

Michael Montagnino and Ignatius Scaduto, trading as Montagnino & Scaduto, New York, N. Y., alleging shipment by said defendants, in violation of the Food and Drugs Act, as amended, on Feb. 1, 1918, from the State of New York into the State of Connecticut, of a quantity of an article, labeled in part "Finest Quality Olive Oil Extra Pure," and "1 Gallon Net," " $\frac{1}{2}$ Gallon Net," and " $\frac{1}{4}$ Gallon Net," which was adulterated and misbranded.

Analysis of samples of the article by the Bureau of Chemistry of this department showed a positive test for corn oil with nitric acid and indicated the presence of over 50 per cent corn oil, and each size can was short volume.

Adulteration of the article was alleged in the information for the reason that a substance, to wit, corn oil, had been mixed and packed therewith so as to lower and reduce and injuriously affect its quality and strength and had been substituted in part for olive oil, which the article purported to be.

Misbranding of the article was alleged for the reason that the statements, to wit, "Finest Quality Olive Oil Extra Pure," "Termini Imerese Sicilia-Italia," "Guaranteed Absolutely Pure," and "1 Gallon Net," or " $\frac{1}{2}$ Gallon Net," or " $\frac{1}{4}$ Gallon Net," borne on the cans containing the article, regarding it and the ingredients and substances contained therein, were false and misleading in that they represented that the article was pure olive oil, that it was a foreign product, to wit, an olive oil produced in Sicily, in the kingdom of Italy, and that each of said cans contained one gallon or one-half gallon, or one-quarter gallon net of the article, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that the article was pure olive oil, that it was a foreign product, to wit, an olive oil produced in Sicily, in the kingdom of Italy, and that each of said cans contained one gallon, or one-half gallon, or one-quarter gallon net of the article, whereas, in truth and in fact, it was not pure olive oil, but was a mixture composed in part of corn oil, and was not a foreign product, to wit, an olive oil produced in Sicily, in the kingdom of Italy, but was a domestic product, to wit, a product produced in the United States of America, and each of said cans did not contain one gallon, or one-half gallon, or one-quarter gallon net of the article, but contained less amounts. Misbranding of the article was alleged for the further reason that it was falsely branded as to the country in which it was manufactured and produced, in that it was a product manufactured and produced in whole or in part in the United States of America and was branded as manufactured and produced in the kingdom of Italy; and for the further reason that it was a mixture composed in part of corn oil prepared in imitation of olive oil, and was offered for sale and sold under the distinctive name of another article, to wit, olive oil, and for the further reason that said statements borne on the cans purported that it was a foreign product, when not so. Misbranding of the article was alleged for the further reason that it was food in package form, and the quantity of the contents was not plainly and conspicuously marked on the outside of the packages.

On January 29, 1919, the defendants entered pleas of guilty to the information, and the court imposed a fine of \$22.50.

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

6893. Misbranding of olive oil. U. S. * * * v. Nicholas Gamanos and George Booskos (Gamanos & Booskos). Tried to the court and a jury. Verdict of guilty as to second count of information, charging misbranding. Fine, \$150. First count of information, charging adulteration, dismissed. (F. & D. No. 9353. I. S. No. 2010-p.)

On March 5, 1919, the United States attorney for the Southern 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 Nicholas Gamanos and George Booskos, co-partners, trading as Gamanos & Booskos, New York, N. Y., alleging shipment by said defendants, in violation of the Food and Drugs Act, on February 11, 1918, from the State of New York into the State of Connecticut, of a quantity of an article, labeled in part "Extra Pure Olive Oil," which was misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed a positive test for corn oil with nitric acid, and an iodine number of 122.5, indicating that the article was practically all corn oil.

Misbranding of the article was alleged in the information for the reason that the statements, to wit, "Extra Pure Olive Oil," "Guaranteed Absolutely Pure," and "Termini Imerese Brand Sicily Italy," borne on the cans containing the article, regarding it and the ingredients and substances contained therein, were false and misleading in that they represented that said article was pure olive oil, and that it was a foreign product, to wit, an olive oil produced in Sicily, in the kingdom of Italy, 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 pure olive oil and was a foreign product, to wit, an olive oil produced in Sicily, in the kingdom of Italy, whereas, in truth and in fact, it was not pure olive oil, but was a mixture composed in part of corn oil, and was not a foreign product, to wit, olive oil produced in Sicily, in the kingdom of Italy, but was a domestic product, to wit, a product produced in the United States of America. Misbranding of the article was alleged for the further reason that it was falsely branded as to the country in which it was manufactured and produced in that it was a product manufactured and produced in whole or in part in the United States of America, and was branded as manufactured and produced in the kingdom of Italy, and for the further reason that it was a mixture composed in part of corn oil prepared in imitation of olive oil, and was offered for sale and sold under the distinctive name of another article, to wit, olive oil; and for the further reason that the statements borne on the cans purported that the article was a foreign product, when not so.

On June 16, 1919, the case having come on to be heard before the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Knox, *D. J.*):

Gentlemen of the jury, I will submit to you in this prosecution the charge the government has made against the partnership of Gamanos & Booskos in the second count of the information which has been filed against them, which charge is that this firm in February of 1918, to wit, on the 11th day of February, shipped in interstate commerce an article of food which was misbranded within the meaning of the Pure Food Law of the United States.

Counsel this morning in summing up to you said that if this shipment had been to Brooklyn there would have been no offence here, but that it being to Connecticut, there is an offence. If the defendant here, the copartnership, has violated good morals, it would violate them none the less if the shipment was to Brooklyn; but the fact is that the United States court has jurisdiction only of cases of this character where interstate commerce is involved; that, under the constitution of the United States, Congress has a right to regulate commerce between the states; so that on a shipment to Brooklyn, that being within the state of New York, the Federal Government must leave the matter to the authorities of the state of New York, it being powerless to act in the case by reason of the sovereignty of the state; but where the shipment crosses a state line, then the government has jurisdiction. I simply mention this to you to make it clear to you as to why there should be a distinction by reason of what the district attorney said to you this morning.

Congress has enacted, in an endeavor to protect the public, the various pure food laws, and it has said that when a man engages in shipping food products or food to be consumed by the general public, those food products must be honestly labeled and branded, because the only thing you and I have to go

by when we enter a store is the brand and the representation that is made to us through the labels upon that which we purchase. That is, if I go into a store and want olive oil for my table, I have a right to secure olive oil and not be misled by getting an inferior product and something that is not olive oil.

Of course, it is pretty obvious to us, from our general knowledge, in a case of this character, that olive oil being a foreign product which has been brought over here from Italy or paid a duty, perhaps, and entering into the trade here, must of necessity be of greater value than is corn oil, of which great quantities may be produced in the United States. Consequently it is said that if anyone misbrands and labels a food product in such a manner as to deceive or calculate to deceive the public as to what that food product actually is, the person or persons doing that thing are guilty of an offense under the law, and upon conviction are subjected to a certain punishment. So consequently the case resolves itself into this, as to whether or not this firm did, on the 21st day of February, ship, as has been charged against them, these articles, to wit, six gallon cans of oil labeled and marked so as to deceive the public. You will look at the can, you will see upon it there that it purports to contain olive oil which has come from Sicily; there is a picture of an olive tree with peasants or natives picking olives; and that it is absolutely pure. And you can say what thought or impression is that going to make upon the mind of the purchaser who wants olive oil and sees it? Is that person going to be deceived as to what is in that can?

It has been testified before you here, and indeed it is not disputed, the actual contents of the can was corn oil which had been flavored with olive oil; that it had present in it more than 50 per cent, indeed, I think perhaps 75 per cent of the contents of the can was corn oil and not olive oil. Standing alone, if you have found those facts which are not disputed to be true, you would be justified in returning a verdict of guilty against the defendant copartnership.

The copartnership, however, defends upon the ground that it is said they pasted upon this can several labels, one of which has been introduced into evidence before you, wherein it indicates that this can did not contain pure olive oil, but that it contained a compound, that is a mixture of olive oil and of some other oil—corn oil; and they seek to escape liability upon the ground that they have done all that is legally required of them to take them outside of the provisions of the law under which this information has been filed against them. And the law with respect to that is: That in the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, then they are not guilty of an offense. But you will recall the testimony here that when the inspector saw these cans in the place of business of the merchant up in Connecticut, there were no tags upon the cans; and consequently the question arises as to whether or not those tags were on the cans at the time they were shipped; and even if you should find that the tags or these labels were upon the cans, were those labels honestly put there so as to inform the purchaser of that can as to the actual contents of the can, or were they put there as a mere subterfuge and a device, so that whoever got them, that they might use that as a stepping stone to safety in case the shipment was discovered. And even if they were put there, was that tag or label of such a character as to plainly indicate to the purchaser, that that can contained a blend? Now those are questions for your determination. It has been suggested to you that that label might easily be rubbed off; consequently in the first place you will determine whether or not it was put there, and if it was put there, was it put there for the purpose of being rubbed off so that the purchaser would never have any idea as to what the true contents of the can were, save as to the lithographed matter contained upon the can, and that is that it shows that this was olive oil or purported to show that the contents of the can was olive oil from Sicily.

You can also consider in the event that you find that the tags were placed upon the can, as to how conspicuous or effective they would have been to serve the purposes of the law; and, in short, whether it was an honest compliance with the law or whether as I have said before it was a mere subterfuge.

The mere fact that one of these partners was down in Camp Gordon does not make it impossible for you to return a verdict of guilty against the partnership here, because during the time he was away from the place of business they are charged with doing business under the name of Gamanos & Booskos. If you find that the firm made the shipment, then it is immaterial

whether either of these gentlemen who are here in court as members of the firm were present at that time or not, because the theory of the law is that this partnership constituted a separate entity differing from either of these parties. And as you men know, in your every day business affairs a partnership does acts every day in which neither of the partners have any actual positive personal knowledge at the time the act was done, and the theory of the law is that this being a separate entity, it can act in and of itself, and that the individuals who go to make up the partnership cannot take advantage of what someone in their employ does, and then come into court and escape liability for what may have been done. That is, if you or I set in motion a chain of circumstances, it is incumbent upon us, in good conscience and good law, that we should know what is being done under our authority; and if we do not do that either through negligence, carelessness or what not, then when the law is violated we should not say we would not be hurt upon the ground that we were not there and had no actual knowledge of what transpired. It would be an easy thing for persons to escape liability on such a pretense as that, if clerks were pursuing a certain line of business and then the proprietor of that business would say, "I was absent when this particular shipment went forth; I am not responsible for that."

It is a simple case in the sense that the amount involved is comparatively little, but nevertheless it is important in that we should have the assurance that so far as the law is concerned, we are going to get that which we think we are getting when we go into a store to purchase it.

Now that is a simple proposition as to whether or not these men have done something or this firm has done something that is calculated to deceive; and to create a misapprehension and misconception in the minds of some one who wants to buy that product. It must be inferred that these men or this copartnership which is manufacturing food products have some idea that somebody is going to buy it, and they are bound to take cognizance of the provisions of the law with respect thereto.

This defendant, the copartnership, is entitled, of course, to the presumption of innocence until the evidence adduced upon the trial convinces you beyond a reasonable doubt that it is not guilty of the offense charged against them. And a reasonable doubt is not a capricious doubt, not a fancied doubt, not a doubt based upon the reluctance upon the part of a jury to perform an unpleasant task, but it is a doubt based upon and growing out of the evidence in the case and such as leaves you short of a moral certainty of the defendant's guilt. If, after an impartial consideration of all the evidence in the case, you do not have an abiding conviction of the defendant's guilt as charged in the information, then you have a reasonable doubt, and it would be your duty to acquit. But if, after such impartial consideration of all the evidence in the case, you do have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more important affairs in your own life, that is, that certainty which would cause you to pursue a certain line of conduct, then you have no reasonable doubt with respect to the defendant's guilt and you should return a verdict of guilty. Gentlemen, you may take the case.

JUROR No. 2. May I ask a question?

THE COURT. Yes.

JUROR No. 2. What is the punishment in case of conviction?

THE COURT. The punishment in the case of conviction of a first offense is a fine.

Mr. WELCH. If your honor please, will you entertain these instructions to charge the jury?

THE COURT. Yes.

Mr. WELCH. I ask your honor to charge the jury first: That a firm or partnership is not a "person" within the meaning of the word as used in the act under which the information is laid.

THE COURT. I decline to so charge.

Mr. WELCH. I ask your honor to charge the jury that the defendant Nicholas Gamanos did not ship or deliver for shipment this particular lot of goods, and that if he did not do it himself in fact and had no knowledge of it and neither instructed, ratified, or stood by and saw any of his agents or employees do it, that it was not his act.

THE COURT. I decline to so charge.

Mr. WELCH. I ask your honor to charge the jury that the law does not require any particular form of label or container.

THE COURT. No; that is entirely a question or a matter of evidence as to the good faith there and whether or not the label is calculated to deceive or not.

Mr. WELCH. I ask your honor to charge the jury that they are only to consider the condition of the container when shipped, and that anything which happens afterwards is of no moment.

THE COURT. They will take into consideration all the evidence in the case and give to it such weight as they think it is fairly entitled to receive.

Mr. WELCH. I ask your honor to charge the jury that under the law it is no offense if the container bears a label which plainly states that it is a corn oil.

THE COURT. I have charged the jury on that point. You may retire, gentlemen.

Mr. WELCH. And I take an exception to your honor's refusal to charge.

The jury thereupon retired, and after due deliberation returned a verdict of guilty as to the charge of misbranding, and the court imposed a fine of \$150. Count one of the information charging adulteration of the article was dismissed.

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

6894. Adulteration and misbranding of olive oil. U. S. * * * v. Vincenzo Licata. Plea of guilty, Fine, \$50. (F. & D. No. 9354. I. S. Nos. 1552-p, 1553-p.)

On January 16, 1919, the United States attorney for the Southern 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 Vincenzo Licata, New York, N. Y.; alleging shipment by said defendant, in violation of the Food and Drugs Act, as amended, on April 23, 1918, from the State of New York into the State of Pennsylvania, of quantities of olive oil, the two brands shipped being labeled differently, which was adulterated and misbranded. The article was labeled in part, "Finest Quality Olive Oil Extra Pure" and "1 Gallon Net," or "Olio Puro D'Oliva" and "Full Gallon."

Examination of samples of the article by the Bureau of Chemistry of this department showed the product to consist essentially of cottonseed oil and to be short volume.

Adulteration of the article was alleged in the information for the reason that a substance, to wit, cottonseed oil, had been mixed and packed therewith so as to lower and reduce and injuriously affect its quality and strength, and had been substituted in part for olive oil, which the article purported to be.

Misbranding of the article was alleged for the reason that the statements, to wit, "Finest Quality Olive Oil Extra Pure," "Termini Imerese Sicilia-Italia," "Guaranteed Absolutely Pure," and "1 Gallon Net," or "Olio Puro D'Oliva Lucca Italy," "Olio Puro D'Oliva Garantito Produzione Propria," and "Net Contents Full Gallon," borne on the cans containing the article, regarding the article and the ingredients and substances contained therein, were false and misleading in that they represented that the article was pure olive oil, that it was a foreign product, to wit, an olive oil produced in Sicily or Lucca, as the case might be, in the kingdom of Italy, and that each of said cans contained one gallon net, or one full gallon, as the case might be, of the article, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that said article was pure olive oil, that it was a foreign product, to wit, an olive oil produced in Sicily or Lucca, in the kingdom of Italy, and that each of said cans contained one gallon net, or one full gallon of the article, whereas, in truth and in fact, it was not pure olive oil, but was a mixture composed in part of cottonseed oil; said article was not a foreign product, to wit, an olive oil produced in Sicily or Lucca, in the kingdom of Italy, but was a domestic product, to wit, a product produced