On May 28, 1914, the Provident Chemical Works, St. Louis, Mo., filed its claim for the goods, and on May 29, 1914, the case having come on for hearing and said claimant having filed a satisfactory bond, conditioned that the product would not be sold or disposed of contrary to the provisions of the Food and Drugs Act, or the laws of any State, Territory, District, or insular possession, judgment of condemnation was entered, the court finding the product misbranded. It was further ordered that the product should be delivered to said claimant upon payment of the costs of the proceedings.

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

WASHINGTON, D. C., *September 24, 1914.*

3400. Adulteration of preserves and alleged adulteration of preserves. U. S. v. Glaser, Kohn & Co. Verdict of not guilty as to counts 1, 2, 5, and 6 by direction of the court; verdict of guilty as to count 4, and not guilty as to count 3 by the jury. Fine, $200 and costs. Motion for new trial and in arrest of judgment overruled. Pending on petition for a writ of error. (F. & D. No. 2688. I. S. No. 3433-c.)

On August 4, 1913, the United States attorney for the northern district of Illinois, acting upon a report by the Secretary of Agriculture, filed in the district court of the United States for said district an information, in six counts, against Glaser, Kohn & Co., a corporation, Chicago, Ill., alleging the sale by said defendants on September 15, 1910, under a written guaranty in the words and figures in substance as follows, to wit:

1/15/07.

STEELE-WEDELES CO., *City.*

GENTLEMEN: Replying to your favor 10th inst., would say we hereby guarantee that all goods as furnished you hereafter will comply with the Food and Drugs Act of June 30, 1906, with the understanding, however, that if we at any time use labels or packages furnished by you, or gotten up as per your instructions, we shall not be responsible for the form or wording of same, but only guartee that goods covered by same are not adulterated. It is expressly understood that the above shall hold good until notice of revocation be given in writing.

Truly, yours,

GLASER, KOHN & CO.,
(Signed) G. D. GLASER, *Pres.*

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of a quantity of fruit preserves which was adulterated in violation of said act, which said article, having been repacked but not having been altered, adulterated, or misbranded in any manner by the purchaser thereof, was, on October 14, 1910, shipped by said purchaser from the State of Illinois into the State of Wyoming. The product was labeled: "Herald Brand Fruit Preserves Blackberry Flavor Apple Preserves 74% Blackberry Preserves 26%."

Examination of a sample of the product by the Bureau of Chemistry of this department showed mold filaments present in about one-half of all microscopic fields; yeasts and spores, about 100 per 1/60 milligram; bacteria, comparatively few.

Adulteration was alleged in the first count of the information for the reason that the article of food consisted wholly of a filthy vegetable substance. Adulteration was alleged in the second count of the information for the reason that the article of food aforesaid consisted in part of a filthy vegetable substance. Adulteration was alleged in the third count of the information for the reason

that the article of food aforesaid consisted wholly of a decomposed vegetable substance. Adulteration was alleged in the fourth count of the information for the reason that the article of food aforesaid consisted in part of a decomposed vegetable substance. Adulteration was alleged in the fifth count of the information for the reason that the article of food aforesaid consisted wholly of a putrid vegetable substance. Adulteration was alleged in the sixth count of the information for the reason that the article of food aforesaid consisted in part of a putrid vegetable substance.

On February 24, 1914, the case having come on for trial before the court and a jury, and at the outset of the trial the sufficiency of the guaranty under which the goods were sold having been raised, the question was disposed of as shown by the following ruling by the court (Landis, *J.*):

Now, in the first place, all that Congress intended by the enactment of this law is to create a situation which as between the parties was a civil liability between the seller and the manufacturer. Congress intended that the man who is selling stuff to the trade, who has not the means of finding out the constituent elements of the things he is putting over his counter, which is in a solid package in nine cases out of ten, that that man, in order to make the pure-food law a reliable thing, was to be relieved in some way of finding out the elementary constituents of the thing he sold. Now, what is the way to do it? Not being a manufacturer himself, but being a middle man, why, of course, it readily appeared to Congress that the way to do this thing is to put the onus on the man who puts it up—the man that puts the bad thing up is the man that ought to be punished, anyway—in order to locate the responsibility where it belongs we will let the middle man out if he has got a good-faith guaranty. Now, Congress put it in the law, if he has a guaranty, to let him out. Now, ever since I have heard anything about guaranties, a guaranty may run until canceled. The banking business of Chicago is now being done on the theory that a guaranty given by Jones on the obligations of Brown is good against Jones's estate 20 years from now, if it is not recalled or canceled, anything done in the future between these powers falling within the liability incurred. Now, the idea that each time the retailer buys from the manufacturer a little dab of stuff that he is going to put out over his counter expressly undertakes with respect to that stuff to identify it in a guaranty, all of which, step by step, would have to be proved by legal evidence when your prosecution comes, the idea that Congress ever had that in mind is perfect nonsense, in my judgment.

Whereupon the trial proceeded, and after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court (Landis, *J.*):

Gentlemen of the jury, the charges in this case against the defendant originally were in six counts. I have taken out of the case all counts except the third and fourth. The third count charges that the substance in question—the article in question here—consisted wholly of a decomposed vegetable substance. The fourth count differs from the third count in this, that the fourth count charges that the article consisted in part of a decomposed vegetable substance.

The statutes provide that an article is to be considered as adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.

Now, this is a criminal case, and we start out with the proposition that the defendant is presumed to be innocent of the charge. By that, as I have already had occasion to say, is meant that the making of this charge against the defendant, the bringing of the accusation, the arraignment of the defendant here on the charge, does not operate to cast any suspicion of guilt against the defendant, and that presumption of innocence continues to abide as a real substantial thing until a time comes in the case when a situation is created which destroys the assumption—a situation of a character that you no longer indulge the presumption. What is that situation? It is a situation where the guilt of the offense charged has been established beyond all reasonable doubt.

Now, by reasonable doubt is not meant a captious doubt, or the frame of mind that a man may find himself in in an endeavor to invent a way out for somebody accused of an offense. It is a real doubt; the frame of mind that a

juror is in, because of something in the proof, or something omitted from the proof, the presence or absence of which puts the juror in a frame of mind where, were he dealing with something of importance to himself personally, [it would] be very hard to act—he would pause and hesitate. If you are in that frame of mind, you have got a reasonable doubt, and your verdict should be "not guilty." On the contrary, if you have no such reasonable doubt—if the defendant's guilt of the offense charged in either counts third or fourth has been established by that degree of proof which I have indicated to you, your verdict should be "guilty."

Now, the term "decomposed," as used, means in a state of decomposition, rotten or decayed, and in this case the charge is against this defendant, which was not the jobber but the manufacturer, that the article was in that condition at the time the defendant turned the article over to Steele-Wedeles & Co., and the thing which the accusation sets out is that when the defendant did turn it over to Steele-Wedeles & Co. it was adulterated within the meaning of the adulteration as I have just given it to you.

Of course, if the evidence, if you find this article to be adulterated, or to have become adulterated, and the evidence fails to show that it was adulterated when the defendant turned it over to Steele-Wedeles & Co., the defendant is entitled to a verdict of "not guilty."

Now, in determining the question—if you find adulteration, that is, decomposition—in determining the question when it took place, consider the evidence of the witnesses here, the analysts, who have told you about their analysis, their microscopical examinations; bring to bear in your consideration of that evidence your common-sense judgment. You have heard from them what they found; you have heard from them an expression of their opinion and judgment as to what was meant, what was indicated by what they found, including evidence as to when the thing happened, as indicated by what they found; and so, if you believe on that evidence, within the requirements, as I have indicated them to you, that it has been shown here as a fact, assuming you find decomposition to have been found when the examinations were made, the bad condition existed when the defendant turned the product over to Steele-Wedeles & Co., the case is made out. As I say, bring to bear your common-sense judgment upon the evidence of these witnesses. You will recall what each said as to the extent to which in the product they found the molds and yeast cells, and what that indicated, what it meant.

Now, in this case, as I stated to you, the shipper is not on trial; the manufacturer is on trial. That is because of a provision in the law which is to the effect that the shipper, that is to say, the dealer, the man that sell things, that people who want to buy things may protect themselves against possible prosecution for violating a pure-food law by exacting from the manufacturer from whom he buys what he sells a guarantee that the product is not adulterated.

In this case there has been offered in evidence a guarantee, what the Government offers as a guarantee, what the defendant contests, alleging it is not a guarantee, but what the court charges you is a guarantee, holding, as I do, that it is a question of law for the court to determine whether the thing offered by the Government as a guarantee, in fact is. That document is in these words, to Steele-Wedeles & Co.:

"Gentlemen: Replying to your favor of the 10th inst., would say we hereafter guarantee that all goods we furnish you hereafter will comply with the Food and Drugs Act of June 30, 1906, with the understanding, however, that if we at any time use labels or packages furnished by you or gotten up as per your instructions we shall not be responsible for the form or wording of the same, but only guarantee the goods covering the same are not adulterated. It is expressly understood the above shall hold good until notice of revocation be given in writing. Truly, yours, Glaser, Kohn & Co. (Signed) G. D. Glaser, president."

I charge you that the legal effect of that document handed to the jobber by the defendant in this case, the manufacturer, was to guarantee the product in controversy in this case against being adulterated, and you have no—you have nothing to do with the question of whether or not there has been given a guarantee. The only question before you is whether or not, as charged in the information, at the time the defendant in this case turned the article over to Steele-Wedeles & Co. it was adulterated within the meaning of that term as I have given it to you.

Any exceptions, Mr. Lannen?

Mr. LANNEN. I desire to except to that part of the court's instruction instructing the jury that the guarantee in question is a legal guarantee on the grounds heretofore argued.

The COURT. Save your point. Any suggestions on behalf of the Government?

Mr. DICKINSON. None, except that your honor suggest to the jury that it is not necessary to find an intent here.

The COURT. I omitted to tell you gentlemen the question of intent or knowledge is not involved here. I should specifically have directed your attention to that point. It is not necessary to make out this case against this defendant, to show that the defendant intentionally put up an adulterated article, or that the defendant knew at the time it turned this article over to Steele-Wedeles & Co. that the article was adulterated in order to make out this case. The only question is whether at that time it was adulterated. The law casts upon the defendant the burden of showing that it was not adulterated. If you find that the article was adulterated wholly, the form of your verdict will be "We, the jury, find the defendant, Glaser, Kohn & Co., guilty as charged in the third count of the information." If you find against the defendant on the theory that the article was decomposed only in part, the form of your verdict will be "We, the jury, find the defendant, Glaser, Kohn & Co., guilty as charged in the fourth count of he informaion", writing in the word "third" or "fourth," whatever you find.

If you find for the defendant, the form of your verdict will be, "We, the jury. find the defendant not guilty."

I send the information with you to the jury room in order that you may refresh your memory as to which count contains the charge.

Mr. DICKINSON. The stipulation is to be offered.

The COURT. All right.

The jury thereupon retired, and after due deliberation returned into court with a verdict of guilty as to the fourth count of the information, and a verdict of not guilty as to the third count of the information, a verdict of not guilty upon the remaining four counts of the information having theretofore been directed by the court, and on April 28, 1914, a fine of $200, with costs, was imposed by the court. The defendant company thereafter filed its petition for a writ of error, and the same was pending on July 3, 1914.

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

WASHINGTON, D. C., *September 24, 1914.*