York. S. Gumpert, Manufacturing Chemist and Distiller of Essential Oils, Fruit and Liquor Flavors. Laboratory 177-179 Hudson St. and 27-29-31 Vestry St., New York"; and the extract of lemon peel being labeled: "Extract of Lemon Peel S. Gumpert & Co." Also on August 19, 1909, the said Sally Gumpert and Harry Horowitz shipped from the State of New York into the State of Ohio a quantity of Maple Flavo, labeled: "Maple Flavo. Flavo for Cake Icing Use sufficient to get a rich, brown color. Colors recommended by the Government for food products. A Gumpert, Importers, Mfgrs., New York. 205 West St. Guaranty Legend Serial No. 4951." Analyses made by the Bureau of Chemistry, United States Department of Agriculture, of samples taken from the above described shipments, showed the former of the vanilla extracts to be a liquid consisting of alcohol by volume 23.06 per cent, vanillin 0.06 per cent, coumarin 0.20 per cent, and color caramel; and the latter to be a liquid containing alcohol 23.10 per cent, vanillin 0.60 per cent, coumarin 0.10 per cent, and colored with caramel; and the extract of lemon peel to be a liquid containing 35.5 per cent alcohol, 0.104 per cent citral, and lemon oil by precipitation none. Samples of the Maple Flavo were also procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be a compound of glucose and sugar, colored with caramel and artificially flavored. As it appeared from the

above analyses and reports thereon that the products were misbranded within the meaning of the Food and Drugs Act of June 30, 1906, the said Sally Gumpert and Harry Horowitz and the parties from whom the samples were procured were afforded opportunities for hearings. As it appeared after hearings held that the shipments were made in violation of the act, the Secretary of Agriculture reported the facts to the Attorney General, with a statement of the evidence upon which to base a prosecution.

In due course four criminal informations were filed in the Circuit Court of the United States for the Southern District of New York against the said Sally Gumpert and Harry Horowitz, charging the above shipments and alleging that the vanilla extracts were misbranded, in that the labels thereon were false and misleading and the products were labeled so as to deceive and mislead the purchaser, because said labels indicated that the products were a true extract of vanilla, whereas, in truth and in fact, the said products were not a true extract of vanilla but a compound of vanillin and coumarin, artificially flavored and colored in a manner whereby inferiority was concealed; that the extract of lemon peel was misbranded, in that the labels thereon were false and misleading and the product was branded so as to deceive and mislead the purchaser, because said labels indicated that the product was a true extract of lemon peel, whereas, in truth and in fact, said product was not a true extract of lemon peel, but a dilute extract containing no oil of lemon peel whatever; and that the Maple Flavo was misbranded, in that the labels upon said product were false and misleading and the said Maple Flavo was branded so as to deceive and mislead the purchaser, because said labels indicated that the product was a true maple product, whereas, in truth and in fact, it was a compound of glucose and sugar, artificially flavored and colored in a manner whereby its inferiority was concealed.

Upon arraignment, the defendants entered a plea of not guilty to the above informations and the cases coming on for joint hearing the issues were tried to a jury and the evidence and arguments of counsel on the part of both parties having been heard, the court instructed the jury as follows:

The COURT (HAZEL, *J.*): "Gentlemen of the jury, the United States Attorney for this District has filed four informations in this case charging the defendant company with violating the Pure Food and Drugs Act, so called. The Pure Food and Drugs Act was passed by Congress in 1906 and was designed to protect the public from the adulterations of food and drugs, furthermore, it was designed to protect the public from being deceived by misbranding or labeling articles differently from what it is in truth and in fact.

"Now, in this case, the Government is required to satisfy you beyond a reasonable doubt of the guilt of the accused on all of these various informations

and unless it has done so the defendants are entitled to an acquittal. Of course it is entirely within your province to find the defendant guilty of one or more of the alleged offenses contained in the various informations, or all of them, or not guilty of any. The Government is required to show affirmatively that this was an interstate shipment, because the jurisdiction of this court depends upon the claim contained in the information that the alleged misbranded merchandise was shipped or forwarded from the State of New York into another State. There is no controversy in relation to interstate shipment, and hence, you gentlemen doubtless will be able to reach a conclusion upon that subject without difficulty.

"The Government is also required to show that the samples taken by the inspectors in each case were submitted to the chemists intact, were not mixed with other ingredients or deleterious substances, and this must be established by the Government to the end that you may be satisfied by the proofs that when the chemists made the analyses that the contents of the container were in fact the articles or goods that had been shipped or sent by the defendants interstate.

"It must also appear beyond a reasonable doubt that the chemical analyses were true and correct, and if you are satisfied upon all these points as stated by me, then the defendant is guilty as charged in the information.

"Now, we are chiefly concerned with articles named variously Maple Flavo, Extracts of Vanilla and Extracts of Lemon Peel. With reference to the extract of vanilla the defendant contends that there was no intention on his part to violate the statute, and he leaves the impression in my mind and perhaps in yours that he does not dispute the analysis made by the Government's witness Shanley, that the article was adulterated and misbranded as claimed by the Government. But to excuse such misbranding it is claimed on behalf of the defendant that the misbranding was an inadvertence or a mistake; and that is a question submitted to you for your consideration. As this, however, is a criminal case, the Government is required to satisfy you, as I have already intimated, that there was a misbranding, and because the Government is required to satisfy you upon that point it may not be amiss for me to recall to your mind that the witness Shanley, the expert chemist of the Government, testified that the product shipped to the witnesses Young and Heim, this extract of vanilla, was analyzed by him and that he found the samples were imitations of vanilla. He testified, in substance, that he found coumarin and vanillin in the samples submitted to him, and that they were artificially colored with caramel; that he found there was twice the amount of vanillin in the samples, and that in the genuine vanilla extract there is no coumarin and not as large a percentage of vanillin. This is the evidence that is submitted now for your consideration upon the subject of whether the article that was shipped in interstate was misbranded and as to whether it was admixed with ingredients such as are necessary to produce the pure article. The claim of the Government, of course is, that this vanilla was not an extract of vanilla, and, as I have already indicated to you, that is not seriously controverted by the defendants. The defendants claim that the article was misbranded or mislabeled and that such misbranding or mislabeling was due to a mistake, and of that I shall speak later.

"The expert witness Wilson for the Government testified that he made an analysis of the so-called Maple Flavo, and he found that it was chiefly made of cane sugar, glucose, slippery elm and largely colored with caramel, and that the ingredients of caramel was used to imitate the color of maple, and lovage

to imitate the Maple Flavo—in fact, it was an imitation of the Maple product. The witness explained that the maple product of the maple tree does not contain the same ingredients as Flavo, and that it contains neither vanillin, caramel, lovage or slippery elm. The witness Seeker, for the Government, testified that he analyzed the defendant lemon extract, so-called, and found the article contained no lemon oil; that it was colored with a coloring of lemon peel, and that citral was used by the defendant for flavoring; that citral is obtained from lemon grass; and he further testified that according to the standards fixed by the Association of Chemists and adopted by the Agricultural Department, lemon extract contains a solution of 5 per cent of lemon oil by volume in grain alcohol; that the first analysis of the defendant's product did not disclose oil of lemon. He further testified that extract of lemon peel is the same as an extract of lemon, and gives the same testimony with reference to the absence of terpenes, and that the product was an imitation of lemon extract.

"This, gentlemen, is substantially the testimony of the Government, and it remains for you to say as to whether these chemists who testified as you will perceive upon the material point, are entitled to weight and as to whether their testimony is entitled to controlling weight upon the subject in reference to the analyses.

"Now, the defendant has given testimony in his own behalf and he denies that he intended to violate the statute, and he undertakes to explain various of these transactions to which the information relates. Now, he claims that the term 'Maple Flavo' used by him in the sale of his commodity is a distinctive name and the product became generally known by that name and that it became so known prior to the enactment of the Pure Food and Drug Act. Now, gentlemen, if the term 'Maple Flavo' is used to mislead the public or cause it to believe that it was a pure maple product, then I instruct you it was a misbranding. The Government's claim is that the term 'Maple Flavo' is false and misleading and that the compound was artificial flavoring. Now, if you find from the evidence that the defendant's designation was false and misleading and calculated to deceive the ordinary purchaser, then the article was misbranded and the statute applies. Upon this question of whether the name 'Maple Flavo' was distinctive, I instruct you that a distinctive name is one ordinarily used to clearly distinguish it or the article to which it is applied from all others, or one which the public might come to generally recognize as meaning something different from any other thing. Now, if you believe from the evidence Maple Flavo by reason of that name used by the defendants so completely distinguished it from the pure maple product as to readily inform the public the difference between it and the genuine maple product, then the defendant should not be convicted on count 1 of the information. In other words, if the defendants' article has been on the market long enough to inform the public generally that it was not a genuine maple product but merely a maple flavo, or imitation of the maple product, then this has an important bearing on the question of whether the public was misled or was deceived by the alleged misbranding. On the other hand, gentlemen, if you are not satisfied by the testimony of the defendant on this point, if you believe that the product has not become generally known to the public as one distinguished from the maple product, and that the word 'Flavo' was merely a trade distinction and was used in connection with the word 'Maple,' and it deceived the public into believing that it was a product containing pure maple, then the defendants are guilty of misbranding. You will bear in mind, gentlemen, that the defendant, Mr. Gumpert, gave testimony generally to show that this article 'Maple Flavo' was exhibited by him at various exhibitions here in this city and elsewhere, and

moreover it was exhibited in London, and he claims that it became widely known in various states, and so it became a distinctive product from what was ordinarily known by the term maple product. Now, if in that respect he has testified truthfully and you are satisfied by the evidence that his commodity did become distinctive, that it was ordinarily recognized by the public as distinctive, that it was not regarded as purely a maple product, he is entitled to an acquittal. If you believe this was simply a trade distinction used by him for convenience or used by him to beguile the public or lead the public to believe that his commodity really consisted of pure maple, then he is guilty of the count.

"Now, as to the lemon extract, which the evidence indicates was sold to Mr. Young, the defendant claims that he used terpeneless lemon oil instead of pure lemon oil. He explained the method of manufacturing this product and claims it to be an extract. The point, however, according to the Government, turns on the requirements of the pure lemon oil, as to pure lemon ingredients of the lemon extract. Expert witnesses for the Government testified that the article was not a lemon extract, as I have already stated, in that it contained no lemon oil; that it was colored with a coloring of lemon peel and citral, and was used as a flavoring; that the true lemon extract is a solution of five per cent.

"I think, gentlemen, this substantially states or recalls to you the evidence given on behalf of the Government, and substantially all the testimony given on behalf of the defendant to establish the innocence of the company, and there may be and doubtless is other testimony in the case which you ought to consider and which it is your duty to consider, in order to establish the guilt of the accused or their innocence.

"Now, there is another question, however, to which your attention must be directed by the Court, and that is the question of intent: As to whether the defendant intentionally committed the offense charged in the information. Now, gentlemen, in most criminal trials it is necessary for the Government to establish beyond reasonable doubt that the accused intended to violate the statute and the person charged with crime should not be convicted if it appears that the offense was due to a mistake or inadvertence—that is to say, absence of intent to violate the statute. Usually in criminal trials the intent is presumed from the facts and circumstances and follows as a necessary consequence of the act, hence the defendants if they knew that their product was an imitation of the other and was not a distinctive article, then you may assume the defendant must be held responsible under the act in question. The Pure Food and Drugs Act does not expressly provide that shippers or dealers must knowingly or wilfully violate its provisions, but if, as it is claimed by the defendants, this label was put on inadvertently or by a mistake by employees whom he had hired, and who had not become sufficiently familiar with their duties, it is my opinion then, gentlemen, that he ought not to be held guilty of these two counts. On the other hand, if it is your opinion that this claim made at this time is merely a subterfuge, that the article in fact was misbranded and that it is now claimed to have been a mistake, in bad faith, in order to escape liability under the statute, then manifestly you will give little heed to the claim of mistake or inadvertence. Of course, if a dealer in a commodity of this character is to escape punishment, if persons are to be permitted to misbrand their goods and send them into interstate commerce and then may be heard to say that they did not intend to violate the statute, if they are not to be held liable as a necessary consequence of their act, this statute which is now before us will not remedy the evils that Congress designed it to remedy by its enactment.

"Now, gentlemen, there is another rule of law which it is my duty to call your attention to, namely, that the defendant cannot be convicted unless the

Government has established these essential elements to which I have drawn your attention beyond a reasonable doubt. By that term, however, is not meant a capricious doubt or one that may fancifully arise in your mind. If it exists at all it should be based upon the testimony, namely, that the Government has not satisfied you, that the evidence is not sufficient to justify you to believe that the defendants are guilty as charged. Moreover it would be well for you to bear in mind that the defendants are presumed to be innocent until the contrary is established. This presumption remains with them throughout the trial and follows you into your jury room until you are satisfied that the offenses are established by the Government.

"Now take this case with the facts and circumstances and give it such consideration as you can."

Mr. HANSON. "May it please the Court, at one place in your charge, in referring to the evidence of one of the experts, I understood your Honor to say that you understood him to testify that citral is not obtained from the lemon but from lemon grass. My recollection is that his testimony was that it was obtained not only from lemons but also from the grass, that it might be obtained from both."

Mr. SMITH. "He testified commercially, that the citral sold commercially was obtained from the lemon grass."

The COURT. "You will remember the testimony."

Mr. SMITH. "I will ask the Court to charge the jury that for all first offenses the law only provides that the defendant shall be fined."

The COURT. "Yes."

Mr. SMITH. "And this, I understand, is the first offense. And I also ask your Honor to charge the jury the first section of subdivision 4 of the Food and Drug Act wherein it states: "In the case of mixtures of compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article"—that is subdivision first—right there, sir" (indicating).

The COURT. "I intended to read to you this provision of the Act, for it bears on one of the defenses interposed by the defendant. The Act provides as follows: "In the case of mixtures of compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not as an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced." You may consider so much of the statute together with what I have already said on the subject.

"You may now retire."

The jury rendered its verdict in due form, finding the defendants guilty, as charged in the above informations, whereupon the court entered its judgment in accordance with said verdict, and imposed a fine of $400.

This notice is given pursuant to section 4 of the Food and Drugs Act of June 30, 1906.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *March 13, 1911.*