

## I. S. 1066-c—Continued.

Methyl alcohol: None.

Citral: Trace.

Color: Naphthol Yellow S.

It was alleged in the information that these products were adulterated in the following particulars, that is to say, that, whereas the said article of food to which was attached the label hereinbefore mentioned and referred to as I. S. 1055-c was declared by the defendant, by means of the printed words contained upon said label, to be an orange flavoring made from the [juice or (?)] oil of the orange and curcuma for coloring, in truth and in fact, the said article of food contained no orange oil and, further, that said article of food contained no curcuma, but, in truth and in fact, contained coal tar dye for coloring matter instead of curcuma; and, further, that, whereas the said article of food to which was attached [the label hereinbefore mentioned (?)] and referred to as I. S. 1057-c was declared by the said defendant, by means of the printed words contained upon said label, to be a lemon flavoring made from lemon oil and containing curcuma for coloring matter, in truth and in fact, the said article of food contained no lemon oil and no curcuma for coloring matter but contained coal tar dye for coloring matter; and, further, that, whereas the said article of food to which was attached the label hereinbefore mentioned and described as I. S. 1062-c was declared by the said defendant, by means of the printed words contained upon said label, to be a flavoring made and prepared from the pure oil of lemon with curcuma for coloring matter, in truth and in fact, the said article of food contained no oil of lemon nor did it contain any curcuma, but did contain coal tar dye for coloring matter; and, further, that, whereas the said article of food to which was attached the label hereinbefore mentioned and described as I. S. 1063-c was declared by the said defendant, by means of the printed words contained upon said label, to be a lemon flavoring made and prepared from the pure oil of lemon with curcuma for coloring matter, in truth and in fact, said article of food contained no lemon oil nor was the said article of food made or prepared from the pure oil of lemon nor did it then and there contain any curcuma but did contain coal tar dye for coloring matter; and, further, that, whereas the said article of food to which was attached the label hereinbefore mentioned and described as I. S. 1066-c was declared by the said defendant, by means of the printed words contained upon said label, to be a lemon flavor, in truth and in fact, the same was not a lemon flavor, nor did it contain any oil of lemon, and all of said articles of food respectively were adulterated in that the certain substances as aforesaid were substituted wholly or in part for the said articles of food as above set forth and the same were colored in the manner as above set forth, whereby the said articles of food were damaged and their inferiority concealed from the purchasers thereof.

On May 2, 1912, the defendant company withdrew its plea of not guilty formerly entered and entered a plea of guilty to the information, and the court thereupon imposed a fine of \$50.

C. F. MARVIN, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *August 14, 1914.*

**3329. Misbranding of fruit puddine. U. S. v. 150 Cases of a Product Purporting to be Fruit Puddine. Tried to the court. Judgment for libellant. Decree of condemnation, forfeiture, and destruction. (F. & D. No. 2818. I. S. No. 104-d. S. No. 1010.)**

On July 22, 1911, the United States attorney for the District of Massachusetts, acting upon a report by the Secretary of Agriculture, filed in the District

Court of the United States for said district a libel for the seizure and condemnation of 150 cases, each containing an article of food, to wit, a product purporting to be fruit puddine, remaining unsold in the original unbroken packages at Boston, Mass., alleging that the product had been transported from the State of Maryland into the State of Massachusetts, and charging misbranding in violation of the Food and Drugs Act.

It was alleged in the libel that the food contained in the cases was misbranded in that said food was labeled and branded in part as follows: That is to say, certain of the retail packages in each of the cases were branded in substance as follows: "Fruit flavored puddine; trade mark registered, rose vanilla, Fruit Puddine Company, Baltimore, Maryland, U. S. A.," and certain other retail packages in the cases were labeled in substance as follows: "Fruit flavored puddine; trade mark registered, cream vanilla, Fruit Puddine Company, Baltimore, Maryland, U. S. A.," and each of the several cartons in each of the aforesaid 150 cases, into which cartons the said food was packed, was labeled in substance as follows: "A mixture; the flavorings and colors used in the mixture fruit puddine are pure and harmless and are guaranteed by the Fruit Puddine Company to comply with the Pure Food and Drugs Act under Serial No. 4167," which aforesaid brands and labels would deceive and mislead the purchaser to believe that the vanilla used in the preparation of said foods was true vanilla flavoring, whereas, in truth and in fact, said foods contained no true vanilla flavoring, but, instead thereof, an artificial vanilla was used; and, moreover, which said brands and labels would deceive and mislead the purchaser to believe that fruit or natural flavoring ingredients entered into the composition of said foods, whereas, in truth and in fact, no fruit or natural flavoring ingredients entered into the composition of said foods, but, instead thereof, artificial flavors were employed.

On August 8, 1911, the Fruit Puddine Co., Baltimore, Md., filed their claim. On January 17, 1913, the case came on to be heard before the court without the intervention of a jury, and on January 17, 1914, a judgment favorable to the Government was made, as will more fully appear from the following opinion by the court (Morton, J.):

This is a proceeding, under the Food and Drugs Act, by information (or libel) against 150 cases of a food product called "Puddine" or "Fruit Puddine." A jury having been waived by both parties, the case was tried before me upon fact and law. I find the material facts, in addition to those alleged in the information and admitted in the answer, to be as follows:

"Puddine" or "Fruit Puddine" is the distinctive name adopted and used as early as 1889 of a proprietary food product consisting largely of corn-starch. It is manufactured by the claimant and is put up in packages or cartons of different flavors, adapted to the retail trade. It does not contain any deleterious or poisonous ingredient. It is not an imitation of, or offered for sale under the distinctive name of, any other article; and the name "Puddine" or "Fruit Puddine" is accompanied, on the same label or carton, with a true statement of the place where it has been manufactured.

The alleged misbrandings lie in the words "Cream Vanilla," "Rose Vanilla," and "Fruit Flavored," which appear upon the cartons. "Cream Vanilla" and "Rose Vanilla" are two of the many flavors in which Puddine is manufactured. All the cartons in question appear to have been marked "Fruit Flavored Puddine," to which is added on some cartons "Cream Vanilla," and on others "Rose Vanilla," according to the flavor of the Puddine therein.

The plaintiff contends that branding any article of food with the word "vanilla," alone or in combination with other words, is a representation that

It is flavored with vegetable extract of vanilla made from the vanilla bean; that the word "cream" prefixed to the word "vanilla" means the best or highest grade of vanilla; that the words "Cream Vanilla" on the claimant's cartons mean "Flavored with the highest grade of vegetable extract of vanilla"; that the word "rose" prefixed to the word "vanilla" means a combination of the vegetable flavors of rose and vanilla; that the words "Rose Vanilla" on the claimant's cartons mean "Flavored with the vegetable extracts of rose and of vanilla"; and that the words "fruit flavored" mean flavored with fruits (commonly so-called), capable of being used as flavoring substances.

The contention of the claimants, who are the manufacturers of the product, is that "Puddine" and "Fruit Puddine" are artificial words, adopted as the name of their product, and constitute a distinctive name for the article within section 8, subsection 4 (1), of the act in question; that "Cream Vanilla" and "Rose Vanilla" are also artificial words, adopted by them to indicate the taste and appearance of their product, and import nothing as to the origin of the taste; that they are not false or misleading and that the term "fruit" or "fruit flavored," while adopted as an arbitrary or artificial part of the name, is in fact true, because the grain out of which the product is manufactured is—botanically speaking—a fruit.

The words in question are to be construed in their ordinary or customary meaning, so far as they have one. *U. S. v. Seventy-five Boxes of Pepper*, 198 F. R. 934; *U. S. v. Thirty Cases of Grenadine*, 199 F. R. 932; *Brina v. U. S.*, 105 C. C. A. 558.

The distinctive or trade name of the product is "Puddine" or "Fruit Puddine," always accompanied on the cartons by words indicating the flavor. "Puddine" and "Fruit Puddine" are frequently used without the adjective "fruit flavored," which is not part of the name. It seems clear that "fruit flavored" does signify, as the plaintiff contends, that the article is flavored with "fruit" in the common, not the botanical meaning of the word. As no such fruit is used in "Puddine," the words "fruit flavored" are untrue and misleading as applied to it; and the misleading effect of them is heightened by the picture of a dish of fruit which appears on some of the cartons. If Puddine were not an article of food known under its own distinctive name, it would clearly be "misbranded" within the act, by reason of the words "Fruit Flavored" upon the cartons.

The claimant contends, however, that articles of food which come within the terms of the proviso to the fourth subsection of section 8 are exempt from the operation of the Food and Drugs Act, and are not to be deemed misbranded, no matter what misstatements are made upon the cartons. The plaintiff contends (1) that the first paragraph of section 8 prohibits all misbranding as therein defined, and is not limited by the proviso in question; and (2) that even if the proviso does apply, it is not the intent of it to except from the operation of the act anything except the distinctive name itself; that even if, as to articles of food which come within the proviso, misstatements which form part of the name itself are not forbidden, it is nevertheless true that any other false or misleading statement regarding the ingredients or substances contained in such articles, constitute misbranding.

It has been said that the sole purpose of this statute "was (1) to protect purchasers from injurious deceits by the sale of inferior for superior articles; and (2) to protect the health of the people by preventing the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health." *Sanborn, J., Hall-Baker Co. v. U. S.*, 198 F. R. 614, at 616 (C. C. A. 8th Circuit). In other words deception and unwholesomeness are the evils which the act is designed to prevent. The last part of section 8, providing that "manufacturers of proprietary foods which contain no unwholesome added ingredients" shall not be required "to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding," plainly implies that a proprietary product may be misbranded. The report of the committee (House of Representatives, Fifty-ninth Congress, first session, Report 2118, March 7, 1906), and the debates, so far as they refer to the proviso in question, indicate that

the attention of Congress was directed to protecting thereby established distinctive or trade-names from being outlawed by the act.<sup>1</sup>

In *U. S. v. Forty barrels of Coca Cola*, 191 F. R. 431, 440, it was held that the proviso in question "was only intended to protect an article sold under its distinctive name from the charge of misbranding in so far as any statement or suggestion contained in the name itself is concerned." See, too, *U. S. v. American Chicle Co.*, U. S. District Court, District of Oregon.

It is undoubtedly true that persons purchasing a proprietary article of food, like Puddine, get what they go for, whether all the statements on the carton are correct or not. But it is also true that the purchase of a proprietary article may well be induced by false statements concerning it upon the cartons; and it is not difficult to imagine cases in which reliance on such misstatements would work real injury to the purchaser. For example, if such an article were branded "Contains no Sugar," when in fact it did, the misbranding might induce the purchase by persons whose diet demanded the absence of sugar. Such articles are within the purview of the statute. It does not seem to me that the proviso in question was intended to except them absolutely from the provisions of the act, and to leave the manufacturers free to make misrepresentations concerning them. Such a construction is out of harmony with all the rest of the statute, and disregards one of the principal purposes of it. It seems to me that the protection afforded by the proviso is limited to the distinctive name; and as so limited, I have no doubt that the proviso applies to the first paragraph of section 8, and fully protects distinctive names from being misbranding.

I therefore find and rule that the words "Fruit Flavored" upon the cartons containing Puddine were a statement regarding such article, or the ingredients or substances contained therein, which was false or misleading and constituted misbranding within the statute.

The conclusion above reached makes it unnecessary to consider whether the use of the words "Cream Vanilla" and "Rose Vanilla" constitutes misbranding; but I infer from what was said at the argument that this is a point upon which a decision is particularly desired by the parties. I therefore proceed to find the facts and state my conclusions in reference thereto.

No such extract, flavoring matter, or combination as "rose vanilla" is known to the trade, or to the public, except in connection with the defendant's product; nor any such extract or flavoring matter as "cream vanilla," except perhaps to a limited extent in the bottling trade, in which it is sometimes used to signify a high-grade vanilla extract; but such use is not known to the public generally, and is wholly unrelated to the use by the claimant. "Cream vanilla," as applied to the claimant's product, is certainly not understood by the public as meaning "flavored with a high-grade vanilla extract." The word "rose" followed by "vanilla" was registered by the claimant in the U. S. Patent Office as a trade mark applicable to "Puddine" on the 21st of May, 1889. Both "rose vanilla" and "cream vanilla" were in use by the claimant on Puddine before the Food and Drugs Act went into effect.

Puddine is not flavored with the vegetable extract of vanilla, but with vanillin, or synthetic vanilla, which is obtained from oil of cloves. Natural vanillin is found in the vanilla bean and forms the characteristic and most im-

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<sup>1</sup>The legislative history of this act is as follows: The bill which, after amendment, became the Food and Drugs Act of June 30, 1906, was Senate bill 88, 59th Congress, first session. It is printed in full in the Congressional Record for that session, at page 897. It was reported favorably to the Senate December 14, 1905 (Senate Reports, vol. 1, No. 8, 59th Congress, first session), passed by the Senate February 21, 1906 (Cong. Rec., 59th Congress, first session, p. 2773), and was introduced in the House of Representatives the next day (p. 2853) and there referred to the Committee on Interstate and Foreign Commerce. The committee's report is found in House Reports, 59th Congress, first session, vol. 1, Report 2118. The committee of the House recommended amendment to the Senate bill by substituting for it the Hepburn pure food bill (H. R. 4527, reported to the House January 18, 1904, and passed by the House) as amended by the committee. The bill was passed by the House with amendments June 23, 1906 (Rec., pp. 9076, 9353), and sent back to the Senate, which refused to concur. Conference committees filed identical reports June 27, 1906, setting out in full the bill as agreed upon and recommending that it pass (House Reports, vol. 3, No. 5056; Senate Docs., vol. 8, Doc. 521; Cong. Rec., pp. 9353, 9379, 9381). The second conference report, making certain minor improvements in sections 1 and 2 of the bill, was filed June 29, 1906, giving the bill as finally enacted (House Reports, vol. 3, No. 5096). The bill was then passed and signed June 30, 1906.

As to the distinctive-name proviso: The subject matter of this proviso appeared in the original Senate bill, and the proviso as finally passed first appears in substance in the bill as amended by the House committee, where it is numbered paragraph 4 of section 7. There appears to have been no discussion at all of the "distinctive-name" proviso in the debates in the Senate, and the only allusion to it in the debates in the House is found under date of June 23, 1906 (Cong. Rec., 59th Congress, first session, p. 9068).