

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 846, FOOD AND DRUGS ACT.

MISBRANDING OF MOLASSES.

On or about February 28 and April 25, 1908, Henry L. Hobart, George B. McGinnis, and Harry C. Christianson, trading under the firm name and style of Henry L. Hobart & Co., New York City, shipped from the State of New York into the State of North Carolina two consignments of alleged molasses, the former of which shipments was labeled: "Heyer Bros. No. 1 Fancy, Wilmington, N. C.," the latter shipment being labeled: "W. I. contains sulphur dioxide. Conforms to Pure Food Law. Armstrong Grocery Co., New Bern, N. C." Samples from these shipments were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and the former of said shipments was found to contain glucose 12.27 per cent, and the latter of said shipments to contain glucose 25.32 per cent. As the findings of the analyst and report made indicated that the product was misbranded within the meaning of the Food and Drugs Act of June 30, 1906, the Secretary of Agriculture afforded said Henry L. Hobart, George B. McGinnis, and Harry C. Christianson, and the party from whom samples were procured opportunities for hearings. As it appeared after hearings held that the shipments were made in violation of the act, the Secretary of Agriculture reported the facts to the Attorney-General with a statement of the evidence upon which to base a prosecution.

In due course a criminal information was filed in the Circuit Court of the United States for the Southern District of New York against the said Henry L. Hobart, George B. McGinnis, and Harry C. Christianson, containing two counts, one for each of said shipments, charging said shipments and alleging the product so shipped to be misbranded in that it was an imitation of and offered for sale under the distinctive name of another article, to wit, molasses, when in truth and in fact the product so shipped was not molasses, but was a compound of molasses and glucose. On November 15, 1910, the

cause came on for hearing and said defendants entered a plea of not guilty to the above information, whereupon the issues were tried to a jury. The testimony of witnesses and arguments of counsel having been heard, the court instructed the jury as follows:

The COURT (HAZEL, J.): Gentlemen of the Jury: The United States Attorney has filed an information in this court charging the defendants, a partnership doing business in the City of New York, with committing a misdemeanor, in that they are claimed to have violated the so-called pure food and drug act, which was passed by Congress in June, 1906. The case does not lack in importance, for it is the undoubted duty of the Government and of the officials of the Government to carry a law, solemnly enacted by Congress, into effect, and to bring the offenders of the statute before the bar of justice.

The case is not unimportant from the view point of the defendants. Although the penalty for the first offense may not be regarded as large in comparison, yet it is to be borne in mind that the business rectitude of the defendants is challenged by the information and by evidence in support thereof and which is about to be submitted to you for your determination.

The information contains two counts, and it is for you gentlemen to say whether the Government has established both counts, or either of them, beyond a reasonable doubt, and it is entirely within your province to find the defendants guilty as charged; to find them guilty on one count only, or to find them not guilty.

The information does not charge the defendant with adulterating this product. They are not charged with admixing with molasses the ingredient commercial glucose, but they are charged with misbranding the merchandise that was sold and delivered to the individuals named in the counts of the information and with selling and delivering to them molasses which in truth and in fact was not such, but which was a compound of molasses and glucose. I think that you should understand the specific charge contained in the indictment, and therefore I quote from it: The defendants are charged "with consigning to Heyer Bros. a certain article of food which was shipped as aforesaid and was misbranded, in that it was in imitation of and offered for sale under the distinctive name of another article, to wit, molasses, whereas in truth and in fact said food shipped as aforesaid was not molasses, but was a compound of molasses and glucose." This specific allegation is also substantially contained in count 2.

The pure food and drug act was passed by Congress to remedy a pre-existing evil. It had been called to the attention of Congress that foods sold to the public were adulterated and intermixed with deleterious substances and hence a law was passed forbidding such acts; and hence a law was passed even going further, namely, prohibiting the misbranding of merchandise and prohibiting attaching thereto a mark or indication which held it out to be an article different from what it actually was. The pre-existing evil produced by adulterated or misbranded articles of food or drugs, could not be over estimated and hence I again admonish you that the evil that Congress designed to remove, and obliterate and eradicate was an important one and touching the welfare and the comfort of the people.

In this case it is to be established in the first instance that this was an interstate commerce shipment. This court would not have jurisdiction of the offense if it were not an interstate shipment; and the evidence is undisputed in this case that the shipment initiated in the City of New York and that it was delivered in a foreign State, the State of North Carolina; so that you need not take up any time to consider any testimony upon the subject as to whether this

was an interstate shipment or not. At the outset of the trial you will remember it was contended that as to the second count the shipment was not interstate, but that question has been waived by the defendant and therefore you may reach the conclusion that the evidence in the case is sufficient to justify your holding that this was an interstate shipment—that both shipments were interstate.

The second element which the Government is required to prove beyond a reasonable doubt is that glucose was in fact introduced into the molasses before or at the time of the shipment, and that the molasses was misbranded in that it was a compound of molasses and glucose.

And the third element is that the defendants, or one of them, or their agent, acting within the scope of his authority, shipped the molasses, in interstate commerce.

That the molasses contained commercial glucose as distinguished from natural glucose is stoutly denied by the defendants and the defendants contend that if you should find that this molasses contained commercial glucose, and if it was admixed with or added to molasses by an agent of the defendants, that such agent was acting without the scope of his authority.

I think before discussing the evidence given on both sides at great length it will not be inappropriate for me to more particularly call your attention to the act under which this information was filed. The act, defining the word "misbranded" substantially says that the term shall apply to a package or label containing a statement, design or device regarding such article or its ingredients which shall be false or misleading in any particular; and that moreover that an article of food or drug shall be deemed to be misbranded when it contains a false label, print or inscription as to the State, Territory or country in which it is manufactured or produced.

The act then specially provides—and this provision more nearly applies to the facts as claimed by the Government in this case—that food is misbranded if it is in imitation of or offered for sale under the distinctive name of another article; or if it be labeled or branded so as to deceive or mislead the purchaser; and when it is a mixture or compound it must be branded by its distinctive name, and it cannot be legally branded as an imitation of some other article and offered for sale.

The pure food and drug act also provides that when articles of food are labeled and marked "compound" or "blend" the term "blend" shall be understood to mean a mixture of like substances, and uses these words in that connection; "not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only."

Of course manufacturers are not obliged to disclose their trade secrets, in the case of proprietary foods which contain no deleterious or harmful ingredients.

The act contains another provision, that after the judgment of the court notice shall be given by publication in such manner as may be prescribed by the rules and regulations referred to in Section 3 of the act.

These, in substance, gentlemen, are the same provisions of the act of Congress under which this information was filed. The government claims that the information is supported by the evidence. It claims that the first shipment occurred on February 28, 1908, and it was from New York City, and then and there consigned to Heyer Brothers and that the consignment was marked "Heyer Bros., No. 1 Fancy." The word "molasses" was not indicated on the consignment, as I remember the testimony, but it is practically conceded on both sides and certainly as I believe it is conceded by the defendant, that it was understood that this indication "No. 1 Fancy" meant No. 1 fancy molasses.

The witness McIntyre, a government inspector, came to the business place of the consignee sometime thereafter and took from one of the barrels a sample of this molasses which had been delivered by the defendant. He sealed it in a bottle or jar, placing his initials thereupon and forwarded it to the Department of Agriculture where it remained a certain period of time and was then forwarded to the chemist who gave testimony with relation to that count. The chemist, Mr. Secker, testified that the molasses was contained in a jar or bottle, that it had a seal upon it, to which I have already drawn your attention, and that that seal was intact and the bottle securely closed and the government actually believes, from that testimony, that the sample had not been disturbed by any one; that the commodity that was analyzed was precisely the commodity that was taken from the barrel by the inspector. Mr. Secker testified that he made a chemical analysis of this molasses, that he made two tests, a polariscope test and an erythro dextrine test, and that there was present in the molasses commercial glucose to the extent of 12.8 per cent. He testified that the fact that the molasses for a period of time was kept in a warm climate or in a warm place, or that it contained organic matter, made no difference with the accuracy of his test.

Count 2 relates to a shipment of five barrels of molasses from New York to Newbern, North Carolina, to Armstrong & Co. The witness Mr. Armstrong testified that he ordered molasses and that it came to him in due course of time and was labeled or had a designation upon the barrels of the letters "W. I." and a butterfly; and it is practically conceded that these initials meant or were understood to mean West India Butterfly Molasses. The witness testified that he ordered molasses and not an admixture of the article glucose.

The Government witness Woodman testified that these bottles came to him from the samples that had been collected by the inspector. He also gave testimony that the boxes of jars were accurately sealed and that as a result of the analysis which he made he found the commodity contained commercial glucose amounting to 25 per cent and the balance was molasses. He further testified that natural glucose is different from commercial glucose; and such was also the testimony of the other expert witness who testified with relation to the first count.

Now this testimony, gentlemen, demands your very careful consideration. No witness has been produced by the Government to show that these defendants admixed into this molasses the ingredient glucose. There is no direct evidence tending to show that this offense was committed by the defendant except such as may be ordinarily presumed from the facts and circumstances; but it seems to me, before the testimony of these expert witnesses is set aside as entitled to no weight, before it is discredited, it should receive your careful consideration and should be most carefully scrutinized. In the acceptance of expert testimony or opinion testimony we are often required to accept the testimony of men who are learned in a particular science, or who are skilled in a particular avocation. A physician is called because of his skill and because of his acumen in matters of medical science and surgery and because few of us are doctors or surgeons. A carpenter is called because he may have some peculiar knowledge with relation to building. And so it is with a chemist; a chemist is called to give opinion testimony with a view of disclosing to us the mysteries of chemistry and with a view of stating to us what his opinion may be with reference to a certain state of facts, or with reference to certain researches that he may have made or certain tests that were made by him or in his presence. The credibility of such testimony, however, is entirely for your consideration. You may set it aside as entitled to no weight. But, gentlemen, if you believe from the testimony as it was given in your presence and from the ap-

pearances of the witnesses upon the stand, that it was impartially given, that the chemists were disinterested, then I charge you that their evidence is of the greatest value and entitled to the greatest consideration. On the other hand if you believe, as is suggested by the defendant that it was biased, narrow and prejudiced, then manifestly it has little value. The testimony in either event is not conclusive upon you. It is simply given for the purpose of enlightening you as to the true situation.

The defendants have given testimony in their own behalf and they deny mixing molasses with glucose. They deny misbranding; and testimony was given by Mr. Hobart and by Mr. Inslee that the shipment in fact was pure and wholesome; that it was pure molasses and was branded as molasses. Furthermore, they testify that the samples in evidence are pure molasses and contain no commercial glucose; that if commercial glucose is contained in the samples it is due to chemical reaction since the shipment was initiated.

You will perceive, gentlemen, that this testimony, which is based on the skill and experience of the defendants, who have been engaged in this business for a number of years, is directly opposed to the testimony of the government; so that you are to determine where the truth lies. Do you believe the testimony of the chemists, who have stated in the one case that 12 per cent of glucose was found in the sample submitted to them, and that in the other case 25 per cent of glucose was contained in the sample submitted to him? If so, the government has proved its case and the defendant is guilty as charged in the information. Of course in reaching such a conclusion you should take into consideration the inferences that are drawn by the defendants, namely, that these samples were not fair samples; and in that connection I also call your attention to the testimony of the chemists that they were abundantly able to reach an accurate analysis or at least practically an accurate analysis. The witness Christianson testified that the molasses was bought from dealers in the West Indies and Cuba and elsewhere; that defendants' Exhibits A and B were tested by him, and in his judgment contained pure molasses. He is not a chemist, but he claims to be able to testify upon the subject from the long practical experience that he has had in this business, and he claims to be able to tell you that these samples did not contain any glucose, from merely tasting the samples.

Evidence is also given that at the time this molasses was received by the defendant it was submitted to a polariscope test and that that test was to ascertain the presence of sucrose, and as I understand the testimony, no direct examination was made to ascertain, with respect to the molasses from foreign countries, as to whether it contained glucose or not.

I do not think I need to discuss the evidence any longer. It is highly technical. You will remember the salient points of it. I have endeavored to direct your attention to it, but you are not to take my opinion or accept my suggestion with reference to any item of fact.

In the courts of the United States the presiding justice may state to the jury what his opinion may be in reference to testimony, in reference to the facts, as to whether a witness in his judgment is reliable or not; yet it seems to be that I ought not to do that in this case. The witnesses on the part of the government as well as the witnesses on the part of the defendants have given testimony in your presence, and I believe that you are as able as I am, perhaps more so, to judge of the qualifications of these various witnesses and what weight should be attached to them.

The next question which it is important to dwell upon is whether in the absence of knowledge or intent to violate a statute these defendants should be convicted as charged. On that subject I charge you that in most offenses of a criminal nature it is essential that it be shown that the accused intended to

commit the offense charged. A person charged with crime ought not to be convicted if it appears that the offense was due to mistake or inadvertence, that there was an absence of intent to violate a statute. But is this such a case? Ordinarily the intent is inferred from the facts and circumstances and follows as a necessary consequence of the act; therefore if these defendants knew—and they are presumed to have known—what law Congress had passed, they are presumed to have known that it was a violation of the statute to misbrand merchandise that was shipped interstate. If knowing that fact it contained commercial glucose; if knowing that fact the commodity was not pure molasses, the commodity which had been ordered, then in my judgment the defendant must be held responsible under this act; for, in cases of this class the statute in effect provides that a dealer may defend on the ground of the absence of knowledge on his part when the article of food has been bought from a manufacturer residing in the United States, and when a guarantee was taken by him from such manufacturer that the article complied with the requirements of the act. I do not think that it is necessary for the government to prove that the defendants, the shippers or dealers had actual knowledge of the contents of the barrels of molasses, or that it was misbranded. The pure food and drug act does not provide that shippers or dealers must intentionally violate its provisions, or that they must know the contents or character of the packages or barrels in which the goods are contained before they may be found guilty of misbranding. The only provision approaching the question of intent or guilty knowledge is the one already mentioned regarding a guarantee from the manufacturer living in the United States to the dealer that the merchandise is of the character specified. Hence the shipper must be presumed to have knowledge of the character of the shipments and that the manufacturer lived in a foreign country is immaterial. It is quite evident, gentlemen, that it would be comparatively easy for a dealer or shipper to escape punishment under the provisions of the act if he could be heard to claim that he had no knowledge of the misbranding. The intent follows from the act. In my judgment the true construction of this law is that the dealer or manufacturer sells the commodity at his peril, and he is bound to understand the ingredients of the product. The defendants in this case were bound to know whether the shipment was pure molasses, as that was understood in the trade, or whether it was a compound of molasses and glucose.

Testimony was given by the witness Hobart that just prior to the time when the act in question went into effect he instructed his superintendent Inslee not to ship goods unless they were properly branded as provided by the pure food law; that compounds should be properly branded; and the superintendent Inslee testified that he received instructions to obey the statute and not misbrand the goods but to ship them for what they actually were; that if compounds consisting of molasses and glucose were to be shipped they should be branded properly. Such were the instructions given by Mr. Hobart, and there is no evidence here denying that they were given. But, gentlemen, there is no evidence here tending to show that any specific instructions were given with reference to the merchandise in question, and I think I will charge you as a general proposition of law that the defendants must be liable if the product was shipped interstate by their superintendent, and if he was authorized to run the factory or plant, and sell and deliver the product in the usual course of business, and if the testimony establishes that the superintendent had charge of the Hoboken plant and of the shipping of orders forwarded to him from New York by the defendants, and if you believe from the evidence that in the shipment of the merchandise specified in counts 1 and 2, he acted within the scope of his authority, and if you believe that in fact the shipment was mis-

branded, that is, if it was an imitation of molasses and known under and by the name of molasses compounds, or a compound of molasses and glucose, then the defendants as principals are liable for the acts of their agents. The act, section 12, specifically provides that the principal shall be liable for the failure of an agent employed by him when acting within the scope of his employment, that his act or failure shall be deemed the act or failure of the employer. As to whether the superintendent and manager Inslee acted in the scope of his employment the government has given testimony tending to show that he was in charge of the factory at Hoboken, that orders were usually sent to him from New York and that he filled them, that he had authority to fill them; he made the shipments and he supervised and managed the plant. If you believe such testimony, and as I recall it is not disputed, you are justified in reaching the conclusion that this instruction which is claimed to have been given to the superintendent does not relieve the defendants from responsibility.

Gentlemen, this is a criminal case and I am obliged under the rules of law to instruct you that you cannot find the accused guilty unless the government has satisfied you upon the various elements required to be proven by it and to which I have already called your attention. The government has the burden of proof and a mere preponderance of evidence is not sufficient; you must be satisfied beyond a reasonable doubt, not only that the shipment was interstate, but that the percentage of glucose, or approximately the percentage of glucose, was found in the samples that have been submitted to the chemists, and that such samples in fact were taken from the merchandise sold by the defendants, and that such samples had not been disturbed or admixed by any other person.

Something has been said with respect to the good character of the accused. In all criminal trials the good character of the accused is presumed, and it has been held to be a proper charge to a jury to say that this character very often will generate a reasonable doubt. The defendants in this case are entitled to the presumption of innocence, until their guilt has been established by the government beyond a reasonable doubt; but by the term "reasonable doubt" is not meant a capricious or fanciful doubt. If you have such a doubt it should be based on testimony; it should be based on the showing of the government, namely, that you disbelieve such showing, that the testimony is insufficient, that it is unreliable, that the chemists ought not to be believed because their tests were improper or not sufficiently accurate. If a reasonable doubt arises in your mind with reference to any such matters which are salient and material in the case you should acquit the defendants. The facts of the case must be consistent with the innocence of the defendant and consistent with their guilt. You should not base your verdict in favor of the government and against the defendants on mere surmise and conjecture. If they are guilty of the offense, as I have already had occasion to say, their guilt should be established upon the record beyond a reasonable doubt.

Take the case.

In due course the jury returned the following verdict: "Guilty on both counts without criminal intent." Thereupon counsel for defendants moved to set aside the above verdict, and for a new trial, and arrest of judgment, urging in support of said motion the following grounds:

(1) Because the jury has affirmatively found the elements of criminal intent to be lacking.

(2) For the reason that a suspension of sentence is in order here for each of the following grounds:

(a) Because the jury has expressly negatived criminal intent.

(b) Because it appears that the Government's last witness himself, at its request, tasted the molasses involved and reported that it did not contain

glucose, to judge by taste, though he said that where as much as 25 per cent of glucose was present you could tell it by taste.

(c) Because express written Instructions from the defendants to their employees governed these two specific shipments, and were ignored by the Court in its charge to the jury; the written shipping orders referring to the lot numbers of molasses which were to be used, and excluding the numbers indicating glucose or glucose compounds.

(d) Because the glucose, if any at all, was probably in at the time of the importation, or before the pure food law went into effect; and we could get no guarantee because of the non-residence of the persons from whom we bought the goods in the foreign country, and this particular importation took place before the pure food law went into effect with its specific provisions as to government analysis in the Custom House for importations subsequent to that date.

(e) Because the fact that we went to trial is no reason for increasing the penalty in view of the uncertainties of the law and its bona fides.

The court being fully informed in the premises denied the above motion and imposed a fine of \$100 upon the said three defendants jointly.

This notice is given pursuant to section 4 of the Food and Drugs Act of June 30, 1906.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *April 24, 1911.*