

State of Michigan, and charging adulteration in violation of the Food and Drugs Act.

Adulteration of the article was alleged in substance in the libel for the reason that it consisted in whole and in part of a decomposed, filthy, and putrid vegetable substance, namely, decomposed tomatoes and tomato pulp and parts thereof.

On March 7, 1921, 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.

E. D. BALL, *Acting Secretary of Agriculture.*

**9290. Misbranding of Newton's Eggno. U. S. \* \* \* v. Newton Tea & Spice Co., a Corporation. Tried to the court and a jury. Verdict of guilty. Fine, \$200 and costs. Pending on appeal in Circuit Court of Appeals. (F. & D. No. 11123. I. S. No. 15473-r.)**

On November 26, 1919, the United States attorney for the Southern District of Ohio, 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 Newton Tea & Spice Co., a corporation, Cincinnati, Ohio, alleging shipment by said company, in violation of the Food and Drugs Act, on or about February 22, 1918, from the State of Ohio into the State of West Virginia, of a quantity of Newton's Eggno which was misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it consisted largely of rice starch, skim milk powder, and milk casein or albumen, artificially colored with a coal-tar dye, with possibly a small amount of egg powder present. Microscopic examination by the said bureau showed a large amount of rice starch present. Baking tests made by the said bureau showed that cakes made with Eggno were no better in volume or quality than cakes made with water with no egg, inferior in volume to cakes made with skim milk without egg, and in no measure comparable in volume or quality to cakes made with equivalent amount of eggs, as claimed in the labeling of the article.

Misbranding of the article was alleged in substance in the information for the reason that certain statements concerning the said article and the constituents and uses thereof, appearing on the labeling of the carton containing the article and in an inclosed circular, to wit, (carton) "\* \* \* To Be Used In Place Of Eggs In Baking And Cooking \* \* \* An Excellent substitute For Eggs \* \* \* to be Used for Baking and Cooking purposes. \* \* \* Eggno contains the constituents that cause fresh eggs to fill such an important place \* \* \* one even teaspoonful is to be used in place of each egg called for in recipes \* \* \* Use a teaspoonful for each egg called for \* \* \*," (circular) "To Take the Place of Eggs in Baking and Cooking \* \* \* Takes The Place Of Fresh Eggs \* \* \* The Contents of a 25-cent Package Can Be Used in Place of Three Dozen Fresh Eggs \* \* \* The Real Substitute For Eggs \* \* \*," together with a design of chickens with the statement, "We have lost our job \* \* \* To Take the Place of Eggs in Baking and Cooking," appearing on an inclosed poster, were false and misleading in that they represented to purchasers of said article that the same was a substitute for eggs, and could be used in place of eggs for baking and cooking, and for the further reason that the article was labeled as aforesaid so as to deceive and mislead purchasers into the belief that it was a substitute for eggs, and could be used in place of eggs in baking and cooking, whereas, in fact and in truth, the article was not a substitute for eggs, nor could the same be used in place of eggs in baking and cooking.

On December 9, 1919, a motion to quash the information was filed by the defendant. On January 17, 1920, the motion to quash was argued and submitted to the court, and on January 21, 1920, the court overruled said motion as will more fully appear from the following decision (Peck, *D. J.*):

The defendant, upon the filing of the information, voluntarily appeared thereto and moved to quash the same, upon the grounds, first, that the information is indefinite and does not apprise the defendant of the facts constituting the alleged crime with such certainty and particularity as to enable the defendant to know what it has to meet; second, the information attempts to charge the defendant with the commission of a crime by way of argument and conclusion; and third, the court has no jurisdiction.

First. The information is brought under the Food and Drugs Act of Congress, June 30, 1906 (34 Statutes at Large, 768), and charges the defendant with shipping in interstate commerce fifty cases of an article designed for food, known as "Newton's Eggno," which the information alleges was labeled to read: "An excellent substitute for eggs \* \* \* to be used for baking and cooking purposes \* \* \* an article of real merit and far superior to the usual egg substitutes on the market. \* \* \* composed of pure materials \* \* \* one even teaspoonful to be used in place of each egg called for in recipes requiring eggs," with directions for using and place of manufacture. A poster and a circular are alleged to have been inclosed within the package, making like representations; but the contents of these, even if false, can not be considered as violations of the act. *United States v. American Druggists Syndicate*, 186 Fed. 387.

The information further alleges that the aforesaid statements of the label were false and misleading in that they represented to the purchasers that the article was a substitute for eggs and could be used in place of eggs for cooking and baking, whereas, in truth, said article was not then and there a substitute for eggs, nor could the same be used in place of eggs for baking and cooking.

The defendant contends that the information is deficient in that it does not set forth why, or in what manner, the article can not be used as a substitute for eggs in baking and cooking.

The statements of the label above set forth were evidently designed to lead the ordinary housewife to believe that the contents of the package could be used in substitution for eggs in the ordinary preparation of food. The information expressly negatives the usefulness of the article for that purpose. It would seem, therefore, to be entirely sufficient to draw the issue upon that question, and, therefore, the motion in this respect is not well taken.

This disposes of the first and second grounds assigned.

Third. Defendant contends that the court has no jurisdiction over the subject-matter, for the reason that the information does not state an offense within the terms of the act. In support of this contention it is argued that the article comes within the proviso of the fourth subsection of section 8 of the act, by which it is provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in case, first, of mixtures or compounds which may now, or from time to time hereafter, be known as articles of food under their own distinctive names and not in imitation of, or offered for sale under the distinctive name of, another article if the name be accompanied on the label or brand with a statement of the place where said article has been manufactured or produced; and, second, in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends. Even though we assume it to be the duty of the pleader under this act to negative the terms of the proviso, or assume that the article in question is shown by the label to be a mixture or compound known as an article of food under its own distinctive name, not alleged to be in imitation of another, nevertheless the protection afforded by this proviso goes only to the branding or name of the article, and does not furnish a refuge for one who has on the label otherwise falsely stated the nature of the contents of the package. It is not against the use of the name of "Eggno" that the information is directed, but against the statement that the contents are useful and fit to be substituted for eggs in ordinary cooking recipes.

In *United States v. 150 Cases of Fruit Pudding*, 211 Fed. 360, having the subject under consideration, at page 364 the court says:

"It does not seem to me that the proviso in question was intended to except them absolutely from the provisions of the act, and to leave the manufacturers free to make misrepresentations concerning them. Such a construction is out of harmony with all the rest of the statute, and disregards one of the principal purposes of it. It seems to me that the protection afforded by the proviso is limited to the distinctive name; and, as so limited, I have no doubt that the proviso applies to the first paragraph of section 8, and fully protects distinctive names from being misbranding."

It was there accordingly held that the words "Fruit Puddine," being false and misleading with reference to the product known as "Puddine," constituted misbranding within the statute.

It is further contended that the statement, "Substitute for eggs in baking and cooking," is not one of fact but of opinion only, and therefore not, in law, misleading; that the substitution of one thing for another is largely a matter of judgment, and that to call a thing a substitute is not to affirm that it is even similar to the original; that one article of diet may be a substitute for another without any necessary similarity. In this case, however, the defendant chose its own definition for the term "substitute" when it expressed upon the label that the article could be used in place of eggs "in baking and cooking." Nothing else could be inferred but that in ordinary culinary compounds the article in question would produce the same or similar results as the use of eggs. This is a direct affirmation of a fact and a definite description, so far as obtainable results are concerned, of the article sold.

It is further contended that the mere representation as to the results which may be obtained by the use of an article do not constitute misbranding under the act, and reliance is had upon *United States v. Johnson*, 221 U. S. 448, where it was held that the curative effect of a medicinal preparation of which the labels stated that the contents were effective in curing cancer, contrary to the fact, was not an offense against the provisions of the act relating to the sale of drugs, as the act then stood. But the terms of the act at that time were very much narrower in scope with regard to drugs than with regard to food. By the amendment of 1912 the prohibition relating to the misbranding of drugs was made to expressly cover any statement regarding the curative effect of the article, and under that amendment it has been held that statements of curative effect in reckless and wanton disregard of their truth come within the act. *Simpson v. United States*, 241 Fed. 841. With regard to food, the act makes it an offense 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 and misleading in any particular; and the allegations of the information would seem clearly to bring the statements in question within that category.

The information is not upon oath, and it is contended that the same is therefore violative of the Fourth Amendment, and for that reason the defendant should not be held to answer. But the information is not required to be upon oath; it is only required that the same shall be supported by oath before warrant may be issued thereon. *Weeks v. United States*, 216 Fed. 292. As the defendant has voluntarily appeared and filed the motion now under consideration, no question concerning the validity of a warrant is here.

Motion overruled.

On December 9, 1920, the case having come on for trial before the court and jury after the submission of evidence and arguments by counsel the following charge was delivered to the jury by the court (Peck, D. J.) :

Gentlemen of the jury, it becomes now my duty to charge you with regard to the law in this case. You are the sole judges of the facts; the facts are entirely within your province. The law you will take from the court, and, applying the law as I shall give it to you to the facts as you shall find them to be, you will reach your conclusion in this case.

The essential elements of this information upon which the defendant is here upon trial are, first, that the defendant did ship in interstate commerce fifty cases of cartons. While the burden of proof is upon the Government to establish this beyond reasonable doubt, the defendant has admitted by a stipulation offered in evidence here that it did ship the fifty cases of cartons in interstate commerce; second, that these cases contained an article designed and intended to be used as an article of food. The burden likewise is upon the Government to establish that beyond reasonable doubt. It is next set forth that these cases

were then and there denominated as to the contents thereof, labeled, marked, and branded as follows: (On cases) "2 doz. Newton's 25c size Eggno Manufactured by The Newton Tea & Spice Co., Cinti, Ohio;" (on top of carton) "Flat Top Gro. Co. Bluefield, W. Va. Food Products, Prepaid, Pieces 51;" (on carton) "Newton's Eggno Artificially Colored. To be used in place of eggs in baking and cooking 3½ Oz. Net. An Excellent Substitute for Eggs. Eggno is an excellent Substitute for Eggs and is to be used for Baking and Cooking purposes. Splendid for Cookies, Cakes, Muffins, Fried Cakes, Bread Puddings, Gravies. Just the thing for Griddle Cakes, Noodles, etc. Eggno is an article of real merit and is far superior to the usual Egg Substitutes on the market. Eggno contains the constituents that cause fresh eggs to fill such an important place in every kitchen. Eggno is the result of scientific research, is composed of pure materials, is nutritious and is economical, as one even teaspoonful is to be used in place of each egg called for in recipes requiring eggs. This package contains 36 even teaspoonfuls. Guaranteed to conform to the Pure Food Laws. Directions Dissolve Eggno in lukewarm water or milk by first making a paste then adding the balance of the water or milk. Use a teaspoonful for each egg called for in recipes requiring eggs. In making use a trifle more Baking Powder than if eggs were used. Eggno does not take the place of Baking Powder. Prepared and Guaranteed by The Newton Tea & Spice Co. 12-14-16-18 East Second St. Cincinnati, Ohio." And while the burden is upon the Government to prove the truth of this labeling beyond reasonable doubt, defendant has filed a stipulation here admitting the facts concerning the labeling as thus set forth.

The next material contained in the information purports to set forth the contents of certain circulars that were contained in these cartons. I have withdrawn that from your consideration, and you will pay no attention to it. I have marked it in the margin of the information "Ruled out. Omit," and you will pay no attention to that; likewise the phrase upon the next page, of similar import, is ruled out and withdrawn from your consideration.

The fourth element of the information—and it is around this one that the contest here principally turns—is this: That the article of food was misbranded in that the statements, "to be used in place of eggs in baking and cooking \* \* \* an excellent substitute for eggs \* \* \* to be used for baking and cooking purposes \* \* \* Eggno contains the constituents that cause fresh eggs to fill such an important place \* \* \* one even teaspoonful is to be used in place of each egg called for in recipes \* \* \* use a teaspoonful for each egg called for," were all false and misleading. It is also alleged that the carton contained the phrase, "takes the place of fresh eggs," which was false and misleading; but I am unable to find those words upon an examination of the carton—were all false and misleading, says the information, in that they represented to purchasers of the article that the same was a substitute for eggs and could be used in the place of eggs for baking and cooking purposes, whereas, the Government charges, said article was not then and there a substitute for eggs and could not be used in the place of eggs for baking and cooking, and that it was so labeled to deceive—that being so labeled it would deceive and mislead purchasers into the belief that it was such a substitute for eggs and could be so used. And the question of the truth of this, the fourth element, as I have described it, of the information is the principal question for your determination.

The Government does not claim that the product Eggno is poisonous, deleterious, or injurious to human health. The question, therefore, raised by these allegations of the information, which I have denominated the fourth element, is whether or not these statements were false in the respects charged in the information.

Now, by what rules are you to judge of the truth or falsity of this language? The principal rule is this: You will take this language in the ordinary meaning and significance of the words used; that is, as they would be understood by the ordinary purchaser, of ordinary intelligence, familiar with the English language. The purpose of the label is to truthfully advise the purchaser of the contents. That is the purpose of the label—or should be. It is, as it were, the voice of the manufacturer speaking to the prospective purchaser, as though they had met in person and the manufacturer verbally stated to the customer, "I made this product. It is the result of scientific research. It is an excellent substitute for eggs. It contains the constituents that cause fresh eggs to fill an important place; that is, an important place in every kitchen. An even teaspoonful is to be used in place of each egg called for in the recipe." Now, is this statement false and misleading? That is the essence of the matter. It says "An excellent substitute for eggs." The word "excellent" hardly re-

quires us to go to the dictionary to find its meaning. One meaning is "remarkably good." However, little stress is to be laid upon mere adjectives commendatory of wares; manufacturers and others who sell wares are to be expected, and are generally expected by purchasers, to use such adjectives with regard to the wares that they offer for sale. More important are the words, "substitute for eggs." What does the word "substitute" mean? What does it mean to the ordinary purchaser, the ordinary housewife or householder who goes to a grocery store to buy articles of this kind—what does it mean to her or to him? One definition found in the dictionary for the word "substitute," and perhaps the one that best gives the meaning of the word as here used, is "a thing serving the purpose of another." The representation, therefore, on this label that the contents are an excellent substitute for eggs may perhaps be taken—may be taken in the ordinary acceptance of the word—to assert to the public that the article therein contained is good for serving the purpose of eggs in baking and in cooking.

Now, it is further asserted on this label that it "contains the constituents." What are constituents? Those things which go to make it up, the components, the elements. "Contains the constituents that cause fresh eggs to fill such an important place"—that is, such an important place in the kitchen. The truth or falsity of that statement is also for you to determine. The label also affirms that one even teaspoonful is to be used in place of each egg called for in the recipe; that is, in the cooking recipe. Is this the equivalent to an assertion that one teaspoonful is equal to an egg in the recipe in cooking and baking?

The information alleges that these statements, taken together, amount to a representation to purchasers that the article was a substitute for eggs and could take the place of eggs in cooking and baking, whereas, in fact and in truth, it was not such, and could not be so used; and that the purchasers thereby—that it was misleading thereby to the purchaser.

Generally speaking, to correctly determine whether a falsehood has been told—that is the essence of this case, that this label told a falsehood to the people; that is what the Government charges in these respects that I have indicated, that this label told a falsehood. Now, to correctly determine whether a falsehood has been told, ordinarily it is first necessary to ascertain just what has been told and then to compare the statement so made with the fact. Concerning the statement made, the label is here; it has been admitted by the stipulation, and there is no contest about what the language was that was used. Now, what are the facts? Does the product contain the constituents which cause fresh eggs to fill an important place in the kitchen? Is the product a substitute for eggs, as that language would be understood by the ordinary purchaser? May one teaspoonful be properly used in cooking recipes in place of each egg called for? The evidence offered by the Government tends to show that the product is inferior to eggs in nutritive value, and of little physical or chemical value in cooking and baking operations. The evidence of the defendant, on the contrary, tends to show that the product has been used with satisfaction and apparently good results by many housewives. If the product is, in fact, well adapted to be used instead of eggs in baking and cooking, if it is in truth genuinely fit to be used in place of eggs in those processes, then the label would seem to me to be not false. On the other hand, if the article is not honestly well fit to be used as a substitute for eggs in baking and cooking, if it is not genuinely well adapted to be used instead of eggs for such purposes, then and under such circumstances the label would seem to be false; but the question of its truth or falsity I leave to you.

The burden of proof is not upon the defendant to prove the label true; the burden of proof is upon the Government to show beyond reasonable doubt, on consideration of all the evidence, that the label is false and misleading in the respects charged in the information.

Now, the question here is not, on the one hand, whether the product is an absolutely worthless article, or, on the other hand, whether it is a complete and perfect substitute for eggs in all respects; the true question is whether the language of the label complained of in the information is false and misleading to the ordinary purchaser in the respects charged in the information. That is the true question for your determination.

As I have said, you are the sole judges of the facts, gentlemen of the jury.

Now, the presumption is that the defendant is innocent, and this presumption prevails until it is overthrown by evidence of its guilt beyond reasonable doubt. The defendant is to be presumed innocent until it is proven guilty. You will

begin your deliberations on that basis. You will remember that the mere fact that an information has here been filed by the district attorney against the defendant, in and of itself, raises no presumption that the defendant is guilty. One charged with the commission of an offense can only be convicted, if convicted at all, upon the evidence produced at his trial. The burden of proof is upon the Government of the United States to prove the offense charged and all its essential elements beyond a reasonable doubt.

What is meant by a reasonable doubt? By a reasonable doubt is meant this: When you lack an abiding conviction to a moral certainty of the truth of the charge, considering all the evidence, then there is a reasonable doubt. A reasonable doubt is an honest uncertainty. If you have an honest uncertainty, then you have a reasonable doubt. It is not a mere captious doubt, a mere ingenious doubt, such as one might, by some process of ingenuity, raise in his mind. To be a reasonable doubt it must be an honest uncertainty.

I shall now state to you under what circumstances you will find a verdict of guilty. If you find that each of the essential elements of this information, as I have defined them to you, has been proven beyond reasonable doubt, then it is your duty to find a verdict of guilty. I shall now state to you under what circumstances you shall find a verdict of not guilty. Unless you do find that each essential element of this information has been proven beyond a reasonable doubt, then it is your duty to find a verdict of not guilty.

You are the sole judges of the credibility of the witnesses. You may consider, in judging of their credibility, their demeanor upon the witness stand; any bias or prejudice that they may have shown in the case, if they have shown any; their interest in the outcome of this trial, if any they have; the probability or reasonableness of their testimony; their intelligence; their means of observation; their knowledge of that whereof they have spoken. You will consider their connection with either party to the case, if any they have; and any and all circumstances which bear, or tend to bear, upon the credibility of the witnesses. And then, having done this, having considered all the testimony bearing upon their credibility, you will give to the testimony of each and every witness such credit as you find it entitled to receive. You are not to reject any of the testimony arbitrarily or without reason. You are not, as a matter of fact or as a matter of law, bound by the greater number of witnesses, although number is a matter for you to consider.

Certain expert witnesses have testified before you. As to matters of opinion, expert witnesses are permitted to give opinions about matters which are not within the common knowledge of all. As, for instance, the chemical science. We are not, generally speaking, chemists or familiar with the chemical science; therefore, the law permits witnesses to be called to give an opinion, state to you an opinion, as to matters pertaining to the chemical science. And so, in this science of food known as dietetics, and so of the refinements of the art or the science of cooking, witnesses have been permitted to give their opinions. Now, the opinion of a witness depends not only upon his truthfulness, but upon the amount that he knows about the subject that he is giving an opinion upon. The opinion of one upon chemistry who knew little of chemistry would be of very little value; so that you will see, in considering the value of opinion evidence, it is necessary for you to carefully consider the qualifications of the witnesses to give the opinions which they have given. Opinion evidence is ordinarily not binding upon the jury, but it is to be considered in determining the matters submitted to the jury.

*Gentlemen of counsel—*

Mr. ROUDEBUSH. Nothing, your honor.

Mr. LANNIN. May it please the court, I wish to take exceptions to the failure of the court to instruct the jury that the question of the element of food value and nutritional value of the product involved in this case is not in issue in this case.

And also to the failure of the court to instruct the jury that in determining whether this product is misbranded or not, they must confine their considerations to its use for baking and cooking purposes, and not for its use as an article of food, for food purposes.

And I also save exceptions to the statement of the court to the effect, as near as I can remember now, that the element of nutritive value and food value is involved in this case. I understand Mr. Simmonds has some objections. I don't know just what the rule of this court is, as to whether both of us can save exceptions or not.

The COURT. Yes; I will permit each counsel to take such exceptions as he wishes. Mr. Simmonds—

Mr. SIMMONDS. If your honor please, we desire to reserve exceptions to the fact that the court has not charged that it is necessary, in addition to establishing the other charges, to establish that the label was so labeled as to deceive the purchaser.

And likewise to the proposition of the qualitative words, as used by the court in his charge, as to the degree of proficiency that must be reached by the product. We think that—

The COURT. It is not time for argument—just your exceptions. Anything further, gentlemen of counsel? Gentlemen of the jury, you will now retire and deliberate upon your verdict. When you have reached your conclusion you will notify the court.

Mr. KROHN (a juror) (after a portion of the jury had retired from the jury box). I didn't understand that charge—

The COURT. If you wish any further instructions the jury will have to return as a whole, Mr. Krohn.

(Thereupon the jury retired from the court room.)

Mr. LANNIN. May the jury not take the exhibits with them to the jury room?

The COURT. The marshal will take all the exhibits to the jury room.

Mr. LANNIN. Take them out of the pans—

Mr. ROUDEBUSH. Is the jury permitted to take the exhibits to the jury room, your honor?

The COURT. It will be just exactly as they are. Just pick these tables up and carry these exhibits into the jury room.

Mr. LANNIN. The jury is permitted to eat the cakes?

The COURT. Wait until the jury has retired. Are all the jurors out of the room? Now you ask if the jurors will be permitted to eat of these cakes?

Mr. LANNIN. Yes, your honor.

The COURT. It seems to me that that should not be so, for this reason: It is undoubtedly the rule that the jurors must receive the evidence in the court room. Is that not the rule? The Constitution requires that no evidence can be taken outside of the court room in a criminal case, and practice so requires. Now, the tasting of these foods would be one way of the juror exercising his senses; it would be one way of his brain receiving information from the evidence, and it seems to me that that might have been done during the taking of the evidence in the court room, and I thought of it and was of a mind to permit it had either side so requested. But now the taking of the evidence has been concluded. Of course, the point is novel; I rule without precedent, so far as I know. But upon general principle it seems to me that the taking of evidence having been concluded, I would have the right to submit to the jury that which their senses have already received—nothing new. And, therefore, the rule will be that the exhibits may all be removed by the marshal to the jury room, as they are.

Mr. ROUDEBUSH. Your honor, isn't that contrary to the rule that has been heretofore, that any exhibits go to the jury room?

The COURT. No; I have permitted the exhibits to go to the jury room in other cases.

Mr. ROUDEBUSH. In criminal cases?

The COURT. I should not permit the exhibits to go contrary to the objection of the defendant, perhaps, but at the request of the defendant—

Mr. ROUDEBUSH. I want to object to it.

The COURT. I am inclined to send the exhibits to the jury room. It doesn't seem to emphasize the exhibits of either side. Each side has introduced its exhibits of this nature. It is a matter that is discretionary with the court. Where it tends to emphasize the evidence of either side it ought not to be permitted, but here it seems to be about as long as it is broad, and I will let all of the exhibits go to the jury room. That includes all of them, the stipulation and everything else.

Mr. LANNIN. Your honor, I don't want to take any time, but I might say the only experience I had on the subject was where we had a vast number of food exhibits introduced last winter before Judge Paris in St. Louis; in that case he permitted the jurors to eat the exhibits in the court room.

The COURT. I should have done that.

Mr. LANNIN. And even served drinks with them—coffee and things of that kind. There was no objection to it. I have never had a case under these circumstances.

The COURT. I think you will see, upon reflection, that the eating of the exhibits in the jury room would be the receiving of evidence out of the jury room.

Mr. LANNIN. I might suggest this—I don't want to get the court in bad—that the marshal tell the jury as to the order of the court.

The COURT. No, we will just follow what seems to be the law in the matter. Is the marshal here? Call him. Have you copies of these special charges requested, Mr. Roudebush?

Mr. ROUDEBUSH. Yes, your honor.

The COURT. I have refused them and have noted upon them some of the reasons I have for refusing them. You may copy them and then hand them to the other side. [At this point a deputy marshal came into the court room.] Mr. Marshal, please get an assistant and carry all of these exhibits on them to the jury room. All of these exhibits go to the jury room, just as they are. (Thereupon the court retired from the bench.)

The special charges requested by counsel for defendant, with the notations made thereon by the court, are here set out, by true copy, as follows:

No. 1.

The court instructs you that if you find from the evidence that purchasers of Eggno in purchasing the same for baking and cooking purposes, do not have in mind the question as to the food value or nutritive value of the product and are not concerned with whether it has or has not any food value or nutritive value or contains any vitamins or food calories, but are concerned solely with the question as to whether it will produce substantially the same effect as eggs for baking and cooking purposes in the way of a binder for food, a settler of food, or to obtain in food the desired form, fluffiness, or texture, or color as the purchaser may desire, and that Eggno will fairly and reasonably, but not necessarily as perfectly as eggs, perform these functions respectively or collectively to the satisfaction of the average purchaser of ordinary intelligence, then you may disregard all testimony as to food value and nutritional value, the presence or absence of calories and vitamins, and you will return a verdict not guilty.

Refused. (Signed) Peck, J.

No. 2.

The court instructs the jury that if you find from all the evidence in this case that there is a well founded difference of opinion, based upon honest convictions, one way or the other, among purchasers and users, of the Eggno involved in this case, as to whether or not the Eggno involved in this case is a substitute for eggs to a fair and reasonable degree for cooking and baking purposes, you will find the defendant not guilty.

And in this connection the court instructs you that you may take into consideration the extent to which such users have used the product for baking and cooking purposes, the length of time they have used the same, and all other circumstances that would enable such purchasers and users to form a fair opinion on the subject.

Refused: The witnesses have given facts as to its use, not their opinions as to its being a substitute. (Signed) Peck, J.

No. 3.

The court instructs the jury that there is no question involved in the case of wholesomeness or healthfulness of the product Eggno, or any of its ingredients, there being no claim that it is poisonous, deleterious or injurious to human health (given), and it being admitted by the Government to be a wholesome article.

Refused—tends to exclude the consideration of nutrition—see label "nutritious." (Signed) Peck, J.

No. 4.

The issue involved in this case is not to be determined by the question as to what persons with lack of familiarity with the product involved herein would understand the label involved in this case to mean, but is to be determined by what idea the label might convey to persons of ordinary intelligence who are conversant with our language.

Refused. (Signed) Peck, J.

No. 5.

I charge you that if you find from the evidence that it is the consensus of opinion of actual purchasers of Eggno, of ordinary intelligence, for ordinary baking and cooking purposes, that the product is a satisfactory substitute for eggs for baking and cooking purposes and will fairly and reasonably take the place of eggs for such purposes, you will find the defendant not guilty.

And in this connection you will not regard purchasers of the product for technical or scientific purposes as purchasers within the meaning of the law in this case.

Refused on same ground as No. 2. (Signed) Peck, J.

No. 6.

I charge you, gentlemen of the jury, that the following statements appearing upon the label on the package in this case, to wit, "Eggno is an article of real merit and is far superior to the usual egg substitute on the market. Eggno contains the constituents that cause fresh eggs to fill such an important place in every kitchen. Eggno is the result of scientific research and is composed of pure materials and is economical," are not statements as to the identity of the article or statements of ingredients of the package, but rather are statements commendatory of the article, and are therefore not within the provision of section 8 of the Food and Drugs Act of January 30, 1906, and you will disregard the same in your deliberation as being withdrawn from your consideration. *United States v. Johnson*, 221 U. S. 488.

Refused. (Signed) Peck, J.

The second sentence quoted is a distinct affirmation of fact concerning the contents.

No. 7.

I charge you, gentlemen of the jury, that there is no legal standard provided by law fixing the degree of efficiency which any given article must contain when sold as a substitute and in this case there is no legal standard provided by law fixing the degree of efficiency which the product known as "Eggno" must possess when sold as a substitute for eggs in baking and cooking, when compared with eggs.

Therefore, if you find from the evidence that the article involved in this case, known as "Eggno," was sold as a substitute for eggs in baking and cooking, and that said "Eggno" did have any fair and reasonable degree of efficiency as such a substitute, or was a substitute to a fair and reasonable degree, for eggs for baking and cooking purposes, you will find the defendant not guilty. And in this connection I charge you further that a product sold as a substitute for eggs for baking and cooking purposes is not required to be 100 per cent as efficient in all or any respects as eggs, but is only required to be fairly and reasonably as efficient as eggs for the purpose mentioned.

Refused. (Signed) Peck, J.

No. 8.

The court instructs the jury that the Eggno involved in this case was not sold as a food for its food value, but that the label fairly construed represents the product to be sold as an accessory in baking and cooking, and in that respect as a substitute for eggs. And in considering whether the product is or is not a substitute for eggs for baking and cooking purposes you are only permitted to take into consideration the purposes for which eggs are used in baking and cooking.

Refused—see label "nutritious." (Signed) Peck, J.

No. 9.

I charge you, gentlemen of the jury, that the basis of the charge in this information is not one of adulteration. The Government undertakes to and must prove beyond a reasonable doubt that the product is so labeled as to deceive the ordinary purchaser of ordinary intelligence purchasing said product for baking and cooking purposes, and if you should find from the evidence herein a reasonable doubt as to whether or not such purchasers in

purchasing the product for cooking and baking purposes were so deceived, then your verdict will be not guilty.

Refused—would require government to establish actual deceit of purchasers. (Signed) Peck, J.

No. 10.

The court instructs the jury that in considering whether the product involved in this case is or is not a substitute for eggs for baking and cooking purposes, the question as to its own food value or the food value (so far as the question of nutrition is concerned) of the finished baked or cooked foods imparted to them by it, is immaterial and you should disregard all testimony relative to the same.

Refused—same ground as No. 8. (Signed) Peck, J.

The jury thereupon retired and after due deliberation returned a verdict of guilty, whereupon the court imposed a fine of \$200 and costs. Thereupon the defendant, by counsel, gave notice of appeal, and on May 10, 1921, the defendant's bill of exceptions was allowed and filed. The case is now pending on appeal in the Circuit Court of Appeals for the Sixth Circuit.

E. D. BALL, *Acting Secretary of Agriculture.*

**9291. Adulteration of tomato catsup. U. S. \* \* \* v. 500 Cases and 25 Barrels of Tomato Catsup. Default decree of condemnation, forfeiture, and destruction.** (F. & D. Nos. 12127, 12128. I. S. Nos. 9501-r, 9502-r. S. No. C-1703.)

On February 2, 1920, the United States attorney for the Eastern District of Louisiana, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 500 cases and 25 barrels of tomato catsup, remaining unsold in the original unbroken packages at New Orleans, La., alleging that the article had been shipped by R. C. Chances Sons, of Mount Holly, N. J., and Philadelphia, Pa., from Mount Holly, N. J., on or about September 20 and November 7, 1919, respectively, and transported from the State of New Jersey into the State of Louisiana, and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Chances Table Talk Tomato Catsup \* \* \* R. C. Chances Sons, Mount Holly, N. J. Philadelphia, Pa."

Adulteration of the article was alleged in the libel for the reason that it consisted wholly or in part of a filthy, decomposed, and putrid vegetable substance.

On or about April 26, 1921, 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.

E. D. BALL, *Acting Secretary of Agriculture.*

**9292. Alleged adulteration and misbranding of macaroni. U. S. \* \* \* v. Albert C. Krumm, Jr. (A. C. Krumm & Son). Demurrer to the information sustained.** (F. & D. No. 12334. I. S. No. 15497-r.)

On February 28, 1920, the United States attorney for the Eastern District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Albert C. Krumm, Jr., trading as A. C. Krumm & Son, Philadelphia, Pa., alleging shipment by said defendant, in violation of the Food and Drugs Act, on or about May 25, 1919, from the State of Pennsylvania into the State of Maryland, of a quantity of an article known as "Krumm's Continental Brand Macaroni," which was alleged to be adulterated and misbranded.

Adulteration of the article was alleged in the information for the reason that a substance, to wit, a product prepared from flour, had been substituted in whole or in part for macaroni, to wit, a product prepared from semolina, which the article purported to be.