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Issued September 27, 1911.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1050.

(Given pursuant to section 4 of the Food and Drugs Act.)

MISBRANDING OF VINEGAR.

On February 15, 1911, the United States Attorney for the Eastern District of Wisconsin, acting upon the report of the Secretary of Agriculture, filed in the District Court of the United States for said district a libel, praying condemnation and forfeiture of ten barrels of vinegar in the possession of the Zinke Mercantile Co. The product was labeled: "46 gal. B. T. Chandler & Sons, 27—55th St., Chicago, Ill. Saratoga Brand Vinegar, a blend of pure apple cider and distilled vinegar. Guaranteed under the Food and Drugs Act of June 30, 1906."

Analysis of the sample of this product, made by the Bureau of Chemistry of the United States Department of Agriculture, showed the following results: Solids, 0.65 gram in 100 cc; reducing sugar direct, 0.35 gram in 100 cc; reducing sugar invert, 0.42 gram in 100 cc; nonsugar solids, 0.23 gram in 100 cc; polarization, direct, at 20° C., + 0.4°; ash, 0.04 gram in 100 cc; acid, as acetic, 3.98 grams in 100 cc.

The libel alleged that the vinegar after transportation from Illinois into Wisconsin remained in the original unbroken barrels, and was misbranded in violation of the Food and Drugs Act of June 30, 1906, because the label on the barrels represented said vinegar to be a blend of pure apple cider and distilled vinegar when in fact pure apple cider and distilled vinegar are not like substances, and a mixture of the two is not a blend under said act, and because the statement on the label that the product is a blend of pure apple cider and distilled vinegar gave the impression that it is a blend of pure apple cider vinegar and distilled vinegar when in fact there is no apple

cider vinegar contained in the said product, and the statement is therefore false and misleading and calculated to deceive and mislead the purchaser, and that the said product was therefore liable to seizure for confiscation.

On February 23, 1911, the Zinke Mercantile Co. appeared as claimant of said product and filed exceptions to the libel. On April 19, 1911, the court, in overruling the exceptions to the libel, rendered an opinion in form and substance as follows:

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN.

THE UNITED STATES OF AMERICA, *Libellant*,
vs.
TEN BARRELS OF VINEGAR. } April 19, 1911.

This is a case arising under the Pure Food Act, so called. A demurrer has been interposed to the libel, which raises the question whether the vinegar in question was misbranded, under the terms of Section 8 of said act, which provides substantially that the term "misbranded" as used in the act, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device; regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, etc.

The vinegar in question was labeled as follows: Gal. Established 1875. Dayton, O. We warrant our vinegar to test 40 grains in strength B. T. Chandler & Son, 27 East 55th Street, Chicago. Manufacturers and Wholesale Dealers in Saratoga Brand Vinegar. A blend of pure boiled apple cider and distilled vinegar. We guarantee the Vinegar sold under our brand to comply with the requirements of the national and state pure food laws. For ———.

GUY D. GOFF, U. S. Atty for the Government.
GORHAM & WALES for the Claimant.

QUARLES, *District Judge.*

The contention of the Government is that the label is so framed as to mislead the average customer who reads the same casually. The eye naturally rests upon the words in large print "Saratoga Brand Vinegar," then in smaller type "Pure Boiled Apple Cider," and in the third line, in larger print "Distilled Vinegar." Without the aid of marks of punctuation, it is contended that the words "A blend of Pure Boiled Apple Cider and Distilled Vinegar" may naturally describe two brands of vinegar that are blended, and the words "Pure Boiled Apple Cider" are merely descriptive of one of such ingredients.

It is matter of common knowledge that cider vinegar is far superior to distilled vinegar. The popularity of cider vinegar is so general that this brand, not subjected to critical examination, would naturally arouse the expectation that cider vinegar has been blended with distilled vinegar. That, like the Delphic Oracle, the label, in the absence of punctuation, may be read either way, and the average buyer might naturally be mislead in the premises.

If, as matter of first impression, the label naturally conveys the idea that cider vinegar is one of the ingredients, then it is calculated to deceive, although a deliberate reading of the label might correct such impression. It is matter of common observation that the average retail purchaser of such commodities

does not delay to make a careful analysis of the label, but contents himself with a hasty glance or cursory examination. If therefore, this label would lead such purchaser at first blush to the conclusion that here was a blend of two vinegars, one of which was cider, it would fall within the definition of misbranding under section 8. In other words, the ordinary purchaser reading this label, would not be led to suppose he was buying distilled vinegar compounded with a foreign element. He is comforted with the assurance "We guarantee the Vinegar sold under our brand to comply with the requirements of the National and State Pure Food Laws."

There is another subdivision of the Pure Food Act which must be considered pari materia with the clause already under consideration, Section 8, subdivision 4, paragraph 2, is in substance as follows. An article of food which does not contain any poisonous or deleterious ingredients shall not be deemed misbranded if labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word "compound" "imitation" or "blend" as the case may be, is plainly stated on the package in which it is offered for sale. Up to this point the label in question conforms with the act and, if the legislative conditions ended here, there could be no just cause of complaint. But Congress added another requirement in the case of a blend— "provided that the term blend as used herein shall be construed to mean a mixture of like substances" etc. If the substances so blended are not similar, the statement on the label that they are blended is not sufficient to secure immunity.

The defendants contend that this restrictive proviso applies only where the blend is claimed without disclosure of ingredients, and has no application whereas here, the component parts of the blend are disclosed. This construction seems to be too narrow. One prime object of this legislation is to prevent the public from being misled or deceived. In view of the language of the act we are justified in saying that the term "Blend" as here displayed on the label, is an assurance to the public that the mixture consists of like substances; and in the present case it is an assurance that the "Saratoga Brand Vinegar" consists of two like substances, that is, distilled vinegar and a vinegar derived from apple cider. In this regard the label is false and misleading.

We have seen how naturally the buyer might be misled by a casual examination of the label. The use of the term "Blend" coupled with a specific reference to the Pure Food Act, is well calculated to confirm such mistake, in view of the guaranty that the vinegar sold under this brand meets all the requirements of the National Pure Food Law. Special significance is thus given to the statutory definition of the term "blend". It is true that boiled apple cider might be used as a harmless agent to give color or flavor to the distilled vinegar; but in such a case the boiled cider would be an infusion as distinguished from a "blend", and the public would be entitled to notice of its use for that qualified purpose. Here it is presented to the public as a blend, which is falsely misleading, because it is conceded that no cider vinegar whatever is contained in these packages.

Defendants cite in support of their contention, In re Wilson, 168 fed. 556; United States vs. Boeckmann, 176 Fed. 382; United States vs. 68 cases of Syrup, 172 Fed. 782.

The Wilson case is not in point, because there the substances comprising the "Gold Leaf Syrup" were both like substances, and under the terms and provisions of the act could properly be blended. The ingredients were maple and white sugar, and it is apparent that there was no misbranding in that case.

In the Boeckmann case, supra, the product was labeled "Compound" "Pure Comb and Strained Honey and Corn Syrup". It will be observed the representation in that case was that it was a compound, as distinguished from a blend. So that has no bearing on the instant case.

In United States vs. 68 Cases of Syrup, supra, the court treated the extract of maple wood as a saccharine substance which might be blended with refined cane sugar, and that they constituted a blend within the meaning of the act. In the case at bar, we have no two similar substances, but only one substance; namely, distilled vinegar, which has been mixed with a product wholly unlike distilled vinegar. While the reasoning in this case is not satisfactory, a careful examination will show that it does not rule the instance case.

The Government cites the case of United States vs. Scanlon, 180 Fed. 485. This is a very interesting and well reasoned case and goes far to sustain the conclusion we have already reached in this case. The defendant in that case manufactured syrup of cane sugar flavored to imitate maple syrup by the introduction of an extract from maple wood after it had been chopped down. The syrup was put up in bottles labeled "Western Reserve Ohio Blended Maple Syrup," the words "Ohio" and "Maple Syrup" had be ween them the word "Blended" and then in small type the statement "This syrup is made from the sugar maple tree and cane sugar." The court held that the label was misleading in that purchasers would ordinarily understand that the article contained in part maple syrup made from the sap drawn from live maple trees, and therefore the article was misbranded.

I am constrained to hold that the vinegar in this case was misbranded within the meaning of the Pure Food Act, and therefore the demurrer will be overruled with leave to respondent to answer within twenty days if so advised.

On May 25, 1911, the claimant to said property having consented that judgment of forfeiture pro confesso be entered, and it appearing from the return of the marshal that he had duly seized seven of the ten barrels of vinegar mentioned in the libel, the court found and declared the seven barrels of vinegar misbranded as alleged in the libel, and condemned and forfeited the same to the United States, and directed the marshal to sell the seven barrels of vinegar on such terms and conditions as were not in violation of the aforesaid act.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *August 8, 1911.*

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