Polarization, invert, 87° C. (°V.)	+23.1
Glucose (per cent)	14.2
Erythrodextrin test: Positive.	
Ash (grams per 100 cc)	0.23
Alkalinity of soluble ash (cc N/10 acid per 100 cc)	11.6
Total acidity as acetic (grams per 100)	0.417
Fixed acid as malic (grams per 100 cc)	0.248
Lead precipitate: Heavy.	
Color (degrees, ½ inch, brewer's scale)	1.5
Saccharin: Positive.	
Benzoic acid: Positive.	
Saccharin (grams per 100 cc)	0.02
Sodium benzoate (grams per 100 cc)	0.15
Alcohol (per cent by volume)	7.00

Adulteration of the product was alleged in the information for the reason that it was not apple cider nor apple base cider, but was an imitation cider made in part by the fermentation of impure starch sugar, containing a high amount of dextrin and being a highly alcoholic compound. Adulteration was alleged for the further reason that the product contained added phosphoric acid and fermentation of impure starch sugar and dextrin, which said substances had been added wholly or in part for apple cider or apple base cider so as to reduce, lower, and injuriously affect the quality of said article. Misbranding of the product was alleged for the further reason that it was prepared in large part from impure starch sugar, the presence of which was not declared upon the label; for the further reason that the label contained the following, "Fortified with sugar," whereas this statement was false and misleading, in that the same was not fortified with sugar but was prepared from, in part, a solution of impure starch sugar containing dextrin; for the further reason that said article was an alcoholic beverage containing approximately 7 per cent by volume of alcohol, the presence and amount of which was not stated on the label; and for the further reason that the label contained the statement, "Conforms to the provisions of the Food and Drugs Act, as passed by Congress June 30, 1906," whereas, in fact, said label did not conform to the requirements of said act, in that the product was both adulterated and misbranded.

On November 13, 1913, the defendant company entered a plea of guilty to the information and the court imposed a fine of $25, with costs of $15.85. (When this case was reported for prosecution, no claim was made by this department that the product was misbranded, for the reason that the presence and amount of alcohol was not stated on the label thereof, or that it was adulterated for the reason that it contained added phosphoric acid.)

B. T. GALLOWAY, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *June 8, 1914.*

3275. Adulteration and misbranding of macaroons. U. S. v. F. B. Washburn & Co. Tried to the court and a jury. Verdict of guilty. Pending on motion to set aside verdict and for a new trial. (F. & D. No. 2247. I. S. No. 1928–c.)

On March 30, 1911, the United States attorney for the District of Massachusetts, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information, and on January 8, 1913, an amendment to the information, against F. B. Washburn & Co., a corporation, Brockton, Mass., alleging shipment by said company, in violation of the Food and Drugs Act, on August 1, 1910, from the Commonwealth of Massachusetts into the State of Pennsylvania, of a quantity of so-called

macaroons which were adulterated. The product was labeled, in part: "I. X. L. Macaroons. Guaranteed under Food and Drug Act, June 30, 1906."

Analysis of a sample of the product by the Bureau of Chemistry of this department showed the following results:

Benzoic acid: None.
Salicylic acid: None.

Polarization, direct, 20° C. (°V.)	+89.2
Polarization, invert, 20° C. (°V.)	+38.4
Polarization, invert, 87° C. (°V.)	+48

Iodin test for erythrodextrin: Positive.

Sucrose (per cent)	38.29
Glucose (factor 163) (per cent)	29.44

Microscopical examination showed presence of oil, coconut, pulp and cornstarch.

Adulteration of the product was alleged in the information for the reason that a substance, to wit, glucose, had been mixed and packed with said food so as to reduce, and lower, and injuriously affect its quality and strength. Misbranding of the product was alleged in the amendment to the information for the reason that the label on said food and its containers, and the package containing the same, bore a statement regarding said food which was false and misleading in certain particulars, that is to say, the statement in substance and effect following, "Macaroons," whereas, in truth and in fact, said food was not macaroons.

On January 10, 1913, the case having come on for trial before the court and a jury, after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court (Dodge, *J.*):

Mr. Foreman and Gentlemen: The Government charges against this defendant two offences under the pure food law. The first offence, as charged, was the offence of adulteration. Afterward an amendment was filed, and the other charge of misbranding added. You will be asked for a verdict on those two charges separately. You will be asked when you come in what your verdict is on the first count, charging adulteration—"Do you find the defendant guilty or not guilty on the first count?" That will mean adulteration. You will remember that the first count is the charge of adulteration; the second count is the charge of misbranding, and after you have given your verdict on the first count you will be asked, "How say you as to the second count? Is the defendant guilty or not guilty?" And that will be, Do you find him guilty or not of misbranding?

As long as the charges are presented in that order by the Government, I will deal with them in that order. I will say first as to both these charges that the burden is upon the Government to prove to you that the defendant is guilty beyond a reasonable doubt. You must find the evidence such as to satisfy your minds beyond a reasonable doubt of the defendants' guilt of the charge before you can find them guilty of either charge. You will consider the two charges separately, and you will ask yourselves whether or not you are satisfied beyond a reasonable doubt by the evidence you have listened to that the defendant is guilty of this charge, whichever it is that you are considering at the time. As you know, gentlemen, a reasonable doubt means such a doubt as reasonable men, making a proper exercise of their reason, allow to affect their decision upon the important affairs of their own lives. It does not mean a mere fanciful, imaginary, or frivolous doubt, of course. But if as to either of these charges the evidence leaves your minds still affected by a reasonable doubt as to the defendant's guilt, you are to give the defendant the benefit of that doubt.

Take now the charge of adulteration. Are you satisfied beyond a reasonable doubt that these so-called macaroons which the defendant admits having shipped in interstate commerce under the label which has been repeatedly read to you in this case, and in the container or box which you have seen, were adulterated in that a substance, to wit, glucose, had been mixed and packed

with them so as to reduce, or lower, or injuriously affect their quality or strength? That is the question for you on the charge of adulteration. Now, in considering that charge I think you may leave out the question whether they are properly called macaroons or not, and consider that they are macaroons notwithstanding that they have cocoanut in them. The Government has not charged that they are adulterated because a substance, to wit, cocoanut, has been mixed with them; it charges that they are adulterated because a substance, to wit, glucose, has been mixed with them so as to reduce, or lower, or injuriously affect their quality or strength. It is admitted that glucose was mixed with them, that glucose is an ingredient in them. Are you satisfied beyond a reasonable doubt that the admixture of glucose is such as to reduce, or lower, or injuriously affect their quality or strength?

Now, the Government's claim upon that question is this, that these so-called macaroons ought to be made of cocoanut, or almond, whichever it is, white of egg and sugar and nothing else, and that any admixture of glucose reduces. or lowers, or injuriously affects their quality or strength, and you have heard the Government's evidence on that question. According to the witnesses for the Government, these cakes should have been composed of almond, or cocoanut, and sugar and white of egg; there should not have been any glucose in them at all. On the other hand, you have heard the defendant's evidence, which tends to show that using glucose with the sugar not only does not reduce, or lower, or injuriously affect their quality or strength, but in some respects it improves it.

The Government's witnesses have told you that glucose is not as sweet as sugar; I don't understand that there is any dispute on that point; glucose is only three-fifths as sweet as sugar. The defendant's evidence is, however. that notwithstanding that fact there is such a compensating advantage over the loss in sweetness that on the whole it cannot be said that mixing glucose in the composition of these cakes reduces, or lowers, or injuriously affects their quality or strength.

Now, that is the problem for you under the charge of adulteration. Are you or not satisfied on the whole evidence, and satisfied beyond a reasonable doubt, that the admitted admixture of glucose in this case was such as to reduce, or lower, or injuriously affect their quality or strength? If you are, but not otherwise, your verdict will be "Guilty" on the charge of adulteration. If you are not, your verdict will be "Not guilty."

I pass now to the charge of misbranding. The defendant admits that he shipped these cakes, or whatever we call them, labeled as you have seen, in that container, and in interstate commerce. Now, they were misbranded, under the Food and Drugs Act, sometimes called the pure food law, if they were labeled so as to deceive or mislead the purchaser. If they were not labeled so as to deceive or mislead the purchaser, they were not misbranded within the meaning of the act. Has the Government convinced you beyond a reasonable doubt in this case that the label which you have seen here, taken in connection with the goods which it covered, deceived or misled the purchaser? That is the question under the charge of misbranding.

The Government claims, in the first place, that the purchaser was deceived or misled because the cakes in the box were not composed of almond, but of cocoanut. The Government further claims that the purchaser was deceived or misled by the label, because the cakes contained glucose instead of sugar. The Government's contention is that the label "Macaroons" means cakes composed not of cocoanut but of almonds, and cakes mixed with sugar and not with any glucose in them.

Mr. GARLAND. Will your Honor pardon me? The charge is misled in a certain particular, that is, that the article was not macaroons, and of course my argument was that the label would tend to mislead. My contention is that it is not necessary to prove that it did mislead anybody, but that it would have that tendency. That, I thought, was what the law meant.

The COURT. Don't you charge them with misbranding under the act?

Mr. GARLAND. Yes, sir.

The COURT. And is not the definition of the act of misbranding if it be labeled so as to deceive or mislead the purchaser?

Mr. GARLAND. So as to. I understood that meant, so as to have that tendency. Of course, we haven't proved here that it did in fact mislead anybody.

The COURT. There is no definite purchaser shown in this case, so when I say that you must prove that the label was such as to deceive or mislead the purchaser, I mean, of course, purchasers generally; isn't that correct?

Mr. GARLAND. It would have that tendency; when they buy the box they would expect to find something different in it from what in fact they find. That is our position.

The COURT. Does that differ from what I have instructed the jury?

Mr. GARLAND. I understood you to use it in the past tense, as though it was necessary that the Government show that in fact it had deceived or misled somebody.

The COURT. [To the jury] The Government must show beyond a reasonable doubt that the label was such as to deceive or mislead the purchaser. That, I think, must be a correct statement of the law. Now, gentlemen, you will consider the two respects in which it is contended by the Government that this label was such as to deceive or mislead the purchaser, and if you are satisfied beyond a reasonable doubt that the label was such as to deceive the purchaser in either or both those respects, you will find the defendant guilty, and unless you are so satisfied, you will find them not guilty.

Take the first claim, that "macaroon" means cakes made of almonds only. You have heard what the Government witnesses said about that. They were asked how they made macaroons, and they told you, and they said, some of them at least, that they did not know of any other kind of macaroons, or never heard of their being made in any other way. On the other hand, you have heard what the defendant's witnesses have said. You have heard what the books introduced in evidence by the Government witnesses, or, at least, some of them spoke of, the recipes that are contained in those books. It is contended by the defendant that there is more than one kind of macaroons, that cakes made of almonds are not the only kind of macaroons, that there are cocoanut macaroons, pecan macaroons, and I don't know how many other kinds besides.

Now, gentlemen, the question will be for you. You have heard the evidence on both sides. Are you satisfied beyond a reasonable doubt that "macaroon" means one kind of cake only and that composed of almonds, or are you not so satisfied? Are you inclined to agree, on the other hand, with the defendant's witnesses that there may be more than one kind of macaroons, and that one of those kinds may be composed of cocoanut?

You are there dealing, gentlemen, with a question of common acceptation, common understanding. This act, of course, was passed to apply in interstate commerce. It was passed to apply to the public of this country; and when for the purposes of a question like this under the act you are called upon to determine the meaning of a label, the meaning referred to, the meaning which you must determine, is that which is commonly accepted by the public. It would not do to say that the makers of macaroons or the dealers in macaroons have a meaning for the term and that that must be the meaning which you are to take. If you restrict it to dealers or makers, it must be a common acceptation by the public, including consumers, purchasers, as well. Now, when I instruct you, therefore, that you are to consider whether you are satisfied beyond a reasonable doubt that the word "macaroon" means this or that, you must understand that I mean, What does it mean in common acceptation in this country by the general public, not one class of the public only but the public generally? What is the commonly accepted meaning of the term? If a purchaser gets goods which are properly described by the label according to the commonly accepted meaning of the label, he is not cheated. If, however, he gets something palmed off on him under the label which is different from what the label means in common acceptation among the public, then he is cheated. Now, you are to say, dealing with the meaning of this term, what is its commonly accepted meaning? Well, gentlemen, if you find that according to the commonly accepted meaning the label of a "macaroon" means almond cakes only, if you are satisfied of that beyond a reasonable doubt, that, as I have told you, will require a verdict of "guilty." If, however, you are not so satisfied, the Government has another claim under this charge of misbranding. It says, whether cocoanut cakes can properly be described as macaroons or not, at any rate there was glucose instead of sugar in these cakes, and therefore they can not be macaroons according to the common understanding of the term. Upon that question, gentlemen, you must take the evidence on both sides. You have heard the Government evidence, the evidence of their chemists and of the makers of macaroons whom they have called. You have heard what is contained in the box produced by the Government experts. On the other hand, you have the defendant's evidence as to the practice of

manufacturers and dealers as to the length of time during which they have used glucose in the composition of macaroons, or of cocoanut macaroons at least, as to the advantages of using it, and you have heard the evidence tending to show that almond paste, of which I think nearly all the witnesses agree that macaroons when made of almonds are composed, often itself contains glucose. Now, you will take all that into consideration and say whether or not you are satisfied beyond a reasonable doubt that goods labeled "macaroons" are misbranded, according to the common acceptation of the term, if there is glucose in them instead of sugar. You must decide, gentlemen, from the evidence what is the meaning of the term "macaroons," commonly understood by the public in the United States, at the time of the commission of the alleged offense by the defendant, including dealers, consumers, and, in fact, all the public. If you find that the word "macaroon" means a small cake composed of ground almonds, sugar and whites of egg, then you will be justified in finding that the product shipped by the defendant was misbranded within the meaning of the Food and Drugs Act, if you find that the word "macaroon" means that and means nothing else. If you find, gentlemen, that the word "macaroon," as commonly understood in the United States by the public, means a small cake principally composed of ground almonds, sugar and whites of egg, you will be justified in finding that the label, "I–X–L Macaroons," used on the packages shipped by the defendant, would have a tendency to deceive or mislead a purchaser, and you will be justified in finding the defendant guilty under the count charging misbranding, if you find that the word "macaroons," as commonly understood, has that meaning and no other.

The mere fact, gentlemen, if you find it to be the case, that the defendant has used the label in question for a number of years and before the passage of the Food and Drugs Act would not legalize the use of such label if you find it to be misleading to a purchaser.

Now, gentlemen, I think that is all I have to say to you on the two questions which you are to pass on. The question of adulteration, as I have told you, turns on the question of the reducing, or lowering, or injuriously affecting the quality or strength of the goods. The question of misbranding turns on what you find to be the commonly accepted meaning of the word "macaroon." The question of wholesomeness or unwholesomeness does not enter into this case at all. Nobody claims here that glucose is unwholesome.

The question whether sugar or glucose costs the most does not enter into this case at all, except so far as you may be inclined to think that the question of expense affects the testimony of some witness or other in the case. If you think that the question of cheapness raises an interest on the part of any witness so as to be likely to affect his testimony which he gives you, of course you would be justified in taking that into account in deciding how far you believe his testimony.

Is there anything further that counsel desire to ask me? Are the officers ready? Now, gentlemen, you will retire and consider your verdict under these instructions I have given you, and I will send the exhibits and the papers to your room.

The jury thereupon retired and, after due deliberation, returned into court with its verdict of guilty on both counts of the information. On February 4, 1913, the defendant company filed its motion to set aside the verdict and for a new trial, and on April 7, 1913, its bill of exceptions was filed by consent of the United States attorney and presented to the court, and the case is now pending upon said motion and exceptions.

B. T. GALLOWAY, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *June 10, 1914.*

3276. Adulteration and misbranding of lemon mixtures. U. S. v. The Schorndorfer & Eberhard Co. Plea of nolo contendere. No sentence imposed. (F. & D. Nos. 2328, 2348. I. S. Nos. 3619–c, 8455–c.)

On May 8, 1911, the United States attorney for the Northern District of Ohio, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against The Schorndorfer &