

& Feed Co., Nashville, Tenn., alleging shipment by said defendants, in violation of the food and drugs act, on or about November 21, 1919, from the State of Tennessee into the State of North Carolina, of a quantity of mixed feed which was misbranded. The article was labeled in part: "100 Lbs. No. 1 Mixed Feed Manufactured by Nashville Grain And Feed Co., Nashville, Tenn. Protein 18.00 Fat 4.00."

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it contained 15.9 per cent of protein and 3.4 per cent of fat.

Misbranding of the article was alleged in the information for the reason that the statements, to wit, "Protein 18.00, Fat 4.00," borne on the tags attached to the sacks containing the article, were false and misleading, in that the said statements represented that the article contained not less than 18 per cent of protein and not less than 4 per cent of fat, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it contained not less than 18 per cent of protein and not less than 4 per cent of fat, whereas, in truth and in fact, it did contain less than 18 per cent of protein and less than 4 per cent of fat.

On April 17, 1924, the defendants entered pleas of guilty to the information, and the court imposed a fine of \$100.

R. W. DUNLAP, *Acting Secretary of Agriculture.*

13092. Alleged adulteration and misbranding of olive oil. U. S. v. Demetrius Marmarelli, Nicholas Katramados, and Peter Marmarelli (Marmarelli Bros. & Katramados). Information abated by death as to Peter Marmarelli. Tried to the court and a jury. Misbranding charge dismissed by court. Verdict of not guilty on adulteration charge. (F. & D. No. 18469. I. S. No. 10601-v.)

On May 5, 1924, 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 Demetrius Marmarelli, Nicholas Katramados, and Peter Marmarelli, copartners, trading as Marmarelli Bros. & Katramados, New York, N. Y., alleging shipment by said defendants, in violation of the food and drugs act, on or about September 12, 1922, from the State of New York into the State of Massachusetts, of a quantity of olive oil which was alleged to be adulterated and misbranded. The article was labeled in part: (Tag) "Marmarelli Bros. & Katramados" (design showing two barrels with statement "M B & K Pure Olive Oil" on heads) "New York."

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it was olive oil mixed with approximately 40 per cent of cottonseed oil.

It was alleged in the information that the article was adulterated, in that a substance, 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 for olive oil, which the article purported to be.

It was further alleged that the article was misbranded, in that the statement, to wit, "Pure Olive Oil," borne on the tag attached to the barrel containing the article, was false and misleading, in that the said statement represented that the article consisted wholly of pure olive oil, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it consisted wholly of pure olive oil, whereas it did not so consist but did consist in part of cottonseed oil. Misbranding was alleged for the further reason that the article was an imitation of and offered for sale under the distinctive name of another article.

On June 13, 1924, the information having been abated by death as to Peter Marmarelli, the case against the remaining defendants came on for trial before the court and a jury. On motion of counsel for the defense, the second count of the information, involving the alleged misbranding of the product, was ordered dismissed by the court. After the submission of evidence and arguments by counsel, the court delivered the following charge to the jury (Clayton, D. J.):

"Gentlemen of the Jury: I call your attention to elementary and familiar rules, which will govern you in your consideration of this case.

"Every man is presumed when charged with a crime to be innocent, and that presumption of innocence goes with him and protects him until, or unless, it is overcome by evidence which convinces the jury beyond a reasonable doubt—

that is, to a moral certainty—that he is guilty as charged. Then the presumption no longer protects him, because that presumption is overcome by proof that convinces a jury to a moral certainty that he is guilty.

“Now, it is for you to judge of the evidence in this case, and, in the light of that presumption, has the evidence satisfied you beyond a reasonable doubt that the defendants are guilty as charged—satisfied you to a moral certainty that they are guilty as charged in the first count of this information.

“Now, you want to know what is the duty of the Government. It is the duty of the Government to prove the charge made against the defendants and to prove it beyond a reasonable doubt, for otherwise they are entitled to an acquittal. They are not required to prove their innocence, but the Government must establish by the evidence, beyond a reasonable doubt, their guilt, or else they are entitled to an acquittal.

“Now, you want to know, perhaps, what a reasonable doubt is. Well, a reasonable doubt is what the words imply—that is, a doubt for which you can give a reason, a substantial doubt, a doubt that grows up out of the evidence, or a doubt that arises from a lack of evidence sufficient to convince your minds that the fact has been established as charged. It is not a mere flimsy maybe or perhaps. It is not such a doubt that you might conjure up in any case, but it means a substantial, reasonable doubt.

“Now, if it is probable that the defendants are not guilty, that would be a reasonable doubt; and if it is probable that they are innocent, that would be a reasonable doubt.

“There is a reasonable doubt which compels an acquittal in every case, unless the evidence is so strong and cogent as to convince the jury that to a moral certainty the defendants are guilty.

“In short, gentlemen of the jury, as sensible men I think you will understand that a reasonable doubt is a reasonable doubt. I can not make it, I think, any plainer to you.

“Now, the defendants had a right to testify for themselves, and the law will not permit a man to testify and then say in the next breath that his testimony is not to be believed, because that would be a vain and a foolish thing to say—that a man may testify and yet you must disregard his testimony.

“You take the testimony of the defendants in this case and consider it like you do the other evidence in the case, and along with the other evidence, and in the light of all the evidence, and in the light of the fact that they are interested in your verdict in this case.

“Of course, every defendant—when people make statements to us that they are interested in a personal way or in a financial way, why, ordinarily we weigh that more carefully, what they say, than if we knew they were not interested in what they were saying, not interested in our judgment or our conclusion as to the truth of what they say.

“You take the same common-sense rule that you practice every day in your practical affairs of life with you into the jury box, and that is why you are put there, because you are possessed supposedly of a large amount of experience and common sense and common knowledge, and that is the reason why jurors are selected, because they have common knowledge, common sense, and common experience, and that is what qualifies you as jurors, together with your good character and standing and your desire to do the right thing as good citizens in the jury box and out of the jury box.

“Now, coming, gentlemen, to this case, I have dismissed from the case count 2 of the indictment. Of course, you very readily understand why I did it. There the charge was a misbranding of this barrel of oil. There was no evidence, in my opinion, that the barrel itself was misbranded. The proof showed that the shipping tag which was in evidence was attached to it, and that it had on it the words ‘Marmarelli Brothers and Katramados, importers of olive oil, black olives, cheese, figs, and all groceries.’”

Mr. WOLFF: “That is ‘Marmarelli Brothers and Katramados, pure olive oil’ on the head, and a quite small figure on the barrel, [and] ‘Marmarelli Brothers and Katramados, pure olive oil’ on a small slip, a small head of another barrel. In the middle of the picture on the back, and under [were] those words ‘Italian, Greek, and Oriental products, 63 Thompson Street, New York.’”

The COURT: “Evidently it was an ordinary shipping tag, with an eyelet of about one inch to it, and that was a product made by hand, or, as in this case, it can be attached to the articles shipped by putting a tack in each corner, as the proof in this case showed, and as the original tag showed, and it was tacked with four tacks to the barrel.”

"Now, that was not a misbranding in the eyes of the law, and therefore this second count charging the misbranding of it, which is wrong and which is a violation of the law, to misbrand an article and to ship it in interstate commerce, that is a violation of the law, and I did not think that that charge was sustained by the evidence.

"Now, there is evidence, in my opinion, in the case which authorized me to submit to you the first count of this information.

"This count, of course, will be before you, and you will read it for yourselves, 'which said article,' it goes on to say, 'article of food especially as aforesaid was then and there adulterated, in that a substance, to wit, cottonseed oil, had been mixed and packed with the article so as to lower and reduce its quality and strength, and the said article was further adulterated in that a substance, to wit, cottonseed oil, had been substituted for olive oil, which action purported to be against the peace of the United States and their dignity and contrary to the form of the statute,' and so forth.

"So you see that charges the defendants with having shipped in interstate commerce an adulterated article.

"Now, of course, at once you see that there are involved in this charge several elements. First, the element of adulteration of the article shipped. Now, that is for you to determine. Was this barrel of so-called olive oil adulterated by the addition of cottonseed oil?

"Now, it may be that cottonseed oil, and I think it is, is just as wholesome as olive oil, but it is, nevertheless, a violation of the law to mix cottonseed oil with olive oil, when the stuff shipped purports to be pure olive oil.

"The law is designed to protect the public against that sort of fraud, and it is a fraud to mix cottonseed oil with olive oil and to ship it as pure olive oil.

"Now, this barrel of so-called olive oil with the bill of lading, and which they shipped out according to the evidence in this case shows they shipped it and sold it as pure olive oil, was it adulterated with the addition of, say, 40 per cent of oil or any other material amount of cottonseed oil, by putting that, by mixing it with the olive oil in the barrel?

"Even if that be so, these defendants can not be convicted unless they had to do with the mixing of the cottonseed oil with the olive oil, or they knew or had good reason to believe that it had cottonseed oil in it, and with that guilty knowledge that they shipped it and sold it as pure olive oil.

"So you see that it is essential, before you can convict the defendants in this case, for you to find beyond a reasonable doubt that the oil was adulterated by the addition of cottonseed oil as charged, and then you must go further and find beyond a reasonable doubt that the defendants did the adulterating or knew that it was adulterated when they sold it and shipped it as pure olive oil.

"Now, if the evidence falls short of either one of these things, of convincing you of either one of these facts beyond a reasonable doubt, why, the defendants are entitled to an acquittal.

"Now, as to the adulteration of this oil, I express the opinion, which is not binding upon you, that the oil was adulterated by the addition to the olive oil in the barrel of cottonseed oil.

"I think these Government experts and others, the expert from Massachusetts, I think their evidence is sufficient to warrant the conclusion that it was adulterated, but if that be proven beyond a reasonable doubt it is not sufficient to convict these defendants unless the evidence is clear and shows, as I have attempted to say, that they either adulterated it themselves or knew it was adulterated or had good reason to believe it was adulterated when they sold it and shipped it in interstate commerce.

"If the oil was adulterated after it passed out of their possession, after it had been received up in Massachusetts, they could not be convicted; or if when they shipped it they had no guilty knowledge, and if there is nothing to charge them with the knowledge or belief that it was adulterated, they could not be convicted.

"The evidence must be convincing to a moral certainty on those propositions or they can not be convicted, although you may find that the oil was adulterated at some time, somewhere.

"Now, if you believe from all the evidence in this case beyond a reasonable doubt that these defendants are guilty as charged in the first count of this indictment, a part of which I read to you, and you will read it entirely, why, you will find the defendants guilty under that first count, but if, however, under the rules that I have given you and in the light of this evidence all

fairly considered, you are not convinced beyond a reasonable doubt or to a moral certainty that their guilt has been shown, to wit, that the article was adulterated with cottonseed, and that they either did it themselves or knew it was done when they shipped it, and that it was not done by somebody else after it got to Massachusetts, and that they knew that, or had reason to know it, that it was adulterated, if they had all that guilty knowledge why, then they could be convicted, but unless they did have that guilty knowledge they can not be convicted.

"No man can be convicted of a crime unless he knowingly—as a rule—unless he knowingly and intentionally violated the law. There must be the criminal intent. There must be the guilty knowledge somewhere in most crimes, and I think in a case like this there must be the guilty knowledge, the criminal intent, shown.

"Now, the evidence, if it falls short of convincing you of that to a moral certainty, they are entitled to an acquittal. But if, on the other hand, after thoroughly considering all the evidence and in the light of all the facts and circumstances, you are convinced that they shipped adulterated oil, knowingly and intentionally shipped the oil as pure olive oil, adulterated with cottonseed oil, if the evidence convinces you of that to a moral certainty, then you should convict them, but if there is a reasonable doubt on that proposition, they should be acquitted.

"Now, do you want all these charges that you wrote?"

Mr. ROMANO: "I think Your Honor has covered most of them, and I shall withdraw them."

The COURT: "What?"

Mr. ROMANO: "I withdraw them. I think Your Honor has covered most of the charges."

Mr. WOLFF: "I will ask Your Honor to change a portion of your charge in a small respect."

The COURT: "Yes."

Mr. WOLFF: "The statute in this case nowhere requires——"

The COURT: "Let me see the statute. What is it? Let me see it. Go ahead. I do not mean to interrupt you."

Mr. WOLFF: "The statute in this case nowhere requires that the crime shall have been committed willfully or knowingly. By that meaning to infer that the mere fact that a person transports in interstate commerce adulterated food—the crime has been committed because it is his duty to protect the public and to examine whether or not that food has been adulterated, and I will stand responsible and ask Your Honor to charge to that effect."

The COURT: "I do not think there is any difference—any substantial difference—and yet there may be, in my view of the law from yours.

"What I meant to say, gentlemen of the jury, and I now tell you as being a part of the law that I gave you in the consideration of this case, is that the general law—under all general law these men, before they can be convicted, must first have shipped in interstate commerce an adulterated article as charged in the indictment.

"Now, that must be first shown, and then I think the law requires that they must have known that it was adulterated or they must have had reason to believe that it was adulterated.

"I do not think that the law contemplates that a man was violating the law when he had no intention whatever to violate the law. That would be a very hard law, and I do not altogether agree with that view. I think there must be an intention to violate the law somewhere."

Mr. WOLFF: "That is exactly where the decisions disagreed. That was my opinion until about a week ago; but the mere effect of my request to change was this, that this law confers upon the dealer a duty to investigate, to learn the substance and quality of what he ships."

The COURT: "And to know that it is absolutely pure when he shipped it."

Mr. WOLFF: "Yes, sir; that is the purport."

The COURT: "I think, if the jury has any reasonable doubt on that proposition, I will put it that way, a reasonable doubt on that proposition, that they could give the defendants the benefit of it, but I am not going to say any more than that. I am not going to say any more to them. I think you can take this case and return your verdict, gentlemen."

The jury then retired and after due deliberation returned a verdict of not guilty as to the remaining count of the information, involving the alleged adulteration of the product.

R. W. DUNLAP, *Acting Secretary of Agriculture.*