

## United States Department of Agriculture,

OFFICE OF THE SECRETARY.

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### NOTICE OF JUDGMENT NO. 1642.

(Given pursuant to section 4 of the Food and Drugs Act.)

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#### ALLEGED ADULTERATION OF CANDY EGGS, PEACHES, AND PEARS.

The United States Attorney for the District of Massachusetts, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district—

(1) On March 10, 1911, a libel for the seizure and condemnation of 131 boxes of candy eggs, alleging that the product had been shipped from Henry Heide, New York, N. Y., and from R. C. Boeckel & Co., York, Pa. (date not shown), and transported from the States of New York and Pennsylvania into the State of Massachusetts, and charging adulteration in violation of the Food and Drugs Act.

(2) On March 17, 1911, a libel for the seizure and condemnation of 96 boxes of candy peaches and pears, alleging that the product had been shipped by S. Fisher & Co., Hoboken, N. J. (date not shown), and transported from the State of New Jersey into the State of Massachusetts, and charging adulteration in violation of the Food and Drugs Act.

(3) On March 17, 1911, a libel for the seizure and condemnation of 80 boxes of candy eggs, alleging that the product had been shipped by the National Candy Co., Buffalo, N. Y. (date not shown), and transported from the State of New York into the State of Massachusetts, in violation of the Food and Drugs Act.

None of these products bore labels but all remained unsold in the original unbroken packages and in possession of parties to the United States Attorney unknown. Adulteration of all the products was charged in the libel for the reason that they were alleged to have contained talc, a substance deleterious and detrimental to health.

On April 24, 1911, R. C. Boeckel, Henry Heide, the National Candy Co., and S. Fisher & Co. filed their claims and answers to the libels,

and on December 16, 1911, they severally applied for jury trial. On March 5, 1912, the United States Attorney filed a motion to amend the libels and said motion was allowed.

On March 6, 1912, the cases coming on for trial were committed to the jury and on the same date they returned a verdict finding that the products were not adulterated.

The charge to the jury (Dodge, *J.*) follows:

DODGE, *J.* Mr. Foreman and Gentlemen: The printed forms of verdicts which will go out with you when you go out to consider this case are a little different from those you have used before. A specimen will be enough: "The jury find that the candy eggs contained in 131 boxes are"—then there is a blank—"adulterated." That verdict you will complete either by omitting or by inserting, according as you shall find, the word "not" in that blank. The foreman will sign that verdict when it is agreed upon, in the usual way. There will be one verdict to be rendered in each of these three cases, and you have a form applying to each one. The only difference between the three cases, the only respect in which one differs from another, is that in case No. 395 the United States proceeds against 96 boxes of candy peaches and pears. Now for the present purposes you may treat this case as if it were a proceeding against the candy pears only. The Government admits that it has nothing to object to in the peaches, and you may disregard them. You may treat this case as if it related to the pears and nothing else, and when your verdict is rendered we will see what to do with the peaches.

This, as you have heard, gentlemen, is a prosecution under the Pure Food Law, so-called; and we shall all agree that of all the laws ever passed by Congress it is probable that that is one of the most useful, and one which has benefited the people of this country, probably, as much as any other. There is no question that such a law should be properly enforced, just as any other law of Congress should be properly enforced. It is, nevertheless, true that that law, like all the other laws which Congress passes, is a law passed for practical purposes, to be considered by practical people, and not to be given an unduly theoretical construction.

The law says, as you have heard several times while this case has been on trial, that all goods in interstate commerce which are adulterated are liable to be forfeited to the United States,—all goods within the Act, goods which come within the Pure Food Law. The law also says in so many words that candy is adulterated within the meaning of the law if it contains talc. There is no dispute about that. Those are the words of the law.

The Government in seeking to have these goods declared forfeited rests upon the mere words of the law. The Government says: "This candy had talc in it; never mind anything more, it has talc in it; therefore it is adulterated under that law."

Well, gentlemen, the Government does not try to show you in this case that the goods are injurious to anybody. You have no such question as that before you. You are not to inquire, for any purpose in this case, whether the talc would hurt anybody or whether it would not. So far I agree with the contention of the Government counsel. The Government does not try, and there is no question for you to consider, as to whether talc is injurious, or whether talc in the quantities which these Government experts have described is injurious. There is no such question before you here.

It seems to me that to say that the goods are necessarily adulterated under the law as it stands, if only any talc, no matter how little, may be found in them, is

not the proper construction of the law. Such a claim might be good, undoubtedly is good, in strict logic; but does it follow that for the purposes for which this law was intended it is good? I do not think it follows that any such thing was necessarily the intent of the law when it was passed. We must suppose that the law was passed by reasonable and practical men for use among reasonable and practical men. I take on that question a little different view from that taken by the Government. It is the duty of the Court to instruct the jury in matters of law. Questions of fact it is the duty of the Court to submit entirely to the jury. The court should not undertake to interfere with any question of fact, but questions of law are for the Court, and if the Court makes any mistake in ruling upon them the party against whom he rules has a perfect remedy by appeal.

Now, I shall instruct you, gentlemen, that the Government in order to prove these goods adulterated, and to be entitled to a verdict from you that they are adulterated, has the burden of satisfying you by a fair preponderance of the evidence, in the first place, that there was talc in these candies; and, in the second place, that there was something beyond a mere chemical trace of talc, that is to say, a quantity sufficient to enable you, as reasonable and practical men, to say that it was significant or important for some possible practical purpose.

Let us take first the question, Was there any talc in this candy? The Government has the burden to satisfy you of that, in the first place, by a fair preponderance of the evidence. If it has failed to do that, you should find for the defendant, without going any further. On the one side you have the evidence of the experts introduced by the Government. They tell you they found talc, as a result of their examination. They undertake to tell you or to estimate for you how much talc they found. Now it is for you to say how far you will believe them. You have heard them cross-examined. They have been made to detail before you the manner in which they treated these candies in their analyses, and the reasons which they have for believing that what they found in the candy was talc. All that evidence you are to consider, and consider fairly. You are to say how far you will believe it. If there is any evidence the other way, you are to consider that in the same manner. You are to say, then, which way to your minds the preponderance, the fair preponderance, of the evidence has been.

The witnesses for the Government, as I understand them, have told you that they found in these candies, as a result of their analyses, mineral matter. They have not undertaken to claim to you that all of it was talc, at least not all of them have made that claim. There was mineral matter. Talc is mineral matter, but not all mineral matter is talc. What the Government has to prove to you is, in the first place, that there was talc in these candies, and you must say whether that has been proved by a fair preponderance of the evidence or not.

If you are so satisfied by a fair preponderance of the evidence that the candy did contain talc, I shall instruct you that it is still necessary to consider to some extent the amount of talc that there was there.

We have been told in the course of this case that there are no substances which are chemically pure. We have been told in the course of this case that there is mineral matter to a greater or less quantity, contained in every ingredient of this candy. Gelatine enters into it, and gelatine, they tell us, contains mineral matter, a trace, a small quantity, however much it may be. Chocolate enters into it; in that we are told there is mineral matter. Sugar enters into it; in that we are told there is also mineral matter.

In considering the quantity of a substance like this, not claimed to be poisonous, it seems to me that of a quantity so small as not to be appreciable for any practical purpose whatever, the law does not take account. Things which are entirely trifling, insignificant, unsubstantial, of no consequence for any practical purpose, as a general rule the law does not take account of. Of course, gentlemen, we are to give to this law a fair and honest construction, for the purpose of enabling it to be carried out to accomplish that which it was intended to accomplish. It is important that the law should be strictly enforced. But it does not follow from that that we are required to give the law a construction or an effect purely theoretical, as opposed to a practical construction.

If you have been satisfied by a fair preponderance of the evidence that there is talc in these candies, I instruct you that you should also be satisfied, in order to find for the Government, by a fair preponderance of the evidence, that there is in the candies a quantity of talc sufficiently appreciable to enable you, as reasonable men, to regard it as significant or important for some practical purpose. I shall instruct you, gentlemen, that it is not merely a quantity so small that all the difference it could possibly make for any purpose whatever would be only imaginary or theoretical. That is not enough to enable you to find these eggs adulterated within the meaning of this law. A mere mechanical trace, only to be detected by a skillful chemist, would not, as I shall instruct you, be sufficient.

There must be such a quantity, at least, as you would say, supposing that were the question, you could possibly regard as enough to show on the manufacturer's part some purpose of deception. If it were so insignificant and small that you could not say, if the question of deception on the manufacturer's part were raised here, that he could possibly have been supposed to have any purpose of deception, if he used only so small a quantity as that, then I shall instruct you that there was not enough talc in this candy to justify your finding it adulterated within the meaning of the Act.

I think that the law means that there should be at least so much of the forbidden substance in this candy as you would say, if that were the question, might possibly be considered by you as enough to show a want of that extreme care expected of the manufacturer of candies, in guarding the purity of his product; and if you find that the quantity of talc was so small that, no matter what extreme care the manufacturer had to use, yet he would not be guilty of any failure whatever in that extreme care if only so much talc as that got in, then that would not be a sufficient quantity of talc to warrant you in finding the candies adulterated within the meaning of the law.

Now, gentlemen, it is not necessary that you should find that there was enough talc to injure or hurt any consumer of those candies, for the purpose of this case. That is not the question here. Undoubtedly it may be true that a quantity so small that it could not possibly hurt any consumer, would be within the meaning of the law, and would require you to find the candies adulterated. All that I mean to say is that, in my opinion, and I shall so instruct you, there should be at least some quantity beyond a mere chemical trace, something which you can regard as going beyond what is merely imaginary or merely theoretical.

Counsel can remind me of anything they desire me to say further.

Mr. FURBER. Your Honor suggested that if it were only such a quantity as would be detected by a skillful chemist. I suggest, of course, that a layman could never detect it; it would always have to be a skillful chemist who could ever detect it.

DODGE, J. I understand you desire to except to that part of my charge?

Mr. FURBER. Yes.

DODGE, J. Very good. Anything else?

Mr. FURBER. Yes.

DODGE, J. You may save your exceptions with the stenographer. My inquiry now is whether I have omitted to say anything I indicated to counsel I would say?

Mr. FURBER. Does your Honor mean to charge that if a layman could not detect this, it would not be adulterated?

DODGE, J. That is not a question which I feel called upon to answer, Mr. Furber. You may except to what I have said.

Mr. FURBER. I am merely trying to get some basis for my determination as a lawyer. May I have an opportunity to except to portions of your Honor's charge after it is written out, in order that I may make the exceptions definite, or does your Honor insist that I should do it now?

DODGE, J. What you have to do now is to indicate the parts of the charge to which you except. That is all it is necessary to do at present.

Mr. FURBER. I except to what I have just suggested. I except to the portion of the charge which relates—I except to all of your Honor's charge that goes beyond saying that merely the presence of talc is sufficient. Perhaps that is the easiest way of stating it, if your Honor will allow me all my rights under that?

DODGE, J. Certainly; I think a brief indication is all that is necessary—enough to give the other side notice. Have the defendants any exceptions?

Mr. BEAL. We have none.

On April 5, 1912, the United States Attorney filed a bill of exceptions in these cases, taking them on appeal to the Circuit Court of Appeals for review, where they are now pending.

W. M. HAYS,

*Acting Secretary of Agriculture.*

WASHINGTON, D. C., *April 30, 1912.*

