

CHAPTER XII

FOODS, DRUGS, AND COSMETICS

THE necessity for protecting the public health by regulating the sale of foods has been recognized from early times. At common law, the sale or offering for sale of diseased, adulterated, or unwholesome food constituted a nuisance and was an indictable offense.

The purity and wholesomeness of foods is now regulated by statutes in all the States.¹ In recent years this type of legislative control has also been extended to drugs, diagnostic and therapeutic devices, and cosmetics, the purity or lack of purity or the efficacy of which may affect the public health as well as the economic welfare of consumers.

The constitutionality of state laws regulating foods and food products has been upheld by the United States Supreme Court on numerous occasions,² and also by many state courts of last resort.³ The constitutionality of a state law regulating cosmetics was sustained by the United States Supreme Court in 1937.⁴

Since many foods, drugs, and cosmetics are shipped in interstate commerce, the regulation of these products is, under the Federal

1. C. W. Dunn, *Food and Drug Laws, Federal and State*, New York, United States Corporation, 1927-28. A. D. Herrick, *Food Regulation and Compliance*, Vol. 1, New York, Revere Pub. Co., 1944.

2. *Powell v. Pennsylvania* (1888), 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253. *Plumley v. Massachusetts* (1894), 155 U.S. 461, 15 S. Ct. 154, 39 L. Ed. 223. *Capital City Dairy v. Ohio* (1902), 183 U.S. 238, 46 L. Ed. 171. *Lieberman v. Van de Carr* (1905), 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305, 108 A.S.R. 781. *St. John v. New York* (1906), 201 U.S. 633, 26 S. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909. *North American Cold Storage Co. v. Chicago* (1908), 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276. *Adams v. Milwaukee* (1913), 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971. *Price v. Illinois* (1915), 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400. *Sligh v. Kirkwood* (1915), 237 U.S. 52, 35 S. Ct. 501, 59 L. Ed. 835. *Hutchinson Ice Cream Co. v. Iowa* (1916), 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917 B 643. *Hebe Co. v. Shaw* (1919), 248 U.S. 297, 39 S. Ct. 125, 63 L. Ed. 255.

3. See 36 C.J.S. Food, and cases cited.

4. *Bourjois v. Chapman* (1937), 301 U.S. 183, 57 S. Ct. 691, 81 L. Ed. 1027. State laws regulating barbers, beauty shops, cosmetics, and cosmeticians have been upheld in the following cases: *State v. Rollins* (1922), 152 Ga. 588, 110 S.E. 726, 20 A.L.R. 1105. *State v. Lockey* (1930), 198 N.C. 551, 152 S.E. 693. *State Board of Barber Examiners v. Blocker* (1932), 176 Ga. 125, 167 S.E. 298. *Gerard v. Smith* (Tex. 1932), 52 S.W. (2d) 347. *Luzier Special Formula Laboratories v. State Board of Hairdressing and Beauty Culture Examiners* (1933), 189 Minn. 151, 248 N.W. 664. *Mundell v. Graph* (1934), 62 S.D. 631, 256 N.W. 121.

Constitution, a matter for the Federal Government. In 1906 Congress passed the Federal Food and Drugs Act (34 Stat. 768; U.S.C. title 21, secs. 1-15), which, while amended from time to time, remained in force in virtually its original form until June 25, 1939. This law, which pertained only to adulterated and misbranded foods and drugs and did not include cosmetics or therapeutic devices, was upheld by the United States Supreme Court in a number of decisions.⁵

The Federal Food, Drug, and Cosmetic Act

In order to overcome numerous defects in the Federal Food and Drugs Act of 1906, Congress adopted a new law in 1938 (U.S.C. title 21). This law, known as the Federal Food, Drug, and Cosmetic Act, was signed by the President on June 25, 1938, to take effect one year from that date, except that a section (Sec. 701) authorizing the Secretary of Agriculture to promulgate regulations for the efficient enforcement of the act, a section (Sec. 502j) stating that drugs which are dangerous to health when used in accordance with directions on the label shall be deemed to be misbranded, a section (Sec. 505) prohibiting the introduction of new drugs except on application to the Secretary, and a section (Sec. 601a) stating that cosmetics shall be deemed to be adulterated if they contain poisonous or deleterious substances which render them injurious under the conditions of use prescribed in the labelling, all took effect at the time of the passage of the act in 1938. In 1940 the Food and Drug Administration was transferred by the President's Reorganization Plan No. 4 from the Department of Agriculture to the Federal Security Agency, which had been established in 1939. Since that time the law has been amended in several particulars, and regulations have been issued (Title 21, Chapter 1, Code of Federal Regulations).

This federal law prohibits the introduction or delivery for introduction or the receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded and the adulteration or misbranding of any such product in interstate commerce. It also prohibits refusal to permit the Federal Security Administrator or his representative access to or copying of any record showing the

5. *Hipolite Egg Co. v. U.S.* (1911), 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364. *McDermott v. Wisconsin* (1913), 228 U.S. 115, 33 S. Ct. 431, 57 L. Ed. 754, Ann. Cas. 1915 D 39, 47 L.R.A. (N.S.) 984. *Weeks v. U.S.* (1918), 245 U.S. 620, 38 S. Ct. 219, 62 L. Ed. 513. See O. H. Gates, compiler, *Decisions of Courts in Cases under the Federal Food and Drugs Act*, U.S. Department of Agriculture, 1934. Also, annotations in the United States Code, Annotated, 1934 edition and supplements; and Federal Digest (Food).

movement or holding of these products in interstate commerce, and prohibits refusal to permit these officials to enter or inspect factories, warehouses, and establishments where these products are manufactured, prepared, or held for shipment in interstate commerce. The law applies to the territories of the United States as well as to interstate commerce. Penalties are provided for violations, and legal seizures of adulterated or misbranded articles are authorized.

Adulteration. Foods, drugs, devices, and cosmetics are deemed to be adulterated under this law if 1) they bear or contain any poisonous or deleterious substances which may render them injurious to health; 2) if they contain any added poisonous substances; 3) if they consist wholly or in part of any filthy, putrid, or decomposed substances, or are otherwise unfit for food purposes; 4) if they have been prepared, packed, or held under insanitary conditions whereby they may become contaminated with filth, or rendered injurious to health; 5) if the container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; 6) if they bear or contain coal-tar colors other than those certified by the Administrator.

Foods are likewise deemed to be adulterated if they are, wholly or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter; and if any valuable constituent has been wholly or partly omitted or abstracted, or any substance has been substituted wholly or in part therefor; if damage or inferiority has been concealed in any manner, or if any substance has been added or mixed or packed with a food so as to increase its bulk or weight, reduce its quality or strength, or make it appear better or of greater value than it is.

In addition to these provisions drugs are likewise deemed to be adulterated if they purport to be drugs whose names are recognized in an official compendium but are of different strength, or if quality and purity are inferior to the standard set forth in the compendium; or if the strength, purity, or quality of a drug falls below that which it purports or is represented to possess; or if substances have been mixed with it so as to reduce its quality or strength. The official compendia recognized by the law are the United States Pharmacopoeia, the Homeopathic Pharmacopoeia of the United States, and the National Formulary.

The law does not include soap among the cosmetics. Coal-tar hair dyes are not deemed adulterated as cosmetics when their labels bear the following legend conspicuously displayed:

Caution: This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness.

Misbranding. Foods, drugs, devices, and cosmetics are deemed to be misbranded under the law if 1) the labelling is false or misleading in any particular; 2) if in package form unless the label tells the name and place of business of the manufacturer, packer, or distributor, and bears an accurate statement of the quantity of the contents (with reasonable variations); 3) if the container is so made, formed, or filled as to be misleading; 4) if any word, statement, or other information required by or under authority of the act to appear on the label is not sufficiently prominent to be read and understood by the ordinary individual under customary conditions of purchase and use.⁶

A food is likewise deemed to be misbranded if offered for sale under the name of another food; or in imitation of another food, unless labelled "imitation"; if it purports to be or is represented as a food for which a definition or standard of identity has been prescribed by regulation, unless it conforms to the standard and its label gives the standard name of the food and, in so far as required by regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in the food; or if the quality of a standard food falls below the specified quality or the standard of fill of container; if it bears any artificial flavoring, artificial coloring, or chemical preservative, unless the label so states, except where exemptions have been permitted. Where no standard of identity has been prescribed, the label must bear the common or usual name of the food and its ingredients.

Foods purported or represented to be for special dietary uses are required to show on the label such information concerning vitamin, mineral, and other dietary properties as the Administrator determines by regulation to be necessary; otherwise they are misbranded.

Drugs are likewise deemed misbranded if they are for use by man and contain any quantity or chemical derivative of the narcotic and hypnotic substances alpha eucaïne, barbituric acid, beta eucaïne, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane, unless the label bears the statement, "Warning—may be habit form-

6. Pamphlet material regarding a product, sent through mails, was held not to be misbranding under the act in *U.S. v. Lee* (1941), 40 F. Supp. 801. See *U.S. v. Alberty* (1946), 65 F. Supp. 945.

ing"; if not designated by name in an official compendium, unless the label bears the common or usual name of the drug, or the common or usual name of each active ingredient, including the kind and amount of alcohol, and the quantity or proportion of bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative of these substances.

Labels of drugs must also bear adequate directions for use; adequate warnings against use in pathological conditions or by children where the use would be dangerous to health; warnings against unsafe dosage or methods or duration of administration or application, so as to protect all users. Where subject to deterioration, a drug must be packaged and labelled in such manner as the Administrator requires by regulations. For failure to comply with these provisions, drugs are considered misbranded, as are also all drugs that are dangerous to health when used according to the directions on the label.

No person is permitted to introduce or deliver for introduction into interstate commerce any new drug unless an application is filed with the Administrator, giving full details, as outlined in the law. Certification by the Administrator of drugs containing insulin and of drugs containing penicillin is provided for in newer sections of the law, the first of these provisions having been necessitated by the expiration of the United States patents on insulin in 1941.

This outline of adulteration and misbranding is a summary, and is not necessarily taken verbatim from the Federal Food, Drug, and Cosmetic Act, which should be consulted in the complete original by those directly interested or concerned. A current copy, with pertinent regulations, can be obtained from the Food and Drug Administration, Federal Security Agency, Washington, D. C.

Administration. The Federal Food, Drug, and Cosmetic Act of 1938 is administered by the Administrator of the Federal Security Agency, who is empowered to hold hearings and promulgate regulations for the efficient enforcement of the act, such regulations to take effect ninety days after their issuance. The validity of any such order may, however, be appealed by any person adversely affected to a Circuit Court of Appeals of the United States, which may affirm the order or set it aside in whole or in part, temporarily or permanently. The judgment, while final, is subject to review by the Supreme Court of the United States.

The Administrator is authorized by the law to conduct examinations and investigations through officers and employees of the Agency,

or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Administrator as an officer of the Agency. A sample of any food, drug, or cosmetic collected for analysis under the law must be furnished on request to the owner or his attorney or agent.

Injunctions to restrain violations of acts prohibited by this law may be issued by the District Courts of the United States, which also have jurisdiction over criminal violations of the law and over libels for seizure and condemnation of products that are adulterated or misbranded in interstate commerce. The penalty for a violation of the provisions of the act is imprisonment for not more than one year, or a fine of \$1,000, or both. If a violation occurs after a conviction has become final, or there has been intent to defraud or mislead, the guilty person is subject to imprisonment for not more than three years, or a fine of \$10,000, or both. The person who receives adulterated or misbranded goods is not subject to penalty unless he refuses to disclose the name and address of the shipper and other necessary information.

Reports of judgments, decrees, and court orders rendered under the act, and information regarding foods, drugs, devices, or cosmetics in situations involving, in the opinion of the Administrator, imminent danger to health or gross deception of the consumer, must be published from time to time by the Secretary.

While the Administrator is responsible for the administration of this act, the actual execution of the law is delegated to the Food and Drug Administration of the Federal Security Agency.

Regulations issued by the Administrator, giving standards for various foods and food products, have been upheld by the courts in a number of instances.⁷

Enriched Foods

On May 27, 1941, the Administrator of the Federal Security Agency promulgated a standard for "enriched flour," after extensive hearings had been held on this subject during 1940. This standard required the presence in each pound of flour of 1.66 mg. of thiamine, 1.20 mg. of riboflavin, 6.0 mg. of niacin, and 6.0 mg. of available iron. In addition the producer was allowed the option of including in enriched flour calcium to the extent of not less than 500 mg. or more than 2,000 mg. per pound of flour, and Vitamin D to the extent of not less than

7. *Twin City Milk Producers Ass'n v. McNutt* (1941), 122 F. (2d) 564 (skim milk). *Columbia Cheese Co. v. McNutt* (1943), 137 F. (2d) 576 (cheese). *Land O'Lakes Creameries v. McNutt* (1943), 132 F. (2d) 653 (oleomargarine). See 158 *American Law Reports* 842.

250 U.S.P. units or more than 1,000 U.S.P. units per pound. The standard was to become effective on January 1, 1942.

At the same time a standard for enriched farina was issued, requiring or permitting the same vitamins and minerals in the same amounts. Shortly thereafter a manufacturer of farina, who had been marketing a product containing only added Vitamin D for several years, brought an action in the Federal Circuit Court of Appeals for judicial review of the order of the Administrator. In this court it was held that the regulation was void because it did not actually promote honesty and fair dealing.

On appeal to the United States Supreme Court, however, the decision of the lower court was reversed, and the regulation for enriched farina was upheld.⁸ The court pointed out that the products of milled wheat are among the principal items of the American diet, that enriched flours and farinas with widely varying compositions had been placed on the market, and that definitions and standards for these products are necessary, in order to prevent consumer confusion.

"The judicial is not to be substituted for the legislative judgment," said the court. "It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made."

As a result of further hearings in 1943 the standards of identity of enriched flour were changed. As issued on July 1, 1943, to take effect on October 1, 1943, they were as follows:

Nutrient Requirements for Enriched Flour

	Minimum	Maximum	
Thiamine	2.0	2.5	mgs. per pound
Riboflavin	1.2	1.5	" " "
Niacin	16.0	20.0	" " "
Iron	13.0	16.5	" " "
Calcium (optional)	500	625	" " "
Vitamin D (optional)	250	1000	U.S.P. units

Action on bread enrichment standards was postponed due to the war, but such enrichment was made compulsory by War Food Administration Order No. 1 (1944, revoked October 25, 1946). In about half

8. *Federal Security Administrator v. Quaker Oats Co.* (1943), 318 U.S. 218, 63 S. Ct. 589, 87 L. Ed. 724, 158 A.L.R. 852. R. M. Wilder and R. R. Williams, *Enrichment of Flour and Bread*, Washington, National Research Council, Bulletin No. 110, November, 1944.

of the States, laws have been passed for the mandatory enrichment of bread and flour, in accordance with the federal standards.

False Advertising of Products in Interstate Commerce

Congress passed and the President signed on March 21, 1938, an act (15 U.S.C. 41, 44-45, 52-58) making it unlawful for any person, partnership, or corporation to disseminate or cause to be disseminated any false advertisement by United States mails or in interstate commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, or cosmetics. This act took effect sixty days after the date of its passage. It is administered by the Federal Trade Commission, an independent establishment of the United States Government.

The term "false advertisement" is defined in this act as an advertisement, other than labeling, which is misleading in a material respect. In determining whether any advertisement is misleading, the act states that there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in such advertisement, or under such conditions as are customary or usual. Advertisements of drugs are not to be deemed false if they are disseminated only to members of the medical profession, contain no false representation of a material fact, and include or are accompanied by a truthful disclosure of the formula showing quantitatively each ingredient of the drug.

Under the law of 1914 creating the Federal Trade Commission (U.S.C. title 15), a false advertisement of a food, drug, device, or cosmetic may be proceeded against as an unfair method of competition in commerce, by the holding of a hearing and the issuance, for cause, of a cease and desist order, which may be reviewed on petition by a Circuit Court of Appeals of the United States. If such a petition is not submitted within sixty days, the Commission's order becomes final. Before issuing a cease and desist order, the Commission may issue a stipulation, which is a promise by a concern to discontinue the alleged unlawful practices.

In addition to this procedure, the act of 1938 authorizes the enjoining of the dissemination of false advertisements by District Courts of the United States, as well as criminal proceedings against those who violate the law, where the use of the commodity advertised may

be injurious to health because of reliance on the advertising. The penalty in such cases is a fine of not more than \$5,000 or imprisonment for not more than six months, or both.

No publisher, radio-broadcast licensee, or agency or medium for the dissemination of the advertising, except the manufacturer, packer, distributor, or seller of the falsely advertised commodity, is liable unless he refuses to furnish to the Commission the name and address of the person responsible for the advertisement. Advertising agencies are absolved from liability under similar conditions.

The Federal Meat Inspection Act

The inspection and control of meat and meat products shipped in interstate commerce is governed by the Federal Meat Inspection Act of 1907, as amended (34 Stat. 1260; U.S.C. title 21, secs. 71-91). The constitutionality of this law has been upheld by the United States Supreme Court.⁹

This law empowers the Secretary of Agriculture to have examined and inspected all cattle, swine, sheep, and goats before they are allowed to enter any slaughtering, packing, canning, salting, rendering or similar establishment for preparation for shipment in interstate commerce as articles of food, and to require that any diseased animals or animals suspected of disease shall be slaughtered separately and their carcasses further examined.

Postmortem examinations of all slaughtered animals, whether diseased or not, are also made under authorization of this law. Those that are found wholesome are marked "Inspected and Passed," while those found to be unwholesome are stamped "Inspected and Condemned." A reinspection may be made at any time thereafter, with condemnation of previously approved products if the circumstances warrant such action.

Meat products are likewise subject to inspection up to the time they are sealed in the final container, which must bear a label stating that the contents have been inspected and passed.

Meats and meat products imported into the United States are subject to inspection by the Secretary of Agriculture under the terms of the Imported Meat Act of 1913 as amended in 1930 (U.S.C. title 19, sec. 1306), while similar products for export are covered by the Meat Inspection Act, which was likewise extended to include horse meat by a law passed by Congress in 1919 (41 Stat. 24, U.S.C. title 21, sec. 96).

9. *U.S. v. Lewis* (1914), 235 U.S. 282, 35 S. Ct. 44, 59 L. Ed. 229. *Pittsburgh Melting Co. v. Totten* (1918), 248 U.S. 1, 39 S. Ct. 3, 63 L. Ed. 97.

These laws are administered through the Bureau of Animal Industry of the United States Department of Agriculture. They do not, of course, apply to meat and meat products which are shipped solely in intrastate commerce. Such products are subject to local control under state legislation and municipal ordinances.

*Other Federal Laws on Food*¹⁰

In addition to the Federal Food, Drug, and Cosmetic Act of 1938, the Federal Trade Commission Act of 1914 as amended in 1938, and the Federal Meat Inspection Act of 1907 as amended, there are a number of other federal laws pertaining to the wholesomeness of foods shipped in interstate and foreign commerce.

The Tea Act of 1897 as amended (U.S.C. title 21, secs. 41-50) prohibits the importation into this country of tea that is inferior to standards of quality fixed by the Secretary of Agriculture. This law has been upheld by the United States Supreme Court.¹¹ Tea shipped in interstate commerce is also subject to the terms of the Federal Food, Drug, and Cosmetic Act.

Filled cheese, defined as a substance a) made of milk or skimmed milk with the admixture of butter, animal oils or fats, vegetable or other oils, or compounds foreign to such milk, and b) made in imitation of cheese, must be specially labelled when shipped in interstate commerce, and is subject to a tax at the rate of one cent per pound or fraction thereof, according to the Filled Cheese Act of 1896 (U.S.C. title 26, ch. 10).

The Filled Milk Act of 1923 (U.S.C. title 21, secs. 61-63) prohibits the shipment in interstate commerce of filled milk, defined as any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of the milk products mentioned. This law was sustained as a valid exercise of the federal power over interstate commerce in a decision handed down by the United States Supreme Court in 1938.¹²

In delivering the opinion of the court in this case, Mr. Justice Stone pointed out that this law was passed by Congress after extensive

10. See A. P. Blanck, *Foods and the Law*, New York, Peter Smith, 1935.

11. *Buttfield v. Stranahan* (1904), 192 U.S. 470, 24 S. Ct. 349, 48 L. Ed. 525.

12. *U.S. v. Carolene Products Co.* (1938), 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234. *Carolene Products Co. v. Evaporated Milk Ass'n* (1937), 93 F. (2d) 202.

hearings and investigation, from which the conclusion was drawn that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public. In a separate opinion, Mr. Justice Butler concurred in the result, but stated that whether the filled milk product in this case was or was not an adulterated food injurious to health tenders an issue of fact to be determined upon evidence.

In 1944 the Filled Milk Act was again upheld by the United States Supreme Court in a case involving a blended milk product to which vitamins and other nutrients had been added. While the wholesomeness of the product was acknowledged, the court stated that it was still a matter for Congress to decide whether such a product should be permitted to be sold in interstate commerce.¹³

A number of state courts have held that state laws prohibiting filled milk are unconstitutional, because the product is not injurious to health,¹⁴ but laws of this nature have been upheld in other states,¹⁵ and legislation of this type is in force in thirty-five states.

The Federal Import Milk Act of 1927 (U.S.C. title 21, secs. 141-149) prohibits the importation of any milk or cream into the United States unless the shipper has a valid permit from the Federal Security Administrator, who is authorized either to have necessary inspections made or to accept duly certified statements from accredited officials of an authorized department of a foreign government that the milk or cream complies with the requirements of the law. According to this act, all milk and cream, if raw, must come from healthy, tuberculin-tested cattle; must be produced in a sanitary manner; must contain not more than 300,000 bacteria per cubic centimeter if raw milk, not more than 750,000 if raw cream, not more than 100,000 if pasteurized milk, and not more than 500,000 if pasteurized cream; and must not

13. *Carolene Products Co. v. U.S.* (1944), 323 U.S. 18, 65 S. Ct. 1, 89 L. Ed. —, 155 A.L.R. 1371.

14. *People v. Carolene Products Co.* (1931), 345 Ill. 166, 177 N.E. 698. *Carolene Products Co. v. Thompson* (1935), 276 Mich. 172, 267 N.W. 608. *Carolene Products Co. v. McLaughlin* (1936), 365 Ill. 62, 5 N.E. (2d) 477. *Carolene Products Co. v. Banning* (1936), 121 Neb. 429, 268 N.W. 313.

15. *Hebe v. Shaw* (1919), 248 U.S. 297, 39 S. Ct. 125, 63 L. Ed. 255. *Carolene Products Co. v. Harter* (1938), 329 Pa. 49, 197 A. 627, 119 A.L.R. 235. *Poole and Creber Market Co. v. Breshears* (1939), 343 Mo. 1133, 125 S.W. (2d) 23. *Carolene Products Co. v. Mohler* (1940), 152 Kan. 2, 102 P. (2d) 1044. *State ex rel. McKittrick v. Carolene Products Co.* (1940), 346 Mo. 1049, 144 S.W. (2d) 153. *Carolene Products Co. v. Hanrahan* (1941), 291 Ky. 417, 104 S.W. (2d) 597. *Sage Stores v. Kansas* (1945), 323 U.S. 32, 65 S. Ct. 9, 89 L. Ed. *Setzer v. Mayo* (1942), 150 Fla. 734, 9 So. (2d) 280.

exceed 50° F. in temperature. Under certain conditions these requirements may be waived by the Administrator, who is authorized to prescribe necessary rules and regulations for the issuance of permits.

An act of Congress of 1923 (U.S.C. title 21, sec. 6) defines butter and provides a standard therefor. Federal legislation on renovated or processed butter is contained in the Internal Revenue Code (Secs. 2320 to 2327), which not only imposes taxes on these products but requires rigid sanitary inspections to be made by the Secretary of Agriculture. In a recent case it was held by the United States Supreme Court that because of this federal regulation, there can be no state regulation of this product which conflicts with the federal.¹⁶

The Postal Laws of the United States prohibit the use of the mails for fraudulent material. Under this power, the Postmaster General may cite an offender who mails fraudulent advertising on foods and drugs, or mails the goods themselves. After a hearing, he may issue a fraud order enjoining the person, firm, or corporation sending such fraudulent material from further use of the mails. Action under the Postal Laws against fraudulent and misbranded foods and drugs sometimes has been more effective than under the Food and Drugs Act or the Federal Trade Commission Act, which also applies to the use of the mails for false advertising of foods and drugs.

Federal Narcotics Acts

Federal control over narcotics is based not on the undisputed power of the Federal Government over interstate commerce, but upon the taxing power conferred upon the national government by the Federal Constitution. The so-called Harrison Narcotic Act of 1914 as amended (U.S.C. title 26, secs. 1040-1064) and the Marihuana Tax Act of 1937 (U.S.C. title 26, sec. 1399) are basically revenue measures, but they also have moral and social implications, since uniform regulation of the national traffic in dangerous narcotics is a matter of public health significance.

The Harrison Narcotic Act imposes annual taxes upon all importers, manufacturers, producers, compounders, wholesalers, and retail dealers in narcotics, and upon physicians and other practitioners who prescribe narcotics. The law requires annual registration of all persons who dispense or deal with narcotics.

The taxes imposed by this and other federal narcotics acts are collected by the Bureau of Internal Revenue of the Treasury Depart-

16. *Cloverleaf Butter Co. v. Patterson* (1942), 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754.

ment, but the enforcement of the regulatory features of these laws is entrusted to the Bureau of Narcotics of this Department. The Customs Bureau is concerned with the prevention of smuggling of narcotics into the United States. The United States Public Health Service cooperates with the Bureau of Narcotics in determining the quantities of crude opium and coca leaves that may be imported into the country for legitimate medical and other uses.

Although the constitutionality of these federal narcotic laws has been severely questioned, and similar federal taxes on the products of child labor have been held to be invalid as an attempt to regulate a state right under the guise of taxation,¹⁷ the Harrison Act has been sustained as constitutional by the United States Supreme Court in a number of decisions,¹⁸ although sometimes by a sharply divided court.

State Control of Foods and Drugs

The existence of federal laws relating to foods and drugs shipped in interstate commerce does not inhibit or preclude the States and their political subdivisions from regulating by law the purity and wholesomeness of foods and drugs sold wholly in intrastate commerce.¹⁹ Where such state laws were in effect prior to the passage of the federal laws and were not inconsistent with the federal acts, they are not rendered inoperative thereby, since the State and not the Federal Government has complete jurisdiction over articles produced and sold entirely within the State.²⁰ The production and sale of narcotics

17. *Bailey v. Drexel Furniture Co.* (1922), 259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 817, 21 A.L.R. 1432.

18. *U.S. v. Jin Fue Moy* (1916), 241 U.S. 394, 36 S. Ct. 658, 60 L. Ed. 1061. *U.S. v. Doremus* (1918), 249 U.S. 86, 39 S. Ct. 214, 63 L. Ed. 493. *Webb v. U.S.* (1919), 249 U.S. 96, 39 S. Ct. 217, 63 L. Ed. 497. *Linder v. U.S.* (1925), 268 U.S. 5, 45 S. Ct. 446, 69 L. Ed. 819, 39 A.L.R. 229. *U.S. v. Daugherty* (1926), 269 U.S. 360, 46 S. Ct. 156, 70 L. Ed. 809. *Boyd v. U.S.* (1925), 271 U.S. 104, 46 S. Ct. 442. *Alston v. U.S.* (1927), 274 U.S. 289, 47 S. Ct. 634. *Casey v. U.S.* (1928), 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed. 632. *Nigro v. U.S.* (1928), 276 U.S. 332, 48 S. Ct. 388, 72 L. Ed. 600.

19. *Armour & Co. v. City Council of Augusta* (1910), 134 Ga. 178, 67 S.E. 417, 27 L.R.A. (N.S.) 676. *Comm. v. Moore* (1913), 214 Mass. 19, 100 N.E. 1071. *Price v. Illinois* (1915), 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400. *Ex parte Arrigo* (1915), 98 Neb. 134, 152 N.W. 319. *Fougera v. City of New York* (1918), 224 N.Y. 269, 120 N.E. 642, 1 A.L.R. 1467. *Day-Bergsvall Co. v. State* (1926), 190 Wis. 8, 207 N.W. 959.

20. *Corn Products Refin. Co. v. Eddy* (1919), 249 U.S. 427, 39 S. Ct. 325, 63 L. Ed. 689; affirming (1916), 99 Kans. 63, 163 P. 615. *Hebe v. Shaw* (1919), 248 U.S. 297, 39 S. Ct. 125, 63 L. Ed. 255. *Weigle v. Curtis Bros Co.* (1919), 248 U.S. 285, 39 S. Ct. 124, 63 L. Ed. 242.

may also be regulated by a State, so long as there is no conflict between the provisions of the state laws and the Federal Narcotics Acts.²¹

The established legal principles regarding state and municipal control of foods and drugs are, in general, the same as those already set forth for dairy products in Chapter XI, on Milk Control.²² In order to protect the public health, the State may regulate by law, and/or authorize its political subdivisions to regulate, the sanitary conditions pertaining to the production, manufacture, distribution, handling, and sale of all foods used for human consumption or for animals, and of all drugs, devices, and cosmetics employed in the alleviation or treatment of disease, or for the actual or alleged promotion of health, beauty, or physical welfare.

The State may provide for the issuance and revocation of licenses or permits to manufacturers and dealers in foods, to restaurant and market owners, and to other purveyors of foodstuffs. Where a state license is required by law, a municipal license may likewise be required, as a rule,²³ unless a statute provides to the contrary.²⁴ A reasonable fee to cover necessary costs of administration may be charged for such official licenses and permits, which must operate equally and without discrimination upon all persons, although reasonable classification will be permitted.

While municipalities have the authority to enact food inspection ordinances which are designed to safeguard the public health, such ordinances cannot be unreasonable and arbitrary in their classification of foods for inspection purposes. Thus, where a city ordinance prohibited any retailer from selling uncooked or perishable foods at any time other than the hours of the day and days of the week when inspection of such foods was available by the health department, and by the terms of the ordinance various baked and frozen foods were expressly exempt, the ordinance was held to be invalid as class legisla-

21. *State Laws Relating to the Control of Narcotic Drugs and the Treatment of Drug Addiction*, Supplement No. 91 to *Pub. Health Rep.*, U.S. Public Health Service, 1931.

22. See page 181. J. A. Tobey, *Legal Aspects of Milk Sanitation*, 2d ed., Washington, Milk Industry Foundation, 1947. *Ordinance and Code Regulating Eating and Drinking Establishments*, Public Health Bulletin No. 280, U.S. Public Health Service, 1943.

23. *Kugler v. City of Milwaukee* (1932), 208 Wis. 251, 242 N.W. 481. *State v. Houston* (1941), 210 Minn. 379, 298 N.W. 358.

24. *Husting Co. v. City of Milwaukee* (1930), 200 Wis. 434, 228 N.W. 502. *Janke v. City of Milwaukee* (1930), 202 Wis. 214, 231 N.W. 261.

tion, which was discriminatory and oppressive in its effect on legitimate business.²⁵

The summary seizure and destruction of dangerous and unwholesome foods and drugs by public health officials or other food and drug officials will be upheld when such action is necessary in the interests of the public health.²⁶

The administration of state food, drug, and cosmetic laws may be vested in the state health department, in the state department of agriculture, or in a separate bureau especially created for that purpose. In less than half of the states the department of health is now given the responsibility for the enforcement of food and drug legislation, although the statutes frequently provide for cooperation between the health department and any other bureau primarily charged with the enforcement of milk and general food control.

Bureaus of food control, including milk and meat control, are usually organized in the health departments of the larger cities. Aside from the issuance of licenses and permits to food establishments, the regular inspection and scoring of such places, and the general supervision of their hygiene and sanitation, duties of municipal bureaus of food control often include special attention to cleanliness in public eating places²⁷ and medical examinations of foodhandlers. While the medical examination, including laboratory tests, of foodhandlers at regular intervals is valid legally as a public health measure,²⁸ many leading sanitarians are dubious as to its practical value, and the procedure has been abandoned in some cities as ineffectual from the standpoint of public health.²⁹

The legal principles applicable to the control of food in the interests of the public health were ably set forth in a recent decision of the

25. *McCulley v. Wichita* (1940), 151 Kan. 214, 98 U. (2d) 192, 127 A.L.R. 312.

26. *North American Cold Storage Co. v. Chicago* (1908), 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276. *Adams v. Milwaukee* (1913), 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971. *Nelson v. Minneapolis* (1910), 112 Minn. 16, 127 N.W. 445, 29 L.R.A. (N.S.) 260.

27. See D. Fromson, *Regulatory Measures Concerning the Prohibition of the Common Drinking Cup and the Sterilization of Eating and Drinking Utensils in Public Places*, New York, Cup and Container Inst., 1936. An ordinance requiring sterilization of drinking glasses in public eating places was upheld in *Donahue v. City of Portland* (1940), 137 Me. 83, 15 A. (2d) 287. See *Universal Machine Co. v. Alcohol Beverage Contr.* (1938), 301 Mass. 40, 16 N.E. (2d) 53.

28. *Sekaly v. State* (1940), 138 Tex. Cr. A. 415, 136 S.W. (2d) 854. *Bauer v. State* (1941), 7 Wash. (2d) 476, 110 P. (2d) 154.

29. W. H. Best, Is routine examination and certification of food handlers worth while? *Am. J. Pub. Health*, 27:1003, October 1937.

Court of Appeals of New York, in upholding the conviction of a food company for violation of the Sanitary Code of New York City in having in its possession poultry that was concededly unwholesome.³⁰ Said the Court:

The danger to human life and health from unwholesome food is so great that the courts generally have treated food differently from most other products. It has been placed in the same category as drugs, poisons and other instrumentalities which, if they are negligently dealt with, are ordinarily certain to affect seriously the public health and safety. The good intentions of the defendant would matter very little to consumers who might consume this poultry. Food laws are designed primarily, not for the punishment of the dealer, but for the protection of the consumer. In this field of law, the obligation to beware is on the seller rather than the buyer. Lack of proof of guilty intent does not satisfy that obligation.³¹

In a few cities municipal abattoirs are maintained, so that local slaughtering of animals for food may be done under the immediate supervision of the city officials. Private abattoirs not shipping meat in interstate commerce are, of course, subject to inspection and supervision of the municipal authorities.

Liability for injuries due to impure or unwholesome foods is discussed in Chapter XIX.

30. *People v. Swift & Co.* (1941), 286 N.Y. 64, 35 N.E. (2d) 652.

31. See also *U.S. v. Greenbaum* (1943), 138 F. (2d) 437, 152 A.L.R. 751.