

3909. Adulteration and misbranding of butter. U. S. v. Albert F. Lopez. Pleas of guilty. Fine, \$50. (F. & D. Nos. 4944, 5139. I. S. Nos. 21502-d, 2303-e.)

At the April, 1914, term of the District Court of the United States of America for the Southern District of New York, the jurors of the United States within and for said district, acting upon a report by the Secretary of Agriculture, upon presentment by the United States attorney for said district, returned two indictments against Albert F. Lopez, New York, N. Y., charging shipment by said defendant, in violation of the Food and Drugs Act, on April 27, 1912, from the State of New York into the State of South Carolina, and on July 16, 1912, from the State of New York into the State of Florida, of quantities of butter which was adulterated and misbranded. The first shipment was labeled: "V. Lopez & Co. New York, U. S. A. Packers of the celebrated Blue Ribbon Brand Butter Guaranteed Absolutely Pure." The second shipment was labeled: "Crescent Brand Butter Guaranteed Absolutely Pure Packed especially for Family use. V. Lopez & Co. New York, U. S. A. (Picture of cow and crescent)."

Analysis of a sample of the first shipment of the product by the Bureau of Chemistry of this department showed the following results: Water, 23.85 per cent; fat (by difference), 72.10 per cent; casein, etc., (by ignition), 1.38 per cent; ash, 2.67 per cent. Analysis of a sample of the product from the second shipment by said bureau showed the following results: Water, 19.20 per cent; fat (indirect), 74.10 per cent; casein, 2.10 per cent; ash, 4.60 per cent; total, 100.00 per cent; total solids, 80.80 per cent; sodium chlorid, 4.38 per cent. On the fat: Reichert-Meissl number, 26.10; iodine number, 40.12; refraction at 25° C., 1.4597; spoon test—fairly quiet, sputters a little.

Adulteration of the product in both shipments was charged in the indictments for the reason that a substance, to wit, water, had been mixed and packed with the article in such quantity as to reduce and lower and injuriously affect its quality and strength; further, for the reason that a substance, to wit, water in an excessive amount, had been substituted in part for the article, to wit, butter, and, further, for the reason that a valuable constituent of the article, to wit, butter fat, had been in part abstracted. Misbranding of the product in the first shipment was charged in one of the indictments for the reason that the statement "Butter Guaranteed Absolutely Pure," appearing on the label aforesaid regarding said article and the ingredients and substances contained therein, indicated that the article was pure butter conforming to the legal standard for pure butter, whereas, in truth and in fact, said article was not pure butter conforming to the legal standard for pure butter, but was an adulterated butter containing an excessive amount of water; and, further, for the reason that the article was labeled and branded so as to deceive and mislead the purchaser, being labeled "Butter Guaranteed Absolutely Pure", thereby indicating that the article aforesaid was pure butter, whereas, in truth and in fact, it was not pure butter, but was an adulterated butter. Misbranding of the article in the other consignment was charged in the second indictment for the reason that the statement "Butter * * * Guaranteed absolutely pure", appearing on the label aforesaid regarding the article and the ingredients and substances contained therein, was false and misleading in that it indicated that the article was pure butter conforming to the legal standard for pure butter, whereas, in truth and in fact, the article aforesaid was not pure butter conforming to the legal standard for pure butter, but was an adulterated butter containing an excessive amount of water; further, for the reason that the article was labeled and branded so as to deceive and mislead the purchaser, being labeled "Butter * * * Guaranteed absolutely pure", thereby indicating that the article aforesaid was pure butter, whereas, in truth and in fact, it was not pure butter, but was an adulterated butter containing an excessive amount of water.

It was further charged in the indictments that on October 20, 1911, a criminal information was filed in the United States District Court for the Southern District of New

York, charging Aimee Lopez and Albert F. Lopez with a violation of the Food and Drugs Act, and that on February 26, 1912, the said defendants pleaded guilty to said criminal information and were sentenced to pay a fine of \$10; further, that on January 22, 1912, a criminal information was filed in said United States District Court, charging said defendants with a violation of the Food and Drugs Act, and that on February 26, 1912, said defendants pleaded guilty to said criminal information, and were sentenced to pay a fine of \$10.

On May 14, 1914, the defendant entered pleas of not guilty to the indictments. On July 29, 1914, the cases having come on for hearing upon motions by defendant to quash the count of each of the indictments setting forth the allegations relative to prior convictions under the Food and Drugs Act, said motions were denied, as will more fully appear from the following memorandum decision by the court (Grubb, *J.*):

A motion has been made by the defendant to quash the fifth count of two indictments returned against him for violations of the Food and Drugs Act of June 30, 1906, on the grounds that the said fifth count of each indictment improperly and illegally contains allegations as to prior convictions under the Food and Drugs Act. It seems to be the proper practice to set forth in an indictment the allegations as to prior convictions of another offense. In the case of *Graham v. the State of West Virginia*, 224 U. S. 616, the court says on page 625:

"While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination. Provision for a separate, and subsequent, determination of his identity with the former convict has not been regarded as a deprivation of any fundamental right. It was established by statute in England that, although the fact was alleged in the indictment, the evidence of the former conviction should not be given to the jury until they had found their verdict on the charge of crime."

It may well be that this defendant would have the right to have the issue of his prior conviction tried by a separate jury, but that is a matter for the determination of the trial judge. In view of the decision of the Supreme Court in the *Graham* case, however, it would seem that the allegation as to a prior conviction was properly set forth in the indictment and, therefore, the motion to quash the fifth count of each indictment is denied.

On February 18, 1915, the defendant entered pleas of guilty to the two indictments, and the court imposed a fine of \$25 on each indictment, making an aggregate fine of \$50.

D. F. HOUSTON, *Secretary of Agriculture.*

WASHINGTON, D. C., *June 8, 1915.*