

On April 10, 1925, the defendant company having entered a plea of not guilty to the information, the case came on for trial before the court and a jury. After the submission of evidence, the court delivered the following instructions to the jury (Howe, D. J.) :

"GENTLEMEN OF THE JURY: I am going to give you my charge right now. These gentlemen can argue afterwards. We are going to finish this case up. This South Peacham Creamery is complained of for having too little butterfat in their butter. Now, you were all here in that other trial, weren't you, everyone of you? Is there anyone on this panel that didn't hear the other trial and my charge in that other case? Now, the question for you to decide is whether you are satisfied beyond a reasonable doubt that when this butter was shipped in interstate commerce it did not have 80 per cent butterfat. That's the question for you to decide.

"Now, in order to find the defendant guilty you must be satisfied beyond a reasonable doubt. The Government must prove beyond a reasonable doubt that when this butter was shipped it did not contain 80 per cent butterfat. You have heard the testimony of this chemist, who operates on one-fifteenth of an ounce. Now, as practical, reasonable men you heard him say that a slight error in computation would make a heavy difference when you apply it to a pound or 20 pounds. You have heard these butter makers testify it contained more than 80 per cent butterfat. Now, the question for you to decide is how much or how little credit you will give the testimony of the witnesses. You should keep in mind the presumption is that the butter did contain 80 per cent when it was shipped. If you return a verdict of guilty here, you must be satisfied beyond a reasonable doubt that when this was shipped it didn't contain 80 per cent butterfat. You apply the presumption of innocence, which is very old law, very sound law. If there is more than one theory in the case, both equally reasonable, one leading to innocence, the other leading to guilt, you should adopt the theory leading to innocence, because it is better and safer to believe good of a person rather than to believe evil of him. It is for you to say how much or how little credit is to be given to the testimony. If you are satisfied beyond a reasonable doubt this did not have 80 per cent of butterfat when it was shipped, you will find the defendant guilty. If you are not satisfied it contained less than 80 per cent butterfat, you will find the defendant not guilty.

"Well, gentlemen, if you are satisfied beyond a reasonable doubt that it didn't contain 80 per cent, find the defendant guilty. If you have a reasonable doubt about that, find it not guilty. If you are satisfied that it did contain more than 80 per cent, you will find it not guilty."

The jury then retired and after due deliberation returned a verdict of not guilty.

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

**13707. Alleged adulteration and misbranding of butter. U. S. v. Barnet Creamery Association. Tried to the court and a jury. Verdict of not guilty. (F. & D. No. 18991. I. S. Nos. 15285-v, 15287-v.)**

On November 20, 1924, the United States attorney for the District of Vermont, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Barnet Creamery Association, a corporation, Barnet, Vt., alleging shipment by said company, in violation of the food and drugs act, in various consignments, namely, on or about November 30 and December 3, 1923, respectively, from the State of Vermont into the State of Massachusetts, of quantities of butter, a portion of which was alleged to be adulterated and misbranded and the remainder of which was alleged to be misbranded. The article was labeled in part: "40# Net" or "40 Pounds Net."

Examination by the Bureau of Chemistry of this department of 10 boxes from each shipment showed an average weight of 39 pounds 5.3 ounces and 39 pounds 10 ounces, respectively. Analysis of a sample of the article from the shipment of December 3 showed 78.4 per cent of milk fat.

Adulteration was alleged in the information with respect to a portion of the article, in 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 prescribed by the act of March 4, 1923.

Misbranding was alleged for the reason that the statements, to wit, "40 Pounds Net" or "40# Net," as the case might be, borne on the labels of the boxes containing the article, were false and misleading, in that the said statements represented that the boxes each contained 40 pounds of butter, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that the said boxes each contained 40 pounds of butter, whereas the said boxes did not each contain 40 pounds of butter but did contain a less amount.

On April 10, 1925, the defendant company having entered a plea of not guilty to the information, the case came on for trial before the court and a jury. After the submission of evidence and arguments by counsel, the court instructed the jury as follows (Howe, D. J.):

"GENTLEMEN OF THE JURY: You will have three questions to decide in this case. There are seven different charges against the defendant. The court submits only three of them to you. There are four charges in the information that are withdrawn from your consideration. I have made a schedule of the number of the charge, the date of the charge, and what the charge is, that I am going to ask you to consider and decide. A charge in an indictment is called a count. The first column here gives the number. Now, charge, or count, No. 6 charges that the boxes contained less than 40 pounds, shipment of November 30. Count No. 7 charges that the boxes contained less than 40 pounds, shipment of December 3. Count No. 4 charges that the boxes contained less than 80 per cent butterfat, shipment of December 3. I think that will make it more simple and easy for you than it will to give you this long indictment.

"Now, you may find the defendant guilty or not guilty upon all of these counts, or charges, or you may find the defendant guilty of any of them, or you may find the defendant guilty of one alone and not guilty of the remainder. It's a simple question of fact for you to decide. In two counts, two different shipments, shipment of November 30 and December 3, the Government charges that those boxes didn't contain 40 pounds of butter, and in count No. 4, shipment of December 3, the Government charges that the butter didn't contain 80 per cent of butterfat. Three simple questions of fact.

"The Government's evidence shows that in the shipment of November 30, a number of crates containing 40 pounds each, the maximum shortage was six ounces. One, two, three, four, five, six, seven, eight, nine, ten, there were ten crates supposed to contain 40 pounds each. Some of them had more than 40 pounds, but of the ones they claim were short the largest shortage is six ounces, and the minimum shortage in any of those 40-pound packages was one ounce. That's all there is to that charge. Some of them contained too much. Of course it isn't unlawful for them to contain too much, so the Government has complained against the Barnet Creamery Co. for shipping ten boxes of butter, containing 40 pounds each, one of which they say lacked six ounces of having 40 pounds, and in another of those boxes they say the creamery should have put in another ounce. Now, on the shipment of December 3, one, two, three, four, five, six, seven, eight, I haven't got the date written down here, they say that one of those 40-pound boxes was a pound and six ounces short and another one was three and one-half ounces short. There is a greater shortage there, a pound and six ounces, not quite a pound and a half. The minimum shortage in that shipment was three and one-half ounces. Some of the boxes they shipped contained more than 40 pounds. Still, as it has been suggested here, the fact that they contained more than 40 pounds isn't material except such bearing as you think it has on whether the Barnet Creamery was short weighing their butter. It is material on that question. If a concern is selling short weights, they would not be likely to have a considerable number of the packages overrun. The evidence of the Government is that they sent out their inspector, that he got samples and took them to some laboratory and had their chemist analyze them. They weighed up these packages and come up here and tell you how much they weighed and how much butterfat they contained. The defendant tells you that they used a lever scale, that they put a quarter of an ounce more in each pound to take care of evaporation—that is, an eighth of an ounce in each half-pound print—and they weighed that up. Each box of 40 pounds contained 40 pounds. Well, now, the law is, gentlemen, that it must contain 40 pounds when it was shipped. Unless you are satisfied beyond a reasonable doubt that these boxes didn't contain 40 pounds when they were shipped, why, no offense is committed by the creamery association. It is not the law that they must continue to weigh 40 pounds three days, three weeks,

or three months after shipment. So the time of materiality is the day it is taken to the express company and shipped. It has been suggested here that these boxes made of spruce, fir, hemlock, pine, and dry lumber absorb the moisture in the butter. Some one said they are permitted to put in 16 per cent moisture, got to have 80 per cent butterfat, 3 per cent salt, 2 or 3 per cent—at least 2 or 3 per cent—salt. Well, if they had 16 per cent moisture and 40 pounds of butter, it would be 6.40 pounds of water. Sixteen per cent of 40, that's 6.40; that's more than 6 pounds of water starting out in a pine box, spruce box, or fir box. Well, it is important for you to say what bearing, if any, that would have upon what that package would weigh three days later or six days later. Would some of that moisture be likely to go from that butter into the box and from the box into the air? Now, another thing for you to consider is which one of these witnesses, the chemist of Boston, the inspector at Boston, or the butter maker at Barnet, you are inclined to put the greatest faith and confidence in, and which scale you are inclined to have the most confidence in, the spring scale or the lever scale. Now, gentlemen, there are two questions here as to whether the packages weighed 40 pounds, contained 40 pounds of butter when they were shipped, and whether they contained 80 per cent of butterfat when they were shipped, not whether they contained 80 per cent three days later, three weeks later, or six weeks later. Now, all the rules I gave you yesterday apply to this case. The same rules apply. I see some of you on this case that were on the other case, but I will have to repeat all those rules I gave you yesterday to guide you in determining whether you are going to find this defendant guilty or not guilty. In the first place, the presumption is that the defendant is innocent. The presumption is that these boxes did contain 40 pounds, that the butter did contain 80 per cent butterfat. This presumption is to be weighed and considered by you throughout the trial, which means that you must start in the trial of the case with the thought and belief uppermost in your minds that the packages did contain 40 pounds, that the butter did contain 80 per cent butterfat, and this presumption should continue with you until the Government has convinced you beyond a reasonable doubt that the packages did not contain 40 pounds and that the butter did not contain 80 per cent butterfat. The fact that the defendant, the creamery company, has been complained of and placed on trial for this charge should not be taken against them in the least. No unfavorable inference can be drawn against the Barnet Creamery Co. because the Government has made this complaint against it. If you can reconcile the evidence in the case on any reasonable basis consistent with the defendant's innocence, you should do so, and, in that case, find the creamery company not guilty. You can not find the creamery company guilty unless from all the evidence you are satisfied of its guilt beyond a reasonable doubt. A reasonable doubt does not mean beyond all doubt; it does not mean beyond a fancied doubt; it does not mean that you are to examine all the evidence with a view to seeing if you can find something that you can call reasonable doubt; but it means such a doubt as a reasonable man would have after considering all the evidence in the case. If, after an impartial consideration of all the evidence in the case, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt, and you should find the company not guilty. But if, after such impartial consideration, you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in important matters of your own, you have no reasonable doubt, and you should find the company guilty. The weight to be given to the testimony, the credibility of the witnesses, are questions entirely for your consideration and determination. The law is that you are not bound to give the same credit and the same weight to the testimony of each witness, but you should give their testimony just such credit and just such weight as you think it is fairly entitled to receive. Consider their appearance upon the stand, their candor or lack of candor, their feeling or bias, if any, their interest in the result of the trial, if any, and the reasonableness of the testimony which they give, and believe as much or as little as you think you should. Now, applying these rules to the testimony that you have heard, if you are satisfied beyond a reasonable doubt that the shipment made on November 30 didn't contain 40 pounds of butter when it was taken to the express office, you should find the defendant guilty; and, likewise, if you are satisfied beyond a reasonable doubt that the shipment made on December 3 didn't contain 40 pounds of butter when it was taken to the express office, you will find the defendant guilty. If you are satisfied the shipment made on December 3 did not contain 80 per cent

butterfat, you will find the defendant guilty; but if, on the other hand, you have a reasonable doubt as to whether there was 40 pounds of butter in the shipment of December 3, you will find the defendant not guilty on those. Likewise, if you have a reasonable doubt as to whether there was 80 per cent of butterfat in the shipment of December 3, you will find the defendant not guilty on that charge. That's all there is to the case, gentlemen. Any suggestions by the district attorney or defendant?

"Mr. Gardner is appointed foreman. Your verdict will be oral. You will say guilty or not guilty. If you find the defendant guilty, you will say on which count."

Mr. AMEY: "If it please your honor, there was nothing said about the weight of the wrappers on the butter."

Court: "You will take into consideration all the evidence as to the wrappers and everything else, gentlemen."

The jury then retired and after due deliberation returned a verdict of not guilty.

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

**13708. Adulteration and misbranding of butter. U. S. v. 14 Tubs Churn #5 (Butter). Consent decree of condemnation and forfeiture. Product released under bond. (F. & D. No. 20305. I. S. No. 6894-x. S. No. E-5439.)**

On July 20, 1925, 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 a libel praying the seizure and condemnation of 14 tubs of butter, remaining in the original unbroken packages at New York, N. Y., alleging that the article had been shipped by the Alta Vista Farmers Creamery Co., Alta Vista, Iowa, on or about July 10, 1925, and transported from the State of Iowa into the State of New York, and charging adulteration and misbranding in violation of the food and drugs act.

Adulteration of the article was alleged in the libel for the reason that a substance deficient in butterfat and containing excessive moisture had been mixed and packed therewith so as to reduce, lower, or injuriously affect its quality or strength and had been substituted in whole or in part for the said article.

Misbranding was alleged for the reason that the article was offered for sale under the distinctive name of another article.

On July 30, 1925, the Fredericksburg Butter Factory, Fredericksburg, Iowa, claimant, having admitted the allegations of the libel and having consented to the entry of a decree, judgment of condemnation and forfeiture was entered, and it was 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 \$450, in conformity with section 10 of the act, conditioned in part that it be reworked so as to contain at least 80 per cent of butterfat.

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

**13709. Adulteration and misbranding of butter. U. S. v. 30 Cases of Butter. Consent decree of condemnation and forfeiture. Product released under bond. (F. & D. No. 20304. I. S. Nos. 6415-x, 6419-x. S. No. E-5378.)**

On July 20, 1925, the United States attorney for the Northern District of Georgia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 30 cases of butter, remaining in the original unbroken packages at Atlanta, Ga., alleging that the article had been shipped by the Beatrice Creamery Co., from Topeka, Kans., on or about July 8, 1925, and transported from the State of Kansas into the State of Georgia, and charging adulteration and misbranding in violation of the food and drugs act. The article was labeled in part: "Meadow Gold Butter \* \* \* Beatrice Creamery Company, General Office, Chicago, Ill."

Adulteration of the article was alleged in substance in the libel, in that a substance containing less than 80 per cent of milk fat had been substituted in part for butter, in that a substance, to wit, water, had been substituted in part for butter, and in that a product deficient in milk fat had been substituted in part for butter, and in that it contained less than 80 per cent by weight of milk fat.

Misbranding was alleged for the reason that the article was labeled "Butter" so as to deceive and mislead the purchaser into the belief that it was butter,