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United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 271, FOOD AND DRUGS ACT.

MISBRANDING OF CANE AND MAPLE SYRUP.

On or about October 3, 1907, John A. Tolman & Company of Chicago, Ill., shipped from the State of Illinois to the State of Iowa a consignment of a food product labeled: "Topmost Cane and Maple Syrup. This syrup is composed of the following ingredients and none other. Cane Syrup 60%, Maple Syrup 40%. John A. Tolman & Company, Chicago." Samples from this shipment were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and as the findings of the analyst and report thereon indicated that the product was misbranded within the meaning of the Food and Drugs Act of June 30, 1906, the Secretary of Agriculture afforded John A. Tolman & Company and the dealer from whom the samples were purchased opportunities for hearings. As it appeared after hearings held that the said shipment was made in violation of the act, the Secretary of Agriculture reported the facts to the Attorney-General, with a statement of evidence on which to base a prosecution.

In due course a criminal information was filed in the District Court of the United States for the Northern District of Illinois, charging the above shipment, and that the product was misbranded in that it contained the statement on the label "This syrup is composed of the following ingredients and none other, Cane Syrup 60%, and Maple Syrup 40%," whereas, in truth and fact, the product contained little if any, maple syrup. To this information the defendant entered a plea of not guilty and on September 24, 1908, the case came on for trial, and a jury having been demanded by the defendant, the issue was submitted to the jury upon the testimony and argument of counsel, and the following instructions:

Gentlemen of the Jury:

This is a case which is governed by the rules of the criminal law. The paper filed by the United States formally charging the offense against the defendant is not an indictment; it is called an information. But the rule which guides you, which you must observe, is the same rule that would be in force if, instead of an information, it were a grand jury indictment. Now, in this case, it is by this rule of the criminal law that it devolves upon the United States to establish this charge against the defendant

beyond all reasonable doubt as distinguished from establishing the charge by the preponderance of the evidence, as has been the rule in some civil cases which you gentlemen have served in. You will recall that in a civil case the court instructed you as to the rule governing in that case, namely, that that side in the litigation which had the greater weight of the evidence was entitled to your verdict. Not so here.

Now, by this expression of reasonable doubt is meant such a state of mind on the part of the jurors, and each juror, where that juror may say that he has an abiding conviction of the guilt of the defendant of the offense charged, that is to say, there is no hypothesis consistent with the defendant's innocence that you can reasonably arrive at. If you are in that frame of mind, the guilt of this defendant of this charge has been established beyond a reasonable doubt. It does not mean such a state of mind as a man may work himself up into in an endeavor to find a way out for somebody accused of crime. That is not a reasonable doubt.

Now, at the outset of this proceeding this defendant is presumed to be innocent, just as in the case of an indictment. It is presumed to be innocent of this offense. The making of the charge, the conducting of the inquiry, the analyses made by all of these witnesses prior to this hearing, the filing of the papers in the court, the issuance of the summons—all that counts for nothing as far as the matter of the guilt of the defendant is concerned, the point being that when you take your oaths here as jurors the defendant stands before you as innocent of this charge as you are; that is what the presumption of innocence means. It is not a form nor a conventional expression which has no color nor meaning. It is a real substantial right, a right of such substance that it has to be torn down and destroyed by evidence—evidence of such a character as to put your mind in that state where you may say, as I said before, you have an abiding conviction of the defendant's guilt. Now, it has been said that it is an important case for the United States. It has been said that it is an important case for this defendant—because it has been said there are people away from this court room interested in the outcome of this litigation. You have not anything to do with that—not a thing—with that procession on the sidewalk moving by this building, you have no concern whatever, save only that it may hear that you have answered your obligation under your oaths in this lawsuit between the parties litigant here in this court room. Now, there is the important thing in this situation, and if you discharge that obligation you have discharged your duty, regardless of what the consequences of your verdict may be.

Now, the charge in this case is that this defendant, the John A. Tolman & Company, on the third day of October, nineteen hundred seven, delivered to the Chicago, Milwaukee and St. Paul Railway Company two packages for transportation over the rails of that company from Chicago, the place of delivery, to Algona, in the state of Iowa; that these packages contained four dozen one-quart oblong tin receptacles filled with a preparation called "Topmost cane and maple syrup," and that to each one of these quart oblong tin receptacles—in plain language, a tin can; you have seen it here—were then and there attached, one upon the front, the other upon the back, labels; which said labels did then and there contain various printed matter; that these labels, that is to say, the one attached to the back of each of these tin receptacles, containing this commodity referred to as "Topmost cane and maple syrup," contained the following statement: "This syrup is composed of the following ingredients, and none other: cane syrup, 60%; maple syrup, 40%. John A. Tolman and Company, Chicago." Then, the charge is in the information that that statement in the label is false and misleading in that the article contained in the tin receptacle contained little, if any, maple syrup. Those portions of the law for an infraction of which the defendant is sued in this case provide that the delivery for shipment of an article of food misbranded for transportation to another state than the point of delivery is prohibited and punishable. The term "misbranded" as related to food means, if the package containing the food product or the label on the package containing the

food product, bears any statement, design, or device regarding the ingredients, or the substances therein contained, which statement, design or device shall be false or misleading in any particular, then, in the case of a charge that—a charge involving the food section, there is a misbranding. So, the charge in this case is in substance that the defendant company, on the date named in the information delivered to the St. Paul road for transportation by that company over its road to Algona, to the addresses named in the information, the consignees named in the information, two boxes containing four dozen of these tin receptacles, each of which tin receptacles was misbranded in the respect indicated, namely, that the brands stated 40% maple syrup when, in truth and in fact, the commodity contained little, if any, maple syrup. The defendant pleads not guilty to this charge. And the charge with the plea, raise the issue, as I have stated, that you are to determine and express by your verdict: did the defendant deliver to the St. Paul road at the time indicated, four dozen of these receptacles contained in these two boxes, consigned as the information states. Now, as to that phase of the inquiry, dealing with the question of the contents of those other receptacles in the two boxes, other than was examined by the chemists, these which it is admitted by the stipulation were found on the shelves of the Algona merchant; I have this to say: you are authorized, if in your judgment the proof justifies it, having in mind the rule of presumption of innocence and reasonable doubt, as I have devined those expressions to you, you are authorized, if you believe the testimony shows a misbranding as to those receptacles referred to specifically in the evidence as having been analyzed, you have a right to infer, and the law authorizes you to infer from that proof as to the contents of the specific receptacles examined and analyzed, that all of the receptacles contained in that two boxes contained the same ingredients and were the same commodity. I say you are authorized to infer that, considering the testimony of the witnesses as to what was contained in this, and all the other evidence in the case, even with no evidence of a specific examination of the other receptacles that went with this receptacle in the box, if you say, if you can say, I have an abiding conviction that the other receptacles in those boxes other than the ones examined contained this same thing, then, on that phase of the case, you have no reasonable doubt, and in determining the question of what is proved here in that regard, as well as in all others, the rule is that in a criminal case, as in a civil case, you bring into the jury box with you your common sense judgment. You take the testimony of the witnesses here and the evidence in this stipulation of facts which the counsel in the case representing the two litigants have agreed to, and subject that testimony to the same kind of judgment that you would subject your important matters away from here to, at home or in your business, with no purpose save only to answer the question, guilty, or not guilty, as charged here, and, as I said a while ago, without any possible or remote regard to the fact that the United States of America or the defendant considers this a very important lawsuit. This is no more important than any other. Subject the testimony of these witnesses, the testimony of this stipulation, all of it together, to your common sense judgment, to determine you in answering the question whether or not the contents of the receptacle is as charged in the government's information, namely, does it contain little or no maple syrup? The facts in this case are for you and not for me. I have no inclination nor authority to control your determination of a matter of fact. Were I to do that, it would be an invasion of your rights and authority. You can not shift that burden to me, if you want to. It is on your shoulders, and not mine. The law of this case is on me, and it is the law that you must take my word for the law, even though you disagree from me as to the law, even though you may think it is not a good law, that you could write a better law, or there should be no law on this subject. It is this thing here that binds you and me in this lawsuit, and this thing here that must be enforced in this case, if the facts of this case fit this law, no matter what your private view may be.

Now, coming to the question—and there does not seem to be much dispute in this case as far as you are concerned—matters for you to determine. There does not seem to be much dispute in this case to bother your minds, that is to say, dispute between witnesses. The difficulty here, if any there be, is in coming to a conclusion of the evidence of the witnesses introduced on one side, as to whether or not that testimony reads within the meaning of this law, the delivery of a thing containing something that was enclosed in a thing misbranded, bearing a false and misleading brand. In other words, it is difficult, if any there be, in construing or interpreting, or analyzing and concluding whether or not these things come within this law—no dispute between the witnesses. The label, as I stated a while ago, and as you know, contains a statement that the contents, in substance the contents of this parcel contain 40% maple syrup, and, as I said a while ago, this law forbids the placing upon the parcel of a label containing that statement, if it is substantially untrue, or substantially misleading. So, the question for you to decide is whether or not this parcel contained a substance, one of the ingredients of which was maple syrup, and if so whether that ingredient, maple syrup, constitutes 40% of the commodity. That is the question for you to determine. And on that question you have had here the testimony of chemists, and I say to you in this kind of a case I suppose that that is about the best testimony we can get. I suppose you probably cannot take that can and determine the contents, the ingredients of the contents. That is a matter for chemical analysis; and yet you have a right, when you go to your jury room, to open that can and determine by your taste, if under your oaths in accordance with the rules I have laid down, you can do it and are satisfied to do it, you may open that can and by your taste determine this defendant to be not guilty. You have that power under the law, and three experts, nor a hundred experts, can take that power away from you, a power, however, to be exercised having regard to the nature of a function which under our system you here exercise, exercising it with no purpose in the world save only to arrive at the truth of the matter, always bearing that in mind.

Now, the dispute is between this prosecution and this defense as to whether or not there is any way of determining what is meant by the expression, "maple syrup," or "pure maple syrup," or "genuine maple syrup." For the United States the position is that the phrase "maple syrup" used on this label of this defendant is to be understood as meaning to him who put it there, and as having been intended by him to be read by him who saw it there, as meaning the result of boiling down the sap of the hard maple tree to a degree or state of consistency where it would be regarded and called maple syrup, excluding the addition to it of any outside substances, excluding putting into it anything in the way of an adulterate—the product solely of boiling down the sap of the hard maple tree. Now, my own judgment is that it is not a serious question, as you might suppose, having in mind that that is what it means—the product solely of boiling down the hard maple sap. It is my judgment that it isn't very important whether it was boiled down to a point where there was within the resultant product 34% of water or 36% of water, or 40% of water. It might very rationally and reasonably still be called maple syrup. The tests which these witnesses have gone by have been explained to you. One has been called the lead test. What that means the witnesses have told you. I will not undertake to repeat to you what they said to you they had in mind when they talked about that test. The ash test is another way which they explained to you, and that test is as familiar to you as to me.

Now, their testimony is that, subjecting the contents of the can to those two tests, certain facts appeared, which facts have been detailed to you by the several witnesses as to the presence of ash and the condition shown by the lead test, and the witnesses have testified as to the amount of ash necessarily and essentially present in pure maple syrup, and you are dealing here, when you talk about maple syrup, you are dealing with pure maple syrup, as I have defined to you the meaning of maple syrup heretofore

in these instructions; and by those tests the reasoning of the witnesses is that the contents of this tin receptacle contain the percentage (and it is a percentage per volume of contents)—the percentage of maple syrup within the can.

I do not know how I can any better explain to you the nature of this charge. It is a new field. There are questions involved which would be more satisfactorily disposed of by the court, after a better opportunity for consideration and reflection than is afforded in the trial of a case, the day after day trial of the case with sessions of the court separated by periods which are largely clogged with other business than the business which calls you here. I have done the best I can in defining to you what the issue is in this case. It is your duty to answer this question: guilty or not guilty, to the best of your ability. If you find for the United States, the form of your verdict will be: we, the jury, find the defendant guilty; if you find for the defendant, the form of your verdict will be: we, the jury, find the defendant not guilty.

On December 23, the jury returned a verdict of "guilty" and defendant filed motions for a new trial, and in arrest of judgment, and on March 7, 1910, these motions were overruled by the court, and a fine of $50 was imposed upon the defendant.

This notice is given pursuant to section 4 of the Food and Drugs Act of June 30, 1906.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *April 5, 1910.*

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