F. & D. Nos. 1652 and 1653.
I. S. Nos. 1518-a and 9-b

Issued February 6, 1913.

# United States Department of Agriculture,

OFFICE OF THE SECRETARY.

## NOTICE OF JUDGMENT NO. 1891.

(Given pursuant to section 4 of the Food and Drugs Act.)

### MISBRANDING OF DRUG HABIT CURE.

On January 12, 1911, the United States Attorney for the Southern District of Ohio, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Dr. J. L. Stephens Co., a corporation, Lebanon, Ohio, alleging shipment by said company, in violation of the Food and Drugs Act, from the State of Ohio into the District of Columbia—

(1) On or about December 19, 1908, of a certain box containing 18 articles of drug in unbroken packages and bottles, which were misbranded. The product was labeled: "Maplewood Sanatorium. Ledger M. 45 3609. Directions: Take half a tablespoonful four times a day and as directed.", and each bottle bore a separate number, said numbers being from 1 to 18 in consecutive order. Analysis of the product by the Bureau of Chemistry of this Department showed the following results:

| No. of bottle. | Morphin sulphate (grains per fluid ounce). | Alcohol (per cent by volume). | No. of bottle. | Morphin sulphate (grains per fluid ounce). | Alcohol (per cent by volume). |
|---|---|---|---|---|---|
| 1 | 3.91 | 14.14 | 10 | 0.78 | 14.78 |
| 2 | 3.45 | 13.70 | 11 | .84 | 14.66 |
| 3 | 3.07 | 14.45 | 12 | .72 | 14.86 |
| 4 | 2.22 | 15.01 | 13 | .60 | 14.66 |
| 5 | 1.92 | 15.02 | 14 | .51 | 14.51 |
| 6 | 1.64 | 15.01 | 15 | .40 | 14.87 |
| 7 | 1.40 | 14.88 | 16 | .17 | 14.84 |
| 8 | .85 | 14.69 | 17 | Absent. | 14.94 |
| 9 | .84 | 14.63 | 18 | Absent. | 14.91 |

Misbranding of this product was alleged in the information for the following reasons: First, that the packages and bottles containing each of the articles of drug known and designated as Nos. 1 to 18, respectively, failed to bear statements on the labels thereon of the quantity of alcohol contained in said articles; second, that the packages and bottles containing each of the articles of drug known and

designated as Nos. 1 to 16, respectively, failed to bear statements on the labels thereon of the quantity or proportion of the morphin or its derivatives contained in the articles of drug.

(2) On or about October 22, 1909, of a box containing 18 articles of drug in unbroken packages and bottles. This product was labeled: "Maplewood Sanatorium,—Ledger M. 45. 3964—Directions: Take half a tablespoonful four times a day and as directed.", and each of the bottles bore a separate number, said numbers being from 1 to 18 in consecutive order. Analysis of these products by the Bureau of Chemistry of this Department showed the following results:

| No. of bottle. | Morphin sulphate (grains per fluid ounce). | Caffein. | Alcohol (per cent by volume). | No. of bottle. | Morphin sulphate (grains per fluid ounce). | Caffein. | Alcohol (per cent by volume). |
|---|---|---|---|---|---|---|---|
| 1 | 3.25 | ---- | 7.04 | 9 | None. | Present. | 8.36 |
| 2 | 2.32 | ---- | 7.20 | 10 | do. | do. | 8.60 |
| 3 | 2.12 | ---- | 7.70 | 11 | do. | do. | 8.40 |
| 4 | 1.40 | ---- | 8.00 | 12 | do. | do. | 7.70 |
| 5 | 2.10 | ---- | 8.14 | 13 | do. | do. | 8.40 |
| 6 | 1.00 | ---- | 8.00 | 14 | do. | do. | 8.36 |
| 7 | Small quantity present. | ---- | 8.00 | 15 | do. | do. | 9.02 |
| | | | | 16 | do. | do. | 8.40 |
| | | | | 17 | do. | do. | 8.14 |
| 8 | Trace. | Present. | 8.20 | 18 | do. | Absent. | 8.40 |

Misbranding of these products was alleged in the information for the following reasons: First, that the packages and bottles containing each of the articles of drug known and designated as Nos. 1 to 18, respectively, failed to bear statements on the labels thereon of the quantity or proportion of alcohol contained in said articles; second, that the packages and bottles containing each of the articles of drug known and designated as Nos. 1 to 8, respectively, failed to bear statements on the labels thereon of the quantity or proportion of the morphin or its derivatives contained in the articles.

On May 23, 1911, an agreed statement of facts was filed in the case in part as follows:

That since March 4, 1907, Dr. F. E. Crosier, President and Medical Director of said Company, has had charge of the Sanitarium owned and conducted by said defendant Company, and has had charge of all the patients at said sanitarium, and also all patients that have been treated away from the institution by correspondence. The said Dr. Crosier is a graduate of the medical department of Columbia University, New York City, and was licensed to practice medicine by the University of the State of New York, on the 10th day of July, 1894, after an examination by the New York State Regents. He served on the surgical staff of Bellevue Hospital for eighteen months, and on the medical staff of the same hospital for six months. He is a member of the society of "Some of the Alumni" of Bellevue Hospital. Later, he served six months on the staff of the Lyingin Hospital in New York City. He practiced medicine in Springfield, Massachusetts, for a short time. He was appointed Acting Assistant Surgeon of the United States Army during the Spanish-American war and served in Sternberg Hospital, Chickamauga Park. On the 5th day of April, 1904, after examination, he was licensed to practice medicine in the State of Ohio, and since

that time he has been engaged in the practice of his profession at Lebanon, Ohio. For years he has made a specialty of treating patients addicted to drug and liquor habit.

The defendant company has no proprietary medicines, nor does it put up or offer any medicines to the general public. Its medicines, nor its prescriptions for medicines, are not for sale at any drugstore or other place whatsoever. They are not put up or kept for sale by the defendant company, or delivered to any other party or parties for administering to patients generally, who are afflicted with the drug habit, nor can any person afflicted or claiming to be afflicted with the drug habit send to the company, or to anyone connected with the company, and buy a stock remedy or proprietary medicine for the cure of the drug habit.

In every case where the patient applies for treatment either at the Sanitarium or at the patient's home, a history of the patient's case is first obtained from the patient, from which a diagnosis is made and a prescription written by the Medical Director as the examining physician, to meet the needs of the particular case then under consideration which prescription is then filled by the Medical Director, or under his immediate direction. Persons addicted to the drug habit have frequently made application to the defendant company for medicines, asking that the same be sent them without first submitting the facts and necessary data concerning the patient's habit, condition of general health, previous history, etc., from which an intelligent diagnosis of their case could be made, and from which the physician in charge could prescribe for their particular case, and the defendant company has always refused to prescribe for such persons or furnish any medicines until the patient could furnish the necessary facts from which the examining physician could intelligently prescribe for their individual cases. The defendant company has frequently been applied to by persons claiming to be afflicted with the drug habit to furnish them with sample, or trial packages of their remedies, but have always refused, as their treatment was that of a regular practicing physician, and sent out only on prescription for each individual case.

The package of medicine referred to in First Count of the Information, was shipped by the defendant company under the following conditions and circumstances:

On November 30th, 1908, a person signing himself A. Stengel, and giving his address as 1415 Chapin Street, Washington, D. C., sent a communication to the defendant company, inquiring about its treatment of the morphine habit, expense of same, etc. This communication was answered on December 5th, 1908, and other correspondence followed. The said A. Stengel endeavored to get the defendant company to forward him medicines for curing the morphine habit without submitting to its Medical Director and physician in charge a full statement of his physical condition, health, symptoms, effects of the habit upon him, etc. The defendant company refused to prescribe for him or to receive him as a patient without such complete statement. The result of the correspondence was, that the said A. Stengel furnished the required information, and after a diagnosis of his case, a prescription was made and entered upon the Prescription Ledger of the company, the medicine put up in accordance with said prescription by the Medicial Director of the defendant company, and the same was sent to him by express, December 15, 1908.

The package of medicine referred to in the Second Count of the Information was shipped by the defendant company under the following conditions and circumstances:

On November 5, 1908, the defendant company received a communication from a person signing himself, L. F. Kay, and giving his address as Washington,

D. C. Said communication was in fact from Dr. L. F. Kebler, Chief of the Division of Drugs and Bureau of Chemistry, United States Department of Agriculture, the name of "L. F. Kay," having been assumed by him for the purpose of obtaining evidence. The first communication being an inquiry concerning the defendant company's treatment of the drug habit. Several communications passed between the date of the said L. F. Kay's first inquiry, and October 20, 1909, when the defendant company accepted him as a patient and sent him medicines for a course of treatment for the morphine habit. This medicine was prepared and sent by the Medical Director and physician in charge of the defendant company, after he had diagnosed the case of the patient, the prescription having been made and entered upon the Prescription Ledger of the defendant company prior to the preparation and shipment of the medicine as aforesaid.

At the time of the Spanish-American war, when the Government imposed a tax upon all proprietary medicines, an official of the Government examined the Sanitarium, the books of the defendant company, and its methods of doing business, and decided that the medicines prescribed and put up for its patients were not amenable to the Revenue tax, and that no Revenue tax has ever been paid by said defendant company on its preparations.

It is a recognized fact by the medical profession generally that in the treatment of diseases, especially the drug habit, it is an important and in most cases a vital factor, that the patient should not know the composition of the medicines given in such treatment.

In the treatment of the morphine habit and of other drug habits of a similar character, and which constitute the main business of the defendant company, it is generally accepted and recognized and followed by the medical profession as the proper medical treatment to diminish the amount of the drug taken, without the knowledge of the patient, at the same time correcting nervous, digestive or other effects of the habit by proper proportion of medicines generally combined with the drug against which the treatment is directed.

These prescriptions attached to "Exhibits A and B" herein, when filled, constitute a course of treatment for the morphine habit, based on the gradual reduction plan; they also embody combination of drugs calculated to overcome the effects of the morphine used, and while regularly diminishing the amount used, tend to correct the disordered conditions and restore normal health.

The alcohol contained in the compound is not for any therapeutic use whatever; on the contrary, it is used only in very small amount, as the analysis shows, to prevent fermentation and to insure against freezing.

On October 6, 1911, the case was argued and submitted on the agreed statement of facts.

On October 10 a jury was impaneled and the case presented; thereupon, plaintiff and defendant having introduced their testimony, the District Attorney for the United States moved the court to instruct the jury to return a verdict for the Government, which motion was allowed after argument by counsel as set forth in the following opinion by the Court (Sater, J.):

This case is submitted upon an agreed statement of facts. Each party asks for a directed verdict.

The defendant's first contention is that the information is defective and insufficient, because it alleges that each of the bottles shipped to the vendee was misbranded, whereas, it should have been alleged that the larger package, of which each bottle was a part, was misbranded.

A number of bottles of the article in question were shipped together as a single shipment. They went forward through the channels of interstate commerce as a single bundle or package, surrounded by some sort of a cover. The information charges that each individual bottle was mislabeled and misbranded, and not that the enclosing cover of all of the bottles was mislabeled or misbranded.

The first sentence of the second section of the Pure Food and Drugs Act provides:

"That the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited."

The paragraph then recites that "Any person who shall ship or deliver for shipment from any state or territory or the District of Columbia to any other state or territory or the District of Columbia, or to a foreign country, or who shall receive in any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act" shall be punished as is thereinafter set forth. For the purposes of this case, the other portions of the section need not be noticed.

This section prohibits the introduction into interstate commerce of any article of food or drugs which is adulterated or misbranded within the meaning of the Act. It also penalizes the shipment or delivery for shipment from any state or territory or the District of Columbia, of any such article so adulterated or misbranded within the meaning of the Act.

The verbs "ship" and "deliver" are both transitive and call for an object. The object is found in the words, "any such article so adulterated or misbranded within the meaning of this Act." The antecedent of "such" and "so" is found in the first sentence of the section, in the words, "any article of food or drugs which is adulterated or misbranded within the meaning of this Act." If I should be wrong in this, and if the object of the transitive verbs "ship" and "deliver" should be found further along in the section, in the words, "any such adulterated or misbranded food or drugs," the meaning would not be changed. I do not think, however, that I am mistaken as to the grammatical construction.

The section also imposes a penalty on the vendee or consignee who, having received, delivers in original unbroken packages for pay or otherwise, or offers to deliver to any other person, any article adulterated or misbranded within the meaning of the Act. The law contemplates the punishment of two classes of persons. This construction accords with that put upon the section by the Supreme Court in Hipolite Egg Co. v. United States, decided March 13, 1911. In that case an adulterated article was involved. The court said:

"Section 2 of the Food and Drugs Act prohibits the introduction into any state or territory from any other state or territory of any article of food or drugs which is adulterated, and makes it a misdemeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or, having received it, shall deliver it in original unbroken packages for pay or otherwise."

It was also said in that case:

"The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, or to condemn them while being transported, or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we can not unite or qualify them by the purpose of the owner to be a sale."

It will furthermore be noted that the statute declares that it is one "—for preventing * * * the transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein."

The words, "package" and "original unbroken package," are both used in the Act. The word "package" is not used in the same sense as "original unbroken package." The framers of the Act manifestly had in mind the definition heretofore given by the courts to the term "original package," and in the second, third and tenth sections have used that expression, or its equivalent. It is used in those sections with reference to the situations which arise where the article transmitted has reached the vendee or consignee, but has not yet become a part of the general property of the state in which the vendee or consignee lives. The package still being unbroken, and not having become a part of the property of the state, remains subject to federal control. The article, if thus found, is subject to seizure and may thereby be prevented from reaching the ultimate consumer.

The word "package" is repeatedly used in this Act without any modifying adjective or other qualifying term. It is in such instances to be taken in its broad sense. The word "package" as thus used means the package made up by the manufacturer for sale to the ultimate consumer, which goes into the possession of the person who will use the article of food or drugs.

In the portion of Section 7, which deals with drugs, the statute recites in the proviso:

"That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary."

What does that language import, if it does not mean the particular receptacle of drugs which the person intending to use the drug buys along with the drug, as its container?

It means the bottle, or box, or other container, whatever it may be.

How can a person who wishes to buy a drug determine what the actual composition or character of the drug is, unless there be upon the bottle, or box, or paper, pasteboard, or other container, i. e., on the package, of whatever material it may be, the information which the law says he shall have?

The bottle, box, container, or package, in whatever form it may be, may have reached the druggist encased in a great wooden box, for instance, along with a great number of other bottles, boxes, containers or packages. The ultimate consumer may never see, and in fact rarely does see, the large box encasing the individual packages. The label or inscription put upon the large box—the box enclosing the bottles, boxes, or containers sold by the retailer—will afford no protection to the purchaser. He must look to the bottle, or box, or container that he buys for the thing that he buys.

The same section provides that food shall be considered adulterated:

"If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health; Provided, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption."

This language recognizes that a food may, for its preservation in shipment, be packed in a preservative which may be removed so as to leave no deleterious or poisonous effects behind.

If the shipper puts upon the covering or the package directions for the removal of the preservative, which enable the person who receives the article for use to bring it to a wholesome condition, the shipper does not become amenable to the law. The lawmakers, in the use of this language, had in mind the ultimate consumer, rather than the person who prepares the food for use for him.

The eighth section relates to misbranding. It recites:

"That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substance contained therein which shall be false or misleading in any particular," etc.

It is common knowledge that there are many articles of food and drugs found in the hands of grocers or druggists, which the individual buys for use by himself or his family. It is from the package he buys, from the label upon such package, that he learns what the article is. If the label or brand upon it is misleading, an offense is committed. The package may have been shipped along with many other packages of the same kind in a large enclosing box or case. It is not such enclosing box or case to which the consumer looks, or about which he inquires for information

The same section, in referring to drugs, provides that they shall be deemed to be misbranded:

"If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium * * * or any derivative or preparation of any such substances contained therein."

To what package does the statute allude? Manifestly, the package that the consumer buys, the package which goes into his possession, the package originally put up for sale and use.

Under the provisions relating to the misbranding of foods, the same section (Section 8) recites that an article of food shall be deemed to be misbranded:

"If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, * * * contained therein."

The word "purchaser" it will be noted, is used without imitation or qualifying terms. The language quoted does not say the wholesale, retail, or individual purchasers. It does not say the purchaser who buys in order to utilize the article in some process of further manufacture or to sell to retailers. If it

be broad enough—and I do not say that it is not so—to include wholesale and retail purchasers, it is also broad enough to include the ultimate consumer as a purchaser, and the labeling or branding of the particular package, box, bottle, or other container enclosing the article which he buys must be such as not to deceive or mislead him.

It will not do to say that this law was framed to protect wholesalers and retailers and not the common people. Its primary purpose is the protection of the ultimate consumer. The same section further provides that an article of food shall be deemed adulterated:

"Third. If in package form and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

"Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular; Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or 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, 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.

"Second. In the case of article labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale; provided," etc.

The law does not mean that when a number of bottles or boxes are put into the channels of commerce as a single shipment, encased together in a wooden box, for instance, that the aggregate weight of all the enclosed bottles or boxes, or of each individual enclosed bottle or box shall be placed upon the enclosing wooden box and need not be placed on the individual enclosed bottles or boxes.

In whose favor does the prohibition run against any false or misleading statement, design, or device on the package or its label, regarding the ingredients or the substances contained therein? For whose benefit is the provision for labeling, branding or tagging of articles so as to indicate that they are compounds, imitations, or blends, made?

The answer to these questions, to my mind, is clear. It is the purchasing public, the ultimate consumer, whom the provisions of the statute are primarily intended to protect.

Without enlarging further, I am convinced that the word "package," as used in it, means the package which passes into the possession of the public, of the real consumer; and that the words, "original unbroken package," relate, as heretofore stated, to the package in the form in which it is received by the vendee or consignee.

The objection to the information thus far considered is not well taken.

The remaining question is this. Is a reputable, regularly licensed, practising physician, residing in Ohio, who prescribes for a person beyond the limits of the state and transmits to such person through the channels of interstate commerce the medicine prescribed, subject to the penalties of the law, if the medicine so prescribed and so passing through the channels of interstate commerce, contains morphine—the bottle, box, container, or package enclosing the medicine so prescribed and to be taken by the patient not being so labeled as to show the presence of that drug.

The defendant is engaged in the business of treating persons enslaved by the morphine, cocaine, and other drug habits.

In the course of the argument reference was made to the debates in the House of Representatives when the Pure Food and Drugs Act was under consideration and when amendments were offered and voted down, to exempt from the provisions of the Act the prescriptions of regularly licensed and practising physicians. The statute, like a written instrument, is to be construed by its express terms, from its four corners, as it is frequently said. It is said in 26 Am. & Eng. Ency. of Law, 638–639, that the opinions of individual legislators as to the object and effect of a statute are of little or no weight on questions of construction, and are generally inadmissible; and that while it is unquestionably a general rule that what may be called the legislative history of an act is not admissible to explain its meaning, yet in cases of doubt and ambiguity the journals of the legislature may be examined for the intent of the lawmakers to ascertain facts of which such journals are evidence. In view of the principle announced in United States v. Delaware & Hudson Co., 213 U. S., 366, 414, the fact that congress refused to incorporate in the Pure Food and Drugs Act a provision permitting regularly licensed and practising physicians to send their medicines containing morphine, cocaine, and like drugs, through the channels of interstate commerce without so labeling them as to show the presence of such drugs, is practically conclusive that it was the intention of congress that physicians should not enjoy such a privilege.

The Act under consideration, however, is not so obscure as not to be susceptible of interpretation without recourse to the journals of congress.

It makes no exemption in favor of regularly licensed practicing physicians. The purpose of the law is to prevent deceit and false pretenses in the sale of foods and drugs, and to protect the public. It is aimed at imitations, shams, frauds and pretenses of every character as regards articles of food and drugs. Its purpose is to apprise people who buy and use drugs as to what they buy and use, and to check the use of drugs which lead to destructive habits.

In the case at bar the prescription was given to correct the morphine habit. The agreed statement of facts recites that the best way to cure such a habit is by administering, without the knowledge of the patient, morphine in steadily diminishing quantities until finally none at all is given. It is urged that if a physician may not thus prescribe, he may be thwarted in his treatment of his patient, and that thus the law will operate to the detriment of the morphine victim. The court is therefore asked to so temper the law, to so construe it, as to permit a physician of the character above and in the agreed statement of facts named, to transmit medicine, to prescribe for his patients and transmit to them medicine through the instrumentalities of interstate commerce, without apprising the patients of their use of morphine, cocaine, and other drugs named in the Act.

This, however, is asking the court to read into the law a provision not therein contained. If the requested construction be placed upon it, then in every case the question will arise: Is the physician who prescribes regularly licensed, practicing and reputable?

The effect of the construction asked would be so to open the door as to permit disreputable physicians, "quacks," and the manufacturers and vendors of proprietary medicines, to place their prescriptions in the possession of the people and thus to continue the growth of the very drug habits which the law is designed to check. In the absence of any provision which exempts a regularly licensed, practicing and reputable physician from sending his medicines or prescriptions through the channels of interstate commerce to his patients without

labeling or branding them so as to show precisely what their contents are, I am of the opinion that such physicians are not exempt from the provisions of the Act, and that a failure on the part of the defendant to so label its medicines or prescriptions as to show that one of the ingredients is morphine, constitutes an offense.

If the law as it stands, operates injuriously, relief should be sought from congress and not from the courts.

One of the reasons for requiring the labeling or branding to show the presence of morphine, cocaine, and articles of like nature, is that people may not become addicted to the use of such drugs without knowingly acquiring the habit of using them. Medicines or prescriptions might otherwise be taken by them without knowledge of their real contents and ultimately the used have fixed upon them a habit which destroys both health and life. The law is far-reaching, but it was intended to be so.

Another question presented is, whether the Pure Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. It is urged that the medicine or prescription is a mere incident of the services rendered, and that it is not therefore to be treated as an article of commerce.

There are some sections of the act, as the third, which use the words "sale. or offered for sale." If a master employs a servant, he buys the servant's labor and the servant sells it. If a client employs a lawyer, he buys the lawyer's services. The lawyer sells his services, his learning, his skill. The client buys what the lawyer offers to sell. A physician holds himself out as ready to serve others for a consideration. In a sense he sells his services to his patient. It is common knowledge that physician rendering services to a patient also furnishes a considerable part, and sometimes all of the medicine taken by the patient. The medicine is furnished along with, under, and as part of the contract of employment. In cities, the physician may write a prescription to be filled at a drugstore, and yet it is within the knowledge of all the physicians in calling upon patients ordinarily carry with them some medicine at least for administration. There are instances, especially in cities, in which there is a separation of the drugs furnished from the employment. The patient then pays for the drugs in addition to the services rendered by the physician. But I do not understand from the agreed statement of facts that such a situation is presented in this case. The employment which a physician accepts is contractual in its nature and is sufficiently of the nature of bargain and sale to avoid the argument which is made. Moreover, the statute (Section 2), prohibits the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, or shipments to any foreign country, of any article of food or drugs which is adulterated or misbranded within the meaning of the Act.

As was said in the Hipolite Egg Company case, the object of the law is to keep adulterated and misbranded articles out of the channels of interstate commerce, and it is immaterial whether the medicine or prescription which was furnished by the defendant company was the mere incident of the employment, or its primary object. It is enough to know that the medicine or prescription was sent through the channels of interstate commerce, and misbranded, within the terms of the Act. The information is sufficient.

On the fact submitted, the defendant violated the law, and it is therefore my duty, gentlemen of the jury, to direct you to return a verdict in favor of the Government.

Mr. Bruce: I except to the holding of the court, and except to so much of the opinion as relates to the unbroken packages, etc.

The Court: Yes; you may take such exceptions as you like afterwards.

Thereupon the defendant by its attorneys moved the court in arrest of judgment, which motion was denied by the court and upon motion of the United States Attorney the court imposed upon the defendant a fine of $50 and costs.

On October 12, 1911, the defendant moved that the verdict of the jury be set aside and that a new trial be granted, and on December 22, 1911, after argument by counsel, the motion was denied.

On February 1, 1912, the defendant company, by its attorneys, sued out a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit upon the following assignments of error:

ASSIGNMENT OF ERROR NO. ONE.

The Court erred at the conclusion of the Agreed Statement of Facts in overruling defendant's motion that the Court instruct the jury to return a verdict in favor of the defendant, to which ruling of the Court counsel for the defendant at the time excepted, for the full reasons to-wit: First. That the information herein is defective and insufficient in that it failed to charge the defendant with any offense under the statutes of United States of America.

Second. The information did not charge the defendant with unlawfully shipping and causing to be shipped and delivered for shipment, certain articles of drugs "in original unbroken packages"; but did charge that the said certain articles of drugs were unlawfully shipped and caused to be shipped and delivered for shipment "in unbroken packages."

Third. The evidence adduced as set out in the submitted statement of facts does not disclose that the defendant unlawfully shipped and caused to be shipped and delivered for shipment, certain articles of drugs "in original unbroken packages and bottles"; containing alcohol and morphine-sulphate which were misbranded within the meaning of the Food and Drugs Act of June 30th, 1906.

Fourth. That the aforesaid Food and Drugs Act does not apply to a reputable, regularly, licensed, practising physician who prescribes for patients beyond the limits of the state wherein he is licensed and is practicing, and who transmits to his patients through the channels of interstate commerce the medicine prescribed, if the medicine prescribed and so transmitted contains morphine and not being so labeled as to show the presence of the drug.

Fifth. That the aforesaid Food and Drugs Act applies to the giving of a prescription and the filling thereof by a reputable, regularly licensed, practising physician.

ASSIGNMENT OF ERROR NO. TWO.

The Court erred, at the conclusion of the reading of the Agreed Statement of Facts in granting the motion of the plaintiff to direct a verdict in favor of the plaintiff, to which ruling of the Court counsel for the defendant at the time excepted, for the reasons assigned under the first assignment of error herein.

ASSIGNMENT OF ERROR NO. THREE.

The Court erred, in holding that the terms "original unbroken packages" in Section 2 of the Food and Drugs Act aforesaid, applied only to the vendee

and consignee, and not also to the person who shall ship, cause to be shipped, or deliver for shipment any article of food or drugs which is adulterated or misbranded within the meaning of said Act, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. FOUR.

The Court erred, in holding that the aforesaid Food and Drugs Act in relation to the adulteration or misbranding within the meaning of said Act applies to other than, "original unbroken packages," to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. FIVE.

The Court erred, in holding that the word "package" as used in the aforesaid Food and Drugs Act, applied to drugs meant other than "original unbroken packages," to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. SIX.

The Court erred, in holding that the aforesaid Food and Drug Act applied to a reputable, regularly licensed, practising physician who prescribes for a patient beyond the limits of the state wherein he is licensed and is practising and who transmits to his patient through the channels of interstate commerce the medicine prescribed, if the medicine so prescribed and transmitted contains morphine and not being so labeled as to show the presence of the drug, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. SEVEN.

The Court erred, in holding that the aforesaid Food and Drugs Act applies to the giving of a prescription by a reputable, regularly licensed, practising physician and the filling of the same, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. EIGHT.

The Court erred, in holding that the giving of a prescription by a reputable, regularly, licensed, practising physician and the filling of the same is the subject of bargain and sale, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. NINE.

The Court erred, in rendering judgment against the defendant upon Information No. 777, to which counsel for the defendant at the time excepted.

The case is now pending on appeal before said Circuit Court of Appeals.

W. M. HAYS,
*Acting Secretary of Agriculture.*

WASHINGTON, D. C., *October 30, 1912.*

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