

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1441.

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

ADULTERATION AND MISBRANDING OF CIDER VINEGAR.

On November 2, 1911, the United States Attorney for the Northern District of Iowa, acting upon a 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 75 barrels of vinegar in the possession of John T. Hancock Co., a corporation, of Dubuque, Iowa. The product was labeled: "John T. Hancock Company, Faultless Pure Cider Vinegar Dubuque, Ia.—Guaranteed Cider Vinegar 4½ Percentum—Spielmann Bros. Co., Mfrs., 6095."

Analysis of two samples of said product, numbered I. S. 3839-d and 3834-d respectively, made by the Bureau of Chemistry, United States Department of Agriculture, showed the following results:

I. S. No. 3839-d.

Alcohol (per cent by volume).....	0.10
Glycerol (grams per 100 cc).....	.14
Solids (grams per 100 cc).....	1.98
Nonsugar solids (grams per 100 cc).....	1.21
Reducing sugar as invert before inversion after evaporation (grams per 100 cc) ..	.77
Per cent sugar in solids after evaporation.....	39
Polarization, direct..... ° V..	-.9
Ash (grams per 100 cc).....	.32
Alkalinity of soluble ash (cc N/10 acid per 100 cc).....	31.4
Total phosphoric acid (mg. per 100 cc).....	22.0
Total acid, as acetic (grams per 100 cc).....	4.59
Volatile acid, as acetic (grams per 100 cc).....	4.58
Fixed acid, as malic (grams per 100 cc).....	.01
Lead precipitate.....	light
Color on 0.5 in. brewer's scale (degrees).....	6.0
Ratio ash to nonsugar solids.....	1:3.8
Color removed by fuller's earth (per cent).....	55

I. S. No. 3834-d.

Glycerol (grams per 100 cc).....	0.15
Solids (grams per 100 cc).....	1.66
Nonsugar solids (grams per 100 cc).....	0.94
Reducing sugar as invert before inversion after evaporation (grams per 100 cc) ..	0.72

Per cent sugar in solids.....	43.38
Polarization direct..... ° V	-1.1
Ash (grams per 100 cc).....	0.31
Alkalinity of soluble ash (cc N/10 acid per 100 cc).....	34.4
Total phosphoric acid (mg. per 100 cc).....	27.9
Total acid, as acetic (grams per 100 cc).....	4.47
Volatile acid, as acetic (grams per 100 cc).....	4.46
Fixed acid, as malic (grams per 100 cc).....	0.01
Lead precipitate.....	slight amount
Color on 0.5 inch brewer's scale (degrees).....	6.0
Color removed by fuller's earth (per cent).....	64
Ratio ash to nonsugar solids.....	1:3.0

The libel alleged that the product, after transportation from the State of Illinois into the State of Iowa, remained in the original unbroken packages, and was adulterated and misbranded in violation of the Food and Drugs Act of June 30, 1906, and was therefore liable to seizure for confiscation. Adulteration and misbranding were alleged in the libel in form as follows: "For the reason that the said barrels, and each of them, do not contain pure cider vinegar as they purport to contain and the branding and labeling of the said barrels as representing that the said barrels each contain pure cider vinegar is misleading and false, so as to deceive and mislead the purchaser, and the said barrels, and each of them, bear a statement regarding the ingredients or substances contained therein, which statement is false and misleading, and the said barrels, and each of them, do not contain pure cider vinegar, but consists wholly or in part of distilled vinegar, or dilute solution of acetic acid and a material high in reducing sugars and foreign mineral matter, which has been mixed and prepared in imitation of cider vinegar, and said barrels contain an article of food that contains deleterious ingredients.

On December 5, 1911, Spielmann Bros. Co. entered their appearance and filed exceptions to the libel, which exceptions were overruled by the court. Thereafter, on December 9, 1911, the said Spielmann Bros. Co. filed an amended and substituted answer to the said libel, whereupon the attorney for libellant filed exceptions to part of the aforesaid amended and substituted answer. The case coming on for hearing on December 11, 1911, on the said answer and exceptions thereto, the court sustained the exceptions in the following opinion in which is stated those allegations of the answer to which the Government, by its attorney, excepted:

REED, District Judge:

In this case the United States have filed a libel of information against seventy-five barrels of vinegar, which it is alleged were shipped from the state of Illinois into the state of Iowa, and held in the latter named state within the jurisdiction of this court by the John T. Hancock Company at Dubuque, Iowa, and were being offered for sale for food consumption by that company in violation of the Food and Drug Act of Congress approved June 30th 1906, 34 Stat. 768.

Spielmann Brothers Company, a corporation of Illinois, has intervened in said proceedings, and claims to be the owner of said vinegar; admits that it was shipped from Illinois to Dubuque in the state of Iowa, and was being held at Dubuque by said John T. Hancock Company, a corporation; but denies that the same was shipped, or is being held or offered for sale in violation of said act of Congress.

It further alleges that a sample of said vinegar was obtained by the Bureau of Chemistry of the Department of Agriculture and was analyzed by said Bureau, or under its directions, and found, in the opinion of said Bureau, or the analyst of said sample, to be adulterated and misbranded within the meaning of said act of Congress: and a report and certificate to that effect made by the Secretary of Agriculture and forwarded by him to the U. S. Attorney for this district, who upon such report and certificate alone, instituted this suit under Section 10 of said act, as directed by Section 5 thereof, for the condemnation and forfeiture of said vinegar.

It is then alleged in Article 6 of its substituted answer or claim as a defense to the proceedings, that the Secretary of Agriculture failed to give notice to the person from whom the sample of said vinegar was procured, or to this claimant, or to any other person, that such sample of vinegar had been analyzed by the Bureau of Chemistry, or under its direction, and found to be adulterated or misbranded, and an opportunity given to them to be heard upon the question of adulteration, or misbranding of said vinegar, before this proceeding was commenced: and prays that the suit be dismissed and said property restored to the claimant.

To so much of the allegations of the claimant corporation, as alleges the failure of the Secretary of Agriculture to give the notice required by Section 4 of said act, and afford to it, or to the person from whom said sample was obtained, an opportunity to be heard before the Department of Agriculture prior to the commencement of this proceedings, the Government excepts for the reason that the same constitutes no defense to this proceedings.

It is contended in behalf of the claimant company that when a proceeding of this character is instituted by the United States Attorney, solely upon the report and certificate of the Secretary of Agriculture to him of a violation of said act, and not upon his own initiative, or upon information furnished to him by the local authorities, that such proceedings cannot be sustained unless the Secretary of Agriculture has prior to the commencement of such proceedings, in fact given the notice and afforded to the person from whom the sample was obtained an opportunity to be heard as provided in Section 4 of said act: and the cause of the United States v Twenty cases of grape juice, Flickinger & Co. claimants, 189 Fed. 331, decided May 8, 1911, by the Circuit Court of Appeals of the Second Circuit, is cited in support of such contention. That case supports the contention of the claimant, upon the ground as it would seem, that because it is the practice of the Government to make an investigation through the proper executive department of alleged violations of the laws of the United States, before commencing criminal proceedings against the alleged offender, or proceedings for the forfeiture of property shipped, or offered for sale in violation of law. Admitting that such is the practice of the Government, it cannot be that it is the right of an alleged offender to have such investigations made before he can be indicted for an alleged offense or proceedings commenced against him, or property which has been shipped or offered for sale in violation of law; for its condemnation and forfeiture; or that he can plead the failure to make such investigation as a defense to an indictment, or other proceedings for the condemnation of the property so illegally used.

Section 4 of the Food and Drugs Act reads in this way:

“That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act: and if it shall

appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States District Attorney, with a copy of the result of the analysis or the examination of such articles duly authenticated by the analyst or officer making such examination, under the authority of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid."

Section 5 is as follows:

"That it shall be the duty of each District Attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

This proceeding is under Section 10 of the act, which need not be set out.

In the case above cited it is conceded that the failure of the Secretary of Agriculture to give the notice and afford the opportunity to be heard, as required by Section 4 of the act, does not limit the authority of the United States Attorney to commence proceedings upon his own initiative and prosecute the same to final determination; but it is held that said section imposes upon the Secretary of Agriculture the duty of making an investigation of the facts before he may rightly make a report and certificate to the United States Attorney for the proper district, of a violation of the act, and before proceedings instituted without such notice and opportunity to be heard, can be sustained. It seems to me that Section 5 of the act imposes upon the United States Attorney of the proper district, the duty of instituting the appropriate proceedings whenever he is informed by the local authorities, or by the report and certificate of the Secretary of Agriculture, that the law has been violated, to commence without delay the appropriate proceedings for the alleged violation of this act. And whenever such information, or report is made to him, he has no discretion but to proceed as directed by that section; and he is not required to investigate and determine whether or not the Secretary of Agriculture has performed his duty under the law.

Just what may be the purpose of the requirement of Section 4, that the Secretary of Agriculture shall give the notice and opportunity to be heard, may not be entirely clear. It will be observed that this section only requires the notice to be given to the person from whom the sample is obtained, who may be only the bailee of the property of which it is a sample and knows nothing of its ingredients, and afford him an opportunity to be heard. This may be for the purpose of ascertaining who is the real violator of the law, if the analysis shows such violation, with a view of affording him an opportunity to discontinue its violation and proceed lawfully in the conduct of his business under the act and the requirements of the Department of Agriculture. However this may be, it does not seem to me that the giving of, or the failure to give, such notice and opportunity to be heard can relieve any violator of the law of the penalties which he may have incurred by reason of its violation; or that the Government is barred from prosecuting him by indictment or commencing proper proceedings for the condemnation and forfeiture of the property illegally manufactured and shipped, or offered for sale. This is the view taken by several of the district courts, viz., Judge Morris in 165 Fed. 966; Judge Dayton in 170 Fed. 449; 454; Judge McPherson in 179 Fed. 983; and Judge Willard in 188 Fed. 471. With the utmost respect for the opinions of the Court of Appeals of the second circuit, I am unable to agree with its conclusion in the case cited.

The notice that is required to be given of the seizure of the property, and of the proceedings for its condemnation, affords ample opportunity to its owner to appear and defend against such proceedings; and if upon the final hearing it is condemned and declared forfeited, he is not deprived of his property without due process of law.

The exceptions of the Government to that part of the answer of the claimant above referred to are allowed and an order will be entered accordingly.

Thereupon a jury was impanelled to whom the case was submitted under general instructions of the court after the introduction of testimony on behalf of the libellant and defendant and argument of counsel, and the jury returned a verdict for the Government.

On December 15, 1911, the case coming on to be heard by the court upon the verdict rendered by the jury, the court entered a decree against Spielmann Bros. Co. and G. P. Smith, surety on the cost bond, for the costs of the proceedings, and ordering that the aforesaid product should be sold by the marshal at private or public sale, but with a proviso that the product should be released to the said Spielmann Bros. Co. upon the execution by said company of a bond in the sum of \$1,000 conditioned that the product should not be again sold or disposed of contrary to the provisions of section 10 of the Food and Drugs Act.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *April 3, 1912.*

