sore throat, tonsilitis, quincy, and nasal catarrh; and effective to retard tooth decay and receding gums. Misbranding was alleged with respect to the 4-ounce bottles for the further reason that certain statements, designs, and devices, contained in a circular shipped with the article, regarding the curative and therapeutic effects of the article, falsely and fraudulently represented that it was effective as a treatment, remedy, and cure for sore throat, quinsy, tonsilitis, acute and chronic inflammation of the throat, bleeding gums, pyorrhea, trench mouth, spongy loose gums, cuts, wounds, infections, nasal conditions, nasal catarrh, hay fever and all infections of the nasal cavity; effective as a treatment against disease in time of epidemics; effective as a remedial spray in oral and nasal cavities; and effective to retard tooth decay and receding gums.

On November 14, 1932, a plea of guilty to the information was entered on behalf of the defendant company, and the court imposed a fine of $150.

R. G. TUGWELL, *Acting Secretary of Agriculture.*

20553. Misbranding of Papoose root beer. U.S. v. 68 Bottles, et al., of Papoose Root Beer. Default decrees of condemnation and destruction. (F. & D. nos. 29058, 29059, 29108. Sample nos. 16937-A, 16943-A, 16946-A.)

Analyses of the root beer extract covered by these cases disclosed that the article contained no ingredient or combination of ingredients capable of producing certain curative and therapeutic effects claimed on the bottle labels.

On October 14, 1932, the United States attorney for the Southern District of Alabama, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of 68 bottles of the said Papoose root beer extract at Mobile, Ala. On or about October 14, and October 21, 1932, the United States attorney for the Southern District of Mississippi, filed libels against 57⅔ dozen bottles of the product at Gulfport, Miss. It was alleged in the libels that the article had been shipped in interstate commerce by E. A. Zatarain & Sons, Inc., in various shipments, on or about July 2, July 11, and August 13, 1932, from New Orleans, La., into the States of Alabama and Mississippi, and that it was misbranded in violation of the Food and Drugs Act as amended.

Analysis of a sample of the article by this Department showed that it consisted essentially of extracts of plants, glycerin, and water, colored with caramel and flavored with sassafras oil and methyl salicylate.

Misbranding of the article was alleged in the libels for the reason that the following statements appearing on the bottle labels, regarding the curative and therapeutic effects of the article, were false and fraudulent: "It is Nature's own remedy. It is a gift from the Almighty * * * It is a treasure for the sick and afflicted. It is free for the blind and in all cases of incurable diseases."

No claim or answer was filed in the cases. On February 27, 1933, judgments of condemnation were entered in the cases instituted in the Southern District of Mississippi, and the court ordered that the product be destroyed by the United States marshal. On March 6, 1933, a decree of condemnation and destruction was entered against the product seized at Mobile, Ala.

R. G. TUGWELL, *Acting Secretary of Agriculture.*

20554. Conspiracy to violate the Food and Drugs Act. U.S. v. Harry Lesser, Forrest E. James, Walter E. Anderson, Philip M. Lahn, and Henry J. Henners. Tried to a jury. Indictment dismissed as to defendant Anderson. Defendants Lesser and James found guilty; each sentenced to 1 year and 8 months' imprisonment and fined $2,500, without costs. Defendant Lahn found guilty and sentenced to 1 year and 5 months' imprisonment, without costs. Verdict of not guilty as to defendant Henners. Appeal to Circuit Court of Appeals. Judgment of conviction affirmed. (Conspiracy no. 100.)

This indictment charging conspiracy to violate the Food and Drugs Act was the result of investigations conducted by the Food and Drug Administration. At the trial evidence was introduced showing interstate shipments by the defendants trading as Jordan Bros., S. A. Hall, and Charles M. Pomeroy, of a product labeled, "Liquid Medicine", and invoiced as "Fluid Extract of Ginger, U.S.P.", or with a similar statement representing that the article was fluidextract of ginger made in accordance with the formula set forth in the United States Pharmacopoeia. Analyses of samples showed that it contained a smaller proportion of ginger extractives than contained in the pharmacopoeial product. It also contained an abnormal ingredient, an organic phosphorous

compound, namely, triorthocresyl phosphate, a substance which is recognized as the cause of so-called "ginger paralysis." Extractives from samples, when administered to chickens, produced a partial paralysis.

On May 26, 1932, the grand jurors of the United States presented to the United States District Court for the Eastern District of New York, an indictment against Harry Lesser, Forrest E. James, Walter E. Anderson, Philip M. Lahn, and Henry J. Henners, trading under the names of Jordan Bros., S. A. Hall, and Charles M. Pomeroy, at Brooklyn, N.Y., charging conspiracy to violate the Federal Food and Drugs Act. The charges contained in the indictment are set out in full in the court's instructions to the jury, which appear hereafter.

On June 16, 1932, the defendants were arraigned and each entered a plea of not guilty. On December 9, 1932, the case came on for trial before a jury. Adjournment, however, was ordered until December 12, at which date the trial commenced. At the opening of the case motions to dismiss the indictment as to all defendants were made and denied. At the end of Government's case these motions were renewed and denied. At the end of the case the motions were further renewed and granted as to defendant Anderson, who was ordered discharged from custody, and denied as to the four remaining defendants. On December 30, 1932, all evidence having been heard and concluding arguments of counsel made, the court delivered the following instructions to the jury (Campbell, *J.*):

Gentlemen of the Jury: The defendants are presented before you upon an indictment which in substance is as follows: The defendant Anderson, having been dismissed, I will not include his name in this reading—Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, the defendants herein, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, and within the jurisdiction of this court, doing business under the names of Jordan Brothers, S. A. Hall, and Charles M. Pomeroy, said names, Jordan Brothers, S. A. Hall, and Charles M. Pomeroy, being fictitious, and having a usual place of business during the times covered by this indictment at Brooklyn, N.Y., and divers other persons whose names and residences are to your grand jurors unknown, did on or about the first day of June in the year 1929, and continuously between that date and the first day of February in the year 1932, at Brooklyn, in said district, willfully, knowingly, and unlawfully conspire, combine, federate, and agree together to commit certain offenses denounced by and in section 2 of the act of Congress of June 30, 1906, sometimes called 'The Food and Drugs Act', the purpose and object of said conspirators, and each of them, being to unlawfully introduce, ship, and deliver for shipment from one State to another adulterated and misbranded foods and drugs, within the meaning of the said act of Congress of June 30, 1906; that is to say, that the said Harry Lesser, Forrest E. James, Philip M. Lahn, and Harry J. Henners, and others, to your grand jurors unknown, should possess, sell, transport, deliver, and introduce, ship, and deliver for shipment from one State to another a large quantity of fluidextract of ginger, sometimes called 'liquid medicine in bulk', which was then and there adulterated, in that it differed from the standard strength, quality, and purity of fluidextract of ginger recognized in the United States Pharmacopoeia, as determined by the tests laid down in the United States Pharmacopoeia, at and during the time covered by this indictment, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided, Title 18, United States Code, Section 88; that in pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, the above-named defendants did commit the following overt acts: I wish you would retain—this is not in the indictment—that which I just stated to you, but I wish you would retain in your minds that word 'overt act', because in my instructions that will follow I will call your attention particularly to the meaning of it.

"Reverting to the indictment—

"1. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, on the 14th day of March 1930, the said defendants, Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, under the name of S. A. Hall, did ship to American Products Company, 617 Grand Avenue, Kansas City, Missouri, two barrels of liquid called, 'liquid medicine in bulk', invoiced as '2 bbls. U.S.P., Fl. Ext. Ginger', said invoice being made to Globe Products Company, Fort Worth, Texas;

"2. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, on the 4th day of December, 1930, Harry Lesser, Forrest E.

James, Philip M. Lahn, and Henry J. Henners, under the name of Jordan Brothers, did ship to California two barrels of liquid called 'liquid medicine', invoiced as '2 bbls. Fluid Extract of Ginger, U.S.P.';

"3. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of the same, on the 22nd day of December, 1930, Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, under the name of Jordan Brothers, did ship to California Extract Company, Los Angeles, California, three barrels of liquid called 'liquid medicine', invoiced as '3 bbls. Fluid Extract Ginger, U.S.P.';

"4. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, on the 22nd day of December, 1930, Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, under the name of Jordan Brothers, did ship to California Extract Company, Los Angeles, California, two barrels of liquid called 'liquid medicine', invoiced as '2 bbls. Fluid Extract Ginger, U.S.P.';

"5. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, on the 6th day of January, 1931, Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, under the name of Jordan Brothers, did ship to California Extract Company, Los Angeles, California, five barrels of liquid called 'liquid medicine', invoiced as '5 bbls. U.S.P. Fluid Extract Ginger';

"6. In pursuance of said unlawful conspiracy and for the purpose of effecting the object of same, on the 27th day of January, 1931, Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, under the name of Jordan Brothers, did ship to California Extract Company, Los Angeles, California, five barrels of liquid medicine, invoiced as '5 bbls. Fluid Extract Ginger, U.S.P.';

"7. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, on the 28th day of January, 1931, Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, under the name of Jordan Brothers, did ship to Wholesale Druggist Spec. Company, Los Angeles, California, one barrel liquid medicine, invoiced as 'U.S.P. Fluid Extract Ginger';

"8. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, on the 23rd day of January, 1931, Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, under the name of Jordan Brothers, did ship to California Extract Company, Los Angeles, California, five barrels of flavoring extracts, invoiced as '3 bbls. Im. Pineapple Flavoring Extract, 1 bbl. Im. Cherry Flavoring Extract, 1 bbl. Im. Raspberry Flavoring Extract';

"9. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, on the 23rd day of March, 1931, Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, under the name of Charles M. Pomeroy, did ship to the Valo Products Company, Kansas City, Missouri, three barrels imitation flavoring extract, invoiced as '1 bbl. Imitation Pineapple Flavoring Extract, 1 bbl. Imitation Cherry Flavoring Extract, 1 bbl. Imitation Raspberry Flavoring Extract';

"10. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, on the 21st day of August, 1930, Harry Lesser, Forrest E. James, Philip M. Lahn, and Henry J. Henners, under the name of Jordan Brothers, did ship to P. D. Burkett, Kansas City, Missouri, one barrel liquid drugs, invoiced as '1 bbl. Tincture Valerian U.S.P.';

"11. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, the said defendants did write and cause to be written, certain letters under the names of Jordan Brothers, S. A. Hall, and Charles M. Pomeroy;

"12. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, the said defendants did hold certain conversations with various individuals doing business with them under the various fictitious names of Jordan Brothers, S. A. Hall, and Charles M. Pomeroy;

"13. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, the said defendants did rent certain premises;

"14. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, the said defendants did pay rent upon space in a loft building;

"15. In pursuance of said unlawful conspiracy, and for the purpose of effecting the object of same, the said defendants did cause to be printed certain letterheads containing fictitious names.

"The indictment is but a charge; it is a method whereby a defendant is placed upon trial. Guilt cannot be found simply because an indictment is presented. Guilt, if found, must be found as a result of proof offered at the trial.

"The defendants under the humane provisions of our laws are presumed to be innocent. That presumption is with them from the beginning of the trial right down to the time when you, by your verdict, determine whether that presumption has been rebutted or sustained.

"It is the duty of the Government to prove the guilt of the defendants beyond a reasonable doubt; that is, as to every element necessary to constitute the crime. A reasonable doubt is exactly what its name implies—not some mere whim or preconceived prejudice, but a fair doubt on the evidence, a doubt for which you can give a reason satisfactory to your conscience.

"Now, in this trial, with the large amount of testimony that has been presented before you, the evidence oral and documentary, it may be that you have not a clear apprehension of the crime that is charged here. The defendants are not charged with the substantive crime of shipping in interstate commerce from State to State an adulterated article under the name of fluid extract of ginger or under some other name. They are not charged with any result that would follow from the use of the article that was shipped. Let us get that clear. All they are charged with is, with having confederated, agreed, and conspired together to ship from one State to another an article which had a place in the United States Pharmacopoeia, and the article to be so shipped to be adulterated and sold, and that by the test, whether it be the manufacturing test or whatever other test was prescribed in the American Pharmacopoeia, the article to be shipped would not be that article as it was described in the American Pharmacopoeia. Now, you get that straight, gentlemen, because that is what we are dealing with. The crime charged is the crime of conspiracy.

"The elements of a criminal conspiracy are these:

"1. An object to be accomplished, which, insofar as this case is concerned, must be the commission of an offense against the United States.

"2. A plan or scheme embodying the means to accomplish the object.

"3. An agreement or understanding between two or more persons, the defendants and some person who is not to the grand jury known and mentioned but whom you could determine was a part of the conspiracy, whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and,

"4. An overt act committed by one or more of the conspirators to effect the object of the conspiracy. The gist of the offense is conspiracy, a combination or agreement to effect an unlawful end, which offense is completed only on some one or more of the parties doing an act to effect the object of the conspiracy, termed an overt act.

"That brings me to what I called your attention to in reading the indictment, the overt act. If the conspiracy be proven, that is, if the proof satisfies you that these defendants, or any two of them, or any one of them with someone not named, entered into a conspiracy to do the act charged in the body of the indictment, there would still be no crime of which cognizance could be taken, unless one or more of those that you find to have been part of that conspiracy did one of the overt acts that are alleged in the indictment. In other words, a mere agreement among men to violate the law is not of itself sufficient, unless at least one of them shall commit an overt act, an overt act in furtherance of that conspiracy. Now, that act of itself, standing alone, need not be criminal; but if it is an act, the purpose of which would tend to the carrying out of the agreement to do the unlawful act, then that would be sufficient to vitalize the conspiracy, and then it would be a crime.

"A conspiracy is a combination of two or more persons, by concerted action, to do an unlawful thing, or to do a lawful thing in an unlawful manner, and no formal agreement is necessary, a tacit understanding being sufficient; and it is not essential that each conspirator have knowledge of the details, the means to be used, or that the agreement be formal: that means just this, that they do not have to sit around a table and adopt resolutions in order to constitute a conspiracy. As a matter of fact, all do not have to agree at the same time. One may be the moving party, and he may bring in the others at different times, but there must be a common purpose; there must be a common understanding and agreement amongst them to do the particular

'hing, which the law says shall not be done, and which is charged in the ıdictment. It is not necessary that the conspiracy should originate with the persons charged. A conspiracy may originate with others, but if carried on and continued by the persons charged, and an overt act were done, then they would be a part and parcel, and it would be their conspiracy.

"It is no bar to the existence of a conspiracy that it is to be executed entirely by one conspirator. That means this, that if there be a common purpose, an agreement, an understanding, a meeting of the minds, that the thing is to be done, each and every one of them does not have to participate in the doing of the particular overt acts that are charged; it would be sufficient if it be done by one, and, as in a case like this, where the charge is that under different names the overt acts were performed, that under different names the conspiracy was to be carried out, it is not necessary that each one of those who constitute a part of the conspiracy should be concerned with the operation under that particular name. As a matter of fact, they might divide it between them, and one or more operate under one name, and one or more operate under another name, so long as the purpose was a common purpose, and these acts under these different names were in pursuance of that common purpose for the accomplishment of the conspiracy. A common design being the essence of the charge, it is sufficient if two or more persons in any manner, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design, and that must be the design charged in this indictment, and no other. That is what the charge is, and that is what they must have agreed to do. That is what they must have conspired, confederated, and agreed to do.

"It is not necessary that each conspirator have knowledge of all details of the conspiracy, or the means to be used. Intent is an essential element. An intent to take part in a conspiracy is always essential to the commission of the crime of conspiracy, but that does not mean that they must know that they are violating a statute of the United States; they must know that the act which they are designing to do is the act which is charged. Ignorance of the law would be no excuse.

"While the offense under this section consists alone in the conspiracy, yet hat offense is not complete unless one or more of the conspirators did some act to effect the object of the conspiracy—as I told you before, an overt act. Overt acts are in reality something apart from the conspiracy itself. They are acts to effect the object of the conspiracy.

"The offense of conspiracy may be established by circumstantial evidence, but the circumstances must be of such a character as to exclude every reasonable hypothesis but that of the defendant's guilt of the offense charged. The offense charged here is conspiracy to unlawfully introduce, ship, and deliver for shipment from one State to another adulterated and misbranded food and drugs, fluid extract of ginger, sometimes called "liquid medicine in bulk", being the article which it is charged they conspired to ship. Now, of course, that must be between States. If they entered into a conspiracy to simply sell it within this State, that would not be any crime under our Federal law. The Federal law applies, of course, to a sale in the Territories, but when we come to the question of States it must be between States.

"We have four men. Did they conspire? If so, when? If they entered into this agreement before the time charged in the indictment, this conspiracy, and they continued with the conspiracy within the time stated in the indictment, that would be sufficient. There must have been a conspiracy between them within the time, and there must have been what is called an overt act.

"The mere doing of some act which would have aided in committing the substantive crime of shipping from one place to another, would not be sufficient, because they are not charged with a substantive crime. They must have been part and parcel of a conspiracy.

"Now, as I said before, you have four men. You have had testimony here as to the doings of certain of these men. You have had read here before you the letters which the handwriting expert says were written or signed by one of the men, James. Now, each of the acts of each of these men binds him, and not the others, unless there was a conspiracy, but if all of them had entered into a conspiracy to do the thing charged in this indictment, then any act on the part of any one of them in furtherance of that conspiracy, or any declarations of theirs, would then be binding upon all of them, and so, of course, before you attempt to determine whether or not some particular thing is binding upon one or all, you must first determine whether there was a conspiracy.

"Now, were all of these men interested in a concern? I am not going into the facts. You have heard them discussed before you. Were they all interested in a concern that preceded these things? Did they then have and enter into a common plan and purpose when continuance under that concern was impossible to do the thing charged? Did they as the instruments for the carrying out of the purposes of the conspiracy form these other agencies, Jordan Brothers, S. A. Hall, and Charles M. Pomeroy? Is that so? Or was the establishment of these agencies a perfectly innocent thing, designed to carry on in a legitimate way a business?

"In order to determine whether the acts of a person are done honestly and legitimately, of course, you have a right to consider the manner and the method in which the business is done, whether it is done in the open and in the light of day, in which men carry out a legitimate business, or whether there be concealment or other things which would lead you to conclude that there was an attempt to hide, and not an attempt to carry on in an open way.

"Now, you have had connected with Pomeroy by name one defendant. You have had connected with Jordan Brothers one defendant as the active man in the place, assuming that the evidence is true. It is for you to say whether it is or not. You have had connected with Jordan Brothers facts with reference to the furnishings and so forth going from the Fulton Chemical Company to the Jordan Brothers premises. You have had the facts with reference to the office in New York. You have had, with reference to Hall, the testimony with reference to the activity of one of these defendants with reference to mail and other things. You have had evidence with reference to another defendant to whom mail was to be sent, and to other activities on his part. You have had reference to one of the defendants, evidence as to visits to Cincinnati and Texas, and the talk there with the witnesses who were produced here. You have had all that, and I am not going over it. It is for you to say whether there was a conspiracy, who was in the conspiracy, if there was one, and if you find that there has been a conspiracy, then, was there committed at least one, and that is all that is required; more may be shown, of the overt acts that are stated in this indictment.

"It is not necessary, in order to prove the crime of conspiracy, to prove that the thing which it was conspired to do was fully accomplished by the sending of the adulterated article from one State to another. That would be an overt act, but there could be other overt acts showing the intent, the conspiracy to do the thing, and the act, the substantive crime in itself, would not of necessity have to be accomplished in order for the conspiracy to be established.

"The defendants were not bound to take the stand on their behalf. It is the duty of the Government to prove their guilt beyond a reasonable doubt. They have a right, a perfect right, to sit mute, and say to the Government, 'Prove your case', and no presumption can be drawn against them to their detriment, or of guilt, because they fail to take the stand. They are exercising a right which was granted to them under the Constitution.

"There has been some talk about one defendant, Lahn, being a bookkeeper, and a number of people have testified to the fact. The fact that he was a bookkeeper, if he joined in the conspiracy, would be no defense. No man has a right to violate the law at the request or the instance of his employer, but the fact that there is testimony that he was a bookkeeper, occupying that position, you should consider, of course, in determining whether or not he was part and parcel of the conspiracy, if there was one, and knew what was going on, and joined in the doing of it, or was occupying a position where he had no such knowledge, but was simply performing the work that a man ordinarily occupying that position does. If he knew what was going on, and if he loaned himself to the accomplishment of it, not in one case alone, but if he joined in the common purpose, and by tacit agreement loaned his services to the carrying out of the accomplishment, and the entering into of this conspiracy, then the mere fact that his title was bookkeeper, or his position was bookkeeper, would not be a defense.

"The defendant Henners has been described here many times as a laborer, and I repeat, as I said about the defendant Lahn, that the mere fact that he occupied a position of laborer, if that be so, would be no defense, if he joined in the conspiracy, if he was a part and parcel of it, and knew what was going on, and tacitly loaned his services, not in the accomplishment of one offense that is described by the statute, but if he joined in the conspiracy for the purpose of accomplishing the object of that conspiracy. However, it is for

you to consider in arriving at your determination whether or not a man occupying that position was part and parcel of the conspiracy. Conspiracies do not have to be between bosses alone. A conspiracy may include people of the humblest positions providing they are part and parcel of the conspiracy.

"This is a matter of great importance, of course, to the defendants and to the Government. It should not be enlarged beyond its due proportions. Testimony was offered here, of course, by an expert which showed what the adulteration in some cases was. That, of course, had to be done because you gentlemen would have to know that there was no error in the determination of the expert, and that he could positively say that there was an adulteration of a certain character, but that is the purpose, and that is the object of it, and his testimony must be received for that purpose, but you must still keep in your minds that the crime here that we are dealing with, as charged in this indictment, is a conspiracy to ship from State to State this adulterated article, and not the results that might flow from the use of the article, or anything of the kind, nor the substantive crime of shipping the article in itself.

"Now, of course, you are to weigh the testimony of everybody who appeared on this stand. You are to determine whether you believe they are telling the truth. That is the only way you can arrive at a verdict. How did they impress you? Did they appear to be truthful? Did they appear to be giving their testimony in a free and fair manner? When you come to the testimony of the experts, did they satisfy you that their opinions were based upon good, sound reasons? Because it is for you to determine the weight and credence you will give to everybody's testimony, the experts' as well as anybody else's. Experts are called here to assist, and you, of course, must determine whether their opinions, because it is opinion testimony that the experts give, are based upon good, sound reasoning. That is why the experts are allowed to show you how and why they arrive at the opinions they express. Having weighed the testimony of each witness, and having allocated to each witness the credence that you think his testimony is entitled to; you then will arrive at a verdict based on the evidence and on the instructions of the court.

"Now, there has been offered here on behalf of these defendants testimony as to good character. Good character is an asset. Good character of itself sometimes is sufficient to raise a reasonable doubt, but good character evidence must be considered with all the other evidence. Each and all of the evidence must be considered together, including that of good character, in determining what effect that will have.

"Do not be misled, gentlemen. Do not be moved by any bias, or prejudice, or sympathy. That plays no part in the determination of a criminal charge. I may say now, gentlemen, with all due respect, that you have no concern whatever with the result of your verdict, except that it shall be a true verdict on the law and on the evidence.

"You are the sole judges of the facts. You need not try to seek or to learn whether I have any opinion on the facts or not. That in no wise controls you; but you are bound to take the law as I give it to you, whether you believe it is the law or not. The law that I announce to you for this case at this time is the law, and you are bound to accept it. Receive the law from me, apply it to the facts as you find them, and then render a true verdict.

"Now, in this case, like all cases of conspiracy, naturally we will find circumstantial evidence. This case is based, insofar as the charge of conspiracy itself is concerned, very largely on circumstantial evidence. Circumstantial evidence is good evidence, provided, as I told you before, taking all of the circumstantial evidence, there is one reasonable hypothesis, and that of guilt. If that be not so, then, gentlemen, all circumstantial evidence is no stronger than its weakest link, and if it does not point directly and solely to that hypothesis of guilt, then, of course, it would be not sufficient.

"This is an involved matter, perhaps. I think the summation of counsel has been helpful in presenting to you the facts and that is why I have not recited the facts. If I have made any reference to any facts at all it was simply for the purpose of making plain to you my instructions on the law, and if I may have referred to any one particular fact, it did not mean that I thought that that was more important than any of the others. On the contrary, they are all equally important to you, and I did not mean to exaggerate, nor did I mean to derogate from the importance of any of the testimony that has been presented here, by reason of the fact that I may have referred specifically to some part.

"Now, gentlemen, we have four defendants, and they are charged here with conspiracy. There could be no conviction of one for conspiracy, because one man could not conspire with himself. There must be at least two who enter into a common purpose, who confederate, agree, or conspire together. As I say, the indictment charges these defendants and other persons unknown. It may be that the evidence would show that there were other persons unknown, and if that be so, then an agreement, a confederation, a conspiracy between one of the defendants and others unknown, would be sufficient. But each of these men is charged here separately. You cannot just go out and say, 'Well, they are all together.' That is not so. Each man is entitled to your separate consideration of the question of his guilt or his innocence. You must determine from the evidence whether each one of these defendants, taken as an individual, entered into this conspiracy, and with whom, and if you shall find that any one of them entered into a conspiracy with persons not in the indictment, or that they entered into a conspiracy with one or more named in the indictment, having determined that, and who constitutes that conspiracy, then the acts of any of those that you find part and parcel of that conspiracy can be considered as against all of the other conspirators.

"It does not of necessity follow that each must have played the same part. It does not of necessity follow that each must have had the same important role. As a matter of fact, it does not follow that each and all of them must have performed any one of these overt acts. It would be sufficient if one did it. The crime is a conspiracy to do this particular thing, not the doing of it, and the allegations of the doing of it are simply the allegations of overt acts, which, as I have explained to you, vitalize and make the conspiracy itself, if there was an agreement.

"Now, take all the exhibits. I have given you an opportunity to consider this when you have time during the day, and I hope that you will give it your careful consideration, considering what I have instructed you is the crime charged, and that only, and do not go off in the realms of speculation as to things which are not charged in this indictment.

"Any exceptions or requests:

Mr. BASS. No requests on the part of the defendants, if your honor please.

The COURT. Counsel will agree that these exhibits that the jury have not taken, if they want them, they can have them taken to them; is that correct?

Mr. BASS. Yes.

Mr. KAMBER. Yes.

Mr. SAVARESE. Yes.

On December 30 the jury returned a verdict finding defendants Harry Lesser, Forrest E. James, and Philip M. Lahn, guilty, and defendant Henry J. Henners, not guilty. On January 4, 1933, the court sentenced both defendants Lesser and James to imprisonment for 1 year and 8 months in a Federal penitentiary or prison camp and a fine of $2,500 each; and sentenced defendant Lahn to imprisonment for 1 year and 5 months in a Federal penitentiary or prison camp. Costs were not imposed.

On January 5, 1933, notice of appeal was given and bail was fixed at $10,000, for each defendant. On June 14, 1933, the appeal came before the United States Circuit Court of Appeals for the Second Circuit on briefs and oral arguments, before Circuit Judges Manton L. Hand and August N. Hand, and on July 31, 1933, judgment of conviction was affirmed in the following opinion (August N. Hand, *Cir. J.*):

"Harry Lesser, Forrest E. James, Philip M. Lahn, Walter E. Anderson, and Henry Henners were indicted for conspiring to violate section 2 of the Federal Food and Drugs Act of June 30, 1906. The indictment against Anderson was dismissed, and the jury found Henners was not guilty. Lesser, James, and Lahn were convicted and have all appealed.

"The indictment alleged that the defendants conspired to 'introduce, ship, and deliver for shipment from one State to another State adulterated and misbranded foods and drugs' and to 'sell, transport, deliver and introduce, ship and deliver for shipment from one State to another State, a large quantity of

fluid extract of ginger * * * which was then and there adulterated in that it differed from the standard strength, quality, and purity of fluid extract of ginger as determined by the tests laid down in the United States Pharmacopoeia.' * * * The indictment also alleged that the defendants were doing business under the fictitious names of Jordan Brothers, S. A. Hall, and Charles M. Pomeroy and that the conspiracy continued from June 1, 1929 to February 1, 1932.

"Section 2 of the Food and Drugs Act makes any person guilty of a misdemeanor who shall ship or deliver for shipment from one State to another State 'any article of food or drugs which is adulterated or misbranded, within the meaning of section 1 to 15 * * *.' The term 'drug' is defined in the act as including all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use (section 7). In section 8, a drug is defined as adulterated if, when it 'is sold under or by a name recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopoeia or National Formulary official at the time of investigation.' But it is provided that no drug shall be deemed to be adulterated 'if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test laid down in the United States Pharmacopoeia or National Formulary.'

"We think that the Government introduced evidence at the trial which justified the jury in finding that there was such a conspiracy as the indictment alleged and that all three of the defendants-appellants participated in it.

"The defendant Lesser was interested in a flavoring and fruit extract business, having its headquarters at 601 Bergen Street, Brooklyn, New York, known as the Fulton Chemical Works. It manufactured and supplied fluid extract of ginger and various fruit extracts to customers in many parts of the United States, among others California Extract Company, Los Angeles, California, of which Jacob Rosenbloom, the half brother of Lesser, was the owner; K. & K. Drug Company, of Newport, Kentucky, owned by Sol Kauffman; Leo B. Dreyfoos, of Cincinnati, Ohio, and Prescott B. Burkett, who did business under the name of Valo Products Company, Kansas City, Lone Star Company, Dallas, Texas, and American Products Company, Kansas City. From the year 1925 on, Rosenbloom's concern purchased Jamaica ginger extract from the Fulton Chemical Works and in the latter part of 1930 and early part of 1931. Lesser went west to see his half brother in the latter part of 1929. Just before Rosenbloom ceased to do business in the early part of 1931 the sales were made to him in the names of Jordan Brothers and S. A. Hall. The evidence identified the latter with Fulton Chemical Works. Some of the ginger shipped in the name of Jordan Brothers was found upon a chemical examination to have been adulterated.

"Sol Kauffman conducted business under the name of K. & K. Drug Company. He began doing business with the Fulton Chemical Works of 601 Bergen Street about 1925 and 1926, and met James, Lesser, Lahn, and Henners at that place. He did business with the same concern in 1929 and early part of 1930, when he ceased doing business. Fluid extract of ginger was sent to him under invoices of Fulton Chemical Works, Decker Ingraham & Smith, J. Carboy, and S. A. Hall, and he made his checks payable to the order of the person or concern named in the invoice. The orders, however, were given to the Fulton Chemical Works. An invoice dated February 13, 1930, was in the name of S. A. Hall. Kauffman discussed with Lesser the business of fluid extracts and extract of ginger and the prices of goods he had ordered from the Fulton Chemical Works (fol. 1713) during the latter part of the year 1929 when Lesser was in Cincinnati on business. Kauffman said that Lesser was connected with Fulton Chemical Works in 1929 and early in 1930 (fol. 1926).

"Dreyfoos, of Cincinnati, testified that he purchased fluid extract of ginger from Lesser, James, and Lahn in 1927, 1928, 1929, and up to the latter part of February, 1930; that he would give orders to Lesser, James, or Lahn, and when he sent in written ones, would send them to 601 Bergen Street, Brooklyn, the office of the Fulton Chemical Works. Merchandise would be shipped in the names of this company and of S. A. Hall, and J. Carboy, and the check would

be made out to the person named in the invoice but the orders would be given to Fulton Chemical Works. Lesser and James were at the Gibson Hotel in Cincinnati in the early part of 1930.

"Preston D. Burkett testified that he had business relations with Lesser, James, and Lahn. He admitted making purchases from Lesser as the Fulton Chemical Works in 1924. He refused to disclose what they were on the ground that to answer might tend to incriminate him, but denied that he purchased extract of ginger from them in 1929 or 1930. On the same ground he refused to say whether he purchased it from S. A. Hall or Jordan Brothers in 1929 or 1930, and likewise refused to say whether he had any correspondence with James in 1929 or 1930. It was, however, shown by another witness named Darnell that he and Burkett, under the name of Valo Products, purchased adulterated ginger extract in 1930 and 1931 from Jordan Brothers and Pomeroy. There was evidence showing those persons were identified with Fulton Chemical Works.

"Various other witnesses testified to dealings with Lesser in connection with the Fulton Chemical Works but at dates prior to 1929.

"We think that the foregoing proof was sufficient to justify a jury in finding that Lesser continued in the business of the Fulton Chemical Works and of the individuals and concerns allied with it in the sale of fluid extract of ginger in interstate commerce. He offered no proof of severance from the association with the Fulton Chemical Works which had once existed and had continued for years. Though the earliest shipment of adulterated and misbranded fluid extract of ginger established was of the date of December 4th, 1930, and the latest connection of Lesser with the conspiracy specifically shown was in February, 1930, it may reasonably be inferred that his proved relation continued in the absence of any evidence to the contrary. The 'presumption of continuance' so-called justified the jury in believing that Lesser remained connected with Fulton Chemical Works throughout the period of the conspiracy during which the illegal shipments which were pleaded occurred. Commonwealth v. Fregassa, 278 Pa. 1; Easterday v. United States, 292 Fed. 664; Peterson v. Mobile Steel Co., 202 Ala. 471; Cooper v. Peabody v. Dedrick, 22 Barb. 516.

"The so-called 'Jim' letters written by the defendant James to Preston D. Burkett not only show the connection of James with the conspiracy but greatly reenforce the case against Lesser. Exhibit 153, which is apparently dated January 15, 1931, says that Harry 'suggested that you destroy all your records as understand they want to try and subpoena them for the cases which are coming up.' In Exhibit 155, which is under date of March 24, 1931, is the statement: 'Harry did not see his party Sat. but he talked to him by phone and was told not to worry. Have not heard from the Coast since I wrote to you last. They were supposed to go on trial yesterday in some small town and surely hope they come out O.K. If only they can smooth that thing out there is still some hope that the business will come back somewhere near normal and if it does we will have to try our "darndest" to keep it clean'.

"It is to be noted that prior to March 24, 1931, there had been a shipment of fluid extract of ginger in the name of Jordan Brothers to the California Extract Company which was found by the analysis of the chemists to be poisonous.

"In Exhibit 157, under date of March 28th, 1931, we find the following: 'Haven't heard a word from California so we have been unable to even guess what happened Monday. * * * Certainly will be glad when that matter is adjusted and naturally hope that they go no further than fines, and that they do not put an embargo on future shipments. * * * Oh, well, why worry, they may have us down but so far we are not out and to use Harry's pet expression, "everything will be all right in the morning."'

"In Exhibit 161, under date of May 27, the writer says: 'Have been unable to make shipment of your two barrels because we have been out of merchandise and have been after Harry for 10 days to get some in, but he is so dizzy that I don't know what is going to happen. If I don't get something definite from him within a day or two I will go out myself and get some goods and see that your order is filled. He seems to think that the racket is about over and wants to close up shop and quit. * * *'

"On May 29, (Exhibit 162) James writes that: 'Harry and I haven't gotten together regarding the future but I did not want to hold you up any longer so went ahead and handled everything myself. He is coming in Monday and we will then decide definitely whether we continue or whether he drops out and I carry along alone for awhile.'

"In Exhibit 163, dated June 5, 1931, James writes: 'Had another long chat with Harry today at lunch and he thoroughly understands now that I am going ahead alone and try and get the four samples approved. * * * Hated like the devil to break away from Harry because he certainly has been a wonderful friend but he has other things on his mind and did not want to follow along on my proposition so I just must follow along by myself. * * *'

"In Exhibit 164, dated June 11, 1931, James writes about a mistake in the last shipment and says: 'Sorry about this but Harry had me going around in circles while he was trying to make up his mind what to do. When he finally decided to step out I rushed too fast and was depending on memory, hence the error.'

"To this exhibit is appended a financial statement dated June 11, 1931, showing a payment on August 1, 1930, to H. L. of $1,153.80. 'Harry' and 'H. L.' were evidently the defendant Lesser. The foregoing letters show that the defendant Lesser was closely identified with James in the shipments to California and to the companies with which P. D. Burkett was connected and that this relation continued until June, 1931.

"It is perhaps unnecessary to refer to other evidence than the 'Jim' letters to show the participation of James in the conspiracy, but there was much other proof connecting him with the sales in interstate commerce of the Fulton Chemical Works and its adjuvants. Kauffman testified that he had had dealings with James as well as with Lesser and Lahn at the Fulton Chemical Works, that he did business with that concern in 1929 and 1930 and placed orders with it for fluid extract of ginger and received deliveries upon those orders, invoiced under the names of Fulton Chemical Works, S. A. Hall, Decker Ingraham & Smith, and J. Carboy. His conversations regarding the payment of the invoices were with James. James stayed with Lahn and Lesser at the Hotel Gibson in Cincinnati in 1929 and was there with Lesser in 1930. Dreyfoos likewise had conversations there with James and Lahn about fruit extracts and prices of merchandise. The insurance firm, of which James was a member, paid the rent of Jordan Brothers at No. 360 Furman Street, Brooklyn, whence shipments in the name of Jordan Brothers were made. A dealer in essential oils, named Bolz, took orders from James on October 25, 1930, and at times thereafter. In January, 1931, this dealer received an order from Jordan Brothers. When they tendered their check for the purchase price, Bolz refused to accept it without some assurance that it was good. He was thereupon referred by Jordan Brothers to James who telephoned that their check was all right. Proof connecting James with the conspiracy was ample.

"The evidence also established the participation of the defendant Lahn in the conspiracy. He was the bookkeeper of Fulton Chemical Works. He took orders for it from persons purchasing extracts, ordered letter-heads printed both for it and for S. A. Hall, Decker Ingraham & Smith, and J. Carboy, and also ordered supplies of essential oils including oleoresin of ginger. He directed the mail of S. A. Hall to be forwarded from No. 598 Atlantic Avenue to 186 Joralemon Street, care of James, and rented an office at 598 Atlantic Avenue under the fictitious name of Slade. A check used to pay the Schwartz Laboratories for an analysis on March 4, 1931, for James, of fluid extract of ginger, and found to contain phenols of a harmful nature, was charged to the account of Lahn.

"It is evident from the above that Lesser, James, and Lahn were all associated in the business of Fulton Chemical Works and its various instrumentalities and were all engaged in shipping fluid extract of ginger in interstate commerce.

"Various shipments of ginger fluid extract were made in interstate commerce in the names of Jordan Brothers, S. A. Hall, and Charles M. Pomeroy, which, upon analysis, were found to be adulterated and to differ from the 'standard of strength, quality, or purity' of fluid extract of ginger 'as determined by the test laid down in the United States Pharmacopoeia.' (Food and Drugs Act § 8.) It is argued for the appellants that no 'test' is laid down in the pharmacopoeia to determine the character of fluid extract of ginger and that consequently the act is not shown to have been violated. But the pharmacopoeia sets forth how a fluid extract of ginger is to be compounded and the statute penalizes any person guilty of adulterating or misbranding. (U.S. Pharmacopoeia 10th Revision 1926, pages 158, 159, and 175). To interpret the words 'test laid down' as referring to a *method* of detecting non-conformity with the standard of the pharmacopoeia is to give the words an unnecessarily

narrow meaning. They require conformity with the standard set up in the pharmacopoeia and make no attempt to prescribe a method of ascertaining whether such conformity exists. The chemist Eaton testified that he subjected the California shipments to chemical tests and found that they contained more oil and less ginger solids than a normal product of fluid extract of ginger. He also found that they contained an 'organic phosphorous compound of the type tricresyl phosphate', which is a poisonous ingredient, and were not the fluid extract of the United States Pharmacopoeia. He said that the way to ascertain whether fluid extract of ginger complies with the United States Pharmacopoeia is to make a ginger extract according to its teachings and then determine the various ingredients 'like the solids, and the ash, and the phosphorous compound * * * and the alcohol' and find out 'what they run on an average.'

"The testimony of the chemist Reznek was to the same effect. The testimony of the chemist Maurice I. Smith related to specimens taken from shipments to California Extract Company and to Burkett's companies. He said that the preparations purporting to be fluid extract of ginger contained a triorthocresyl phosphate, which was a poisonous ingredient. He tested the effect of the material upon chickens and the results of administering it was a partial paralysis, known to be caused by the presence of triorthocresyl phosphates. The basis for a finding by the jury that the shipments were adulterated and did not meet the standard of the United States Pharmacopoeia was ample.

"There can be no doubt that enough was proved to justify an inference of guilty knowledge. The shipments failed to conform to lawful standards and were made in many cases by persons or concerns from whom they were not directly ordered. Lahn directed the Post Office to forward to James the mail of S. A. Hall, in whose name some of the shipments were made, and Lahn himself used the fictitious name of Slade when he rented an office at 598 Atlantic Avenue for Hall. The 'Jim' letters show that James and Lesser were aware of the illegality of the enterprise, and that Lesser abandoned it about June 1931, after the shipments to California had come under investigation and danger was imminent. We think it evident that the business was conducted in a surreptitious way and are satisfied that there was proof of guilty knowledge on the part of the appellants.

"It is argued that the indictment should have been dismissed at the opening. It is said that the allegation that the defendants conspired to 'unlawfully introduce, ship, and deliver for shipment from one State to another State adulterated and misbranded foods and drugs' having been made in the conjunctive, a conspiracy to ship food as well as drugs had to be shown, and that the specification of fluid extract of ginger as the subject matter of the conspiracy makes it impossible to prove the broad allegation as to both food and drugs. But the allegation as to adulterated foods may be disregarded as surplusage where, as here, the indictment sufficiently states a crime conspiring to ship adulterated drugs.

"The contention that the indictment should have been dismissed for duplicity because it alleged generally a conspiracy to ship adulterated foods *and* drugs is trivial. As it specifies that the shipments to be made were of fluid extract of ginger there is in fact no duplicity. But in no event could the defendant be prejudiced by the inclusion of 'foods' in the allegation. It is said that in case of an acquittal under this indictment where the only proof related to shipments of fluid extract of ginger, which is a drug, the defendants might still be subject to a new indictment for conspiring to ship adulterated foods. But it is well established that in case of a second prosecution resort may be had to parol evidence to establish the crime of which a defendant has in fact been convicted and that the sufficiency of a plea in bar must be tested in that way. Bartell v. United States, 227 U.S. 433.

"It is also argued that error was committed by the trial court in allowing the Government's pharmacological expert Maurice I. Smith to testify about his experiments on chickens with the samples of the extracts shipped by the defendants and to show that the administration of the ingredients produced paralysis. Proof of the poisonous effect of the compounds shipped tended to fortify the chemical testimony that they were adulterated and contained tricresyl phosphate, which is known to produce a paralyzing effect. There is no reason to hold that the noncorrespondence of the extracts shipped with the standard of the pharmacopoeia must only be shown by chemical analyses. On

the contrary, it may be established in any other logical and convincing way. Goodwin v. United States, 2 Fed. (2nd) 200; Columbus Const. Co. v. Crane Co., 98 Fed. 946, at p. 957."

Judgment affirmed.

R. G. TUGWELL, *Acting Secretary of Agriculture.*

20555. Misbranding of Diano for Diabetes. U.S. v. 71 Bottles of Diano for Diabetes. Default decree of condemnation, forfeiture, and destruction. (F. & D. no. 29054. Sample no. 336-A.)

Examination of the drug preparation, Diano for Diabetes, disclosed that the article contained no ingredient or combination of ingredients capable of producing certain curative and therapeutic effects claimed in the bottle and carton labels and in a circular shipped with the article.

On October 14, 1932, the United States attorney for the Northern District of California, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of 71 bottles of the said Diano for Diabetes, remaining in the original unbroken packages at San Francisco, Calif., alleging that the article had been shipped in interstate commerce on or about September 27, 1932, by the Samaritine Co. from Philadelphia, Pa., to San Francisco, Calif., and charging misbranding in violation of the Food and Drugs Act as amended.

Analysis of a sample of the article by this Department showed that it consisted essentially of calcium chloride (approximately 1 percent) a trace of chlorine, glycerin (approximately 16 percent), and water (approximately 83 percent).

It was alleged in the libel that the article was misbranded in that the following statements regarding its curative and therapeutic effects, appearing on the bottle and carton labels and in the circular, were false and fraudulent: (Bottle) "Diano For Diabetes A Scientific Preparation With Definite Known Quality Of Quickly Relieving Diabetics And Ultimately Eliminating All Traces of Diabetes * * * Directions Start with two teaspoonfuls in one-half glass of water four times daily. Third day reduce dosage to three times daily, either before or after mealtime. When sugar content of urine has been materially decreased (usually in about a month), continue taking Diano twice daily two teaspoonfuls morning and evening, until urine becomes normal. As a preventive take one dose Diano every night"; (carton) "Diano For Diabetes"; (circular) "Diano For Diabetes Marvelous Cures * * * 'Cured about one hundred cases' * * * 'was * * * analyzing the urine of the diabetes and Bright's Disease patients. * * * we cured about one hundred cases of Diabetes, losing only one during the three years. In Bright's Disease we cured about 40 per cent. * * * one case particularly where the urine was a dark brown color, too thick to filter and practically all albumen. In less than 14 days the man had resumed his work and the albumen was down to one percent.' Directions for the use of 'Diano for Diabetes' Start with 2 teaspoonsful in one-half glass water, four times daily. Third day reduce dosage to three times daily, either before or after mealtime. When sugar content of urine has been materially decreased (usually in about a month) continue taking Diano twice daily two teaspoonsful, morning and evening, until urine becomes normal. As a preventive, take one dose Diano every night. * * * Free Chlorine, * * * scientifically blended with other drugs remedial in their action upon the digestive organs, aiding in the proper assimilation of the carbohydrates ingested. By the use of Diano for Diabetes a marked reduction in the amount of the urine sugar appears at once and a steady diminution is noted every week. The patient also is able to retain his water for longer periods and in a few weeks will not have to rise during the night. In the earlier stages of Bright's Disease (Acute Nephritis), the Chlorine will entirely eliminate the albumen and will restore the patient to health very speedily. In chronic cases, it reduces the inflammation and arrests the disease, but it will not restore a wasted kidney. Diano effects immediate relief from Diabetes and eventually eliminates it entirely from the system. Its use quickly shows a marked reduction in Diabetes. Its action is such that carbohydrates again take their normal course of nourishment, thus allowing the sufferer eventually to become free from dietetics. * * * When taken according to directions, a marked improvement is positively assured by the first week's treatment * * * For Diabetes A Scientific Preparation with definite known quality Of Quickly Relieving Diabetics and ultimately Eliminating all traces of Diabetes."