F. & D. No. 784.
I. S. No. 15550–a.

Issued October 17, 1912.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1692.

(Given pursuant to section 4 of the Food and Drugs Act.)

MISBRANDING OF SO-CALLED IMPERIAL SPRING WATER.

At a stated term of the Circuit Court of the United States for the Southern District of New York, begun and held in the city of New York on the first Monday of March, 1910, the grand jurors of the United States of America in and for said district, acting upon a report by the Secretary of Agriculture, returned an indictment against John Morgan and Alfred Y. Morgan, doing business under the firm name and style of John Morgan, New York, N. Y., alleging shipment by them, in violation of the Food and Drugs Act, on October 21, 1908, from the State of New York into the State of New Jersey, of a quantity of so-called spring water which was misbranded. The product was labeled: "Imperial Spring Water, John Morgan, 343 W. 39th Street, New York."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed the following results: Total solids, 63.6 parts per million; volatile solids, 22.8 parts per million. The inspector's factory report showed that the product was prepared at the factory from Croton water and was not a natural spring water.

On May 23, 1910, the defendants entered their pleas of not guilty, and on June 13, 1910, they demurred and moved to quash the indictment, which demurrer was overruled and motion denied. Thereafter, the case coming on trial before the court and a jury, a verdict of guilty was returned by the jury. Upon the announcement of the verdict defendants moved for a new trial on the ground that the verdict was against the evidence, against the law and upon all the exceptions taken during the trial, and also moved that judgment be arrested. On September 20, 1910, the court granted the motion in arrest of judgment (see 181 Fed. Rep., 587), and the motion for a

new trial was denied on the ground that no conviction could be had under the indictment. The decision of the court follows (Holt, *J.*):

HOLT, J.

These are motions by the defendant for a new trial and in arrest of judgment. The defendants were convicted, under the act of June 30, 1906, commonly called the pure food act, for shipping from New York to New Jersey misbranded bottled water. The bottles were labeled "Imperial Spring Water." They contained water which was originally ordinary Croton water, drawn from a pipe on the defendants' premises in New York City. This water was first passed through a fine sand filter, then through beds of gravel and charcoal, then a small quantity of mineral salts was added, it was charged with carbonic acid gas, and put in thoroughly clean bottles. This water when sold was pure and wholesome. A food and drug inspector, appointed by and acting under the Department of Agriculture, whose office was in New York City, went to a druggist at Newark, New Jersey, and asked for Imperial Spring Water. The druggist had none. The inspector thereupon asked the druggist to order some for him. He did so. In compliance with such order the defendant shipped half a dozen bottles so labeled from New York City to the druggist at Newark, New Jersey. He thereupon sold them to the inspector, who brought them back to New York and reported the case to the district attorney. The defendants were thereupon indicted for such shipment. There was no evidence on the trial that any notice was given to the defendants of the examination of said water by or under the direction of the Bureau of Chemistry in the Department of Agriculture, or that any opportunity was given to them to be heard on the question whether the pure food act had been violated.

The defendants claim, on these motions, first, that the evidence showed that the water sold was spring water, and therefore that the bottles were not misbranded. The proof showed that ordinary Croton water, like the water of any fresh-water lake or river, is partly spring and partly rain and surface water. The water as treated by the defendants was a thoroughly filtered water, with a little mineral salts and carbonic acid gas added, which made it more sparkling, and, to many people, more attractive. It was perhaps as expensive to produce and as pure and wholesome as spring water. But it was not what is commonly understood by the public as spring water—that is, water taken directly from a natural spring. The label therefore was misleading and the bottles misbranded. The object of the pure food act is not only to protect the public from unwholesome food and drink, but to require that any article of food, drink, or medicine sold shall be correctly described by its label.

The defendants also claim that no judgment should be entered in this case because there is no evidence that they ever made any other shipment of such water in interstate commerce, and the evidence shows that the shipment on which the indictment was based was secretly induced by a Government detective in order to create a basis for a criminal charge. There is no evidence that the defendants ever before sold or shipped water outside of New York *York* City. The inspector who ordered the water at Newark had his office in New York. His only apparent object in going to Newark to order this water was to secretly lure the defendants into an act which would enable him to make a criminal charge against them. This was a perfectly wholesome water, and if there was no other justification for the inspector's proceeding than appears in the evidence, I think his course of action was one of unnecessary zeal. If there were no bottles to be found in other States which had been voluntarily shipped there by the defendants, whatever public evil might result

from the sale of such water in New York City might wisely, in my opinion, have been left to be dealt with by the State authorities. The pure food act is a beneficial act; and it will be a matter of regret if the inspectors of the Department of Agriculture arouse hostility to it by excessive zeal to institute trivial prosecutions. But there may have been valid reasons for the course which was taken which did not appear on the trial; and in any event, I am not willing to hold that because some criticism may perhaps be made on the manner in which the proof was obtained, the proof itself was invalid or insufficient.

The important question on these motions is whether it was necessary for the indictment to allege and for the Government to prove that notice was given to the defendants by the agents of the Department of Agriculture of the examination of the samples obtained of the water, and an opportunity given them to be heard on the question whether the law had been violated.

Sections 3, 4, and 5 of the pure food act are as follows:

"SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

"SEC. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

"SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

The claim that the indictment was invalid on its face because it did not allege that notice of the examination and opportunity to be heard was given to

the defendants is, I think, untenable. There is obviously at least one case in which a prosecution is authorized when no preliminary investigation has been had by officers of the Department of Agriculture. The 5th section provides that it shall be the duty of the district attorney to prosecute whenever any State health officer presents satisfactory evidence of any violations of the act. Moreover, the first and second sections, making it a misdemeanor to manufacture in the Territories or District of Columbia, or to ship in interstate commerce, adulterated or misbranded foods or drugs, are general in their terms. The act prohibited constitutes the misdemeanor. There is no direct reference in them to the subsequent sections providing for the notice to the owner of the samples and the opportunity to be heard; and in my opinion the district attorney can institute prosecutions under those sections, upon adequate evidence, without any preliminary investigation or action by the officers of the Department of Agriculture. But under the provisions of section 4 of the act, whenever an investigation is first instituted by the food and drug inspectors or other agents of the Department of Agriculture or of its Bureau of Chemistry, and an examination of specimens of foods or drugs had for the purpose of determining whether they have been adulterated or misbranded, notice of the examination and an opportunity to be heard must have been given to the party from whom the sample was obtained. In my opinion a compliance with this section is a prerequisite to a prosecution in all cases in which the matter is brought before the district attorney for prosecution by the agents of the Department of Agriculture. Proof of such notice and opportunity to be heard before the indictment is therefore material in all such prosecutions; and of course all material facts which are necessary to sustain a conviction must be alleged in the indictment. The result is that although an indictment under the pure food act is not demurrable because it contains no allegation of such notice and opportunity to be heard, since such prosecutions can be maintained by the district attorney without the intervention of the officers of the Department of Agriculture, such allegations and proof are necessary in all cases where the prosecution is instigated by such officers; and if it appears by evidence on the trial that the case is such, no conviction can be had in the absence of such allegation and proof. In this case, the investigation and prosecution were due to such officers. I think therefore that the indictment should have alleged and the evidence for the Government established that such notice and opportunity to be heard were given to the defendants and that, in the absence of such allegation and proof, the motion in arrest of judgment should be granted. The motion for a new trial should be either withdrawn or denied. If granted a new trial would result in nothing, because, in my opinion, the indictment is fatally defective.

On October 18, 1910, leave having been obtained, the United States Attorney sued out a writ of error on appeal to the Supreme Court of the United States from the action of the lower court upon the following assignments of error: (1) That said court erred in granting said motion in arrest of judgment. (2) That said court erred in adjudging that the said indictment was insufficient upon any construction of the Food and Drugs Act of June 30, 1906. (3) That said court erred in its construction of the Food and Drugs Act of June 30, 1906. (4) That said court erred in its decision arresting a judgment of conviction herein on the ground that the indictment herein was insufficient and basing its decision upon a construc-

tion of the Food and Drugs Act of June 30, 1906, upon which said indictment was founded.

On December 11, 1911, the Supreme Court reversed the action of the lower court arresting judgment and remanded the case to the lower court for sentence and judgment. (See 222 U. S., 274.) The decision of the Supreme Court of the United States follows:

The defendants maintained an establishment in New York where, after filtering Croton water drawn from the city pipes, adding mineral salts and charging it with carbonic acid, the water was bottled and sold as "Imperial Spring Water." In October, 1908, a food and drug inspector applied to a druggist in Newark, New Jersey, for several bottles of this water. The druggist, not having them in stock, ordered them from the defendants, who shipped them from New York to the druggist in Newark. He delivered them to the inspector, who paid therefor.

The judge, in his opinion, treats the prosecution as having been instituted by the inspector, though this does not affirmatively appear in the record, and the defendants were not indicted until April, 1910, when they were found guilty of shipping misbranded goods in interstate commerce. They moved in arrest of judgment on the ground that it was not alleged that they had been given notice and a preliminary hearing by the Department of Agriculture, contending this was a condition precedent to the return of a valid indictment. The judge held that such hearing must be granted in all cases where the prosecution was instituted by the Department of Agriculture or its agent (181 Fed. 587), and from a later order sustaining the motion in arrest the Government brought the case here under the Criminal Appeals Act.

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the Court.

The Federal courts have not agreed as to the effect of the provision for notice and hearing found in section 4 of the Pure Food and Drug Act of June 30, 1906 (34 Stat. L. 768), C. 3915. *U. S.* v. *Barrels Olives*, 179 Fed. 983. *U. S.* v. *Cases of Grape Juice*, 189 Fed. 331. Whether it confers a right upon the defendant, or results in imposing a duty upon the district attorney, can be determined by a brief examination of a few of the provisions of the act.

Under the Pure Food Law not only a manufacturer, but any dealer, shipping adulterated or misbranded goods in interstate commerce is guilty of a misdemeanor. In aid of enforcement of the statute it is made the duty of the Department of Agriculture to collect specimens of such articles so shipped, and the Bureau of Chemistry is required to analyze them. But, even if the specimen, on analysis, is found to be adulterated, there is no requirement that the case should be turned over at once to the district attorney, for the reason that the "party from whom the sample was obtained" might be a dealer holding a guaranty from his vendor that the articles were not adulterated. In such case the dealer is not liable to prosecution, but the guarantor (§ 9) is made "amenable to the prosecutions, fines, and other penalties."

The act, therefore, declares (§ 4) that when, on such examination by the Board of Chemistry, the article is found to be adulterated, "notice shall be given to the party from whom the sample was obtained. Any party so notified shall be given an opportunity to be heard." If it then appears that he has violated the statute, the Secretary of Agriculture is required to certify that fact, together with a copy of the analysis, to the proper district attorney, who

(§5), *without delay*, must "institute appropriate proceedings," by indictment, or libel for condemnation, or both, as the facts may warrant.

But the act also contemplates (§ 5), that complaints may be made to the district attorney by State health officials. In that class of cases, no doubt because the State agents investigate without giving a hearing, the district attorney is not obliged to prosecute unless such State officers "shall present satisfactory evidence of such violation." But the very fact that he must do so in that event recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard.

In providing for notice in one case, and permitting prosecutions without it in another, the statute clearly shows that there was no intent to make notice jurisdictional. This view is strengthened by the fact that it contains no reference to giving notice to anyone except "to the party from whom the sample was obtained." And if, on the hearing given him, it appears that he is a dealer holding a guaranty, the act in providing for proceedings against such guarantor contains no suggestion that a new notice shall be given him before an indictment can be submitted to the grand jury.

In cases like the present, or where foreign goods are labelled as of domestic manufacture and vice versa, no scientific examination may be necessary. But usually a chemical analysis will be required to determine whether an article is adulterated. The Bureau of Chemistry is equipped to do that work, so that in practice most prosecutions will be based on reports made by the Department of Agriculture after notice. But the hearing is not judicial. There is no provision for compelling the presence of the party from whom the sample was received; if he voluntarily attends he is not in jeopardy; an adverse finding is not binding against him; and a decision in his favor is not an acquittal which prevents a subsequent hearing before the Department, or a trial in court.

The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the Department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case, does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the executive department failed to report violations of this law its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." Rev. Stats., §§ 771, 1022. So, an improper finding by the Department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

Repeals by implication are not favored, and there is certainly no presumption that a law passed in the interest of the public health was to hamper district attorneys, curtail the powers of grand juries or make them, with evidence in hand, halt in their investigation and await the action of the Department. To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.

It was argued that the privilege of a preliminary hearing was granted so as to prevent malicious prosecutions. But, had such been its intention, the statute

would have required that a hearing should be given to all persons charged with a violation of the act, and not merely to those from whom the sample was received. A further answer is, that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an Information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors—the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the Government or prompted by private malice. There is nothing in the nature of the offense under the Pure Food Law, or in the language of the statute, which indicates that Congress intended to grant violators of this act a conditional immunity from prosecution, or to confer upon them a privilege not given every other person charged with a crime. The judgment is

Reversed.

Upon receipt of the mandate from the Supreme Court, order was entered in the United States District Court for the Southern District of New York making that mandate the judgment of said district court, and on February 26, 1912, the court sentenced the defendants to pay a fine of $50.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *June 22, 1912.*

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