"I confess I have been looking at the language of this section 8 here off and on for the last day and a half, and I have not at times been clear as to just what it did mean—whether it meant under the first paragraph 'If it be an imitation of another article' or whether it meant, 'If it be an imitation of another article under a distinctive name.' It would seem to me that, depending somewhat on the attitude of mind you brought to an interpretation of that first clause, you could read it either way.

"Reading it, however, in connection with the proviso, it might seem as though the Congress intended that articles that were not labeled with the distinctive name of some other article would come within the exception or the proviso. Now, that is undoubtedly the conclusion that Justice Hughes came to in Savage *v.* Jones, and while, of course, this case was not a case involving directly the pure food and drug law, it was a case in which there was considered the constitutionality of a local statute of the State of Indiana, the question there being raised as to whether the State statute invaded the field already occupied by the Federal food and drug law; and in order to determine whether it did invade that field it became necessary for Justice Hughes, speaking for the court, to map out or chart the field over which Congress took jurisdiction in so far as interstate commerce was concerned, by this particular section 8 of the Federal statute on behalf of the court. So it is rather more than dictum. Wasn't it necessary to decision that he lay out, define, the limits of the field in which Congress undertook to legislate with respect to interstate commerce, in order to determine whether or not the State statute of Indiana, which was in question, invaded that field? Because the Supreme Court has held that where Congress has taken jurisdiction over commerce that is interstate, so far as it has undertaken to regulate that commerce, its authority is exclusive. That is true.

"And so, whatever Justice Hughes had to say on behalf of the court with regard to the interpretation of this section 8 was not dictum, but was necessary for the decision of the case of Savage *v.* Jones.

"It seems to me that this court is bound to follow the interpretation put upon the section by the Supreme Court of the United States, and even if it be conceded that the interpretation is dictum it is dictum that is certainly highly persuasive as to the real meaning of Congress in the language contained in section 8 of the food and drug law.

"Perhaps, in view of what I have said, it would be unnecessary to spend the time to formulate a more formal opinion. The libel and amended libel will be dismissed, the petition of the claimant for the return of the seized property will be granted—the prayer of the petitioner granted. You may take your exceptions."

Counsel for the Government excepted to the ruling. The court on the same date entered a decree dismissing the libel and amended the libel and ordered that the United States marshal deliver the product to the Glaser-Crandell Co., Chicago, Ill., described in the decree as claimant.

On February 9, 1927, the assistant United States attorney filed an assignment of error and petition for writ of error to the Circuit Court of Appeals for the Sixth Circuit, which petition was allowed by the court. It appearing that the goods had been released under the order of January 6, 1927, the appeal was dismissed on April 14, 1927, on motion of the assistant United State attorney.

ARTHUR M. HYDE, *Secretary of Agriculture.*

17352. Alleged adulteration and misbranding of Bred Spred. U. S. v. 15 Cases of Bred Spred Raspberry Flavor, et al. Claim and answer filed. Hearing on demurrer to answer. Demurrer overruled. Judgment for claimant. Writ of error to Circuit Court of Appeals. Judgment for claimant affirmed. (F. & D. No. 21425. I. S. Nos. 13912–x to 13916–x, incl. S. No. C–5278.)

On December 2, 1926, the United States attorney for the District of Indiana, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying seizure and condemnation of 160 cases of Bred Spred at Indianapolis, Ind., alleging that the article had been shipped by Glaser Crandell Co., Chicago, Ill., in part on June 12, 1926, and in part on September 25, 1926, and had been transported from the State of Illinois into the State of Indiana, and charging adulteration and misbranding in violation of the food and drugs act.

The libel charged that the article was adulterated in that a substance, pectin, had been mixed and packed with the said article so as to reduce, lower, or

injuriously affect its quality and strength in that a substance, pectin, had been substituted wholly or in part for the article; and in that it had been mixed in a manner whereby inferiority was concealed.

Misbranding was alleged for the reason that the article was an imitation of jam; for the further reason that it was offered for sale under the distinctive name of another article; for the further reason that the retail packages containing the article bore labels upon which the statement, "Bred Spred, Raspberry [Strawberry, Peach or Pineapple, as the case may be]," appeared, which statement was false and misleading and deceived and misled the purchaser, in that it represented the product to be a pure jam, whereas it was not, but was a compound of pectin, fruit, and sugar; and for the further reason that there appeared on the said labels pictorial designs or devices of fruit which deceived and misled the purchaser into the belief that the article was raspberry, strawberry, peach, or pineapple—as the case might be—jam, whereas it was not. Misbranding was alleged for the further reason that said retail package inclosing the product, the metal cap and the manner in which said cap was sealed on the package, together with the label bearing statements, designs, and devices with respect to the contents of the said package, viz, "Bred Spred, Glaser, Crandell Co. 1925 Net Weight 14½ ounces, Raspberry [Strawberry, Peach or Pineapple, as the case may be] flavor, Glaser Crandell Co. Chicago" and the pictorial design of fruit were misleading.

On January 14, 1927, the Glaser Crandell Co., Chicago, Ill., entered an appearance as claimant for the property and on February 28, 1927, filed an answer to the libel. On December 7, 1927, the claimant filed its amended answer setting up (1) the case of United States *v.* 49½ cases Bred Spred, N. J. No. 17351, as res judicata in bar of the action, and (2) specific denial of each and every charge of adulteration and misbranding contained in the libel. A motion by the Government to strike claimant's answer as insufficient was overruled on February 14, 1928. On March 16, 1928, the United States attorney filed a demurrer to the answer.

The demurrer was overruled June 5, 1928. On November 28, 1928, the Government having elected to stand upon the action of the court in overruling its demurrer, judgment was entered by the District Court in favor of the claimant. To this judgment the United States attorney excepted and immediately filed petition and notice of appeal and assignment of errors.

On October 25, 1929, the case came up before the Circuit Court of Appeals for the Seventh Circuit, J. J. Alschuler, Evans, and Page sitting. The case was argued by counsel for the Government and claimant and the court handed down the following judgment affirming the judgment of the District Court: (Page, *Cir. J.*)

"The Government (appellant) libeled, in the United States District Court for the Southern District of Indiana, under the food and drugs act, a food product called 'Bred Spred,' manufactured by claimant (appellee) at Chicago, and shipped into Indiana. Appellant abided by its overruled demurrer to each of the two paragraphs of appellee's answer, and the libel was dismissed.

"The first paragraph of the answer sets out, as an estoppel by judgment, the complete record, other than the evidence, of a case in a Federal District Court of Michigan, wherein a judgment, unappealed from, was adverse to the Government.

"Concerning the second paragraph of the answer, appellant in its brief, makes the admission that it 'consists of specific denials of the various averments of the libel and explanations, constituting together a plea of confession and avoidance.' It is not a plea of confession and avoidance, but we find that it is a good and sufficient answer to the libel, and that as to that paragraph the court properly overruled the demurrer and dismissed the libel. The propriety of the court's action in that regard is not discussed or questioned by appellant. On the contrary, after the above admission, appellant abandoned the issue on the second paragraph and said: 'The contested issues here, then, arise upon the views held and ruling made by the Judge of the District Court upon the questions of former adjudication and estoppel raised by the first paragraph of amended answer.' That must end the case. With a good defense upon the merits admitted, it can not matter how many errors may be committed by a trial court on any issue upon which a case can not be reversed. If we should hold with the contention of the Government on the first paragraph, we could not, for that reason, reverse the judgment. The judgment is affirmed."

ARTHUR M. HYDE, *Secretary of Agriculture.*