

Q. Now, Mrs. Alberty, I will ask you if you don't know it to be a fact, after you came to Los Angeles and the Alberty's Foods [a product not involved in this case] were distributed to infants here, that dozens upon dozens of babies were taken to the then City Health Department right across the street from this building and there had to be treated as a result of taking Alberty's Food?

A. Absolutely no. I never ever heard of it.

Such questions well could be deemed improper. They too frequently occur in the heat of criminal causes. However, here the appellant apparently was satisfied with a negative answer and did nothing. That concluded the matter. Whatever hesitation counsel may have regarding a claim of misconduct of a trial judge, there should be none in claiming it against the prosecutor. It should be made at once. The court should be given the opportunity for instant correction and, if the offense be sufficiently hurtful, declare a mistrial. Counsel cannot occupy the instruments of justice, the court and jury, in an extended trial and, without objection or motion for relief, raise such questions on appeal.

Error is assigned to a portion of the cross-examination of George Hyland, pharmacist, a defense witness. The government was permitted to ask and receive an affirmative answer to the question whether there was not at that time a charge against him of manufacturing and selling some of the same material which the defendant was accused of misbranding. There was no exception to the admission of this testimony, so it would not have to be considered. However, the record shows that the court limited the effect of the evidence to the question of the witness' interest or bias in the case. So limited, it was entirely proper.

The defendant complains of the action of government counsel in repeatedly attempting to bring out facts showing the large profit allegedly made by the defendant in the sale of her articles. The court excluded testimony on this factor and instructed the jury that the element of profit was not an element of the offense, and that they could not consider it other than that it might "furnish a motive for the defendant to do what otherwise she might not have done." The instruction was not excepted to. There is no basis for assuming that the conduct of counsel in asking questions on this aspect of the case was prejudicial, in view of the fact that the testimony was excluded and the matter covered by an instruction of which no complaint was made.

There were other assignments, based on remarks of the court, upon certain items of evidence, and matters contained in the court's instructions. They are relatively minor points and it is not made to appear that there was any prejudice to the appellant in the matters alleged. In any case they were not properly objected or excepted to in the court below.

The court sentenced the defendant to pay a total of \$1,000 fine (\$100 on each count) and the costs of prosecution, amounting to \$1,499.80, making a total judgment of \$2,499.80. Error is assigned to this assessment of costs. There is nothing to the assignment. R. S. §974 (28 USCA §822) provides that upon conviction for any offense not capital, the court may award the costs of prosecution against the defendant. Appellant says the award was so excessive as to be a cruel and unusual punishment. There is nothing in the record to bear out that statement.

Affirmed.

M. L. WILSON, *Acting Secretary of Agriculture.*

27377. Misbranding of Experimental OK'd Farm Astringent Tablets. U. S. v. Albert T. Peters and Paul S. Casey (Vitamineral Products Co.). Plea of nolo contendere. Fine, \$50 and costs. (F. & D. no. 36084. Sample no. 23038-B.)

The labeling of this product bore false and fraudulent representations regarding its curative or therapeutic effects.

On February 3, 1936, the United States attorney for the Southern District of Illinois, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Albert T. Peters and Paul S. Casey, copartners, trading as Vitamineral Products Co., Peoria, Ill., charging shipment by said defendants in violation of the Food and Drugs Act as amended, on or about February 21, 1935, from the State of Illinois into the State of Minnesota of a quantity of Experimental Ok'd Farm Astringent Tablets that were misbranded.

Analysis showed that the article contained sodium chloride (approximately 89 percent), boric acid (5.3 percent), and malachite green dye.

The article was alleged to be misbranded in that certain statements regarding its curative and therapeutic effects, appearing on the tube labels, falsely and fraudulently represented that it was effective as an intestinal antiseptic and bacteriostat and as an astringent that arrests discharges; as an intestinal antiseptic destructive to poisonous germs, and as a bacteriostat to stop the growth of bacteria; effective in the drinking water of fowls as an aid in the treatment of coccidiosis, diarrhea, dysentery, fowl typhoid, avian hemorrhagic septicemia (fowl cholera), and other diseased conditions of the intestinal tract in poultry that may be transmitted by contaminated drinking water; and effective as a treatment for sick birds.

On June 10, 1937, a plea of nolo contendere was entered on behalf of the defendants and the court imposed a fine of \$50 and costs.

M. L. WILSON, *Acting Secretary of Agriculture.*

27378. Adulteration and misbranding of tincture of nux vomica. U. S. v. Economy Laboratories, Inc. Plea of nolo contendere. Fine, \$50 and costs. (F. & D. no. 36976. Sample no. 27443-B.)

This product was sold under a name recognized in the United States Pharmacopoeia but differed from the standard established by that authority since it yielded a smaller amount of the alkaloids of nux vomica than provided therein.

On April 13, 1936, the United States attorney for the Southern District of Illinois, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Economy Laboratories, Inc., Peoria, Ill., charging shipment by said defendant in violation of the Food and Drugs Act on or about March 29, 1935, from the State of Illinois into the State of Kansas of a quantity of tincture of nux vomica that was adulterated and misbranded. The article was labeled in part: "El Tincture Nux Vomica U. S. P. * * * Economy Laboratories, Inc."

The article was alleged to be adulterated in that it was sold under a name recognized in the United States Pharmacopoeia and differed from the standard of strength, quality, and purity as determined by the tests laid down therein since it yielded less than 0.237 gram, that is, not more than 0.174 gram of the alkaloids of nux vomica per 100 cubic centimeters; whereas the pharmacopoeia provided that tincture of nux vomica should yield not less than 0.237 gram of the alkaloids of nux vomica per 100 cubic centimeters; and the standard of strength, quality, and purity of the article was not declared on the container thereof. Said article was alleged to be adulterated further in that its strength and purity fell below the professed standard and quality under which it was sold.

It was alleged to be misbranded in that the statements, "Tincture Nux Vomica, U. S. P." and "Adjusted by assay to the U. S. P. Standard," borne on the bottle label, were false and misleading since they represented that the article was tincture of nux vomica which conformed to the standard laid down in said United States Pharmacopoeia; whereas it did not conform to said standard.

On June 10, 1937, a plea of nolo contendere was entered on behalf of the defendant and the court imposed a fine of \$50 and costs.

M. L. WILSON, *Acting Secretary of Agriculture.*

27379. Misbranding of rubbing alcohol compound. U. S. v. 17½ Dozen Bottles of Rubbing Alcohol Compound. Default decree of condemnation and destruction. (F. & D. no. 37126. Sample no. 50492-B.)

This product consisted essentially of isopropyl alcohol and water with traces of borax. Its label, however, bore the conspicuous statement "Rubbing Alcohol Compound", a name which conveyed the impression that it was made from ordinary ethyl alcohol, and this impression was not corrected by the relatively inconspicuous statement of the presence of isopropyl alcohol. The percentage of isopropyl alcohol was not declared on the label.

On January 29, 1936, the United States attorney for the District of Connecticut, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 17½ dozen bottles of rubbing alcohol compound at Bridgeport, Conn., alleging that the article had been shipped in interstate commerce by Best Value Sales Co., Inc., from New York, N. Y., and charging misbranding in violation of the Food and Drugs Act. It was labeled in part: "Rubbing Alcohol Compound * * * Certified Rx Laboratories New York—Chicago."

The article was alleged to be misbranded in that the statement "Rubbing Alcohol Compound", borne on the bottle label, was false and misleading when