**5521. Adulteration and misbranding of macaroni. U. S. * * * v. Atlantic Macaroni Co., a corporation. Plea of guilty as to the misbranding charges. Verdict of guilty rendered on the charges of adulteration. Fine, $398.** (F. & D. No. 5961. I. S. Nos. 991-h, 137-h.)

On October 21, 1915, the United States attorney for the Eastern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Atlantic Macaroni Co., a corporation, Long Island City, N. Y., alleging shipment by said company, in violation of the Food and Drugs Act, on or about August 1, 1913, and October 10, 1913, from the State of New York into the States of New Jersey and Ohio, respectively, of quantities of an article labeled in part, "Macaroni Savoia Brand Gragnano Style," which was adulterated and misbranded.

Analyses of samples of the article in each shipment by the Bureau of Chemistry of this department showed the following results:

Shipment of August 1.

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| Moisture (per cent) | 9.72 |
| Ash (per cent) | 0.43 |
| Nitrogen (per cent) | 1.99 |
| Protein (N x 5.7) (per cent) | 11.34 |

Residue from ammoniacal alcohol extract shows the presence of some semolina.

Sample is not made from durum wheat flour or semolina. It is artificially colored to simulate macaroni made from durum wheat flour or semolina, which is the product from which the best grades of macaroni are made.

Shipment of October 10.

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| Moisture (per cent) | 12.29 |
| Ash (per cent) | 0.34 |
| Nitrogen (per cent) | 1.88 |
| Protein (N x 5.7) (per cent) | 10.72 |

Residue from ammoniacal alcohol extract: Normal.

Semolina: None.

Cooking test: Normal.

Sample is made from a mixture of soft wheat flour and hard wheat flour, and not from durum semolina. It is artificially colored to simulate macaroni made from durum wheat flour or semolina, which is the product from which the best grades of macaroni are made.

Adulteration of the article was alleged in the information for the reason that it was an inferior macaroni prepared in whole or in part from a flour other than semolina prepared from durum wheat, the material from which the best grade of macaroni is made, and the same was colored with a certain dye, to wit, naphthol yellow S., to simulate the natural appearance of macaroni made wholly from semolina prepared from durum wheat, and in a manner whereby the inferiority of said article was concealed.

Misbranding was alleged in substance for the reason that the statement, to wit, "Macaroni Savoia Brand Gragnano Style," the word, "Style," appearing in such inconspicuous type and so placed on said label as to be undecipherable unless closely scrutinized, together with certain pictorial designs and devices suggesting the Italian coat of arms and Italian scenes, and the shape and style of the package, all and singular, were false and misleading in that they purported and represented that said article was a foreign product; and for the

further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it was a foreign product, to wit, a macaroni manufactured in the Kingdom of Italy, whereas, in truth and in fact, it was not so, but was a domestic product, to wit, a macaroni manufactured in the United States of America.

On January 26, 1916, the defendant company entered a plea of guilty to the charges of misbranding, allowing its plea of not guilty to the charges of adulteration, theretofore entered, to stand. On January 15, 1917, the case came on for trial before the court and a jury upon the charges of adulteration, and, after the submission of evidence and arguments by counsel, on January 22, 1917, the following charge was delivered to the jury by the court (Chatfield, *J.*):

Gentlemen of the jury, we have a considerable amount of testimony in this case. Part of the subject matter is very interesting from the standpoint of the average juryman because of what we are talking about. Part of it is interesting from a scientific standpoint because of the way in which the tests were made, and because of the exhibits that are produced. Part of it is interesting from the legal question that is presented under this statute.

But everything that has been allowed to go into the case as evidence for you to consider has to do with some part of the issue that is presented for you to consider. And so you can not divide the case into that which sounds important, or that which sounds interesting, or that which seems to you perhaps has nothing to do with the question as it was originally presented. You must weigh all the testimony from the standpoint of the question that is finally shown and which I have allowed to go to you as a question of fact upon everything that has been said. It is a criminal charge and, therefore, you have to look at the matter from the standpoint of a criminal case. Now, that means that certain rules must be observed by you in weighing the testimony, and also in considering the issue of the case.

The Government is not concerned with this case in the sense of a person who is bringing an action merely to recover damages, and even though you can see that the Government and its officials and the witnesses have some interest in whether or not the routine of the Department and the work of the Department is upheld and carried out, nevertheless this case comes here (with the United States bringing the parties into Court) because of a statute of Congress under which the United States simply makes the parties appear in the court room; then it presents evidence against them, and then it is the jury's duty to see whether the United States presents sufficient evidence to prove a case beyond a reasonable doubt, or else the verdict would be in favor of the defendants, and the defendants would be free of the charge. So, in that way you have to hear all the testimony and scrutinize everything that has been said and everything that has been allowed to go into the case in just testing the question of whether the Government proves its case beyond reasonable doubt—by that I mean a doubt that you 12 men in discussing this case would consider what you would call a reasonable doubt with reference to a matter of this sort—whether the Government proves beyond such a reasonable doubt in your minds that the defendant has done that which is specifically charged in the form in which I shall outline the question to you.

Now, that makes it necessary for you to immediately bear in mind another thing. The defendant could have sat there—of course, it is a corporation, and when I refer to the defendant you will have to understand that it is illustrated by Mr. Calandara, although Mr. Calandara might not have been here. No officer, nor any particular person, need have appeared at all. If Mr. Brown, as counsel, had presented the defendant's case, without anyone from the defendant sitting beside him, you would have to assume that the defendant was there, and that Mr. Brown was talking for a person, which in that sense constituted a corporation which had to work through persons whose acts therefore you could consider just as if the person were here, but remembering the difference between the individual and a corporation—so I say the defendant could have remained in the court room and at the end of the Government's case could have simply said "I have nothing further to present for the jury to consider," and the jury would have considered whether or not the Government had made out its case upon what it had heard. But the defendant here has gone further than that and has put in some testimony which you also have heard, and so you must now consider all that has gone before you. If there is contradiction

consider the testimony, weighing one thing against the other. Where the testimony agrees, that is, if you believe the statement as the witness made it, and where there is no contradiction assume that that proves the facts, unless something in the testimony makes you throw out entirely that particular piece of evidence. Thus consider the whole matter to see if the Government has shown beyond reasonable doubt that the defendant did do as charged in the indictment, and in the form in which I shall leave it to you.

Now, from that you can see, by another step in reasoning, that it is not the number of witnesses, nor the amount that they may say, nor the particular kind of thing that they are talking about that will furnish belief in your minds as you consider it. It is the worth of what is said, and it makes no difference who says it, or how it comes out. If the Government officials, the Government witnesses, through their work in the Department, and their connection in the case have some feeling, either of pride in what they are doing, or of interest in their work, or of feeling that they are right because of the way they do their work, then take that into account in weighing what they said, so as to see whether you find the facts according to what they say. In the case of the defendant, consider the relations of those who are connected with the business and what they say, from the standpoint of their employment, and from what they were doing at the time these acts were charged, just what point of view they testify from when they tell you about these matters. So, you see it is not merely what they may now believe or think which you should have in your mind, but determine for yourselves just what are the facts and what were the facts and just what weight and application those facts should have, in considering the issue from the standpoint of everybody connected with the matter.

Now, one or two things more I want to refer to in that general way. As I have indicated, some matters are not contradicted and are presumed to be correct, unless there is some reason in your minds to disregard the entire testimony. We have one or two matters in this case as to which there seems to be no question but they ought to be inquired into carefully, and you can see that if you once get through with a question and it is not material to the case, then you must remember the testimony, but you can disregard the steps by which we got there. For instance, these questions as to identity of the particular exhibits. Miss Doyle produced a vial here and told us that it was macaroni from box No. 1, while it apparently was of considerably larger size, so if it came from box No. 1 the yeast must have made it grow, or something else, and when we come to inquire about that, the evident situation was that the analysis, the figures that were given, applied to the other one of the two boxes, if they were kept straight prior to the time that Miss Doyle had a chance to analyze them. It is evident she has produced a sample of the other one of the two things that were analyzed at the same time, and she has given you information as to the article which she analyzed. If it is the same one as that which she produces, then she has given you testimony as to the object which she produced and you have testimony that it was one of the two boxes coming from Cincinnati, under the circumstances that were described. If she has given you testimony as to the analysis of the other sample which she had and if she has actually brought here the wrong sample and given you the right analysis then you have the figures as to this other exhibit, but she has given you the wrong or second object to look at. Now, you can see that after hearing all about that, if you are satisfied that the boxes were properly found, that is, I mean that the identical box was found that they are talking about, it was marked, sealed, transmitted and analyzed, and if you have the figures that you need know about, why then we can just dismiss the question of how these exhibits were marked, or how Miss Doyle happened to refer to that one, but you can take that into account in questioning the accuracy of either the marking or keeping track of the exhibits or analysis. In other words, take everything you heard in weighing the testimony of witnesses, so you can find the facts. If you do not find facts or do not have facts, from which to consider the questions of the case, then, of course, you will be unable to arrive at a conclusion.

Now, ordinarily an individual when he submits himself to the jury to testify allows the jury to consider whether or not he is telling the truth. Consider his judgment, the way in which he testifies, the way he appears, what he says. Weigh these in connection with the other matters. A corporation has to testify, just as it has to do its work, through men that it employs, or that have the authority, the actual representatives for the corporation in whatever they are attempting to do. Now, I have already told you that you should weigh the testimony of these individuals, in so far as they represent the corporation and

have done the acts that are being considered as acts of the corporation. Then you need go no further (in so far as they are acts of the persons concerned, in so far as they are acts of the corporation) outside of those individuals who have testified. You will have to assume that a corporation acts through persons, and that whether or not the corporation was intending to do something one way or another way depends upon the intent and purpose of those who at the time were doing the acts for the corporation. So, whether or not there is knowledge or plan, whether a corporation has an idea of doing something in accordance with the law, or contrary, may have to depend upon the circumstances under which the persons acted who were acting for the corporation at the time when the acts were committed. So in such a case as this you have to bear that in mind; bear in mind that a corporation is not like an individual, it does not have a reputation in the ordinary sense for truth telling, because it does not talk. You can weigh the *individuals'* testimony according to what you know about *them.* They are presumed to tell the truth, unless you disbelieve them; so a corporation is presumed to abide by the law, and you know nothing against it unless you find it from the testimony here.

So, you have to find whether the Government proves beyond a reasonable doubt that which the Government charges, and you should not reach that conclusion until you have gone up into the jury room; until you 12 men have talked about the evidence with each other so as to see what is the finding of fact upon each of the material points, by you 12 men talking with each other. You have 12 separate minds, but those must all work in 12 parts so as to make one result, and no mind, of course, should assume that it's one-twelfth is the whole, or that it's one-twelfth can work without the help and the working at the same time of the other 11. So that, after you go to your jury room, determine just what you think did happen; what facts are proven in your mind beyond reasonable doubt; then consider what is the effect of these facts and whether or not the Government proves its case beyond reasonable doubt upon the whole matter.

Now, I have spoken of that longer than would ordinarily be necessary because of this question of a charge against a corporation, because of the length of time that has elapsed since the acts charged; because, also, you have heard some testimony that where a matter of this sort is brought to the attention of the Government and of a person or corporation, where there is any possible variation from the methods that were laid down by Congress, it frequently happens (as happened with relation to some of the matters that you have heard here) that the corporation or person then brings itself or himself entirely in line with the statute and so that the matter which is under consideration is not repeated. If the public have been injured at any time in the past in the way in which the statute has been intended to prevent, and if, in order to avoid repeated charges under the statute, the person whose acts are called in question (as to which there may be a hearing, as you heard, over in the appraisers' stores) after that person gets an understanding of what the Government requires it may then make its labels and its product comply with what the Government will require and then there will be no future question, but if at the time the act charged there was a noncompliance with the statute, the case may still come before a jury and the jury will have to consider whether that particular act and that particular situation was, at that time, a violation of the statute, without reference to whether or not it was trivial; whether it only lasted a short time; whether the effect of it was greater or less through outside circumstances and without reference to whether punishment should be severe or slight.

Now, I am going to come right back to that in just a moment when I speak of the question of misbranding, but before that I want to speak of this pure food and drug law. You understand that Congress, under the Constitution, has certain authority. It may pass a law prohibiting certain things and regulating certain matters, if the Constitution gives Congress the authority. Everything else of what we know as police matters, or health matters, belongs to the laws of the State where you live. So, in New York, if a Commissioner of Health, of the Department of Health, here in New York, wants to clean up some particular section in Brooklyn, he does that under the authority that the State of New York, through its Legislature, gives to him. But if the Department of Health in New York City finds that some one is coming from Texas into New York, and that after he comes to New York disease arises here, they can not stop that person or regulate the coming of a person until the person comes into the State of New York. So Congress has authority under the Constitution

to regulate matters that go from one State into the other in the sense of commerce. They have the power to regulate the passage of articles, that is, goods; they have the power to regulate the running of railroad trains; they have the power to regulate the traveling of persons who use those trains and thereby themselves constitute commercial intercourse between the States, and in the same way if cases arise in which your interest conflicts with the interest of a person in another State, that case can be heard in the United States court, and Congress has the power to make a law about it. Now, that is where this statute started. Congress had power to pass the law prohibiting the transfer or sale, that is the commerce, from one State to the other of food or drugs that did not comply with certain established standards as created by this statute which, as you have heard, was passed and went into effect in June 1906, and which has been amended in some respects since.

Now, it covers two things—foods and drugs. I am not going to refer to the question of drugs. There are a number of provisions specifying just when drugs shall be misbranded, or adulterated, or put out in such a way that they deceive the public. There are a number of provisions relating to foods, and by section 1 of the statute it is made an offense to manufacture an article of food or drug which is adulterated or misbranded within the territories, or in the District of Columbia, where the United States law is exclusive of the State law. Then, in section 2 it provides that the introduction into any State or Territory, or the District of Columbia, from any other State or Territory, or from a foreign country, of any article of food or drugs, which is adulterated or misbranded within the meaning of the act is prohibited. That means that the article is made contraband, and its transmission can be stopped, if Congress provides the machinery for doing that, and the treatment of that article will then go on according to acts of Congress, as, for instance, in this case, you have heard that a certain lot of boxes were seized under the provisions of this act and treated as contraband goods. Now, whether or not Mr. Koch or the defendant here could take up with the Government the question of the manner of that seizure, get some of the goods back, get the value of the goods, whether the goods were properly condemned or not has nothing to do with you in this case. All we know is that, under that section of the law, at a certain time, these inspectors went to Mr. Koch's store and actually took into their custody certain articles of goods and from that time on they were treated as in the custody of the Government on the claim of the Government that it was contraband. The controversy between the defendant and Mr. Koch as to how they should pay for the goods we have nothing to do with, because that has straightened itself all out. You have merely learned what became of the goods.

Now, the next provision is: Any person who shall ship or deliver for shipment from any State to another State any article so adulterated or misbranded, within the meaning of this act, commits an offense, and it says that an article, for the purposes of this act, 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 quality or strength; second, if any substance has been substituted wholly or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed; fifth, if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health; sixth, if it contains putrid animal matter, decomposed animal matter, with which we have nothing to do.

If this macaroni was made in certain localities or countries it might come within the sixth section, but apparently not when made in Brooklyn. The indictment makes no claim in this case that this defendant's factory is not well conducted and is not clean—that the product is not clean. No charge is made that the product is a filthy or decomposed substance, or anything that makes it filthy, injurious to health, in the sense of poison. Then there is a provision that the term misbranded shall apply to all articles of food the packages or labels of which shall bear any statement, design, or device regarding such article or ingredients or substances contained therein which shall be false or misleading in any particular. It says, for the purpose of the act, an article shall be deemed misbranded in the case of food if it be an imitation of or offered for sale under the distinctive name of another article. If it be labeled or branded so as to deceive or mislead the purchaser; or if the contents have been removed and others put in their place; or if it contain certain drugs; if the weight and the contents of the package are not plainly stated; or if the package containing

it or its label shall bear any statement, design or device regarding the ingredients or substances contained therein, which statement, design or device shall be false or misleading in any particular, provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed adulterated or misbranded in certain cases, that is, where they are labeled as compounded or blended.

Now, I have had to read that for this reason, that when this information was filed, and the Government brought this charge, they included four counts Two related to each of the shipments of which the Government claims exhibit 1 in the Cincinnati case, and exhibit 5 in the Newark case were a part. Count 1 charges that by means of a delivery wagon, on or about the 1st day of August, 1913, in violation of this statute, the defendant shipped, by means of this delivery wagon, from Long Island City to H. Koch Co., 180 boxes each containing 22 pounds of something that was designed for an article of food, and that they were labeled and marked, as you have seen, "Macaroni Savoia Brand, Gragnano Style. Guaranteed under the Food and Drugs Act," with a picture of the Bay of Naples, and so on. That said article of food when shipped and delivered for shipment as aforesaid was then and there adulterated within the meaning of said act of Congress in that it was an inferior macaroni prepared, in whole or in part, from a flour other than semolina prepared from durum wheat, the material from which the best grade of macaroni is made, and the same was colored with a certain dye, to wit, naphthol yellow S., to simulate the natural appearance of macaroni made wholly from semolina prepared from durum wheat, and in a manner whereby the inferiority of said article was concealed. Now, the third count which you have before you charges exactly that same offense with relation to the other exhibit, which it is said was shipped by rail to Cincinnati, and as to which you have heard testimony, and the charge is that that was shipped on or about the 10th day of October, 1913, in violation of the same law. Now count 2 provided, or charged, that the shipment of the boxes sent to Koch in Newark were misbranded in that the labels did not show the purchaser that these goods were artificially colored and did not show the purchaser that there was anything in that except semolina. Count 4 charged, in the same words, in the same fashion, that the shipment to Cincinnati was misbranded in that the boxes did not show that it was artificially colored and that it was not made from a semolina of durum wheat. When that was brought to the defendant's attention, this question as to whether or not the goods had been shipped with or without the rubber stamp, the defendant immediately admitted, so far as the record is concerned, that these boxes, which apparently they had sent out, did not bear the rubber stamp, and that therefore they were not branded as the defendant stated it had intended to have them branded when they were shipped. They, therefore, said that they were responsible under this statute for having shipped to Cincinnati and Newark goods that were not stamped as they themselves stamped them so as to comply with the law, and a plea of guilty as to the responsibility for sending out those shipments, without the rubber stamp on the label, was entered.

Now, you can see that under this statute the same article may be charged to be adulterated in that it does not show of what it is constituted, and that the lack of material, or change of material, is covered up, and the same article may be misbranded in that as it was sold to the public its true contents were not disclosed. The purpose of both of these acts may be to defraud the public, or to harm the public, either in the sense of making them pay more, or of getting a poorer article, or of not getting what they think they are buying, but there is a difference when you come to consider the acts themselves, and you must carefully distinguish whether you should charge that the product is merely misbranded or whether it is adulterated. Now, let me illustrate. Suppose an article is sent out and sold for the purpose of killing potato bugs and is labeled Paris green. If, instead of containing Paris green, it merely has some green coloring matter and is made out of earth, and whether potato bugs would like it, or it would do them no harm, then if that is sold for Paris green, of course, it is misbranded, and would come under the misbranding section. At the same time, if it is not Paris green, but is some harmless material, then there is a substitution or some imitation of a product for the genuine, and at the same time there has been an adulteration in that, and a substance is sold which is inferior in quality or strength, and in which the inferiority is covered up by the use of the green coloring matter to make the public think it is something else.

Now, this defendant, then, having been brought into court on a charge that they were doing both, both misbranding the product, in the sense that ship-

ments were made which were not attended to as they should be, so as to see that the label was all right, and being charged also with having sent them out so that the purchaser would get an article that was adulterated, or where the inferiority was covered up, they took the consistent position which they should take if they were innocent, (and which they should properly be in if you should render a verdict of not guilty, that is, if the Government does not prove beyond a reasonable doubt that they were adulterating) then they took the proper position as to the misbranding because this statute does not provide that these acts must be done knowingly. If the head of a great drug company assumes that he is selling Paris green, and some of his clerks are substituting something else and the company should be benefiting from it, then the company may still be held responsible for the shipment. If the clerk was not profiting by it, but if he was doing it for the benefit of the company, the company could still be held responsible for the shipment.

If decomposed animal matter is allowed to form in the article that is shipped, the question whether the person who ships it knows it is there does not prevent the seizing of the article, or avoid a charge for shipping that kind of article without preventing the contamination if it comes within the statute, so that this statute is purposely framed so that it will protect the public, whether the public wants to be protected or not in the first place, whether or not the shipper intentionally evades the law, or whether a defendant is found evading the law, even though he intended or thought that he was complying with it; so, I say, that if this defendant is innocent of the charge of adulterating, they did the proper thing under these circumstances in coming in and saying these goods were found without the rubber stamp that constitutes a violation of the statute of misbranding, and we, therefore, plead guilty to that. We will avoid it in the future. We will change our label and the matter is trivial, and the court should impose a penalty that corresponds with the occurrence.

Now, that part of the case is left in that condition up to the present time. I have had to go into this at length, because this case is simple as to issue, but there is a whole lot to it as the matter is left to you. There is lots of evidence, lots of matters for you to consider. This case, at the present time, stands just upon the position of the defendant as I have outlined it saying that they admit the court must deal with this question of not having the rubber stamp on from the standpoint of misbranding, and that they have done no more wrong and, therefore, they say the Government has not proven the charge that is brought against them. So, now you must come to the question of whether there was any other element, any other act, because if this is all there was to it, then this question of adulteration and addition would be not only trivial, but the case would not fall under the adulteration side of the statute.

The Government then says this: Assuming that these particular boxes did go out, and assuming that no officer knew about it, and assuming that that particular leaving off of the rubber stamp was not intentional, then we still make the charge that the goods were sold for the purpose of supplying a dealer who would not buy artificially colored macaroni for what appeared to him to be natural colored macaroni, that is, macaroni made of this durum semolina, which would give that color, and that he was influenced to buy this because the price was not as high as it would be if the color were produced by the use of a durum semolina, and he was induced to buy this because he had a trade which wanted that kind of macaroni, or macaroni of that color, and in order to make this particular sale the goods were sent out without anything to indicate to this customer that he was getting something that was not up to the standard which he was buying in quality and in color. Now, if such a charge as that is brought against a man under this statute, and, if by accident or by carelessness, two boxes went to Cincinnati and two boxes went to Newark, or even if 113 or 160, whatever the quantities were—you will take the testimony, because you must recollect the testimony as the witnesses give it, not take what I say, by way of illustration, because neither Mr. Brown, nor Mr. France, nor I, are trying to give you the testimony, but we have referred to it, as when I point to a box and call it a box, and if you want to qualify my statement that it is a broken box or a poor box, you could do so, but I am illustrating—as I say, if this shipment of 113 boxes or 60 boxes, whichever they were, got to Cincinnati or to Newark with something wrong in the labeling or packing, so that, for instance, they were marked as macaroni from durum semolina but were in fact macaroni from wheat *flour*, and these Cincinnati people or Mr. Koch did not find that out, and if thereby he was misled into buying it for something else, even if the defendant admitted that a mistake was made and that in the future they would

avoid mistakes, yet they were within the prohibition of the law. It would be for the Court to say how they should be punished, and whether it should be treated as a casual matter and they should be absolved, provided they did not do it again. But this particular charge assumes seriousness for the reason that even though these other dealers who have testified in Court told you they do not compete in the sale of these particular products, that is, that they did not put on the market products which would compete with this particular trade, nevertheless there has been testimony that there is a trade with certain people that have been educated from the Italian or foreign standards and wish this material colored—macaroni. They wish it made either with or without color, according to what they do wish, but those who want it without color do not want to buy that which is artificially colored. Those who do want artificially colored, or who are willing to take artificially colored, are entitled to know, under the statute, what they are getting, so that the price will correspond to the goods that they receive.

Now, when the Government charges this defendant with conducting its business in such a way that it is putting on the market a product which will be sold to the jobber for sale to the customers who want a yellow product, which is uncolored, and to a trade that would consider a product inferior, or lacking in strength and in quality that they are trying to buy, if that yellow color is not produced by durum wheat semolina, if this defendant was deliberately supplying that trade with something that from that standard was inferior and was using the method of misbranding the boxes, or accidentally allowing a foreman of the label room to be careless in not checking up the product upon which these labels were going, and if that was occurring, then this defendant was doing something which assumed importance and illustrates to you the wide difference between the charge of misbranding and the charge of adulteration. As I say, if this case had involved nothing more than whether or not those two boxes might be called adulterated as well as misbranded, the matter might easily have been left to me to say whether or not there should be a severe penalty or a trivial penalty because of the accident. So, the question of misbranding has been left to me properly by the defendant, and you can not take from their admission that these two boxes did not have the label on; that therefore they violated the statute as to adulterating. You can not take that admission as any evidence against them at all, because it is in their favor. In the same way, if the Government had not accepted, not presented the charge that they were adulterated (and therefore coming within this statute) for the sake of selling their product in a way that they could not have sold it otherwise, the whole matter would have been disposed of upon the same statement by the defendant that these two boxes might come within the statute, but if so, it was accidental and made no difference, and you would not have to consider the question, but the Government, instead of doing that, charges that this defendant was violating the statute in sending out a product that would be sold to a certain trade that required a certain standard, or a certain quality, or a certain kind of product in the goods which it would buy, and that therefore this product is adulterated and that it was meant to be adulterated, and that it was meant to be sold as natural colored goods, that therefore the Government charges that it was inferior, and that the inferiority was concealed by the way in which it was colored, or through the addition of this coloring matter.

Now, I referred early in the case to the matter of the Lexington Milling Co. in which some flour was bleached; that finally went to the Supreme Court of the United States, and they decided that under this fifth section an added poisonous or deleterious ingredient which might render the article injurious to health required proof that the bleached flour was harmful to health, and that if the bleaching material was so small in quantity that it would not have any effect on the health, the mere change of appearance in the flour did not bring it within that particular section. In deciding that case the Supreme Court of the United States referred to these other provisions and they used language which seemed to bring in all of these sections. They seemed to say that if the inferiority, or the substitution, did not produce some article or have some effect which would damage health, that the article was not adulterated, but if you look into the case carefully, and examine the section under which it comes, you will see that in the flour case they were talking about the addition of *poison* which would be harmful to health and that we have something entirely different here, because there is no accusation that this coloring matter would affect health, or that the use of one ounce in 12,000 pounds would make

any difference under this health section. This charge comes down solely to the question of using an adulterating material (that is an artificially added material) so as to cover up inferiority in quality or strength by the change in color, and up to that point the question is simple of statement and plain of meaning. That is the charge that is made, but when you get into this question of what is inferior in quality or strength, then you have got to have a standard.

Congress had the power to pass that law. Congress had the power to use this language, and you jurors and I must apply that law according to what Congress says. When Congress provided that if it was injurious to health it would come under one section, and if not injurious to health it would come under that other section, the Supreme Court was bound to follow Congress by saying that something that was not injurious to health was not adulerated *ly a poison.* So, when we consider the proper section as to what is "inferior in quality or strength," we must try to find out what Congress meant If there were anything to indicate that Congress meant if it should be inferior in bran or in gluten, or in the materials that are classified as protein in building up the body, if that were the general meaning of the word inferior, then you can see that the argument would come down to a definite limit. On the other hand, if the word inferior meant something cheaper in price, and there were anything in the law to indicate that Congress meant it was inferior in price or cheaper, then we would be limited to that meaning of the word inferior. If there were anything to indicate that when they were talking about Paris green (that is not a food—I use it, you see, as an illustration) they should say Paris green that was inferior for suiting the appetite of some particular striped potato bug, instead of one that had spots, why we would have to take that as a test. The charge here is that this is an inferior article of food for the purpose for which it is to be used as an article of food. If it is to be put on the market or sent out to a market where a person sending it knows that its saleability will depend upon the demand by Italians who want to purchase articles that have a certain color and desire the goods purchased to be made in a certain way (even if the process involves additional steps and a little increase in cost is involved in order to effect the sale of the goods even at the expense of that little increase in cost), so as to make it inferior in quality or strength from the standards that it is to be measured by in being put upon the market for that particular trade, and if any concern sends out goods so as to meet that particular demand by something that has other articles, or has coloring matter put in, so as to sell goods to meet that particular demand, then he would come within this definition of inferior in strength and quality from the standards or standpoint of the purpose for which it is to go.

So here in this case you must decide whether these shipments were made, you must decide whether the articles that were taken by the inspectors were the articles that were shipped, whether the articles taken by the inspectors were the ones that are produced here and that have been analyzed. You must decide whether or not the analyses are correct and the facts are the way the witnesses present them to you. So far as matters are not disputed (and so far as this plea of misbranding is concerned, the defendant did not question making the shipment) inasmuch as they told you that the shipment was made of course you can assume that is proven. You have to then go on and see when the articles were shipped, if you find that they were shipped, as I have said, whether this adulteration was intended or whether they were sent out in just a casual way so that we would have to consider whether or not the label was accidentally put on. The charge is, the matter you have to consider is whether or not the defendant was putting on the market, and intended by this shipment to put upon the market, goods which were inferior in quality and strength to those which that market to which the goods were being sent would require, and whether thereby they were selling something which was inferior in quality and strength to that which was being bought so far as the people who bought it knew, and whether the label upon the boxes was the means of covering up the misbranding so that the fact of the adulteration, if you find that it was adulterated, in that sense, was covered up, and if the Government proves beyond reasonable doubt that the defendant was sending out boxes or allowing its clerks to send out boxes that did not disclose properly the contents so as to comply with the statute, and if these articles were therefore misbranded in that sense, then if the misbranding was a part of putting these goods on the market so as to dispose of the goods that were adulterated in the sense that I have

referred to in that part of the statute, if the Government shows all that beyond reasonable doubt, then your verdict should be guilty, and the question would rest with the court as to how the matter should be treated. If the Government does not prove the case to that extent, if you have a reasonable doubt as to any material step in the proof that leads you up to the question of determining a verdict, then your verdict should be not guilty, and, of course, you will have to remember and distinguish between counts 1 and 3, count 1 being the Cincinnati transaction and count 3 the Newark transaction, so that you could render a verdict of guilty or not guilty as you might find the facts as to either count or as to both.

Now, what requests and exceptions have you?

Mr. BROWN. I ask your honor to charge the jury this: That if the rubber stamps "artificially colored, made in the United States" were on these two boxes, exhibits one and five, that the contents would neither be misbranded nor adulterated?

The COURT. That is, if the goods were sent out?

Mr. BROWN. The same goods. Which is saying, that they were artificially colored so that people could buy them or not, as they saw fit, in that respect then they would not come within the statute at all because they would be just what this particular box would be purported to be.

The COURT. I so charge. It is evident that this box did not have the rubber stamp on, and therefore we come down to the serious question as to the way they went out, not simply the mere sending out of these two particular boxes.

Officer sworn and jury retired.

Jury returned with a verdict of guilty.

Mr. BROWN. I move to set aside the verdict on the ground it is against the weight of evidence, also move to set aside the verdict on the ground there was absolutely no proof of any intent on the part of the defendant and that the verdict of the jury is not found in accordance with the charge of the court, and is contrary to the law as laid down by the court in its charge

The COURT. I will deny your motions and give you an exception in each.

Mr. BROWN. I renew my motions to set aside the verdict on the ground that there was no proof of the commission of any crime within the contemplation of the statute.

The COURT. You may have an exception.

The jury thereupon retired and after due deliberation returned a verdict of guilty upon the charges of adulteration. The defendant company thereupon filed its motion to set aside the verdict, and said motion was denied by the court. On February 17, 1917, the defendant company was sentenced to pay a fine of $398 upon the plea of guilty as to the charges of misbranding and upon the verdict of guilty returned by the jury as to the charges of adulteration, as will more fully appear from the following remarks of the court (Chatfield, *J.*):

The record shows that the defendant was brought into court upon an information based on two interstate shipments. There were four counts, one as to misbranding and one as to adulteration with respect to each shipment. The two counts as to misbranding were disposed of by the plea and the two counts as to adulteration were disposed of by the verdict of the jury. The maximum would therefore be four penalties which, for a first offense, would be $200 each. It appears from the record of the court, and the fact is not contested, that this defendant was previously indicted and punished for a charge of misbranding, with relation to substantially a similar form of label, in this court. The charge of misbranding in the previous information should have brought home to the defendant the meaning of the statute and the purpose for which the law was intended. It makes no difference whether in the particular instance injury to an individual or harmfulness as a food product is actually shown. The court does not consider that a second offense is a part of the crime, nor does it consider that a person should be put on trial before a jury upon the issue of whether or not it is charged with a first or second offense. That question has entirely to do with the remedy, and if the accusation of the second offense is disputed it can be summarily heard by the court, or the court may have a doubt and impose sentence within the maximum of the first offense. The second offense provision is not a mandatory change in the nature of the crime. I shall therefore treat this matter as consisting

of two offenses, one relating to the shipment to Cincinnati, and the other, the shipment to Newark, New Jersey, and shall consider that it is possible to impose a fine for four separate violations, and that on two of these the maximum would be $200, and as to the other two a maximum of $300 would be imposed which would make a thousand dollars in all. Recognizing the circumstances, I think that a fine of $398 divided in two parts of $199 each, so as to bring the sentence within the specific first offense sentence upon the two adulteration counts, also stating that the total of the fine is imposed because of the nature of the second offense, and also because of the presence of the charge of misbranding as well as of adulteration, is sufficient to indicate the application of the statute to the matter. The Government may have judgment upon the sentence if it desires.

CARL VROOMAN, *Acting Secretary of Agriculture.*