

that the product should be destroyed by the United States marshal, or if said property could be disposed of for fertilizer or other similar or manufacturing purposes, other than for human or animal consumption, that such disposition of it might be made.

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

**7016. Adulteration and misbranding of olive oil. U. S. \* \* \* v. Nicholas S. Monahos. Tried to the court and a jury. Verdict of guilty. Fine, \$200 and costs. (F. & D. No. 9583. I. S. No. 13718-r.)**

On April 29, 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 S. Monahos, New York, N. Y., alleging shipment by said defendant, in violation of the Food and Drugs Act, on April 23, 1918, from the State of New York into the State of Connecticut, of a quantity of an article, labeled "Olio Sopraffino Qualita Superiore Olio Finissimo Olive Oil Tripolitania Brand," which was adulterated and misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed it to be cottonseed oil.

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, "Olio Sopraffino Qualita Superiore," and "Olio Finissimo Olive Oil," together with the designs and devices of the Italian coat of arms, Italian flags, and crowns, 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 olive oil, that it was a foreign product, to wit, an olive oil produced 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 olive oil, and that it was a foreign product, to wit, an olive oil produced in the kingdom of Italy, whereas, in truth and in fact, it was not olive oil, but was a mixture composed in part of cottonseed oil, and was not a foreign product, to wit, an olive oil produced in the kingdom of Italy, but was a domestic product, to wit, a product produced in the United States of America, and for the further reason that it was a mixture composed in part of cottonseed oil prepared in imitation of olive oil, and was sold under the distinctive name of another article, to wit, olive oil, and for the further reason that by the statements on the label it purported to be a foreign product, when not so.

On July 24, 1919, the case having come on to be tried by 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 (Smith, *D. J.*) :

Gentlemen of the jury: There are two counts and certain charges in the indictment against the defendant, one of which is being tried. The first count charges him with shipping or causing to be shipped, a number of cans of a food article which is alleged to have been adulterated, and the second count charges him with shipping or causing to be shipped from one State to another, an article of food in cans that were misbranded.

The first count charges that on the 23rd day of April, 1918, he shipped and caused to be shipped from the city of New York, in the State of New York, to the city of New Haven, in the State of Connecticut, a number of cans containing an article of food, to Domenico Sylvestro, and the charge in this count sets out the words and figures with which these cans were branded or marked, and which is in evidence before you.

It is charged in the first count, gentlemen, that the contents of these cans were shipped as pure olive oil, and that they were adulterated by reason of the fact that they contained cottonseed oil mainly, and that only part of the contents of the can was composed of olive oil.

In other words, it was a compound or mixture of olive oil and cottonseed oil.

Now the statute provides that an article of food is adulterated if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, or if any substance has been substituted wholly or in part for the article.

If you find from the evidence, gentlemen, that this was shipped as olive oil, and you find that it was made up mainly of cottonseed oil as well as olive oil, the defendant would be guilty of shipping adulterated food, and it would be your duty to find him guilty on the first count.

The second count charges this shipment of cans to have been misbranded. The misbranding charged is that it was branded as olive oil, whereas in fact it was made up largely of cottonseed oil as well, and also that by certain devices on the can, and the wording of the label, taken together, it was misleading, in that it created the impression that it was an imported article from Italy, whereas as a matter of fact it was a domestic product, manufactured in this country, made up of cottonseed oil and olive oil.

Now, gentlemen, if you believe that the defendant shipped or caused to be shipped these cans, or any one of them, and that they were branded, "Olive Oil," and if you find that they were made up of olive oil and cottonseed oil, the defendant would be guilty of shipping misbranded articles of food, and you would find him guilty; or, if you find that the label represented that this was a foreign product, manufactured in and imported from Italy, you will find the defendant guilty because he would in that case be guilty of a misbranding.

On the other hand, gentlemen, if you believe from the evidence before you that the label on the can stated that it was a compound of these two ingredients, olive oil and cottonseed oil, the representation that it was something else than what it was, would not be proven.

In that case you would find the defendant not guilty, unless you believe that it contained a representation that it was an imported article. In that case it would be your duty to find the defendant guilty.

Now, gentlemen, as to the defendant in this case, as to his connection with these transactions, the law is that not only the person who directly commits an act constituting an offense is guilty, but those who aid, abet, counsel, induce, or procure another to commit an offense, are also guilty as if they themselves committed it. If the defendant was the proprietor of the business, engaged in the shipping of these articles, and he was at any time engaged in the business of shipping adulterated or misbranded articles of food, if you should find that from the facts and circumstances before you, and that his employees were specially or generally authorized to do that sort of thing, and in pursuance of that authority that some of his employees, instead of himself, made the shipment here in question, it would be the same as if the defendant himself did it; if it was done under his direction, of course it would be the same as if he did it himself.

Now, gentlemen of the jury, you have heard all the testimony in the case, and I hope I have made the law sufficiently clear to enable you to understand the issues involved in both counts of the indictment. It is for you to say what the facts are, whether or not the defendant is guilty upon the charges contained in these two counts.

A defendant is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt. If you have a reasonable doubt, as to his guilt, it would be your duty to acquit him.

JUROR No. 7. Your Honor, will you define the word, "shipper," to me? Who is the shipper?

The COURT. A shipper is any person who delivers to a carrier any article to be carried to some consignee and delivered to him, or any person who aids or abets another, or counsels or induces or procures another to do so; he is the shipper.

JUROR No. 7. Then the owner is not the shipper if he directs merchandise to be shipped to a certain point—

The COURT. He is the shipper.

JUROR No. 7. He is the shipper, the owner is the shipper?

The COURT. The owner is the shipper if he participates in it, and the person who actually does it is a shipper. All persons who actually do it, or

all persons who direct it to be done, or aid or abet it to be done, or induce it to be done, or participate in it in any way, are shippers.

I do not believe, gentlemen, that I have called your attention to what constitutes a misbranding; I have overlooked that. An article is misbranded if it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so.

Mr. EILPERIN. May I ask your Honor to charge the jury that no inference of guilt can arise from the omission of the defendant to testify on his own behalf?

The COURT. How is that? I did not get that.

Mr. EILPERIN. I say, that the failure or omission of the defendant to give testimony on his own behalf, ought not to militate against him or to justify an inference of guilt.

The COURT. The law is, gentlemen, that a defendant in a criminal case may or may not take the stand as a witness; as he chooses.

Mr. EILPERIN. And that his plea of not guilty is a denial of the matters——

The COURT. Just a moment, sir, until I get through with the charge that you requested.

Mr. EILPERIN. I beg your pardon.

The COURT. It is optional with him as to whether or not he will take the stand and testify as a witness. In this case the defendant has not elected to testify; but that fact, gentlemen, should create no presumption against him, and create no prejudice in your minds against him.

Mr. EILPERIN. That the defendant in law is presumed to be of good character, and that in and of itself is sufficient to create a reasonable doubt.

The COURT. Refused.

Mr. EILPERIN. Exception. That if the jury believe that Sylvestro testified falsely in any particular, they are at liberty to disregard his whole testimony.

The COURT. Refused.

Mr. EILPERIN. Exception. That if the jury believe that the defendant shipped cans of oil with the mark or inscription or label of cottonseed oil or compound, that in that circumstance they must return a verdict of not guilty.

The COURT. The jury has been already so instructed.

Mr. EILPERIN. I except to your Honor's refusal to charge as requested. I ask your Honor to charge that there is testimony in this case that the defendant did make such a shipment with such an inscription or label, to wit: Compound Cottonseed Oil, and that because of that the jury are required to find the defendant not guilty.

The COURT. Refused.

Mr. EILPERIN. Exception. I ask your Honor to charge that the denial of the motions heretofore made by counsel, and the refusal of the Court to charge as requested, do not create an inference of guilt on the part of the defendant, nor an intimation that the Court believes the defendant guilty of the crime charged.

The COURT. Refused. Exception noted.

Mr. EILPERIN. Exception. That if in considering the testimony in this case the jury get to the point where there is a doubt as to whether the defendant did or did not do it, in that circumstance they must acquit him.

The COURT. The jury has been already so instructed.

Mr. EILPERIN. I except to your Honor's refusal to charge. I ask your Honor to charge that in considering the guilt or innocence of the defendant, it must be done in the light of this presumption, and in the light of the presumption of good character and innocence.

The COURT. Refused.

Mr. EILPERIN. Exception.

Mr. TAYLOR. If the Court please, I would like the Court to instruct the jury that as far as the issues in this case are concerned, it is immaterial whether the dealer, Sylvestro, knew what he was buying or not.

The COURT. Gentlemen of the jury, it is not material in this case as to whether or not the purchaser, Sylvestro, was misled or deceived in this transaction. It has nothing whatever to do with the case. The question is, did the defendant ship, from one State to another, adulterated food, or did he ship such food misbranded, under the instructions I have already given you.

The jury thereupon retired, and after due deliberation returned into court with a verdict of guilty, and the court imposed a fine of \$200 and costs.

E. D. BALL,

*Acting Secretary of Agriculture.*