

6319. Misbranding and alleged adulteration of alleged mustard seed. U. S. * * * v. 405 Bags * * * of Alleged Mustard Seed and 301 Bags * * * of Alleged Mustard Seed. Tried to the court and a jury. Verdict for the Government. Product ordered released on bond. (F. & D. Nos. 7591-7593. I. S. Nos. 11562-1, 11563-1, 11565-1. S. Nos. C-531-533.)

On June 7, 1916, the United States attorney for the Northern District of Illinois, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district libels praying the seizure and condemnation of 405 bags and 301 bags, each containing 160 pounds of alleged mustard seed, at Chicago, Ill., alleging that the article had been shipped on or about April 26, 1916, and May 9, 1916, by the North American Mercantile Co., San Francisco, Calif., and transported from the State of California into the State of Illinois, and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was invoiced and sold as mustard seed.

Adulteration of the article in each shipment was alleged in the libels for the reason that rapeseed, brown seed, and dirt had been substituted wholly for mustard seed, which the article purported to be.

Misbranding of the article was alleged in the second count of the libels for the reason that it was an imitation of mustard seed in that it consisted wholly of rapeseed, brown seed, and dirt; and in the third count of the libels for the further reason that said article was offered for sale under the distinctive name of another article, to wit, mustard seed.

On November 20, 1916, the case came on for hearing before the court and a jury, and after the submission of evidence and argument by counsel, the following charge was delivered to the jury on November 27, 1916, by the court (Carpenter, *D. J.*):

Gentlemen of the jury, there are only two counts in this libel that have been discussed by counsel before you, which are the first and second, the third by agreement has been withdrawn from your consideration, and I will instruct you as a matter of law that you may eliminate the first count, so that the only count that is now presented to you for your consideration is the count which we will designate the misbranding count.

Mr. DICKINSON. Yes.

The COURT. It is not your purpose to—it is not your function rather—to consider whether or not the pure food law is a good law. I charge you that it is the law of this country; it is on our statute books, and in my opinion it is a very wholesome law, and it is for a very useful purpose. The issues in this case are simple, that is, the actual fact that you have to determine is a single fact, it is drawn in a very narrow channel; the evidence which has been presented to you, so that you may make up your mind what that fact is, may have been complicated, it is more or less complicated, it has come from many different sources and involves professional men, botanists, chemists, practical business men in seed lines, and personal tests that you have made and have seen made in open court.

Now, at the outset some general instructions as to the law. The Government in this case has the burden of proof, and that burden rests upon them until they have satisfied you by a clear and convincing preponderance of the evidence, that they have shown that this was not mustard seed. You will have to determine that one question. It is not so important for you to make up your minds whether or not the seed in seizure, as it has been called, is rapeseed. It is proved here in this case that the actual seed as shipped was labeled [invoiced as] mustard seed, and I charge you as a matter of law, that if you find the seed as shipped was not in fact mustard seed, the Government must succeed in this case. Whether it was rapeseed or some other kind of seed, is unimportant. The shipment has been identified, and the labels on the bags have been proved, evidence has been offered here to show what they were. It has been conceded they were labeled [invoiced as] mustard seed, therefore, if you find from the evidence in this case, if you find the proof clearly convinces you by a preponderance that this was not mustard seed, in your judgment, your verdict here must be for the Government. And it is quite as true, that if you find from the evidence on the basis that I have asked you to consider the evidence, if you find that the seed in question is mustard seed, even though it is some species hitherto unknown in this locality here in Chicago, or any other part of this country, still it is your duty in that case to bring in your verdict for the claimant. And to enlarge upon that a little, the question of fact for your determination is whether or not the product in seizure is rape-

seed, as that term is understood and applied by the trade in this country or whether the product is a species of mustard seed containing qualities and characteristics substantially similar to the well known mustard seeds of European and American commerce and in determining this question from the evidence, the jury must use ordinary common sense as reasonable and intelligent men, and if you find from the evidence that the product in question is mustard seed, then you must find your verdict for the claimant.

Bear in mind, gentlemen, it is not my purpose to tell you anything about the facts in this case. It is my duty to advise you what the law is, and it is your duty to determine what the facts are and apply the law as I give it. If I make a mistake as to the law, that is my responsibility, and the court of review will set me right. You have to do only with the questions of fact, and if during the course of this trial the court may have said something which indicated to you that the court has views on the evidence in this case, please dismiss it from your mind. The court had no such intent at any time, and anything that I may have said or anything that you may have thought I said to that end must be disregarded.

I am not here to influence you one way or the other in your determination of whether or not the seed in seizure is mustard seed. That is the only question you have to settle, and that is your responsibility.

Now, some of the witnesses in this case are Government witnesses. The mere fact that they are Government witnesses does not work for or against the case on either side. They are here as individuals, sworn to tell the truth and to advise you so far as they can of their knowledge of the facts being presented to you. A Government witness is not entitled to more credit because he is a Government witness, nor is he entitled to less credit. The professional witnesses, or rather the professional men, are not necessarily professional witnesses, and all of the witnesses that have testified here before you are to be given credence so far as you think their testimony is material.

Now, if you think any witness has deliberately sworn falsely as to any material fact, it is your right and duty to disregard the evidence of that witness, unless it is otherwise corroborated by good and substantial evidence in this case, which you believe. You have seen the witnesses and you have heard them testify, you have seen their demeanor and you know better than anybody else whether they were telling the truth or not and how much weight should be given to their evidence. If any party has a direct interest in the outcome of the suit, you may take that into consideration. If any of these witnesses are connected with anybody with a direct interest in the outcome of the suit, you may also take that into consideration.

One further thing, you are not to be influenced by anything that you may think is going to happen after your verdict. The verdict in this case will either be for the Government or for the claimant. What shall be done with the seed, whether under the statute it shall be destroyed, there being no deleterious matter found in it—it would be quite unusual if an order of confiscation or destruction should be entered—but whether it is destroyed or not, or whether given back to the claimant after the payment of the costs in this case, that is none of your business, and I say the word advisedly, gentlemen, not offensively, still the thing you have to determine here is whether or not this is mustard seed, because if it was mustard seed, there is no misbranding, if it was not mustard seed, there was misbranding.

Have you any suggestions, gentlemen?

Mr. DICKINSON. Might preserve an exception to your honor's ruling striking out the first specification.

The COURT. Yes.

Mr. DICKINSON. Exception.

Mr. VENT. I think the court should instruct the jury that there is no standard made legal by the Food and Drugs Act on mustard seed, that it is a primary question to be determined.

The COURT. I will instruct the jury so that you may preserve your exception. I think it is immaterial in this case whether the Government has established a standard on what is known as mustard seed or not, the question is, is this mustard seed.

Mr. VENT. That is all I wish, but I thought that it was proper to embody that idea.

The COURT. That will be preserved in the record. Anything further, gentlemen?

Mr. DICKINSON. In order to preserve the record, your Honor, I don't know what will be the outcome of the case, in order that we may have the questions preserved, I desire to preserve an exception to your honor's instruction there, that the Government must prove its case by a clear preponderance of the evidence, or must find, if they do find for the Government, by evidence clear and preponderating.

The COURT. I might enlarge that a little so as to make the position of the court clear. This is not in the opinion of the court a criminal case, but inasmuch as it involves

the possibility, on the part of the court, if there is a verdict for the Government, a possibility, I say, of ordering these goods destroyed, or ordering them seized, taken out of commerce, because they are misbranded, that the defendant is deprived of his property as a result of this trial, and so I say, that while it is not a criminal case that it is something more than a civil case, that is to say, the jury must find by a greater preponderance of the evidence than they would in a civil case. In the ordinary case you are told that, as the scale balances, if there is even a slight preponderation one way or the other, so your verdict may be found, but in this case I think before you find the scale drops one way or the other, you should have a clear and convincing proof that the scale does not tip top; that doesn't mean you will find your verdict beyond a reasonable doubt. The law doesn't require that. All it means is that you must have substantial evidence. You are business men and you have come from twelve different walks of life, and you have been in the habit of considering your own affairs in a common sense way. Now, take this case up in a common sense way. Nobody has tried to stampede you, nobody wants to, nobody has tried to put anything over [on] the jury. All there is to the case, is to take the evidence in this case and if you find there is a preponderance of evidence founded on clear and convincing evidence, satisfactory evidence to you one way or the other, then you may bring in your verdict accordingly. Save your exception, Mr. Dickinson.

Mr. VENT. I wish to note an exception to the ruling of the court.

The COURT. Yes, Mr. Vent's request that the court charge the jury that they must find for the Government beyond a reasonable doubt, against the defendant beyond a reasonable doubt, before a verdict can be for the Government. That is refused an exception.

Mr. VENT. Then that question in the case to the jury, we would like to preserve the question as to whether or not this is a criminal or civil case.

The COURT. That is the point. The question will be preserved, whether you have put it in the right form or whether the court has. The question is here and we will save it. That all, gentlemen?

Mr. DICKINSON. That is all I have, thank you.

The COURT. I will give you two forms of verdict, gentlemen, if you find for the United States, sign the form which reads, "We, the jury, find the issues for the libellant." If you find for the claimant, sign the form, "We, the jury, find the issues for the claimant."

Now as to these exhibits. They will all go to the jury room. I will charge the jury further, that when they come to make tests for the prepared product which has been presented here in evidence, you must bear in mind there has been no evidence offered of what the actual ingredients were of the prepared products, further than that it was—a paste of it was made out of the seed in seizure.

Mr. VENT. No, your honor, I think that is not exactly accurate, the witness testified it had some vinegar and spices.

The COURT. The proportions I mean.

Mr. VENT. The proportions were not given, but this, your honor, it had no other seed than the seed in question.

The COURT. Yes.

Mr. VENT. This exhibit I would ask the bailiff to handle rather delicately, it is a very delicate thing.

The BAILIFF. I will hand it in.

The COURT. The jury may retire now.

Mr. VENT. If the court please, if the jury desire to make experiments, let them take the mortars with them.

The COURT. The jury can do anything they please with the mortars when they go in the jury room.

Mr. VENT. I think the mortars are all in.

The COURT. Do you want this to go to the jury?

Mr. VENT. Yes, your honor.

Mr. DICKINSON. Yes.

Mr. VENT. Can that go in? We read certain sections of Circular 19, regarding rape-seed, yellow and mustard.

The COURT. It was read to the jury, but not offered in evidence as an exhibit. No, I think not.

Mr. VENT. All right.

The jury thereupon retired and after due deliberation returned into court with a verdict finding the product to be misbranded as alleged in the second count of the libels and thereupon Ludwig S. Nachman, Chicago, Ill., claimant, by his counsel,

filed a motion for a new trial, and on February 13, 1917, said motion having come on for hearing, was allowed by the court.

On April 20, 1917, leave was granted to the Morehouse Mills Co., Chicago, Ill., as owners of 110 bags of the mustard seed, to file their appearance, claim, and petition, and on July 2, 1918, leave was granted by the court that the said Ludwig S. Nachman might withdraw his claim and answer to the libels, and the appearance, claim, and answer of Gilbert S. Mann & Co., Chicago, Ill., was entered on the same date.

On July 8, 1918, so much of the case as referred to 244 bags and 301 bags of the mustard seed, having come on for final hearing, and the said Gilbert S. Mann & Co. having admitted the allegations of the libels and consented to the entry of decrees, judgments of condemnation and forfeiture were entered nunc pro tunc as of July 3, 1918, and it was ordered by the court that the product be released to said claimant, Gilbert S. Mann & Co., upon the payment of the costs of the proceedings and the execution of bonds in the aggregate sum of \$2,000, in conformity with section 10 of the act, conditioned in part that the product should be labeled, branded, and sold as rape-seed.

On July 12, 1918, the said Morehouse Mills Co., claimant and owner of 110 bags of the mustard seed, having admitted the allegations of the libel and consented to a decree, a similar judgment was entered as to the 110 bags, and it was ordered by the court that the product should be released to said claimant upon the payment of the costs of the proceedings and the execution of a bond in the sum of \$1,000, in conformity with section 10 of the act, conditioned in part that the product should be labeled, branded, and sold as rapeseed.

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