

Ohio." (Tag on bag) "100 Pounds Corn, oats and barley chop, made by the Imperial Grain & Milling Co., Address Toledo, O. (Trade Mark) (Imperial) Guaranteed Analysis Protein 8.90 per cent., Fat 3.70 per cent., Fiber 11.75 per cent."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed the following results: Moisture, 8.84 per cent; ether extract, 3.58 per cent; crude fiber, 12.48 per cent; protein, 8.06 per cent. Microscopical examination of the product showed it to contain oats, oat hulls, corn, corncob, at least 5 per cent; cottonseed meal in small amount only; and only a trace of barley. Adulteration of the product was alleged in the information for the reason that it was labeled "Corn, oats and barley chop," whereas other substances, to wit, oat hulls and corncob, had been mixed and packed with it so as to reduce and lower and injuriously affect its quality and strength. Adulteration was alleged for the further reason that it was labeled "Corn, oats and barley chop," whereas other substances, to wit, oat hulls and corncob, had been substituted in whole or in part for the article. Misbranding was alleged for the following reasons:

(1) That the statement "Corn, oats and barley chop," borne on the label, was false and misleading in that it would convey the impression that the product was composed of said ingredients, whereas, in truth and in fact, it consisted of corn, oats, oat hulls, and corncob.

(2) That the product was labeled and branded so as to deceive and mislead the purchaser, being labeled "Corn, oats and barley chop," thereby purporting that it was composed of those ingredients, whereas, in fact, it consisted of corn, oats, oat hulls, and corncob.

(3) That the following statement, to wit: "Protein 8.90 per cent," borne on the label, was false and misleading in that it would convey the impression that the product contained said amount of protein, whereas, in fact, it contained only 8.06 per cent protein.

(4) That the product was labeled and branded so as to deceive and mislead the purchaser, being labeled "Protein 8.90 per cent," thereby purporting that it contained said amount of protein, whereas, in fact, it contained only 8.06 per cent protein.

On December 12, 1912, the defendant company entered a plea of nolo contendere to the information and the court imposed a fine of \$25 and costs.

B. T. GALLOWAY, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *February 4, 1914.*

2848. Misbranding of Creamthick. U. S. v. Oscar J. Weeks. Tried to a jury. Verdict of guilty. Fine, \$100. (F. & D. No. 3919. I. S. No. 3404-d.)

On February 4, 1913, the United States Attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Oscar J. Weeks, doing business under the name of O. J. Weeks & Co., New York, N. Y., alleging shipment by said defendant, in violation of the Food and Drugs Act, on September 28, 1911, from the State of New York into the State of Missouri, of a quantity of a product called "Creamthick," which was misbranded. The product was labeled: "Creamthick—Serial No. 2049—Manufactured by O. J. Weeks & Co., New York, N. Y. It is guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed it to consist of a mixture containing approximately equal parts of Indian gum and rice flour. Misbranding of the product was alleged in the information for the reason that the statement on the label, "It is guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article," regarding the ingredients and substances contained in the product, was false and misleading, and the label was calculated to mislead and deceive the purchaser thereof, in that the product did contain as one of its ingredients an article similar to gum arabic, to wit, Indian gum.

On May 13, 1913, the case having come on for trial before the court and a jury, after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court:

HAND, Judge. Gentlemen, the charge against this defendant is the violation of the Pure Food & Drugs Act. That act provides that if any part of the label on goods sent in interstate commerce is misleading, the crime has been committed.

The jurisdiction of this court to determine that depends on the fact that the Government has charge of interstate commerce. I do not recall whether any of you gentlemen have had any such case or not, but to such of you as have not, it may be necessary to explain just why we are all here. Congress has attempted by this law to keep people from sending from one State to another food about which there are misstatements of fact—in this case, on the can.

The defendant is not charged with having adulterated this substance, so you need not concern yourselves about that. I remember, last night, one of the jurors wanted to know whether there was anything deleterious or injurious in this. The Government concedes that there is not. And I think I told him, and I tell you now, that that has nothing to do with the matter, because we are concerned not only with prevention of those things getting into food which are injurious, but we are also concerned with having people know what they get from the outside of the package. I think that will commend itself to your good sense and judgment, that when we buy something as a food, a man shall not be allowed to mislead us about it, and if he makes any statement about what is inside of the package, and it turns out to be untrue, he cannot come to me and say, "Well, it is true that I did not sell what I said I would sell you, but it did not do you any harm; you are just as well off as though you had what I sold you." You would answer him by saying, "That may all be very true, but it is not relevant; I am entitled to know what I am getting, and I am entitled to rely on what you tell me I am getting, and if you have not given me what you told me I was getting, I have a grievance against you." And it is that grievance which Congress has sought to prevent—within the limits of the power of Congress, which means interstate commerce, and it is on that charge that this defendant is before the court. So it is of no consequence in the case whether you find rice flour is innocuous, or the gum chadya which you eat.

Now, there is a very limited statement here which is the only thing that this case turns on. This defendant has invented a name of his own for this substance, and he is entitled to use it—an artificial name—no one challenges it. And you see that there is a good deal of printed matter on the outside of the can here. You can take it and read it if you like, but it will not help you in deciding the case, excepting insofar as it may color and throw light upon the particular phrase, which is the phrase which the Government challenges in this case. I am going to speak of that in a moment. But it is perfectly proper for you to take this and read the whole of it if you like, in an effort to understand what the words which the Government has singled out really mean.

Now, gentlemen, you have in this case to deal with something that we in court have very constantly to deal with, and that is the meaning of language. I suppose all of you, although none of you are learned in law, know how ambiguous language is. A great diplomatist once said that words were designed to conceal ideas. And sometimes, it almost seems as though they were. At least, they can be made to conceal ideas. But that is not the purpose, and that is not what they do between man and man. They are meant to convey ideas, and the only way that you can get the meaning of words, is not by taking them and reading them from a dictionary. Lawyers very often come to me when I construe a statute, and bring to me a dictionary to use, and I find that it does not help me a bit. I do not care so much what the dictionary says. What I try to do when I am finding out what words mean, and particularly written words, is to exercise a certain process of imagination in the matter. I try to put myself in the position of the man that used the words. What did he think those words would mean to the people to whom he used them? When I try to do that, the next thing I have to do is to say, Who did he think would read those words? What other words did he think these men would read alongside of them? What was the class of people whom he knew was going to see what he wrote? And then I try to construct in my own mind, not by any artificial rule, but by general common sense, so far as I have it, to reconstruct what the meaning would be to the man who read them. That is what you must do in this case.

These words were not to be read by chemists, gentlemen; they were not to be read by botanists; they were not to be read by people who dealt in nice distinctions; they were not to be read by lawyers; they were to be read by bakers and confectioners, plain men accustomed to use language—not with the nice accuracy of a

trained expert, but as ordinary men do. And so when you come to find out what this meant, I apprehend that you won't understand that the people who read this, were people who would dissect all the language bit by bit.

The language which is criticised here by the Government is that which is a part of this printed matter below the line "Creamthick," which I show you now. It goes down in three paragraphs of some length. You are entitled, in order to determine the words in question, to take the whole of them, and say what the sentiment of those words was; what the plain men, when they read this, would understand the man meant who put it on. He first says that this substance is smooth enough for cream, and is meant to take the place of whole eggs in ice cream, or egg whites in ice cream and so forth; that it entirely replaces gelatine. Then come the words, "It is guaranteed to be a pure food preparation, to contain no gelatine or egg albumen or similar article."

Now, if he had stopped at the words "Or similar article," the Government would not have objected to it here, because it does not contain gelatine, albumen or egg albumen. But he went farther than that. He said, it contained nothing of the sort. That is one interpretation—one possible interpretation of the language, and it would be important, if it rested with me, which it does not, to determine the meaning of these words.

Supposing he had said, "It is guaranteed to contain no gelatine, egg albumen, or anything of the sort." Now, did that mean that it might contain this gum chadya? That is the whole case in a nut shell.

Did it to the ordinary baker and confectioner, include gum chadya? We know now that this gum arabic and gum chadya have certain different properties; a chemist will tell you that they are different. I should say that they have actually different properties so far as water absorption is concerned, because this gum chadya is a much greater water absorber, though not any more than gelatine, and gelatine is used next to gum arabic in this label. But it is true nevertheless, that it has a water absorption very much greater than gum arabic. But when he said, gelatine, gum arabic or egg albumen, would anyone think, who would read those words, that he would put in another kind of gum, a water absorbing gum, which will act better towards making the ice cream hold up in a solid block underneath than gum arabic?

I take it that we must assume that he supposed that the bakers might think that the gelatine and gum arabic and egg albumen were things which were used in substances of this sort. It would be a reasonable inference to suppose that he must have thought so, if he indicated as one of the merits of this preparation that it did not have any of them. When he grouped those three together, and then said this had not anything of the sort, did he lead anyone to suppose that it did not include something like this gum? That is the whole case. That, gentlemen, is the question of fact, the meaning of the language and the character of the substance, which is entirely in your hands. You are the final arbiters of that fact. In this case it is the meaning of the language itself.

You must find—I think I have told you this in other cases in this term—that question of fact against the defendant beyond a reasonable doubt. That is to say, if you have any doubt on the subject which is not purely a fictitious one, you must bring in a verdict of not guilty. If it seems to you quite clear that the ordinary people, plain men in the trade who used and read those words would think that it did not have any of the gum, gelatinous gum, then the defendant is guilty, but if when he said that it did not contain gum arabic, that did not include that kind of gum, then your verdict must be in favor of the defendant.

In other words, to convict you must find that this gum was similar to gum arabic in the minds of men who would buy this stuff; that they would read gum arabic and this gum chadya as similar. If you can determine that, it is of no earthly consequence whether there is a chemical difference or not.

Now, gentlemen, there is one question in the case that I want to take up and disabuse your minds of, because I must say that I made an error on it yesterday, and I am going to try to impress upon you what I say now, so that by no chance will it injure the defendant. I permitted yesterday proof of a prior conviction of this defendant under the Pure Food Law. That was a mistake on my part. There are some cases where conviction involves moral turpitude on the part of the witness, which we allow in to impeach his general credibility. That is rather a ponderous way of saying that we allow proof that he had been convicted of immoral acts, so the jury may consider whether he is worthy of belief. But this conviction was a prior conviction under the Pure Food Law, and was not such a conviction as that. The reason is, a very good common sense one, because it does not necessarily involve any immoral act on the part of the defendant. A man may be convicted under this act for carelessness in branding, which does not involve his knowledge that he was misleading

any one. And so it would be very unfair to the defendant if you should consider that conviction against him. You have no right to consider it in weighing his testimony, and you under no circumstances would have any right to reason in this way: "Because he has been convicted once of violating this act, therefore it is likely he would do the same thing again." In the first place, it has no logical bearing on the facts of the case. You know all the facts here. All you have to do now is, independently and of your own will, to make up your minds about the meaning of that language. So I lay that question out of the case.

There are some questions which I have been asked to charge you, and I will go over them now, gentlemen, and perhaps I will think I have not covered some of them.

I will charge you that in order to find the defendant guilty, you must find that this product which contained gum chadya, and that the gum chadya was similar to the gum arabic—I have already told you that—I mean, find it similar in the sense in which that word is used on the label. You must find the label to be misleading. I think I have covered that word. And, that it was calculated to mislead and deceive the purchaser. It is true that some evidence was introduced to the effect that he never had misled a purchaser, but that in so far as purchasers never may have found out that gum chadya was here, such evidence was not very important.

Mr. Carlin suggests to me that I tell you that the test is not between this gum and gum arabic as put into the mouth but as it is put into the stomach in ice cream, or the other article mentioned on the label. I think that is true. No one expects this gum to be eaten as gum—it is mixed up here with flour, and then the whole substance is added to milk and made into ice cream.

Mr. CARLIN. If the Court please, I wish to except respectfully to that part of your Honor's charge where I understood the court to say that people were entitled to know from the label what they were getting. I ask the court to limit the statement, that the man need not necessarily state on the label what the product contains, but that if he makes a statement, it must be a true one.

The COURT. That is absolutely true. I think the jury understand that he is not guilty, because he had failed to state that gum chadya was here, but only on the theory that he stated that there is nothing like gum arabic, and we find that that is like gum arabic. I think you understand that. It is not for failure to state it—it is for misstating, misleading.

Mr. CARLIN. I ask the court to charge the jury that in reading this whole label, as the Court charged, it is solely for the purpose of interpreting the language mentioned in the information, and that they shall not consider any other statement, whether it is false or untrue, or whether in their opinion it is correct or not, as bearing on the guilt or innocence of this defendant.

The COURT. I think I did so charge. I will repeat it for you, if I have not made it clear.

Mr. CARLIN. I respectfully except to that part of the court's charge in which he said that he construed the word similar as meaning nothing of the sort.

The COURT. As to that, gentlemen, it would be my opinion personally, what I would do if I had the case. I want to make it quite clear, that that question is a question of fact, and on all questions of fact you are the final arbiters. If you do not agree that "similar articles" means "anything of the sort," why, make up your mind. What I say does not bind you. You are the jury.

Mr. CARLIN. I ask the Court to charge that this product being used by ice cream manufacturers and confectioners, that those dealers necessarily use it for certain purposes, and that they themselves would know whether or not such a substance producing such a result necessarily contained a gum substance or not.

The COURT. Why, I do not know anything about that.

Mr. CARLIN. They are entitled to take that into consideration, that these men would necessarily know.

The COURT. I cannot state that. I do not know to what extent the ordinary men to whom this comes would be aware that there was some gummy substance or something like gelatine is in it; or whether he would be led to suppose there was not, when he gets word that it contains no gum arabic, egg albumen, or similar article. If I was there, I should suppose just the opposite. But it may be that such men are able to tell from this use of the substance, whether it has a gum. I am sure I cannot tell. I do not think I can make such a charge. I have no knowledge of the extent to which they are aware of the substance from its effect.

Mr. CARLIN. I might make this clear. I think the jury should take into consideration that a man using a substance would know its result, and therefore know whether a gummy substance was necessary to obtain that result,—that is, the absorbing of water.

The COURT. They would know what the effect was on the ice cream, or what the usual effect—I should think there was some doubt about it. It is all a question of fact.

Mr. CARLIN. I would ask that the jury be permitted, if there is no objection, to take any of these samples.

The COURT. They may take any that they desire.

The jury thereupon retired and after due deliberation returned a verdict of guilty, and thereupon counsel for defendant moved the court to set aside the verdict for a new trial and an arrest of judgment, which motion was denied by the court, and an exception was then taken by defendant. The court thereupon imposed a fine of \$100.

B. T. GALLOWAY, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *February 9, 1914.*

2849. Adulteration and misbranding of peppermint flavor. U. S. v. S. Hirsch Distilling Co. (Minuet Cordial Co.). Plea of guilty. Fine, \$100 and costs. (F. & D. No. 3924. I. S. No. 12487-d.)

On July 19, 1912, the United States Attorney for the Western District of Missouri, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the S. Hirsch Distilling Co., a corporation, Kansas City, Mo., doing business under the name of Minuet Cordial Co., alleging shipment by said company, in violation of the Food and Drugs Act, on or about October 11, 1911, from the State of Missouri into the then Territory, now State, of New Mexico, of a quantity of peppermint flavor which was adulterated and misbranded. The product was labeled: "Peppermint Flavor Artificially Colored Minuet Cordial Co., Kansas City, Mo. Serial No. 5897 'A'."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed the following results: Specific gravity, 15.6° C., 0.9319; alcohol (per cent by volume), 51.2; solids, 0.03 per cent; peppermint oil, trace; color, Naphthol Yellow S and Light Green SF Yellowish. Adulteration of the product was alleged in the information for the reason that there was mixed, packed, and mingled therewith a certain substance, to wit, a highly dilute peppermint extract containing a trace only of peppermint oil, thereby reducing, and lowering and injuriously affecting the quality and strength of the product, and that there was substituted for genuine peppermint extract as commercially known, that is to say, a flavoring extract prepared from oil of peppermint, or from peppermint, or both, and containing not less than 3 per cent by volume of oil of peppermint, an adulterated compound containing only a highly dilute extract of peppermint, containing a trace only of oil of peppermint by volume, and that the product was artificially colored to give it the effect and color of peppermint oil and the extract thereof and to conceal the identity of its inferiority. Misbranding was alleged for the reason that the product was marked, labeled, and branded as set forth above and was misbranded in that the same was false and misleading because it misled and deceived the purchaser thereof into the belief that the product was peppermint extract as the same is commercially known, that is to say, an extract prepared from oil of peppermint, or from peppermint, or both, and containing not less than 3 per cent, by volume, of oil of peppermint, whereas, in truth and in fact, the product was a highly dilute peppermint extract, artificially colored and containing a highly dilute extract of peppermint, containing an inestimable amount of peppermint oil, and that said product was further misbranded in that the label purported it to be an extract of peppermint, whereas, in fact, it was a highly dilute extract of peppermint, artificially colored and thereby tending to mislead and deceive the purchaser into the belief that he was purchasing peppermint extract as commercially known as aforesaid.

On November 14, 1912, the defendant company entered a plea of guilty to the information and the court, on June 27, 1913, imposed a fine of \$100 and costs.

B. T. GALLOWAY, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *February 4, 1914.*