for sale at the Dr. F. L. Rice Clinic, after shipment in interstate commerce, Floyd L. Rice caused various quantities of the drugs to be dispensed without a prescription from a practitioner licensed by law to administer such drugs. These acts of dispensing were contrary to the provisions of Section 503 (b) (1) and resulted in the dispensed drugs being misbranded.

DISPOSITION: March 30, 1953. The defendant having entered a plea of guilty, the court fined him $1,000 on each of the two counts of the information.

DRUGS AND DEVICES ACTIONABLE BECAUSE OF FAILURE TO BEAR ADEQUATE DIRECTIONS OR WARNING STATEMENTS*

3967. Action to enjoin and restrain the interstate shipment of a misbranded drug. U. S. v. Tom G. Sanders. Consent decree granting injunction. (Inj. No. 228.)

COMPLAINT FILED: September 19, 1950, Western District of Oklahoma, against Tom G. Sanders, Wanette, Okla.

NATURE OF CHARGE: The defendant had been and was, at the time of the filing of the complaint, delivering and causing to be delivered for introduction into interstate commerce at Wanette, Okla., consignments of an article of drug consisting of ground hoof, horn, or other external animal growth suspended in milk diluted with water and containing small amounts of nitrates.

The complaint alleged that the article was misbranded in the following respects:

Sections 502 (b) (1) and (2), the label of the article failed to bear the name and place of business of the manufacturer, packer, or distributor, and an accurate statement of the quantity of the contents; Section 502 (e) (2), the label of the article failed to bear the common or usual name of each active ingredient; and, Section 502 (f) (1), the labeling of the article failed to bear adequate directions for use in the treatment of all the diseases for which it was recommended, namely, cancer, diabetes, heart conditions, ulcers, arthritis, anemia, palsy, gas on the stomach, stomach and kidney trouble, cysts, nervous conditions, and other diseases.

The complaint alleged further that unless restrained the defendant would continue to deliver and cause to be delivered, for introduction into interstate commerce, the misbranded article of drug.

DISPOSITION: October 17, 1950. The defendant having consented to the entry of a decree, the court entered a decree of permanent injunction perpetually enjoining the defendant from directly or indirectly introducing or causing to be introduced, and delivering or causing to be delivered for introduction, into interstate commerce, a drug misbranded as alleged in the complaint.

3968. Contempt proceedings for violation of permanent injunction. U. S. v. Tom G. Sanders. Government's application for citation of defendant for criminal contempt denied. Decision reversed by United States Court of Appeals. Defendant's petition for certiorari denied by Supreme Court. Plea of nolo contendere. Fine, $500. (Inj. No. 228.)

APPLICATION FILED: On May 9, 1951, in the Western District of Oklahoma, the United States attorney filed an application for an order to show cause why the defendant should not be punished for criminal contempt.

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*See also Nos. 3961–3963.

NATURE OF CHARGE: It was alleged in the application that, notwithstanding the provisions of the decree of injunction previously entered against the defendant (see the preceding notice of judgment, No. 3967), the defendant, on January 24 and February 2, 5, and 7, 1951, delivered and caused to be delivered, for introduction into interstate commerce, various quantities of the misbranded drug which was involved in the previous injunction action in that the defendant had sold and delivered, for introduction into interstate commerce, quantities of the drug to various purchasers at Wanette, Okla., with the knowledge that the purchasers intended to and would return to their homes at Garden City, Kans., Denison, Tex., and Kansas City, Mo.

It was further alleged that, after the entry of the decree of permanent injunction, the defendant ostensibly discontinued the practice of using salesmen or so-called "runners" to solicit and fill orders from customers outside the State of Oklahoma, and had adopted the practice of selling and delivering the misbranded drug at Wanette, Okla., directly to out-of-State customers, knowing that the misbranded drug would be transported in interstate commerce by such purchasers for use in other States; and that the defendant was thereby disregarding and circumventing the decree of permanent injunction.

DISPOSITION: On July 27, 1951, the defendant having denied that the activities in which he was then engaged constituted an introduction of the drug into interstate commerce, or a delivery of the drug for introduction into interstate commerce, and the court having considered the arguments and briefs of counsel, the following opinion was handed down by the court:

WALLACE, *District Judge:* "This is a criminal contempt proceeding under Section 302 (b) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 52 Stat. 1040, 21 U. S. C. A. 301 et seq. Judgment for defendant and contempt order denied.

"Defendant, Tom G. Sanders, a resident of the State of Oklahoma, was perpetually enjoined by this court under authority of Section 302 (a) of the Act on October 17, 1950, from 'directly or indirectly introducing or causing to be introduced, and delivering or causing to be delivered, for introduction into interstate commerce, in violation of 21 U. S. C. A. 331 (a), a drug which is misbranded within the meaning of 21 U. S. C. A. 352 [502] (b) (1), 352 (b) (2), 352 (e) (2), or 352 (f) (1).' The injunction was not contested by defendant, and no testimony was heard. This court determined that defendant was engaged in interstate commerce, inasmuch as he had employed 'runners' or 'drummers' who would go into other states and take orders for the drug manufactured by defendant.

"Upon issuance of the injunction order, defendant returned to his home at Wanette, Oklahoma, and continued to distribute and sell his 'home remedy' in the same manner as before, with the exception that he no longer employed 'runners,' but merely sold the drug to such persons as personally came to his home and purchased the product there. Many of these customers were from out-of-state, and defendant was fully aware of this fact. The Government thereupon requested this court to cite the defendant for criminal contempt based upon an alleged violation of the injunction order. Defendant acknowledges and stipulates that the drug is misbranded as provided in the Act, and as alleged by the Government, but denies that the activities in which he is presently engaged constitute an introduction of the drug into interstate commerce, or a delivery of the drug for introduction into interstate commerce, as prohibited by this court's injunction order.

"It therefore appears that the determinative issue before this court is whether or not defendant, by selling his product to persons whom he knew to be residents of another state, but who personally came to defendant's home to make their purchases, was engaged in interstate commerce. So far as this court can determine, this is a matter of first impression, and one upon which there are no cases directly in point.

"At the time of the adoption of the United States Constitution, the 'Commerce power' was relatively unimportant. However, it has so expanded in significance and application that, today, it is certainly one of the most powerful means of Federal regulation. There exists considerable controversy as to whether this expanded application is desirable for the protection of the nation's welfare, or whether it is totally unwarranted and creates an invasion of the regulatory powers of the sovereign states. This difference of opinion is a political issue which is not before this court for determination. We have only to determine whether, under this unique factual situation, the defendant has engaged in interstate commerce.

"An accurate, all-inclusive definition of interstate commerce has never been formulated by the courts. Nor do we attempt such a definition here, for its facets are far too numerous and diverse. However, it is the opinion of this court that certain essential elements must exist before the sales made by the defendant can be classified as constituting interstate commerce. In the case of Carter v. Carter Coal Co., 298 U. S. 238, 298, Mr. Justice Sutherland, in delivering the opinion of the court, stated:

> As used in the Constitution, the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade," and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states.

Thus we see that three fundamental elements must exist before the transaction becomes affixed with the character of 'interstate commerce.' First, there must be the element of a sale or exchange. Second, the transaction must be between citizens of different states, or one which creates commercial traffic between different states. Third, there must be the element of transportation. In the case at bar we find that two of these elements have assuredly been satisfied; namely, there has been a sale between citizens of different states. The existence of the element of transportation is not so readily determined. To begin with, there is some question as to what is the requisite transportation. It is almost axiomatic that the transportation intended must be that between states, and not merely that within a single state. However, actual transportation need not have occurred before the transaction becomes endowed with the attributes of interstate commerce. It is enough that a party 'sells and ships, or contracts to sell and ship, the commodity to customers in another state * * *.' (Carter v. Carter Coal Co., supra, p. 303.) Defendant has not, since the rendition of the injunction order, personally shipped or contracted to ship any of his product to persons in other states. The Government takes the position that the mere culmination of a sale between citizens of different states constitutes interstate commerce, where the purchaser, to the knowledge of the vendor, may return to his native state with the product. This court cannot believe that such a broad application of the Commerce power was ever intended, nor that it is justified under the Constitution. It has previously been determined by the Supreme Court that a product merely in the stage of production is not subject to the Commerce power even though it is fully intended that it shall subsequently be transported to another state. (Carter v. Carter Coal Co., supra.) Nor does this court believe that the mere sale of goods constitutes interstate commerce, unless there is an actual movement out of the state, or such is the purpose and intent of both parties in making the sale. However, the Government cites a number of cases which it contends bear out its assertion that defendant is engaged in interstate commerce. A few of the most important of these cases will be considered.

"The Government cites the case of Dahnke-Walker Co. v. Bondurant, 257 U. S. 282. In that case sale was made in Kentucky, the state of the vendor, to a citizen of the State of Tennessee, the product being delivered to the purchaser in Kentucky. The Supreme Court ruled that the transaction was in interstate commerce. From this, the Government has deduced a rule whereby all such sales between citizens of different states will constitute interstate commerce. However, counsel overlook the fact that the delivery of the commodity in question was made on board the cars of a common carrier, in continuance of a long established practice whereby the commodity was to be immediately forwarded to the purchaser's mill. The contract

required delivery on board the cars of a public carrier for that very purpose. The Supreme Court considered these facts to be of the utmost importance, for Mr. Justice Van Devanter stated in the opinion of the court:

> The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. *They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce.* [Emphasis added.]

The latter portion of Mr. Justice Van Devanter's statement leaves with this court the understanding that had it not been for the *established* practice of the purchaser and vendor, taken into consideration with the delivery of the grain to a common carrier, the court would have determined this transaction to be wholly *intra*state. There is no such similarity of conditions under the facts of the case now before this court. Mere knowledge that the purchaser is a citizen of another state cannot possibly establish such a practice. Delivery was made at the residence of the defendant, personally, to the purchaser. For this court to determine that defendant must inquire into the citizenship of every customer would be to place an intolerable burden upon all persons who sell to the general public. Instead, this court must look to the immediate end which the parties to the transaction have in view. Was it the purpose of the parties to place the commodity within the stream of commerce and transport it to another state? Here, the immediate end in view is to sell the product; how the purchaser uses it or where he takes it is of no concern to the defendant. The fact that defendant was aware that some of his customers were residents of another state does not alter this rule.

"Another case relied upon by the Government is United States v. Dr. Charles Kaadt, 7 Circ., 171 F. 2d 600. In that case the defendant operated a clinic in Indiana for the treatment of diabetics. When persons who had come to the clinic for treatment, returned to their homes in other states, Dr. Kaadt shipped them a special drug, which was misbranded under the provisions of the Federal Food, Drug, and Cosmetic Act. Dr. Kaadt was charged with such practices in five counts. There is some confusion as to the exact facts concerned in the next two counts, but we shall adopt the most charitable interpretation possible to the Government's case. In these two instances, Dr. Kaadt delivered the drug to the patients *before* they left the clinic and they personally carried it into their home state. All of these counts were upheld as being violative of the Federal Food, Drug, and Cosmetic Act. However, that case is not determinative of the issues before the court, for Dr. Kaadt had already placed the sale within the category of interstate commerce, by reason of the fact that he had earlier mailed letters to the purchasers in their home states, advertising the drug and directing the manner in which it was to be used. The court expressly found that these letters constituted part of the misbranding with which the defendant was charged. In the case before this court, defendant has not engaged in such a practice.

"The case of Currin v. Wallace is relied on by the Government to support the rule that where goods are purchased in one state for the purpose of transporting them to another, then the sale is as much a part of interstate commerce as is the transportation. This premise is undeniably sound and one with which this court cannot take issue. However, the basic issue here, is whether defendant did in fact sell his product for the purpose of transporting it to another state. The citation of this case assumes the very point at issue.

"Counsel for defendant refer the court to the case of Eastern Air Transport v. Tax Commissioner, 285 U. S. 147, opinion by Mr. Chief Justice Hughes. In that case the State of South Carolina imposed a tax on the sale of aircraft fuel purchased by an air-transport company for use in its planes, which were engaged in interstate commerce. The airline company contended that this tax constituted a burden on interstate commerce. In upholding the tax, the Supreme Court stated:

> * * * The mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the state *upon intrastate dealers.* [Emphasis added.]

In another place, the Court states:

> Treating the tax as an excise tax upon the sales does not change the result in the instant case, *as the sales are still purely intrastate transactions.* [Emphasis added.]

In both of these statements, the court clearly implies that, even though the fuel is to be used in interstate commerce, the transaction between the vendor of the fuel and the operator of the airline company is wholly of an *intra*state character. What the purchaser of the fuel chose to do with the commodity after its purchase was of no concern to the vendor.

"This court is somewhat astonished to find that an independent gasoline dealer doing business at Ardmore, Oklahoma, who sells fuel to a motorist having a Texas license tag on his automobile, becomes engaged in interstate commerce simply because the purchaser may drive on into Texas and burn part of the fuel there. Yet this is the substance of the Government's pretension. There is yet a further anomaly to the Government's position. If a citizen of Oklahoma purchases a piece of wearing apparel in a Kansas City store, does the vendor thereby become engaged in interstate commerce and subject to Federal regulation, even though he is fully cognizant of the purchaser's native state? Obviously, not. Such an extension of the Commerce power would be wholly unwarranted and an invasion of the regulatory rights of the sovereign states.

"Perhaps the activities of the defendant constitute a recognizable evil which should be apprehended. However, great care must be taken so that, by crushing one evil, the courts do not create in its stead an even greater one. Congress possesses no general power to regulate for the promotion of the general welfare. It is limited in its powers to those which are granted it by the Constitution, and these powers must be either expressly given, or arise by necessary implication. (Martin v. Hunter's Lessee, 1 Wheat. 304.)

"It is the opinion of this court that so long as the defendant does not solicit orders for his product in other states, and does not ship or aid in the shipment of his product to another state, but merely sells his product to persons who personally come to his residence, purchase and carry away this remedy, he is not engaged in interstate commerce, even though some of his customers be residents of another state, and this to the knowledge of the defendant. Therefore, we cannot find the defendant to be in contempt of court for violation of the injunction order.

"Counsel are directed to submit a journal entry in conformity with this opinion within ten days from this date."

In accordance with the above opinion, the court, on or about August 17, 1951, handed down its findings of fact and conclusions of law and entered a decree denying the Government's application for a citation for contempt of the injunction. An appeal was taken by the Government to the United States Court of Appeals for the Tenth Circuit, and on May 7, 1952, the following opinion was handed down by that court:

HUXMAN, *Circuit Judge:* "On October 17, 1951, an injunction was entered against appellee, Tom G. Sanders, in the United States District Court for the Western District of Oklahoma, enjoining him from directly or indirectly introducing or causing to be introduced, and delivering or causing to be delivered, for introduction into interstate commerce, in violation of 21 U. S. C. 311 (a), a drug which was misbranded within the meaning of 21 U. S. C. 352 [502] (b) (1), 352 (b) (2), 352 (e) (2), and 352 (f) (1). Thereafter this action was filed in the nature of an application for an order to show cause why he should not be prosecuted for criminal contempt for a violation of the injunction.

"Appellee, defendant below, filed a response to the order to show cause and moved that appellant's application be quashed and that no citation to show

cause be issued. A hearing was had on appellee's motion. Judgment was entered denying appellant's application for a citation to show cause. While the trial court made findings of fact and conclusions of law, they are based entirely upon the allegations of the application for the show cause order and the statements of the parties at the time of the hearing thereof and not upon evidence introduced bearing upon the issue of appellee's guilt. That issue could not be before the court for determination until a show cause order had issued. Neither did the decree of the court attempt to pass upon the guilt or innocence of appellee. It merely denied the application for a show cause order on the ground that the allegations of the application were insufficient to state an offense.

"Appellee's challenge to the jurisdiction of this court on the ground that the judgment of the trial court constituted an adjudication of guilt and is, therefore, not appealable is not well taken. It is clear that the trial court did not try the issue of guilt or innocence of the appellee. It merely passed upon the sufficiency of the allegations of the application to state an offense, if found true.

"An application to show cause why defendant should not be prosecuted for criminal contempt is equivalent to an information charging criminal contempt, under Rule 42 (b) of the Federal Rules of Criminal Procedure, and a criminal contempt proceeding is a criminal case within the meaning of 18 U. S. C. 3731. An order dismissing a criminal contempt proceeding is appealable under the Criminal Appeals Act.[1]

"It is admitted that the drug in question was misbranded. Appellee's position adopted by the court is that his activities do not constitute interstate commerce as prohibited by the injunction. Prior to the injunction, appellee engaged 'runners' or 'drummers' who went into states other than Oklahoma and solicited orders for the drug. After the injunction, this method of doing business was discontinued. Appellee sold only to those who came to his place of business at Wanette, Oklahoma, and delivered the drugs to them there. Many of these customers came from states other than Oklahoma.

"The application for the order to show cause among others alleged that since the issuance of the injunction appellee had at various times and with full knowledge and notice delivered or caused to be delivered for introduction into interstate commerce various quantities of the misbranded drug; that on January 24, 1951, he sold and delivered to Loyd Mangan of Garden City, Kansas, for introduction into interstate commerce two one-quart jars of said misbranded drug, with the knowledge that Mangan intended to and would return to Garden City, Kansas, with said article or drug. The complaint alleged five other specific sales made to out-of-state customers and alleged that all of said sales were made with the knowledge that the purchaser was from out of the state and intended to and would return to his place of residence out of the state with said drugs. It alleged that while appellee ostensibly discontinued the practice of using salesmen or so called 'runners' to solicit and fill orders from customers outside of the State of Oklahoma he had adopted the practice of selling and delivering his products at Wanette, Oklahoma, directly to out-of-state customers, soliciting them to return at later dates for more of the product, knowing that at all times said misbranded drug would be transported in interstate commerce by said purchasers for use in other states; that by such conduct he was disregarding and circumventing the decree and was in truth and in fact continuing to engage in the interstate business in the misbranded drug and was indirectly introducing or causing it to be introduced into interstate commerce, in violation of the injunction. For the purpose of considering the correctness of the trial court's ruling on the motion for dismissal of the application, these allegations stand admitted and must be accepted as the facts.

"As stated by the Supreme Court in United States v. Walsh, 331 U. S. 432, 34, 'The Federal Food, Drug, and Cosmetic Act rests upon the constitutional power resident in Congress to regulate interstate commerce. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious, adulterated, and misbranded articles of the specified types. * * * It is in that interstate setting that the various sections of the Act must be viewed.' The Act must be given a reasonable construction

[1] United States v. Goldman, 277 U. S. 229; United States v. Hoffman, 161 F. 2d 881.

to effectuate its salutary purposes. It prohibits not only the introduction into interstate commerce of adulterated articles but also the delivery thereof for introduction into commerce. One is as much a violation of the Act as the other. There is a long line of cases beginning with Dahnke-Walker Co. v. Bondurant, 257, U. S. 282, holding that where one purchases goods in one state for transportation to another the interstate commerce transaction includes the purchase as well as the transportation.[2] The court sought to distinguish the Dahnke-Walker case on the ground that the wheat purchased by a resident of Tennessee in Kentucky for transportation to Tennessee was delivered by the vendor to the vendee on board the cars of a common carrier, to be immediately forwarded to the purchaser's mills in Tennessee. The decisions, however, make it clear that whether delivery for transportation is made to a common carrier, a private carrier, or even to the purchaser for transportation by himself is immaterial.[3]

"To be guilty of violating the Act, it was not necessary that appellee be engaged in interstate commerce with respect to a misbranded drug. It was sufficient if he was engaged in delivering such a drug for introduction into interstate commerce. If appellee knowingly and regularly sold misbranded drugs and delivered them, knowing that they were purchased for transportation in interstate commerce, and solicited customers to return for future purchases and deliveries, he was guilty of a violation of the Act. The allegations of the complaint for a show cause order alleged that he did all of this and for the purpose of the motion they stand admitted as true. We accordingly conclude that stated an offense and that the trial court erred in dismissing the application for a show cause order.

"The judgment is reversed and the cause is remanded with directions to proceed in conformity with the views expressed herein."

Subsequently a petition for a writ of certiorari was filed by the defendant, and on October 13, 1952, this petition was denied. Thereafter, on February 4, 1953, the case came on for hearing before the United States District Court for the Western District of Oklahoma, and upon a plea of nolo contendere by the defendant, the court fined him $500.

3969. Misbranding of amphetamine sulfate tablets and pentobarbital sodium capsules. U. S. v. Irving Smith (Corner Drug Store), and Nathan Fleishman. Pleas of guilty. Each defendant placed on probation for 2 years; Defendant Smith fined $500. (F. D. C. No. 33797. Sample Nos. 6081–L to 6083–L, incl., 6131–L, 6132–L, 6157–L, 6251–L, 6275–L.)

INFORMATION FILED: February 5, 1953, District of Massachusetts, against Irving Smith, trading as the Corner Drug Store, Boston, Mass., and Nathan Fleishman, a pharmacist.

ALLEGED VIOLATION: On or about October 25, 26, and 29, and November 5, 12, and 15, 1951, while a number of *pentobarbital sodium capsules* and *amphetamine sulfate tablets* were being held for sale at the Corner Drug Store, after shipment in interstate commerce, various quantities of the drugs were repacked and dispensed without a physician's prescription, which acts resulted in the repackaged drugs being misbranded.

Irving Smith was charged with causing the acts of repacking and dispensing alleged in each of the eight counts of the information, and Nathan Fleishman was joined as a defendant in two of the counts.

NATURE OF CHARGE: Misbranding, Sections 502 (b) (1) and (2), the repackaged drugs failed to bear a label containing the name and place of business of the manufacturer, packer, or distributor, and an accurate statement of the quantity

[2] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211; United States v. Rock Royal Co-op, 307 U. S. 533; United States v. Simpson, 252 U. S. 465; Carter v. Carter Coal Co., 298 U. S. 238; United States v. 7 Barrels, etc., 141 F. 2d 767.

[3] United States v. Simpson, 252 U. S. 465; Tobin v. Grant, 79 F. Supp. 975.