

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 2384.

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

ADULTERATION OF ORANGES.

On November 13, 1912, the United States Attorney for the Northern District of Illinois, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district libels, and on November 27, 1912, amended libels, for the seizure and condemnation of 8 carloads of oranges remaining unloaded and in original unbroken packages at the town of Proviso, Ill., alleging that the product was being transported from the State of California into divers other States and charging adulteration in violation of the Food and Drugs Act. Five carloads of the product had been shipped by the Lindsay Fruit Association, Lindsay, Cal., on November 6, 1912, a carload each to the States of New York, Massachusetts, Ohio, Rhode Island, and Ohio, respectively, and were labeled, among other things, "Dry Bog Brand", "Craigy Nos Brand", "Blue Label Brand", "Happy Boy Brand" and "Sunkist Oranges and Lemons"; one carload had been shipped by the Tulare County Citrus Exchange, Porterville, Cal., November 8, 1912, into the State of New York, and was labeled, among other things, "Sunkist Oranges and Lemons"; one carload had been shipped on November 8, 1912, by the Stewart Fruit Co., Porterville, Cal., into the State of Wisconsin, and was labeled, among other things, "Winterhaven"; one carload had been shipped on November 8, 1912, by the Drake Citrus Association for the Central California Citrus Exchange from Lindsay, Cal., into the State of Massachusetts, and was labeled, among other things, "Sunkist Oranges and Lemons".

Adulteration of the product was alleged in the libels for the reason that it was colored, coated, or stained in a manner whereby damage and inferiority were concealed.

On December 20, 1912, the case having come on for hearing before the court, after the submission of evidence and argument by counsel the following opinion was delivered by the court (Landis, *J.*):

In the view I have of the facts and the law of this case, I do not care to hear from the United States District Attorney, and in view of the presence here from their homes of the counsel and other persons who are interested in or necessarily connected with, as parties and otherwise, this litigation, I will dispose of this matter now, although it is of a character which would make it proper, did these conditions not exist, to take time to set down on a paper the considerations and reasons and theories which move my mind.

Taking up the last point first; the Federal pure food and drugs act contemplates two methods of procedure for the enforcement of its provisions in the courts of the United States: one, at his own instance or on his own initiative, by information presented by the United States District Attorney or an indictment by grand jury; the other, a preliminary examination and investigation by the Department of Agriculture, resulting in a transmission to the District Attorney for the proper district of a statement of the disclosures made at the examination by the Department, to be followed by the District Attorney by an appropriate proceeding.

This question is not a new question in this district. The question that has just been argued to me is not a new question here. It has arisen, I suppose in probably a score of cases. I suppose nothing is in the books. I know of nothing in the books from me on this subject. I have no time to get things in the books. I would like to do it at times, but I don't have the time.

The first time this question arose was in a criminal prosecution where there was either an objection to testimony by the defendant under indictment or a motion to direct an acquittal by a defendant under indictment, because of the fact that the indictment did not allege the fact that the Department of Agriculture had taken the preliminary step, and that it had not been followed by proof that the Department of Agriculture had taken the preliminary step. The argument was made, and it was an attractive argument and it is not altogether an irrational argument, considering it as a legal proposition, and yet I came to the other conclusion. And it came up again, and I came to the same conclusion. And it commenced to come up around in different courts, and they disagreed from me. So that the question of whether a man was guilty or innocent depended a good deal on the district in which he happened to be charged, which is an unfortunate condition of affairs. Finally, this Supreme Court decision came up. The judgment of the trial court, to review which the Morgan case went to the Supreme Court, having been rendered at about the time that a judgment contrary to the trial court's judgment there was rendered in this district. And I read the opinion of the trial judge in this Morgan case before the Supreme Court passed upon that question and I was somewhat inclined to agree with the trial judge in the case, after reading his opinion. But that case went to the Supreme Court, and when Judge Lamar handed down his opinion I studied that opinion at the time, and I came to the conclusion that the Supreme Court intended to decide that point. I have re-read that opinion here, and while it is true, as the counsel for the claimant who last addressed the court, called the court's attention, asserted that it did not appear in the record in that case that that prosecution had been started by the Department of Agriculture, there is not any other theory upon which a justification of the Supreme Court's opinion can be based than that the court considered that question as before it. Judge Lamar goes on in three or four pages to deal with that question, and a re-read-

ing of the opinion forces me to the conclusion that they were considering that question. And I will have to adhere to my impression as to what they had in mind when they decided that case; namely, that the Supreme Court, in that case, was considering whether or not in a criminal prosecution under the Pure Food Law, not initiated by the District Attorney or the Grand Jury, but initiated by the Department of Agriculture, had to proceed, had to disclose in the moving papers, and follow by proof on the hearing, the fact of the initiation at the instance by the Department of Agriculture—that the Supreme Court held that it was not necessary, that it need not be done—and that in a criminal case where the judgment of the trial court was in favor of the defendant, and where the Supreme Court's conclusion was a reversal of the trial court's judgment; that is to say, the entry of an order adverse to the rights of the defendant in the case proceeded against by indictment.

Now, in this Pure Food Law there are two things that it is sought to prevent: the misbranding of an article; the adulteration of an article, for consumption, the general purpose of the act being to give to—as I take it; I may be wrong about it—as I take it, to give to what is called the consumer in our economic discussion, the chance to know what he eats, what he buys and eats, providing it is the subject of interstate commerce. That is the general purpose of this law, and in the reading of the law and in its administration here, and as I take it, elsewhere, the judges have had that in mind as the object and purpose of the law, as distinguished from the giving to persons of expert knowledge information as to the quality or condition of a food or drug product, a subject of interstate commerce.

And, in order to accomplish that, and as one step toward that end—indeed, what may be termed the threshold—the act has a definition of the word “adulteration”—what is adulteration in the case of drugs, and what is adulteration in the case of food. Now, while it is true that the common acceptation of the term “adulteration” implies the admixture of something inferior with the article, the putting in of a foreign substance into the article, this statute goes farther than that, and is not content with the ordinary acceptation or the dictionary acceptation of the word “adulteration.” The act goes on: For the purposes of this act, an article shall be deemed to be adulterated: In the case of drugs; in the case of confectionery—coming to the case of food: “If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.” There they have in mind rather what the average man has in mind than what the dictionary has in mind. And under that section we had here the Pepper case, where the pepper put out by an eminent Chicago house, as far as reputation goes one of the best in the country, put up what it called pepper, which was shipped to the Montana State Penitentiary, and was there so handled or so used—how I don't recall—that a complaint was made, and there was an analysis made of it, and it was found to contain but 5% pepper. What was added I don't recall; but it was under that provision, this adulteration definition, adulteration clause, that that case proceeded. Of course, that is not this case before us.

“Secondly: If any substance has been substituted wholly or in part for the article.

“Third: If any valuable constituent of the article has been wholly or in part abstracted.”

Fifth, If it contain any added poisonous or other deleterious ingredients.

Something added to it—all these provisions are for dealing only with putting something in or extracting something from. That is, if it consist of putrid, decomposed animal or vegetable matter. That is not this case.

Coming now down to Clause 4: For the purposes of this act, an article shall be deemed adulterated, in the case of food, if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

It is not a case of staining. We have a right to look for the dictionary definition of the terms used, here, to determine what Congress had in mind, because Congress must have had in mind, when it used these words, the dictionary definitions. And the dictionary definitions which Mr. Call has read clearly show that the oranges are not stained. Nor are they powdered. Nor are they coated. They are not mixed.

He read a definition of "colored." The same definition I looked up last night. And the definition of colored, dealing now with the legal propositions, not the merits of the case whether these oranges are inferior or not, one of the clauses of the definition of coloring fits this case—I forget which one it was. I got it out of one of my dictionaries last night—several of them. Let me have it, if you please. I can turn right to it. [Mr. Call hands Judge paper.]

The transitive verb "color" is defined by the Century Dictionary, 1911 edition, as follows: "To give or apply a color to; to change or alter the color or hue of."

Now, as I say, Congress had in mind these definitions—the same definition is in the edition of 1900—when Congress used the word "colored"; they had in mind that they were using the word "stained", and that in using the word "stained" they were using a term which dealt with the use of something that was put upon the thing, as the definition here shows. And so with "coated." The word "colored" is the only one of these words that lets in the proposition of changing the hue or color, changing the color or hue of an article without adding something to it, or coating it over, or submerging it in a liquid or some other article. This definition of color, to my mind, clearly justifies and clearly covers the case where the color, the appearance of an article as to hue, is changed by a process other than a natural evolution, without the addition of extraneous substances, chemicals or other matter; so that, if an article is subjected to a process, a heat process, by reason of such subjection undergoes a change, whether that change under such influence is a chemical change in the thing itself, caused or brought about, a reaction of some kind brought about by the application of heat, whatever it is, it is my judgment this statute fits it.

Now, is not that reasonable, is not that a reasonable construction, having in mind the object and purpose of this law?

Passing the question for the present, of whether or not these oranges are good or bad, whether somebody is deceived or nobody is deceived, having in mind for the present, solely the question of the meaning of the word, what Congress had in mind when it selected the word, after having picked "stained" for its purpose, "powdered" for its purpose, "coated" for its purpose, "mixed" for its purpose, with the meaning of each and all of those terms, putting in, in addition to all of them, the word "colored", having in mind the purpose and object that Congress had in mind was to forbid the doing of the thing that would deceive the person who got the thing at the store, this subject of interstate commerce, can there be any doubt that what they had in mind and what they meant to express was that, beyond coating, or staining, or powdering, or mixing, in some other way the thing was colored with the effect and purpose, or with the effect without the purpose, of deception as to its true condition, that the statute should have that meaning. I think it is quite clear that that is what they must have had in mind. To adopt the illustration used in the argument, if, instead of this thing being accomplished by the heating process, it had been accomplished by the use of some sort of paint or the extract of

carrot, or something of that sort, and it was used and the result of its use was to give to the orange this color, and in fact it was a perfectly unfit article of food, it would be plain that that would be a violation of the law. There would be no debate about that. How, then, can it be said, if the subjection of the thing to an artificial process, and it is an artificial process—say what you may, or argue as we will, it is a process that has been evolved with the development of the business for the accomplishment of some purpose in a way that nature did not effect its objects—if, by doing it, a color is given to the thing which belies the contents of the thing and thereby misleads and deceives the person, to prevent whose deception the law was passed, how can it be said, on what theory can it be urged that, merely because there has been no outside matter added to it, the law does not apply to it?

My conclusion on that is against the contention of the claimants. I think the law applies to that case. The dictionary definition, as I read it, requires the holding that it does apply to that case.

Now we come down to the proposition presented by the issue of fact, whether or not this coloring, there has been a coloring whereby damage or inferiority is concealed, having in mind now the court's conclusion as to who Congress had in mind in using the word "concealed." The evidence in this case, in spite of the apparent contradictions of witnesses, to my mind has presented a rather plain, easy question of fact. It appears that, in this orange district in California, the oranges are taken from the trees when the color of the—what did you call that—this outside of the orange?

MR. CALL. We call it the rind.

THE COURT. —the rind is green; that the orange is taken to the packing house and, for a period of, a variable period of from 24 to 48 or 50 hours, is subjected to a heat of 94 to 96 degrees; that as a part of the process pans of water are placed upon the stoves, by the use of which this temperature is obtained, the result being the creation of an ultra-humid condition; the effect of all of which the witnesses all agree is to bring out a yellow color upon the orange. There is also evidence, and I think it is rather in harmony, I think it is prudent to say that it is in harmony; that while this process of yellowing the rind goes on, there is a change to some extent of the interior of the orange—the difference is as to the extent. The claim by the claimants here is that it is a substantial change, quite a substantial change, resulting, as the claimants claim, and some of their evidence sustains, in an increase of sugar, an increase in the total quantity of juice, and a decrease in those elements that are undesirable in the orange as a commercial food product. The evidence of a number of witnesses has been introduced as to the condition of the orange after being subjected to this process.

The evidence of the witnesses in California who were called to a room in a hotel by the United States Government Inspector, and who made an examination, was rather unanimous to the effect that the fruit which they sampled was immature, unripe fruit. The evidence of witnesses produced by the United States here, who examined the oranges after arrival in Chicago, was generally to that effect. The evidence of the claimant's witnesses, by the spoken word of the claimant's witnesses, was that the fruit was, they all agreed it was edible fruit; that it was fit for the purposes of commerce; but the general trend of the evidence was to the effect, as it impressed my mind, that the fruit was unripe fruit.

Taking the contention of the claimant's witnesses, the evidence of the claimant's witnesses as to the effect of the sweating process, in so far as it had to do with changing the inside of the orange, the food part of the orange, if their

testimony on that point is true, one thing stands out perfectly plain, and that is that when they picked the orange it was a green orange because, before the sweating process took place, this change which they all testified did take place, namely, the further ripening of the interior of the orange, had not taken place, and manifestly at the time the orange was picked it could not have been fit for market. And a number of these samples have been cut here, and witnesses have been heard as to their judgment of these oranges here. Several witnesses were heard today, and a number of these witnesses of the claimant expressed their judgment as follows: The color is good, for the first of the season; Considering that it is the first of the season, it is fairly sweet. The evidence of all the witnesses is that, as the season progresses and the oranges hang on the trees longer, something takes place which changes the oranges and makes better fruit out of them.

My judgment of the evidence of these witnesses here and in California, the tests here and the tests there, is that these oranges are picked when it is perfectly clear they are not proper, they are not good food products; that this process to which they are subjected results in a color that does conceal from the consuming public the true condition of the orange, that is to say, that, while the expert may know what the light yellow means and what the dark yellow means, and the various hues between those two extremes may mean, the person Congress had in mind when it passed the law does not know what those several hues mean; therefore, that the process results in so coloring the orange that the inferiority of the orange is concealed; and *there will be an order accordingly.*

Mr. CALL. If the court please, may I ask for special findings on two or three propositions? Would that be improper?

The COURT. I think not.

Mr. CALL. I would like to have a finding——

The COURT. I think that, under the practice, you are required, at the beginning of the hearing, to do something in writing, I am not sure about it, if you are I will let you do it, and let the record show you did it at the beginning because I want this thing settled.

Mr. CALL. It is highly important, it should be settled.

The COURT. I want it settled. My judgment is that the rules require, the United States Supreme Court rules require that there be, in the event a matter is heard by the court, something at the beginning of the trial dealing with the question of the special finding.

Mr. DICKINSON. That stipulation has been filed.

Mr. CALL. The stipulation was filed.

The COURT. Then you have got it.

Mr. CALL. That don't cover it.

The COURT. Whether it is covered or not, I say to you, I will permit you to draw it, and I will require the Government to sign it, and I will enter it as at the beginning of this trial, because I want this question determined.

Mr. CALL. Now, the special findings—I only care for two or three.

The COURT. All right.

Mr. CALL. Would I be entitled to a special finding that this process is the acceleration of a natural process; that the evidence shows it is the acceleration of a natural process?

The COURT. You mean, unqualified, to that extent?

Mr. CALL. It can be qualified. Acceleration of natural process, with the addition of more than normal heat at that season, and more than normal moisture at that season.

The COURT. I have given you what I think I can, and you can express it in whatever words you desire that I will be willing—that I can sign. The natural process in the course of time would result in change of color. My conclusion is that you accelerate it with such speed that it gets beyond the inside of the orange; that is what I mean to hold.

Mr. CALL. The point I want to get at is, not by the addition of any foreign substance.

The COURT. Oh, certainly. Except as artificially created humidity might be a foreign substance—you mean chemical?

Mr. DITCHBURNE. I would like a finding that the process improves, without saying to what extent, improves the character of the fruit, as well as the color.

Another point I wanted to suggest is with regard to the disposition of the fruit. I understand that, under the law, that an order will be entered to sell the fruit. If there is any waiver we could make that would facilitate the sale of the fruit, we would like to make it.

The COURT. What is the provision?

Mr. DICKINSON. If the court please, this being an adulterated case, the practice has always been it should be destroyed.

The COURT. I am not going to destroy this fruit.

Mr. DICKINSON. I am not insisting on that in this case. The court has discretion, under the act, to either sell or destroy.

The COURT. I will find a discretion, whether I have got it or not.

Mr. DICKINSON. The act specifically gives you that discretion. We are not insisting on destruction. I think some other disposition should be made.

The COURT. If I destroy this fruit I ought to be indicted. I think a good deal of this is pretty bad stuff. That is the truth about it. I tasted a number of oranges here. Unfortunately for your side of this case, unfortunately, I used to be in the grocery business, 30 years ago.

Mr. CALL. I suspected you had been both a farmer and grocer.

The COURT. And I have been in a way keeping abreast of this orange business, and I know something about oranges. I do not mean I have had any unhappy experiences in getting bad fruit. I haven't, because I have exercised discretion in my purchases, but there is no question that a good deal of this fruit I have tasted here has been hit pretty hard by this process, it is a far removed fruit from what it would have been if left to hang upon the tree. I do not mean by that, to the sickening ripened condition. It is far removed from what the influences of nature would have done to it and with it.

What do you say you want done?

Mr. CALL. I don't know exactly. I would like an order to have it sold as soon as possible.

The COURT. I will let you gentlemen think this matter over tonight and come over here tomorrow.

Mr. CALL. I will leave it with Mr. Lamb, and I would like to have it sold just as soon as possible. Sell it at public auction, will you?

Mr. DICKINSON. We can agree to satisfactory terms.

The COURT. The thing to do is—this the 20th of December—the thing to do is to sell it inside of the next three or four days. You will get more out of it than if it goes over the 25th of December.

Mr. CALL. One day's notice is as good as three or four.

Mr. DICKINSON. We want some sort of provision or assurance that it will not be sold again in violation of the act. The Government would suggest that a provision be made whereby it will not be sold again in violation of the act.

The COURT. Come in tomorrow morning at 10 o'clock.

On December 24, 1912, the Lindsay Fruit Association, Lindsay, Cal.; the Porterville Citrus Association, Porterville, Cal.; the Stewart Fruit Co., Porterville, Cal.; and the Drake Citrus Association, Lindsay, Cal., claimants, having entered their appearances and filed their answers and amended answers to the libels and amended libels of the United States, formal decrees of condemnation and forfeiture were entered, the court finding, specially, among other things—

That all of the fruit contained in the cars of oranges libeled in this case came from Tulare County, Cal., and that oranges in said county mature and ripen at an earlier date than the oranges in southern California.

That in the various orange districts in Tulare County, as aforesaid, oranges mature and ripen on the trees before the skin or rind thereof becomes yellow or orange colored.

That the color of the oranges libeled in this case was produced by placing the oranges, green in color when picked from the trees, in closed rooms and then heating said rooms with oil stoves upon which were placed vessels of water, and keeping said oranges in said rooms for four or five days at a temperature ranging from 90 to 98 degrees, but at an approximately average temperature of about 94 to 95 degrees.

That the color of the oranges involved in this case was secured by the heat and moisture in the manner above stated and without the use of any chemical or any foreign matter.

That prior to the use of the coloring process described above, the fruit had reached a higher state of development in the process of ripening than appeared from the outside of the rind; that the rind was greener and indicated a more immature condition than was actually shown by the pulp or edible portion of the fruit.

That the color of the rind of said oranges, secured by said process, to the people in the trade and business of handling oranges either in producing or marketing them, corresponds with the color of the inside of the fruit and that color is fairly indicative of the inferior quality.

That by the use of the process described, the oranges involved in this case were not coated within the meaning of the law, and the count of the libel herein charging that such oranges were coated in violation of the law is not sustained.

That by the use of the process described, the oranges involved in this case were not stained within the meaning of the law and the count of the libel herein charging that such oranges were stained in violation of the law is not sustained.

That the libel in this case was not brought or filed upon the initiative of the United States Attorney in and for the district and division aforesaid, nor upon his investigation or information obtained by him; but was brought as a result of the Secretary of the Department of Agriculture certifying to the said United States Attorney the facts resulting from the investigation and examinations of the Bureau of Chemistry, or under its supervision or direction, with a copy of the results thereof, and the claimant of the above-entitled oranges, who was the shipper thereof and from whom the samples were taken from which the examinations and investigations were made, was not given any notice of the investigation by the Department of Agriculture or the Bureau of Chemistry, nor any opportunity for a hearing before said Department.

The court further found, as a conclusion of law from the foregoing special findings of fact, that the product was adulterated in violation

of the Food and Drugs Act in the following particular, that is to say, that when and where said product was so shipped as aforesaid it was colored in a manner whereby damage and inferiority were concealed.

It was further ordered, among other things, that the product should be sold by the United States marshal after removing from each orange the wrapper bearing the trade-mark "Sunkist Oranges and Lemons", and it was further ordered that the marshal should cause a quantity of wrappers to be prepared bearing the statement "Colored by sweating", and should place one of said wrappers around each of the oranges, and that said marshal should cause to be placed on the outside of each box of the product a printed label bearing the words "Colored by sweating", and that the proceeds of the sale, after deducting the legal costs and charges, should be paid into the Treasury of the United States.

W. M. HAYS,

Acting Secretary of Agriculture.

WASHINGTON, D. C., *February 14, 1913.*

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