

and purity of the said drug fell below the standard and quality under which it was sold.

Misbranding was alleged in substance for the reason that the label "Soluble Saccharine" was false and misleading in that the said drug was not in fact "Soluble Saccharine" as represented by the said label, but was a mixture of saccharin and sugar, and for the further reason that it was an imitation of, and was offered for sale under the name of, another article, to wit, "Soluble Saccharine."

On March 3, 1922, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

C. W. PUGSLEY, *Acting Secretary of Agriculture.*

**10371. Adulteration and misbranding of red, ponceau red, orange yellow, amarath red, and lemon colors, and alleged adulteration and misbranding of amaranth and caramella colors. U. S. \* \* \* v. W. B. Wood Mfg. Co., a Corporation. Tried to the court and a jury. Verdict of guilty on counts 1 to 4, inclusive, and 7 to 12, inclusive. Fine, \$2,000 and costs. Directed verdict for defendant on counts 5, 6, 13, and 14. (F. & D. No. 10915. I. S. Nos. 16316-p, 16317-p, 16318-p, 16319-p, 1459-p, 12007-p, 19865-p.)**

On June 24, 1920, the United States attorney for the Eastern 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 W. B. Wood Mfg. Co., a corporation, St. Louis, Mo., alleging shipments by said company, in violation of the Food and Drugs Act, from the State of Missouri, as follows: On or about August 4, 1917, into the State of North Carolina, of a quantity of red color, on or about October 19, 1917, into the State of California, of quantities of ponceau red, orange yellow, amarath red, and lemon colors, respectively, all of which were adulterated and misbranded; and on or about October 3 and 18, 1917, respectively, into the States of Ohio and Wisconsin, respectively, of quantities of amaranth and caramella colors, respectively, which were alleged to have been adulterated and misbranded. Certain of the articles were labeled in part, respectively: "\* \* \* W. B. Wood Manufacturing Co. \* \* \* St. Louis, Missouri" (in pencil) "Red Color \* \* \*"; "\* \* \* Aniline Dye Ponceau Red \* \* \*"; "\* \* \* Aniline Dye Orange Yellow \* \* \*"; "\* \* \* Aniline Dye Amarath Red \* \* \*"; "\* \* \* Lemon \* \* \*." One of the articles was invoiced and labeled "Caramella" and another was invoiced "Amaranth."

Analyses of samples of the articles by the Bureau of Chemistry of this department showed that with the exception of the "Caramella" they were mixtures of permitted and non-permitted colors with excessive amounts of arsenic, sodium chlorid, and sodium sulphate, and other metallic impurities, and that the "Caramella" was a mixture of non-permitted color with an excessive amount of subsidiary by-product, also excessive amounts of sodium chlorid and other metallic impurities.

Adulteration of the red color, amaranth, and amarath red was alleged in substance in the information for the reason that certain substances, to wit, Ponceau 6R, Fast Red A, and Bordeaux B, sodium chlorid, sodium sulphate, and arsenic, had been mixed and packed with the said articles so as to lower and reduce and injuriously affect their quality and strength, and had been substituted in part for red color, amaranth, and amarath red, which the said articles purported to be; adulteration of the ponceau red was alleged in substance for the reason that certain substances, to wit, Ponceau 6R, Orange II, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for ponceau red, which the article purported to be; adulteration of the orange yellow was alleged in substance for the reason that certain substances, to wit, sodium chlorid, sodium sulphate, and arsenic, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for orange yellow, which the article purported to be; adulteration of the lemon was alleged in substance for the reason that certain substances, to wit, sodium chlorid, arsenic, and Orange II, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for lemon, which the article purported to be; adulteration of the caramella was alleged in substance for the reason that certain substances, to wit, Bismarck brown

sodium chlorid, and phenylene diamine hydrochlorid, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for caramella color, which the article purported to be. Adulteration was alleged for the further reason that the so-called red color, ponceau red, amaranth, orange yellow, amarath red, and lemon contained an added poisonous and deleterious ingredient, to wit, arsenic, and the so-called caramella contained an added poisonous and deleterious ingredient, to wit, Bismarck brown, which said substances might render the said articles injurious to health.

Misbranding was alleged with respect to certain of the articles for the reason that the statements, to wit, "Red Color," "Ponceau Red," "Orange Yellow," "Amarath Red," "Lemon," and "Caramella," borne on the respective labels attached to the cans containing the said articles, regarding the articles and the ingredients and substances contained therein, were false and misleading in that the said statements represented that the said articles consisted wholly of red color, ponceau red, orange yellow, amarath red, lemon color, that is to say "Tartrazine," or caramella, that is to say caramel color, as the case might be, and for the further reason that the said articles were labeled as aforesaid so as to deceive and mislead the purchaser into the belief that they consisted wholly of red color, ponceau red, orange yellow, amarath red, lemon color, that is to say "Tartrazine," or caramella, that is to say caramel color, as the case might be, whereas, in truth and in fact, the so-called red color and amarath red consisted in part of Ponceau 6R, Fast Red A, and Bordeaux B, sodium chlorid, sodium sulphate, and arsenic; the so-called ponceau red consisted in part of Ponceau 6R, Orange II, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic; the so-called orange yellow consisted in part of sodium chlorid, sodium sulphate, and arsenic; the so-called lemon consisted in part of sodium chlorid, arsenic, and Orange II; and the so-called caramella consisted in part of Bismarck brown, sodium chlorid, and phenylene diamine hydrochlorid. Misbranding of the article invoiced as "Amaranth" was alleged for the reason that it was an article composed in part of Ponceau 6R, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic, prepared in imitation of, and offered for sale and sold under the distinctive name of, another article, to wit, amaranth.

On May 12, 1921, the case came on for trial before the court and a jury. During the progress of the trial, upon objection by counsel for the defendant to the Government's offer to introduce in evidence certified copies of certain regulations under the Food and Drugs Act, the court, Faris, *J.*, ruled as follows:

I think the question is a fairly simple one, gentlemen. You must bear in mind that you are offering this not as the law of the case but as a part of the evidence in the case. It is evidentiary, almost conclusively so, upon the testimony already adduced, of the guilt of the defendant, if I allow it to come in. This board, or the various officers mentioned in the statute, in making these regulations that fix certain arbitrary rules, or prescribe certain arbitrary colors that shall enter into arbitrary things; that shall enter into as constituent parts, as the various parts of colors for food purposes. If they can do that, that, of course, ends this case.

I do not gather from the statute that Congress meant to confer upon these gentlemen so thorough-going a power. There might be some serious question in it as to its constitutionality, as to the right to delegate the power to the legislature. Congress can perhaps say what constituent elements shall go into divers colors that are to be used as component parts of foods and drinks, but I seriously question whether they can give that power to anybody else. There may be, really, some question as to the right of Congress to do it arbitrarily.

Now, the only case that you have called my attention to does not treat the matter as one of fact, and you are urging the court to treat it as one of fact, to treat the matter as evidentiary, to consider the finding of these gentlemen and their regulations and prescriptions as being evidence.

Naturally, as I said a while ago, in the nature of most cases, it would be conclusive evidence, it would absolutely settle the case; it would settle this case, beyond any question. But, Judge Orr, in the case you called my attention to, I repeat, did not use it as evidentiary matter at all. He used it as a question of law. He adopted the finding and regulations of those gentlemen as the view which the court itself took of the meaning of that statute, because he said, "We refer to the rules adopted, not as controlling this court by way of construing the act, but as being a reasonable construction which the court

might adopt if it sees proper, and perhaps is the construction that is being placed by the rule which is provided for in the act itself."

That is clear, that so far as Judge Orr used that, in the only case you call my attention to, he used that as being persuasive to the court of the law in the case, and not as being evidence. You are offering this as evidence.

I have no doubt (and this conforms with the view already held by the court) that Congress has not given these gentlemen the power to establish evidence of guilt in these cases.

I sustain the objection.

After further submission of evidence and arguments by counsel the following charge was delivered to the jury by the court (Faris, J.) :

Gentlemen of the jury: Now at the close of the evidence and of the arguments of counsel on both sides, to which the jury has listened and to which the jury has paid attention in a most commendable way, it becomes the duty of the court to give you in charge the law which ought to govern you in your deliberations upon your verdict.

This is a duty which falls upon the court. It is the court's duty to declare the law and it is the duty of the jurors, under their oaths of office, to abide by the law as the court shall declare it to them. Touching the evidence, however, and the credibility of the witnesses, the rule is wholly different. You as jurors are the sole judges of the credibility of the witnesses and of the weight and value to be accorded to their testimony.

In reaching a conclusion as to the weight and value that you ought to give to the testimony of any witness you are warranted in taking into consideration the manner and appearance of the witness upon the witness stand, his manner of testifying, the probability or improbability of the testimony that he gives, his disclosed relations to, or feelings for, the two parties to the litigation. Taking into consideration these several facts, it is your privilege to accord to each and every witness such weight and value as you may deem his testimony entitled to.

If you shall find that any witness has wilfully sworn falsely as to any material fact involved in the controversy, it is your privilege to believe or disbelieve the whole or any part of such witness's testimony. By "material fact" is meant any fact which tends to prove or disprove the guilt or innocence of the defendant.

This case, gentlemen, notwithstanding it is a prosecution by the Government of the United States, or by the United States of America, against the defendant, a corporation, is, nevertheless, a criminal proceeding; it has been brought by a criminal information. It is, therefore, to be considered by you, and dealt with by the court, according to the rules which hedge about criminal trials. In this connection, I charge you that the information in this case is nothing but a mere formal charge. It is no evidence whatever of the guilt of the defendant. It has no probative value; it is merely a part of the legal machinery, or, rather, the legal procedure, by which the defendant is brought to answer before a jury of the country. You are, therefore, not to accord to the fact that there has been an information filed any credence or weight whatever.

The charge here as contained in the information is in fourteen counts, fourteen separate and distinct counts. Each of those fourteen represents an alleged violation of the law. Seven of these violations occur with regard to adulteration, and seven of them occur with regard to misbranding of the identical shipments; in other words, there are seven shipments alone involved. Touching those seven shipments two separate alleged violations of the law are charged: One is that a given shipment—take the one contained in the first count, for example—was adulterated; the other is, that that identical shipment (the one in the first count) was misbranded. The same thing is true of all the remaining counts.

In this connection, I would as well say to you now, that in my view, for reasons that I need not now take up your time to call your attention to, your verdict and finding ought to be on counts 5 and 6, 13 and 14, for the defendant. I think the Government has not made out sufficient facts by the evidence adduced, to permit those four counts to go to you. Therefore, the court charges you, as a matter of law, that your finding on those four counts ought to be for the defendant. The other ten counts I am going to submit to you, as to whether your finding shall be for plaintiff, that is, the Government, or for the defendant.

The information, which is of great length, was read to you. I shall not at this time, and on this day of the week, take up your time with again reading it. I shall simply say as to the first count and as to the second count, which are types of all the rest, what they substantially charge.

The first count, substantially and in plain and ordinary language, charges that a shipment of certain colors made by defendant to the Robeson Soda Water Co., in the city of Lumberton, State of North Carolina, was adulterated.

Now, you need not trouble yourselves about whether the shipment was made; whether it was an interstate shipment, and whether the defendant is a corporation. Those three facts have been admitted, so you need not bother yourselves about them. You can devote your attention to the other questions. To repeat, I say, it is charged that a certain shipment of red color was adulterated within the meaning of the act of Congress which I shall presently call your attention to, in that Ponceau 6R, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic had been mixed and packed with this color so as to lower and reduce and injuriously affect its quality and strength; and that it was also adulterated in that Ponceau 6R, Fast Red A, and Bordeaux B, sodium chlorid (or common salt), sodium sulphate, and arsenic had been substituted in part for the red color which the article purported to be.

Touching that point in this, as well as all the other charges, I shall have something further to say.

It has been also charged that an added, a poisonous and deleterious, ingredient, to wit, arsenic, had been added. That charge occurs in all of the seven counts. You need pay no attention to it, because there is no proof in the case that arsenic, in the quantities which the proof shows were contained in these colors, is, in fact, poisonous, hurtful, or injurious to health. That point goes out of the case and you need not trouble yourselves further about it.

Substantially, then, that is the charge in the first count, third count, fifth count, seventh count, ninth count, eleventh count, and thirteenth count; in the odd-numbered counts. The fifth one, however, of those odd-numbered counts, and the thirteenth of those odd-numbered counts I have already told you to disregard, and find thereon for the defendant.

Now, the even-numbered counts deal with the same identical shipments that the odd-numbered counts deal with, and charge, in simple language or, rather, the charge when reduced to simple language means, that that color so shipped was misbranded within the meaning of the act of Congress, in that the statement "Red Color" borne on the label was false and misleading for the reason that the statement that it was red color and consisted wholly of red color was false, because it did not consist altogether of red color, but did consist in part of Ponceau 6R, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic.

It is also charged that it was so labeled so as to deceive and mislead the purchaser into the belief that it did consist wholly of red color, when, in truth and in fact, it was a combination of red color with these other things which I have mentioned.

The charges as to the other eight counts which I am permitting to go to you are similar to the charges in the two counts that I have just read to you. I read those two as types, and explained those two as types of the other eight.

Now, the statute, gentlemen, which is involved in this case is an act of Congress, which provides:

"That the introduction into any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country, of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia, to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense."

There are additional punishments for second offenses, but those are not involved here.

Some of this statute is not pertinent to this case. I think you will, however, be able readily to pick out those parts which are pertinent.

It is further provided by this act of Congress: "That for the purposes of this act an article shall be deemed to be adulterated, in the case of food: First: If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its strength or quality. Second: If any substance has been substituted wholly or in part for the article."

And another proviso which is in the information, but which is not now in this case, is that which has reference to an added poisonous ingredient. I have taken that from you so you need not trouble yourselves, I repeat, about that.

So the two questions, then, gentlemen, upon this statute, so far as pertains to the odd-numbered counts, are, whether there has been mixed and packed with these colors any substance which has reduced or served to reduce or lower or injuriously affect the quality or strength of that color; and, second, if any substance has been substituted wholly or in part for that color.

Now, on the second count the statute provides as to misbranding (and you will already know that the statute which I first read to you forbade misbranding) that:

"The term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular—"

In the case of food—

"First: If it be an imitation of, or offered for sale under the distinctive name of, another article.

"Second: If it be labeled or branded so as to deceive or mislead the purchaser \* \* \*."

Those, I think, are the statutes, gentlemen, which are invo'ved in this case upon the charges which I have read. Of course, the purpose of this act of Congress was to prevent deceit and false pretenses in the sale of food or drugs, and to protect the customer or buyer in his right to receive what he orders, what he buys, and what he desires to receive. It was also for the prevention of fraud and deception to the end that I have mentioned; that is, so that the purchaser should get the thing that he had a right to suppose he was getting.

Taking the first count (and what I shall say applies to all the odd-numbered counts that I am permitting to go to you), if you shall find and believe that the can of red color shipped to the Robeson Soda Water Co. by the defendant in this case, when shipped, or delivered for shipment, contained Ponceau 6R, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic, and that the effect of these articles was to adulterate it; that is, that they were adulterants, and that being adulterants, the effect of them was to lower and reduce and injuriously affect the quality and strength of that color, you will be warranted in finding the defendant guilty. If you find the converse of that, you ought to find the defendant not guilty; or, if you shall find that this red color was adulterated in that Ponceau 6R, Fast Red A, Bordeaux B, sodium chlorid, sodium sulphate, and arsenic, or any of them, had been substituted in part for red color, which the article purported to be, then, other things being equal, you ought to find the defendant guilty. If you shall find the converse of that, you will find the defendant not guilty.

Upon the second count and upon all the even-numbered counts which I am permitting to go to you, if you shall find that a can of red color was shipped to the Robeson Soda Water Co., at Lumberton, N. C. (and those things are admitted), and that the can or container in which this red color was contained bore the words "Red Color," but, in truth and in fact, this article d'ed not consist entirely of red color, but did consist in part of Ponceau 6R, Fast Red A, and Bordeaux B, sodium chlorid, sodium sulphate, and arsenic, and that those things were not on the brand (and, of course, there is no question about that, that they were not on there), and that the effect of the putting into this can that color, and failing to designate on that can these several things which I have enumerated, was to deceive and mislead the purchaser into the belief that the contents of this can was wholly a red color, then you ought to find the defendant guilty. If you shall find the converse of that, you ought to find the defendant not guilty.

These are types of all of the counts. What I have said as to the two of them (because there are only two questions) applies to all of them. I cannot take up your time with going over all of them.

What I have said as [to] the presence of Bordeaux B, Fast Red A, and Ponceau 6R in the several articles in which it is charged these things were used, so far as counts 1, 2, and 3 are concerned, you can not consider them as adulterants under these counts; and the fact that they were used in making the article described in count 4 cannot be considered as tending to prove that these articles were misbranded as charged in that count; and the same thing is true as to the use of the word "Orange" in counts 11 and 12.

I say this to you particularly, you will see, as to count 1, which mentions a red color, because Bordeaux B, Fast Red A, and Ponceau 6R are all red colors, but, of course, this does not include sodium sulphate, sodium chlorid, or arsenic, if you find those things were in those colors.

Now, gentlemen, I charge you as a matter of law that, in order to find the defendant guilty of the alleged adulteration, or of the alleged misbranding, it is not incumbent on the Government to show that the defendant in this case consciously or wilfully put this substance, or these substances, into these colors (if you find they were in there) with the intent to deceive the purchaser with respect to them, but if you shall find that they were in there, and that they were an adulteration within the statute and the law which I declare to you; and upon the question of misbranding, if you shall find that the effect of the label on the cans, when read by a person of ordinary intelligence, creates, or created, a false impression regarding the character and contents of this can, you may find that the can was misbranded. If you find, as I said a while ago, that these things were adulterants, then you may also find that it was adulterated.

The statute provides a way here by which the defendant in the case could have escaped liability; it did not pursue that way and, of course, other things being equal, in finding these other facts, it can not escape liability on the sole ground in this case that it bought this stuff in New York in bulk, I take it, had it shipped here, put it in cans, or put its own label on those cans and sent it out to be sold to all and sundry who might desire to purchase it. So that question need not be considered by you. You need not consider the intent nor, in other words, if it was consciously done. The law penalizes carelessness and negligence and inattention in these cases, because, as I said a while ago, the intent of the law was to protect the public, and if a man were to be permitted to say that he did not know that he was putting up carbolic acid as glucose, it would be the end of the law.

This is a criminal case, gentlemen, and the burden of proof is upon the Government to make out its case beyond a reasonable doubt. This burden the Government assumes in the beginning and bears throughout the case. The defendant is presumed to be innocent, and this presumption attends and protects the defendant throughout the trial, until it is met and overcome by evidence which proves the guilt of defendant beyond a reasonable doubt. This presumption is raised by defendant's plea of not guilty in this case, so unless you find that the Government has made out the guilt of defendant beyond a reasonable doubt you ought to find the defendant not guilty.

A reasonable doubt is a doubt which has a reason for its basis, which arises from the consideration of all the evidence in the case. It is not, however, a mere possibility of the defendant's innocence.

Some evidence has come into the case from expert witnesses; in fact, a large part of the evidence came from expert witnesses. Touching this sort of evidence, I charge you that it is competent for chemists, and other gentlemen who are learned in that art, to give their expert opinions relative to matters within the scope and range and learning of that art, but such expert opinions are not binding upon you and are to be received by you as advisory only. Generally speaking, you are to consider the expert witnesses by the same general rules that you consider other witnesses, and to weigh their credibility by those rules; but touching the expert opinions which they give you are, I repeat, to consider them as advisory only, and you are permitted to consider them in the light of human experience. In determining their weight and value, and in reaching a conclusion as to their probative effect, it is your privilege to accept or reject such evidence in whole or in part, according as you may believe or disbelieve it, when you have applied to it the test that I have mentioned.

Now, gentlemen, the questions before you have been greatly shortened by the candid admissions of the defendant in this case, that the shipments mentioned in the information were made as described therein; that it is a corpora-

tion; that the samples analyzed by the witness, Jablonski, and offered in evidence, were parts of and made from the identical shipments charged in the information, and that these shipments were shipped and sold by the defendant with the knowledge on its part, that the colors were intended as components of food. Of course, nobody claims that these colors have any food value; they are merely colors, but they are, within the meaning of the statute, components of food, and so far as that is concerned are to be regarded as to their effect on the things that they go into, just as if they were food.

Coming down to a little bit of the evidence, in order that I may help you (charging you, however, to bear in mind that you, and not the court, are the sole judges of the evidence and the credibility of the witnesses, and any comment that I may make is not binding on you, you are to disregard it if it does not agree with your views), I might say that the Government in this case has offered proof as to the contents of these seven shipments and there has been no countervailing proof about that matter. The witness, Jablonski, testified as to what were the component elements of Bordeaux B, Ponceau 6R, Fast Red A, sodium sulphate, sodium chlorid, arsenic, and so on. He told you not only what were the component parts of all these cans, but he told you the percentages thereof. These percentages varied largely. They ran, I believe, in salt from perhaps eleven and a fraction to perhaps sixty-three and a fraction. If I should misstate them your better recollections will control and govern. Of course, if you shall believe as to the sodium sulphate and the sodium chlorid, that it was present in these colors (and I do not think you can believe anything else, because the uncontradicted proof shows it; no proof has been offered here as to any different analysis than that testified by Jablonski); if you shall find, I repeat, that common salt and sodium sulphate are usually and generally present in substantially, or about, the quantities shown in the evidence, when these colors are manufactured in the usual and ordinary way that reasonably competent men manufacture them, when using reasonable care and skill, then I charge you that the presence of salt does not create either an adulteration or misbranding within the purview of the charge here, and of the statute. But, if you should find the converse of this, that in this sort of manufacture the quantities shown by the uncontradicted evidence ought not appear, then you may consider that an adulteration; in other words, if the party who made these colors made them with reasonable care and skill, and in the reasonably approved method then existing, and this salt got in there in the process of manufacture, then the defendant ought to be found not guilty. Of course, there is proof here that the defendant did not put any salt, as such, in these colors; that it was in there when he got the colors; that he took nothing from it and added nothing to it. He merely took it out of bulk, put it into cans, and put his labels on those cans and shipped it. But if it was there in forbidden quantities, as I have tried to describe that to you, then the fact that the defendant did not put it there would not protect the defendant.

I do not think of anything else, gentlemen, except the formal charge.

Mr. WHEELER. In regard to punishment, the jury has nothing to do with that. The COURT. I will cover that.

Mr. WHEELER. Secondly, the jury can acquit or convict on any count, or all counts.

The COURT. Very well.

Mr. Cullen, have you anything to say?

Mr. CULLEN. We desire to except to that part of your honor's charge which submits to the jury the question whether or not the presence of arsenic constitutes an adulteration, or an element of misbranding.

The COURT. I will charge the jury upon that, that the presence of arsenic did not amount to an adulteration unless you should find the same thing with regard to arsenic that I have charged touching sodium chlorid and sodium sulphate, because arsenic might be there. You will use the same test in deciding as to whether it was there or not, that has already been testified to in an uncontradicted way, by the witness, Jablonski, and you will consider whether it was a usual and ordinary, and I might say, a necessary, result of the manufacture.

Is that all, gentlemen?

Mr. CULLEN. That is all.

The COURT. Now, gentlemen, with regard to your verdict, I have caused to be prepared for you a blank form of verdict. If you find the defendant guilty

on the counts that I have let go to you, one of your number will sign this as it stands, as foreman. If you find defendant not guilty you will add the word "not" in the form that I have had prepared for you. You may find defendant guilty on any one, two, or three, or more counts, and not guilty upon the others. You may find defendant not guilty upon all, or you may find defendant guilty upon all counts, according as you may find the facts to be. Your verdict, of course, must be unanimous. You have nothing to do with fixing the punishment. You merely find defendant guilty or not guilty, and so say by your verdict, and the court fixes the punishment.

I shall let you return a sealed verdict. When you have agreed upon a verdict you may enclose it in an envelope and hand it to the clerk, and on Monday morning at 10 o'clock you will return and I shall open the verdict and it will be read.

The jury then retired and after due deliberation returned a verdict of guilty, on May 16, 1921, on counts 1, 2, 3, 4, 7, 8, 9, 10, 11, and 12, and on April 4, 1922, the court imposed a fine of \$200 on each count, a total of \$2,000 and costs. As will appear from the above-quoted charge to the jury, the court directed a verdict for the defendant with respect to counts 5 and 6, involving the product invoiced as "Amaranth," and counts 13 and 14, involving the product invoiced and labeled as "Caramella." The defendant filed its motion for a new trial and in arrest of judgment, which was overruled, but has not as yet perfected an appeal from the judgment of the trial court.

C. W. PUGSLEY, *Acting Secretary of Agriculture.*

**10372. Misbranding of Howell's Lymphine tablets. U. S. \* \* \* v. One Dozen Packages \* \* \* of Howell's Lymphine Tablets. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 13571. I. S. No. 8764-t. S. No. E-2632.)**

On August 26, 1920, the United States attorney for the District of Columbia, acting upon a report by the Secretary of Agriculture, filed in the Supreme Court of the District aforesaid, holding a district court, a libel for the seizure and condemnation of one dozen packages of Howell's Lymphine tablets, at Washington, D. C., alleging that the article had been shipped by Charles H. Howells & Co., New York, N. Y., on or about June 8, 1920, and transported from the State of New York into the District of Columbia, and charging misbranding in violation of the Food and Drugs Act, as amended.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that the pills consisted essentially of ferrous carbonate, nuxvomica, aloes, and phosphorus.

Misbranding of the article was alleged in substance in the libel for the reason that the labeling bore, among others, the following statements, (wrapper and bottle labels) "\* \* \* Nervous Prostration, Dyspepsia, Nervous Indigestion, \* \* \* Catarrh, Melancholia, Women At Change Of Life, Premature Decay And All Nervous And Mental Diseases \* \* \*," (circular) "\* \* \* Lymphine Tablets \* \* \* Vitalizer \* \* \* Restore Nerve and Brain Tissues \* \* \* Relieve All Forms Of Weakness \* \* \* not only alleviate, but in many cases cure mental and physical diseases \* \* \* such as Neurasthenia, or Nervous Prostration, Depleted Nerve Force, Impoverished or Impure Blood, Diseases of the Digestive or Eliminative System, Nervous Dyspepsia, Female Disorders attendant on the 'Change of Life,' Irregularities of Uterine Troubles generally, etc. \* \* \* Improve Vital Powers In Both Sexes \* \* \* of inestimable value to sufferers from locomotor ataxia \* \* \* Debility \* \* \* Restore Youthful Vigor And Elasticity \* \* \* Melancholia \* \* \* For All Nervous And Mental Disorders \* \* \* Liquor and Drug Addictions \* \* \* The Best Remedy In Female Disorders \* \* \* Catarrh \* \* \*," which statements regarding the curative and therapeutic effect of the said article and the ingredients and substances contained therein were false and fraudulent for the reason that the said article contained no ingredients or combination of ingredients in sufficient quantity and strength capable of producing the effect claimed.

On April 11, 1922, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

C. W. PUGSLEY, *Acting Secretary of Agriculture.*