and ordering its condemnation and forfeiture, and it was further ordered by the court that the product be released to the said claimant upon payment of the costs of the proceedings and the execution of a bond in the sum of $500, in conformity with section 10 of the act.

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

13539. Alleged adulteration and misbranding of butter. U. S. v. Charles T. Myers (Alamosa Creamery Co.). Directed verdict of not guilty. (F. & D. No. 19003. I. S. Nos. 8548–v, 8549–v, 11945–v, 11946–v, 11947–v, 20632–v, 20633–v.)

On March 18, 1925, the United States attorney for the District of Colorado, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Charles T. Myers, trading as the Alamosa Creamery Co., Alamosa, Colo., alleging shipment by said defendant, in violation of the food and drugs act as amended, in various consignments, namely, on or about February 20, 1924, from the State of Colorado into the State of Arizona, and on or about February 20 and 21, 1924, respectively, from the State of Colorado into the State of New Mexico, of seven consignments of butter which was alleged to be adulterated and misbranded. The article was labeled in part: "Golden Purity Butter 1 Pound 4 Pieces Manufactured by Alamosa Creamery Company Alamosa—Colorado Pure Creamery Butter * * * Net Weight 16 Ounces."

Analysis by the Bureau of Chemistry of this department of 4 samples from each of the seven consignments showed an average of 79.1 per cent, 79 per cent, 79.4 per cent, 79.4 per cent, 79.4 per cent, 79.2 per cent, and 79.6 per cent, respectively, of milk fat. Examination of 30 packages from each of five consignments and 60 packages from each of the two remaining consignments showed an average weight of 15.88 ounces, 15.87 ounces, 15.73 ounces, 15.82 ounces, 15.76 ounces, 15.74 ounces, and 15.72 ounces, respectively.

Adulteration of the article was alleged in the information for the reason that a product deficient in milk fat had been substituted for butter, which the said article purported to be, and for the further reason that a product which contained less than 80 per cent by weight of milk fat had been substituted for butter, a product which should contain not less than 80 per cent by weight of milk fat, as defined by the act of March 4, 1923.

Misbranding was alleged for the reason that the statements, to wit, "Creamery Butter * * * Net Weight 16 Ounces," borne on the packages containing the article, were false and misleading, in that the said statements represented that the article was butter, to wit, a product containing not less than 80 per cent by weight of milk fat, as defined and prescribed by the act of March 4, 1923, and that the said packages contained 16 ounces of the said article, 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 butter and that the said packages contained 16 ounces of the article, whereas it was not butter, in that it contained less than 80 per cent by weight of milk fat and the packages did not contain 16 ounces of the said article but did contain a less amount. 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 and for the further reason that it was food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package, since the quantity stated was more than the actual contents of the package.

On April 15, 1925, the case came on for disposition before the court and a jury. After the submission of certain evidence a motion to suppress the evidence was made by counsel for the defendant and sustained by the court. On April 16, 1925, the court delivered the following instructions to the jury, directing a verdict of not guilty:

THE COURT: "The defendant in this case has made timely motion to suppress the evidence that has been offered, or, rather, testified to by the witness Kathe, on the ground that it violates the constitutional rights of the defendant and also is in violation of the post-office regulations or acts pertaining to the post office.

"It is stipulated and agreed by both sides that Mr. Kathe, an inspector of the Bureau of Chemistry of the United States Department of Agriculture, who is not connected in any official way with the Post Office Department, without a

search warrant entered the post office and opened seven packages of butter which had been deposited in the post office by the defendant for shipment in interstate commerce."

Mr. IRELAND: "That stipulation doesn't cover with the consent of the postmaster or superintendent, but that is a part of the stipulation in the record."

The COURT: "He did this with the consent of the postmaster. After opening the packages, he took samples therefrom and weighed the contents to determine whether they complied with section 8 of the pure food act, under which the defendant is being prosecuted for misbranding. He further took samples to be shipped to the bureau or branch of the Department of Agriculture in Denver for further test, and in place of the samples he took he substituted another product of the defendant, which he had bought in the open market, and sealed up the packages and put them back in the mail, and they went forward to the consignee.

"In order to narrow the question to be decided, it is well to bear in mind all these facts, and also the further fact in addition, that this inspector did not have any authority under any act of Congress for his acts, and, further, had no search warrant. In addition he had no grounds, so far as it appears here, to suspect that the defendant was violating a law of the United States. In other words, he did not act upon any probable cause or grounds to suspect that a crime was being committed by the defendant, so we must look at his acts from the point of view that he was seeking evidence rather than acting upon any previous information or knowledge that would justify him in believing defendant had or was about to commit a crime.

"The Government contends, first, that, granting that the search was illegal and in violation of law, the defendant cannot urge that issue because he had given up possession and parted with the packages in question when he put them in the mail, and therefore the fourth amendment to the Constitution of the United States is no protection, or cannot be availed of under such conditions; secondly, that the pure food and drugs act gave the Department the power to make regulations for the enforcement of the act, and that under that authority the Department has enacted or promulgated the regulation that the food or drugs within the scope of sections 1, 2, and 10 of the act may be sampled wherever found.

"Taking up the last point first, it may be said as a matter of law that a regulation put out by any official or any department cannot add to or detract from the original act. I have not been cited to any section of the act that gives any official of the Department power to sample or seize property wherever found, and it is not necessary to pass upon that at this time. Certainly any mere regulation of the Department would not stand if in conflict with any fundamental right of the defendant, guaranteed him under the Constitution of the United States; it would have no force or effect.

"Going back now to the first question, as to whether the fourth amendment to the Constitution was violated, or whether the defendant can avail himself of its provisions under the peculiar circumstances of this case, I am clearly of the opinion that the inspector had absolutely no authority to go into the post office and open a sealed package. He was not a post-office inspector or employee. He had no more right to interfere with mail in its transportation and stop its transportation than the merest stranger. The Government officials must act within the scope of their authority. Their authority is always limited, and when they go beyond the limits of the same, their acts must be judged like the acts of any other person not holding a Government position. The permission granted by the postmaster to open this mail was without the scope of his authority, and does not affect the lack of authority of this inspector. In any doubtful case I think the doubt ought to be resolved against the Government official, because it is against public policy for any officer, without proper cause or authority, to interfere in any way with property of other people or to interfere with their papers, and when a man deposits property in the post office he has a right to assume that it will not be interfered with in any way except pursuant to some specific authority granted by Congress for the particular purpose in point. The case of ex parte Jackson, which has been cited, in 96 U. S., holds specifically that the fourth amendment to the Constitution applies to papers or property of a citizen wherever it may be, that case saying that: 'The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst

in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment to the Constitution.'

"We do not say that Congress might not give to an inspector of the Department the power to invade the secrecy of the mails. It is not claimed here that such power was ever given. So we have before us a stronger set of facts than that referred to and covered in the quotation from the Jackson case which I have cited. Further, it is against sound public policy for Government officials without probable cause or proper grounds to suspect a crime is being committed and, without specific authority, to go around on fishing expeditions and interfere with the privacy of the individual or his property. This case of breaking into mail was no more or less than a trespass. I am not holding that this regulation could not empower the inspector to sample or seize the butter when offered for sale, but I don't think it gave him power—it could not give him power under the law laid down in the Jackson case—to commit a trespass upon mail matter. The recent decisions of the Supreme Court contain notice that the fourth and fifth amendments are still in full force and effect, and that indirect and partial repeals thereof must be especially guarded against.

"So the motion to suppress the evidence will be granted and exception allowed by the Government."

Mr. IRELAND: "Now, if your Honor please, the question that you have taken up I did not think would come up in this case, but at this time the Government offers to submit evidence to the effect that they did have reasonable ground to believe that the law was violated and was being then and there violated. I don't think it will make any difference, but I want it for the record."

The COURT: "In order to make a record you may show that you made the offer and the same is rejected. It will not affect the case under the facts, in view of the fact that the inspector has no right to violate the secrecy of mail matter."

Mr. IRELAND: "There is one other thing I would like to have the record show: that while the stipulation shows this was sealed, the stipulation does not show it is sealed first class mail; and that the Government offers to prove that the facts in this case are that this was parcel post mail, fourth class, and does not come under what is termed first class sealed matter."

The COURT: "The stipulation states that they were sealed packages—in other words, they had to be broken to get into—and that the information that the Government obtained by virtue of the inspection could not have been obtained without breaking the seal or the package."

Mr. IRELAND: "No, it could not. It had to be broken, but it is not what is first class sealed mail, but I believe it has labeled on it 'Inspection allowed.'"

The COURT: "That disposes of this case."

Mr. PACKARD: "I then move the court for an instructed verdict in favor of the defendant on all the counts."

The COURT: "The motion will be granted. Gentlemen of the jury, under the ruling of the court the evidence that has been given is not admissible. Therefore, there being no other evidence, the court instructs you to find the defendant not guilty on each and every count of this information. The first juryman will please sign the verdict, and the defendant will be discharged.

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

13540. Misbranding of cottonseed meal. U. S. v. 1,000 Sacks and 490 Sacks of Cottonseed Meal. Default decrees of condemnation, forfeiture, and sale. (F. & D. Nos. 19480, 19485. I. S. Nos. 22281-v, 22283-v. S. Nos. E-4901, E-4904.)

On January 14, 1925, the United States attorney for the Western District of Virginia, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district libels praying the seizure and condemnation of 1,490 sacks of cottonseed meal, remaining in the original unbroken packages at Radford, Va., alleging that the article had been shipped by the Wilmington Oil & Fertilizer Co., from Wilmington, N. C., in part December 1, 1924, and in part December 2, 1924, and transported from the State of North Carolina into the State of Virginia, and charging misbranding