

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 176, FOOD AND DRUGS ACT.

ADULTERATION OF CONFECTIONERY--"SILVER DRAGEES."

In accordance with the provisions of section 4 of the Food and Drugs Act of June 30, 1906, and of regulation 6 of the rules and regulations for the enforcement of the act, notice is given of the judgment of the court in the case of the United States *v.* Oriental Dragee Company, a prosecution lately pending in the District Court of the United States for the District of New Jersey against the said Oriental Dragee Company for violation of section 2 of the aforesaid act in the shipment from New Jersey to New York of confectionery, commonly known as "silver dragees," which was adulterated in that it contained a mineral substance, namely, metallic silver.

On December 19, 1908, the United States Attorney for the District of New Jersey filed an information in the above stated court against the Oriental Dragee Company, of Jersey City, New Jersey, in substance and in form as follows:

UNITED STATES OF AMERICA,

District of New Jersey, ss:

In the District Court of the United States for the District of New Jersey, in the Third Judicial Circuit, of the September Term, in the year of our Lord one thousand nine hundred and eight.

Be it remembered, That John B. Vreeland, Attorney of the United States of America for the District of New Jersey, who for the said United States in this behalf prosecutes, in his own proper person comes here into the District Court of the United States for the District aforesaid, on this 19th day of December, in this same term, and for the said United States gives the Court here to understand and be informed that The Oriental Dragee Company, a corporation of the State of New Jersey, and conducting and carrying on business at Jersey City, in the State of New Jersey, and having an office at Number 12 Bayview Avenue, at Jersey City, in said State of New Jersey, on the thirty-first day of July, nineteen hundred and seven, at Jersey City, in the State of New Jersey, in the District of New Jersey, and within the jurisdiction of this Court, did wilfully and unlawfully deliver for shipment and ship, and cause to be transported in interstate commerce from the State of New Jersey to the State of New York, an article of food which was adulterated within the meaning of the act of Congress, entitled "An

Act for preventing the man
branded or poisonous or deleterious foods,
ing the traffic therein, and for other purposes," approved on the
one thousand nine hundred and six (thirty-four statutes at large, page se
and sixty-eight), in that the said The Oriental Dragee Company, on the day
last aforesaid, and within the jurisdiction aforesaid, did ship from Jersey City,
State of New Jersey, and did cause to be delivered to E. W. Dunstan Company,
City of New York, in the State of New York, a large quantity, to wit, twenty-five boxes
of Argente Moyens Assortis, or Silver Dragees, which said Argente Moyens Assortis or
Silver Dragees was an article of food, that is to say, was confectionery, and was adul-
terated within the meaning of the act aforesaid, in that being confectionery as aforesaid
the same contained a mineral substance, to wit, forty-eight [hundredths] per centum of
metallic silver; and in that the said confectionery, known as "Silver Dragees" was
coated with silver, being a mineral substance, and which formed a constituent part of
the said confectionery, the said The Oriental Dragee Company then and there well
knowing that the said confectionery was an article of food and was so adulterated;
against the peace and dignity of the said United States, and contrary to the form of the
statute in such case made and provided.

Whereupon the said Attorney of the United States, who prosecutes as aforesaid, for
the said United States, prays the consideration of the Court here in the premises, and
that due process of law may be awarded against it, the said corporation The Oriental
Dragee Company, in this behalf, to make it answer to the said United States concerning
the premises aforesaid.

JOHN B. VREELAND,
United States Attorney.

To this information the defendant, Oriental Dragee Company, en-
tered its plea of not guilty, but subsequently, on February 27, 1909,
by leave of court first had and obtained, withdrew its said plea and
filed its demurrer to the information for reasons therein stated as
follows:

I. That it appeareth by said information that there is no allegation that the said
"Silver Dragees" contained terra alba, barytes, talc, chrome yellow, or other mineral
substance or poisonous color or flavor, or other ingredient deleterious or detrimental to
health, or any vinous, malt, or spirituous liquor or compound or narcotic drug, in viola-
tion of the form and substance of the statute in such case made and provided.

II. That it appeareth by said information that there is no allegation that the said
"Silver Dragees" contained an ingredient deleterious or detrimental to health, in viola-
tion of the form and substance of the statute in such case made and provided.

III. That it appeareth by said information that there is no allegation that the said
"Silver Dragees" contained any mineral substance deleterious or detrimental to
health in violation of the form and substance of the statute in such case made and pro-
vided.

IV. That it appeareth by said information that there is no allegation that the said
"Silver Dragees" were misbranded in violation of the form and substance of the statute
in such case made and provided.

Thereafter, and on April 5, 1909, the demurrer came duly on for
argument, and was argued, and the court, having taken the matter
under advisement, on April 10, 1909, overruled the demurrer and
filed its opinion thereon as follows:

ERICA }
 vs. } On demurrer to information.
 L DRAGEE COMPANY. }

ER H. BACON, *Assistant District Attorney for the United States.*
 A. FETZER, *for the Defendant.*

CROSS, *District Judge:*

Omitting the formal parts, the information alleges that the defendant, a corporation of New Jersey, and carrying on business at Jersey City, within said state, on July 31, 1907, at Jersey City, aforesaid, and within the jurisdiction of this court, did wilfully and unlawfully deliver for shipment, and ship and caused to be transported in interstate commerce from the State of New Jersey to the State of New York, an article of food which was adulterated within the meaning of the act of Congress, entitled, "An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines or liquors, and for regulating the traffic therein, and for other purposes," approved June 30, 1906, in that the said defendant on the day and year aforesaid, and within the jurisdiction of this court, did ship from Jersey City in the State of New Jersey, and did cause to be delivered to E. W. Dunstan Company, in the City of New York, in the State of New York, a large quantity, to wit, twenty-five boxes of Argente Moyens Assortis or Silver Dragees, which said Argente Moyens Assortis or Silver Dragees was an article of food, that is to say, was confectionery and was adulterated within the meaning of the act aforesaid, in that being confectionery as aforesaid, the same contained a mineral substance, to wit, forty-eight [hundredths] per centum of metallic silver, and in that the said confectionery known as "Silver Dragees" was coated with silver, being a mineral substance and which formed a constituent part of the said confectionery; the said defendant then and there well knowing that the said confectionery was an article of food and was so adulterated. Then follow the usual formal statements. As will have been observed, the information is founded upon what is popularly known as the "Pure Food Act" (34 Stat. 768; Supp. Comp. Stat. 1907, p. 928). The material parts of the act pertinent to the present controversy, will be found in Section 7, and are as follows:—"That for the purposes of this act an article shall be deemed to be adulterated * * * in the case of confectionery if it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug." The defendant has demurred to the information, claiming, among other things, that silver, with which the confectionery in this case is alleged to have been adulterated, is not a mineral substance of like character, with those specifically mentioned in the act; that the information does not allege that the adulterant, to wit, silver, is an ingredient deleterious or detrimental to health, or that the strength and purity of the confectionery falls below the professed quality or standard under which it is sold. As I construe the section in question so far as it relates to the confectionery, it contains five classes of prohibited articles; the introduction of any designated ingredient of either of which violates the act; that is to say, the act would be violated if the confectionery contained terra alba, barytes, talc, chrome yellow or other mineral substance, or if it contained any poisonous color or flavor, or if it contained any other ingredient deleterious or detrimental to health; or if it contained any vinous, malt or spirituous liquor or compound thereof, or lastly, if it contained any narcotic drug. If the construction suggested is correct, then it was unnecessary that the pleader should aver that silver, the mineral substance alleged to have been introduced in this case, was "deleterious or detrimental to health." Those words are limited to the term "ingredient," they qualify that word only, and not any pre-

ceding word or words. If a construction is adopted, the construction would perhaps have been different. The confectionery of mineral substances, is, in my judgment, therefore prohibited of the presence or absence of any poisonous, deleterious or detrimental qualities. Confectionery is prohibited because they are adulterants, and for that reason only. Confectionery, or any other ingredient, although not theretofore specified or classified, which is deleterious or detrimental to health, is prohibited. Certain specified articles are, by the first clause quoted, inferentially denominated minerals, and their use is prohibited; then to the specific mineral substances whose use is thus prohibited, is added "or any other mineral substance." The information in brief, alleges that confectionery was shipped by the defendant and delivered in interstate commerce; that such confectionery was adulterated by having in it as one of its constituent parts silver, which is alleged to be a mineral substance. Assuming, because it is admitted by the demurrer, that silver is a mineral substance, its introduction into confectionery as an ingredient, which is also admitted, brought the confectionery within the prohibition of the statute, once it was shipped in interstate commerce. It is urged, however, that silver is not of the class of the specified mineral substances, whose use is prohibited. It must be borne in mind nevertheless, that we are considering an act which relates to the adulteration of food products of which confectionery is one. Silver is a mineral incapable of assimilation through the stomach. It will not yield to the processes of digestion. One of the main purposes of the act is to prevent the introduction of such substances into food products. The title of the act embraces adulterated foods as completely as it embraces misbranded foods, or poisonous foods, or deleterious foods. It refers to each class separately and in the alternative, and the act deals with each class. Technical rules of construction must give way to the avowed purpose and intention of an act. If it be that an act admits of more than one construction, then that one will be adopted, which best serves to carry out the purpose of the act. Hence I do not feel warranted in permitting the doctrine of *ejusdem generis* or other technical rule of construction to limit the scope of the act. If silver may be used, as claimed, to beautify the confectionery, why not lead to give it weight. The language under consideration is clear and does not require for its construction, the application of technical rules. To yield to the construction of defendant's counsel would open the door for the emasculatation of the act.

As to the contention that it was necessary to allege that by the use of silver the strength and purity of the confectionery fell below the professed quality or strength under which it was sold; it is only necessary to say that that clause of the act applies to drugs and to drugs only. It is found in the paragraph dealing with drugs and precedes that which relates to confectionery, which in turn precedes the clause relating to food. Each paragraph is dealt with separately. The clause referred to can not be read into that part of the act which relates to confectionery. It is no part of it.

The demurrer will be overruled.

JOSEPH CROSS,
Judge.

The case having come on for trial on the issues raised by the allegations in the information and the defendant's plea of not guilty, was submitted to a jury on June 22, 1909, and the jury having heard the evidence, argument of counsel, and charge of the court, returned its verdict finding the defendant guilty. Thereafter, and on June 28, 1909, the court sentenced the defendant to pay a fine of \$100.

The facts in the case were as follows:

On November 19, 1907, an inspector of the Department of Agriculture purchased from the E. W. Dunstan Company, 143 Chambers

Street, New York, N. Y., a sample of an article of confectionery contained in packages labeled "Silver Dragees, Argente Moyens Assortis. Made in Jersey City N. J. U. S.", which was part of a shipment made to said Dunstan Company by the Oriental Dragee Company from Jersey City, New Jersey, on July 31, 1907. This sample was analyzed in the Bureau of Chemistry of the United States Department of Agriculture and found to contain forty-eight hundredths per cent of metallic silver.

It appearing from the aforesaid analysis that the article was adulterated within the meaning of section 7 of the aforesaid act in that it was confectionery and contained a mineral substance, namely, metallic silver, the Secretary of Agriculture, on April 9, 1908, gave notice to the E. W. Dunstan Company, the dealers from whom the sample was purchased, as well also as to the Oriental Dragee Company, the manufacturer and shipper of the article, and gave them an opportunity to be heard, and they were heard, and it appearing that the act had been violated by the Oriental Dragee Company, the party solely responsible for the adulteration of the said article, the said Secretary, on November 9, 1908, reported the facts and evidence to the Attorney General by whom they were referred to the United States Attorney for the District of New Jersey who filed an information, as aforesaid, against the Oriental Dragee Company with the result hereinbefore stated.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *January 28, 1910.*

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