

6629. Alleged adulteration of granulated pink root. U. S. * * * v. S. B. Penick & Co., a corporation. Tried to the court and a jury. Verdict of not guilty. (F. & D. No. 8832. I. S. No. 1804-p.)

On May 7, 1918, 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 S. B. Penick & Co., a corporation doing business at New York, N. Y., alleging shipment by said company, in violation of the Food and Drugs Act, on June 9, 1917, from the State of New York into the State of Maryland, of a quantity of an article labeled in part, "Granulated Pink Root," which was alleged to have been adulterated.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that the product contained 22.33 per cent of ash.

Adulteration of the article was alleged in the information for the reason that it was sold under and by a name recognized in the United States Pharmacopoeia, official at the time of investigation, and differed from the standard of strength, quality, and purity as determined by the tests laid down in said Pharmacopoeia, official at the time of investigation, in this, to wit, that said article on analysis yielded 22.33 per cent of ash, whereas the said Pharmacopoeia, official at the time of investigation, provided that pink root yields not more than 10 per cent of ash.

On March 4, 1919, the case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Hand, *D. J.*):

Gentlemen, the case is substantially one of law, but you must find a verdict—but if this was a civil case, I should have to direct a verdict—but you must find the facts and you must find them beyond a reasonable doubt against the defendant.

Now, the only questions on which the case turns are these: Did the defendant send these two cases of pink root from New York to Baltimore, and was one of them from which the sample was taken, of less than the standard required by the United States Pharmacopoeia?

The United States Pharmacopoeia says that the pink root must have no more than 10 per cent of ash.

The gentlemen whom you have heard on the stand, two of them, said they found, out of one of the packages, over 22 per cent of ash. If you believe them, and believe that a fair sample taken from that box, although it was only one box, showed more than 10 per cent, that is, 22 per cent or thereabouts, then you are to find a verdict of guilty. But if you have doubts on that point, then you are to find a verdict of not guilty.

I think that is all that I need tell you; the rest are questions of law. Are there any requests?

Mr. INGLE. I think your honor ought to submit also the question of whether it was properly labeled on the box.

The COURT. The label is not in dispute.

Mr. INGLE. Nothing is in dispute.

The COURT. What question do you want me to submit?

Mr. INGLE. That the jury must find that the box does not contain a statement as to the standard of purity of the contents.

The COURT. That is true. Mr. Ingle suggests to me that I should tell you that you must find that the box did not contain any statement of the standard of purity of the pink root within it—so much of the box as we have here contains no statement about the standard of purity; that is, how much ash there was. What we have here, what is the end of the box, contains the statement that it is granulated pink root, but nothing more. If, as a matter of fact, the standard of pink root was contained elsewhere on the box, it was a sufficient compliance with the law. If you have any doubts upon it, you may bring in a verdict of not guilty.

Do you want me to charge that the burden rests on the defendant?

Mr. DE WITT. Well, will your honor charge the—that the defendant must bear the burden of proof to show that this was marked in such a way as to indicate that it would meet the requirements?

The COURT. I do not think it is worth while doing that. You have the testimony of Mr. Lowe that he presents all of the box that had any marking—it is not likely that they are going to read his testimony; he had no interest, so far as I know.

Mr. INGLE. I ask your honor to charge that if the jury find that this material was sold as pink root not analyzed, then the case is not one within the statute and they may bring in a verdict of not guilty.

The COURT. No, I will deny that.

Mr. INGLE. Exception.

The jury thereupon retired, and after due deliberation returned a verdict of not guilty.

C. F. MARVIN, *Acting Secretary of Agriculture.*