

3879. Misbranding of macaroni. U. S. v. 90 Boxes of Macaroni. Tried to the court and jury. Verdict for libellant. Decree of condemnation and forfeiture. Product ordered sold.
(F. & D. No. 3390. I. S. No. 15366-h. S. No. 1258.)

On February 6, 1912, the United States attorney for the District of Connecticut, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 90 boxes of macaroni, remaining unsold in the original unbroken packages at Waterbury, Conn., alleging that the product had been shipped on or about December 15, 1911, January 6, 1912, and January 30, 1912, by the Savarese Macaroni Co., Brooklyn, N. Y., and transported from the State of New York into the State of Connecticut, and charging misbranding in violation of the Food and Drugs Act. The product was labeled, in part, "Macaroni, Gragnano Style, Savoy Brand."

Misbranding of the product was alleged in the libel for the reason that the labels upon the boxes at the time of shipment bore certain statements, designs, and devices regarding said macaroni, which were false and misleading, that is to say, said labels bore the words "Macaroni, Gragnano Style, Savoy Brand" "Guaranteed by the manufacturer under the Food and Drugs Act, June 30, 1906, Serial No. 35286," the word "Gragnano" being printed in flaring type, the words "Savoy Brand" being printed in large type, the word "Style" after the word "Gragnano" being printed in much less noticeable type than the word "Gragnano," and the words "Guaranteed by the manufacturer under the Food and Drugs Act, June 30, 1906, Serial No. 35286," being printed in much smaller type than the type used for printing the other words on the label; and said label also bore pictorial representation of a wheat field and three women reaping therein, with a bay and mountain in the distance, said pictorial representation being intended to be a representation of a foreign and Italian scene, and said label being in the general style and appearance of labels customarily used on boxes containing macaroni produced in the district of Gragnano in Italy, said Gragnano being famous for the production of the best macaroni; and said label being so printed as to deceive and mislead the purchaser into the belief that said macaroni was a foreign product, when, as a matter of fact, it was an American product produced at Brooklyn, N. Y.; said macaroni was further misbranded in that the containers were branded "artificially colored" by means of a rubber stamp in so indistinct a manner as to be almost imperceptible although said macaroni was in fact so artificially colored as to resemble in color macaroni produced in Italy in said Gragnano district.

On May 27, 1912, the said Savarese Macaroni Co., claimant, filed its answer, denying the material allegations relative to misbranding, and praying that the libel be dismissed.

On January 31, 1914, 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 (Thomas, J.):

GENTLEMEN OF THE JURY: On June 30, 1906, Congress passed a law familiarly known as the Pure Food Law, the operation of which has resulted in much good to the consuming public. Under this law among other things, provision is made for condemnation proceedings against any food product which the Government thinks is manufactured in violation of this law, and in this particular case the Government seeks to condemn 90 boxes of macaroni which are the subject of an interstate shipment, having been shipped from the claimant's factory in Brooklyn to one Frank Pepe in Waterbury, Conn. This action is in the nature of a civil process as distinguished from a criminal prosecution.

At the beginning of every judicial inquiry the law says that he who asserts the affirmative of any proposition of fact assumes the burden of proof; that is, he must prove what he says. Where claims are made upon the one side and denied upon the other, as here, the parties are at issue upon the truth of those claims and the law places the burden of proving those claims upon the party who makes them. That burden is discharged by a fair preponderance of the evidence in favor of the party who bears it. If, on all the evidence presented to you on such disputed matters, there is a fair preponderance in favor of the party bearing the burden of proof, then you must find the facts as claimed by him to be true. If the evidence does not so preponderate

then he has failed to satisfy you of the truth of his claims within the requirements of the law and your finding must so indicate. A fair preponderance of evidence is in civil cases, the standard measure of persuasion. Whether or not the proof has reached that measure you determine by weighing all the evidence in the case presented to you. The application of this rule, which I have just stated in this case, is this: from the material allegations set up in the libel filed by the Government which are denied in the answer filed by the claimant, the Government bears the burden of proof, i. e., it must prove such allegations by a fair preponderance of evidence and as to those material allegations set out by the claimant and alleged affirmatively in his answer and denied by the Government, the claimant, The Savarese Macaroni Co, bears the burden of proof, i. e., it must prove those allegations by a fair preponderance of evidence. In civil cases it is not necessary that the jury should be free from all reasonable doubt as to the proper conclusion to be drawn from the evidence. Every lawsuit seeks to accomplish a double purpose—first, to end a controversy; second, to end it justly; and in the administration of human action the first is almost as important as the last. It is enough, therefore, if your judgment rests not indeed on mere conjecture, but on a probability strong enough to induce a reasonable belief in an impartial mind.

It is true that the jury is a tribunal which is regarded by the law as one especially fitted to decide controverted questions of fact upon the evidence. The jury decides how much credibility is to be given to each witness, what weight justly belongs to the evidence, and between the statements of hostile and contradictory witnesses, where the truth lies.

A juror must use all his experience, his knowledge of human nature, his knowledge of human events, past and present, his knowledge of the motives which influence and control human action, and test the evidence in the case according to such knowledge and render his verdict accordingly; the juror who does not do this is remiss in his duty. It is properly within your province in listening to the testimony of witnesses to observe their demeanor on the witness stand, their manner and bearing, their intelligence, character, and means of knowledge, and to take into consideration any interest or bias any witness may have or entertain, and reconcile so far as possible any conflicting evidence. As that rule is important in this case I may state it another way. In weighing the evidence and determining the credibility of the witnesses and each of them, I think you should look to the manner and demeanor of each witness in testifying, to the readiness and willingness or tardiness or unwillingness, if any, in answering on the one side or the other; to the interest or want of interest, if any, upon the one side or the other; as to whether the witnesses or any of them have any bias or interest, or not.

Second. The witnesses' means of knowledge and opportunity for knowing the facts he testified to and professes to know and understand. To the reasonableness or unreasonableness, the probability or improbability of the circumstances related by the witnesses when considered in connection with all the facts and circumstances in evidence before you and having thus carefully considered all of these matters, the jury must fix the weight and the value of the testimony of each and every witness and the evidence as a whole, and are not compelled to accept as true any statement made by any witness unless you find such statement to be true after considering the same in connection with all of the facts and circumstances in evidence before you, reconciling, as far as possible, any conflicting evidence.

Now, before we come to the questions particularly involved in this case I ought to and do remind and charge you that you and you alone are the sole judges of all questions of fact which arise here, and you are to determine those questions upon a careful consideration of all the evidence before you without direction or suggestion from the court as to what weight or value you should give to all or any part of the testimony, nor are you in any way to be governed in your conclusions by any opinion the court may seem to give you. The jury's first concern, where the parties are in flat conflict as to the essential facts and where the evidence is contradictory, is naturally to determine what the real facts are. You are to be guided in the performance of that duty by the court, only in following the law which the court gives you, so that while you are in every essential sense the sole judges of the facts, you are answerable to the court for the application of the law to the facts as you find them; and you must receive from the court and apply to the case such instructions upon the law applicable to the questions arising here as shall guide your deliberations toward a verdict in harmony with the law's requirements.

In considering this case and in drawing your conclusions you will necessarily be guided to some extent by the testimony of expert witnesses. I therefore deem it necessary to instruct you with reference to the evidence of such witnesses. An expert witness is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation, and

practice. The jury is not bound by expert testimony, but such testimony should be considered by you in connection with the other evidence in the case. Their evidence is subject to your consideration and to your supervision and to your judgment. Such testimony is to be taken and treated by you like the evidence of other witnesses and their testimony, their opinions are subject to the same rules of credit or discredit as the testimony of other witnesses and are not necessarily conclusive with the jury. Whether the matters testified to by them are facts, whether they are true or false, is to be determined by you and you alone, and you will carefully consider and examine their testimony in connection with all the other testimony in this case, as I say, subject to the same rules of credit and disbelief as the testimony of other witnesses.

Before taking up the issues in the case I want to call your attention to the stipulation entered into between counsel for the Government and the claimants and to its legal effect. The stipulation becomes undisputed evidence and establishes the facts stated in the stipulation, and you are entitled to draw such reasonable and logical inferences and conclusions from it as you deem proper either for or against either party for the purpose of aiding you in determining the issues in this case. It is not within the province of the court to draw any for you. As I said when the stipulation was read to you yesterday, you were to consider that stipulation as containing proven facts about which there is no controversy. You have heard counsel for the Government and the claimant make their respective claims with reference to the deductions and conclusions to be drawn from the facts stated in the stipulation, and here I say to you that you are the sole judges as to the proper inference to be drawn from those facts.

I will now direct your attention to the Pure Food Act and the provisions contained in it that have particular bearing upon this case. Among other things the act provides "that it shall be unlawful for any person to manufacture within any territory of the United States any article of food or drug which is adulterated or misbranded within the meaning of this act," and right at this point I charge you that there is no claim made by the Government that there was any adulteration or that there was any poisonous or deleterious ingredient in the macaroni which might make it injurious or detrimental to the health of the consumers, so that upon this feature of the case before you, your consideration will be confined entirely to the subject of misbranding. In section 8 the law provides that the term "misbranded" shall apply to all 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, and it further provides that for the purpose of this act an article of food shall be deemed to be misbranded "if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so"; and further, "that it shall be deemed to be misbranded if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular." From the pleadings in the case we find that certain facts are admitted, hence it becomes unnecessary to offer evidence in support of the allegations so admitted. The Government alleges and the claimant admits that the macaroni in question was in the possession of Frank Pepe, of Waterbury; that said macaroni was, on various dates, shipped from Brooklyn, N. Y., to Frank Pepe, in Waterbury, Conn.; that the said boxes of macaroni were labeled "Macaroni, Gagnano Style—Savoy Brand," and further labeled—"Guaranteed by the Manufacturer under the Food and Drugs Act of June 30, 1906, Serial No. 35286." That the word "Gagnano" was printed in flaring type and that the words "Savoy Brand" were printed in large type, and that the words "Guaranteed by the Manufacturer under the Food and Drugs Act of June 30, 1906, Serial No. 35286," were printed in much smaller type than the type used for printing the other words on said label; and said label also had printed on it a pictorial representation of a wheat field and three women reaping therein with a bay and mountain in the distance; said pictorial representation being, and being intended to be a representation of a foreign and Italian scene.

These allegations are admitted. The claimant denies in its pleadings that said 90 boxes of macaroni were misbranded within the meaning of this act which I have quoted, and further denies that the labels upon said 90 boxes of macaroni bear and at the time of said shipment and delivery bore certain statements, designs, and devices regarding said macaroni which were and are false and misleading, or intended to deceive and mislead the purchaser. Claimant denies all of that. The Government alleges and the claimant denies that said macaroni was further misbranded in that the boxes were stamped "artificially colored" by means of a rubber stamp in so

indistinct a manner as to be almost imperceptible, although said macaroni was and is so artificially colored as to resemble in color macaroni produced in Italy and in the said Gragnano District. And in the amendment to the libel the Government alleges and the claimant denies that said macaroni was in fact artificially colored in a manner intended to conceal its inferiority and in a manner whereby its inferiority was in fact concealed, and that said 90 boxes of macaroni were and are further misbranded within the meaning of the act in that the boxes containing said macaroni and each of them, were and are so designed and devised by reason of their dimensions and by reason of colored paper strips pasted along the edges thereof as to be misleading in that they were in imitation of the boxes used for the packing and shipping of macaroni in the District of Gragnano in Italy. The claimant admits that the boxes containing said macaroni are of similar dimensions and have pasted along the edges thereof certain strips of paper similar to the boxes used for the packing and shipping of macaroni made in the District of Gragnano, but denies that this is done for the purpose of misleading the purchaser and denies that the style and dress of the box is misleading. Such then are the issues before you as raised by the pleadings. Briefly, then, it may be stated that the questions for you to determine are—

First. Whether the macaroni was artificially colored with intent to conceal its inferiority. This allegation presupposes the existence of certain facts—first, whether the macaroni was artificially colored or not; second, if artificially colored, whether it was so colored with the specific intent to conceal its inferiority; and third, that it was an inferior macaroni. In order therefore to sustain the Government upon this aspect of the case you must find from all the evidence that the macaroni was inferior, that it was artificially colored, and that it was artificially colored for the specific purpose and intent of concealing its inferiority. If, from all the evidence you find all these three elements proven upon this aspect of the case, your verdict will be for the Government, and if, on the other hand, you should find that any one of these three elements is lacking—that is to say, either that it was not artificially colored, or, if so, that it was not done so with the specific intent of concealing its inferiority and that it was not an inferior product—then, of course, your verdict upon this aspect of the case would be for the Government [claimant?].

Now, you are bound to be guided, gentlemen of the jury, by the testimony of the experts for the purpose of coming to a conclusion with reference to this artificial color subject, and the fact that it is artificially colored for the specific intent of concealing its inferiority and that its inferiority was in fact concealed, and as I have given you the rules about expert witnesses and their testimony, you must analyze it, weigh it carefully, and decide upon this aspect of the case, as I say, largely from their testimony. It is not necessary to rehearse their evidence. You have seen all of them, you have heard their testimony, you have observed all of them upon the witness stand; you have heard their qualifications to testify; those are all matters proper for you to take into consideration in determining this particular issue between the Government and the claimant. The witness French says that this was not an inferior macaroni, and you will recall that it was, upon the analysis made by him, found to contain Durum semolina and was a first-class article. On the other hand, you heard the expert, Mr. Jacobs, on behalf of the Government, who says that the percentage of water soluble extract showed that it was of a poor grade or low grade—inferior grade, I think, was his word. It is for you to harmonize that evidence and come to a conclusion. Upon this aspect of the case you can not find for the Government unless you find three things—first, that it was artificially colored; and second, if so, that it was artificially colored so as to conceal its inferiority; and third, that it was an inferior article because it concealed its inferiority. The fact that it was inferior must exist.

I now direct your attention to the label, the style, and dress of the boxes; they are all in evidence before you. The testimony is conflicting upon this important feature of the case and you must reconcile it. While it is true that one may adopt and copyright a label for use in his business, and while those rights must be protected as they represent substantially invested interest, yet I charge you that if they are used in violation of law the fact that they are adopted and copyrighted is not of any avail; therefore, the important inquiry and a responsible one for you to decide in this case is whether this label, adopted and copyrighted and entitled to full protection, is in violation of this law and comes within the meaning of this act that we are now discussing and comes within the meaning of this Pure Food and Drugs Act, and upon this particular feature of the case I call your attention again to that part of the act which says: "An article shall be deemed to be misbranded if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so." In order to answer the inquiry fairly under this provision of the law you will naturally inquire as to whether or not all of the elements of

the statute have been proven by the Government by a fair preponderance of the evidence; some of those inquiries would naturally be as follows: Is the package labeled or misbranded, and if so, is it labeled so as to deceive or mislead the purchaser? The words "deceive" or "mislead" require no legal definition; they are words that we all understand, and their full import is understood. The word "purchaser," it will be noted, is used without limitation or qualifying terms; the act does not say the wholesale, retail, or individual purchaser. If it is broad enough to include wholesale and retail purchasers it is also broad enough to include the ultimate consumer, as the purchaser and the label or brand of the particular box inclosing the article which he buys must be such as not to deceive or mislead him. It will not do to say that this law was framed to protect the wholesaler and retailer and not the common people; its primary purpose is the protection of the ultimate consumer. It is the purchasing public that the purpose of this statute is primarily intended to protect. It was the purpose of Congress in enacting this Pure Food and Drugs Act to put a stop to the transportation and sale in interstate commerce of adulterated and misbranded articles of food and drugs. It was intended to reach all forms of misrepresentation by misbranding by the use of words or by the use of designs or devices, pictures, etc., calculated to mislead or deceive, cheat, or defraud the purchasers.

There has been considerable contention on behalf of both sides as to just what kind of a purchaser is meant in that act. The standard to be applied by you in that connection is the standard of the ordinary man—the ordinary intelligent person. No law was ever passed for the special benefit of any one particular class; if passed it was not constitutional. You can not legislate for the benefit of the Italian who can not read and write any more than you can legislate for the benefit of the highly educated person who may be very unwise about what the ignorant Italian is very wise, but legislation is passed for the general public, for all persons, and therefore the standard to be applied by you in determining the kind of a person [is] meant by the term "purchaser" is the standard of the ordinary intelligent person.

Coming back to the subject of labels in this connection it is also plain that it is the general purpose of this law to give the consumer the chance to know what he buys and what he eats. It is plain that Congress intended that no one who is desirous of knowing what the law is in that regard may make any mistake about it. The law requires the manufacturer to be honest in his statement of the contents of his package; it requires him to be honest in stating the truth about the labels he puts upon it. That is what the act is intended to accomplish and which, if this statute is properly enforced, it will accomplish.

This statute cannot be evaded by a mere subterfuge. It is to be enforced according to its letter and its spirit, and when that is done no one will suffer by it. I have made this reference to this statute, and it is proper that the statute should be given a fair interpretation, but it is a question of fact for you to determine by a careful consideration and analysis of all the evidence, whether in this particular case this claimant has violated it, and I caution you, gentlemen of the jury, that the burden is upon the Government to prove this contention. It is not important so far as your consideration is concerned, as to why the claimant is here or why he didn't do something else. He has a perfect right to be here under the law; he has elected his own action and why he didn't do something else is of no concern to us.

Now, we come again to the subject of labels and designs. The Government claims that the macaroni bore a certain label, a pictorial representation of a wheat field and three women reaping therein, with a bay and mountain in the distance in representation of a foreign scene in Italy; now, counsel for the claimant admits that this is a foreign scene, an Italian scene, but denies that they were false or misleading or intended to represent a foreign product. Now, the question for you to pass upon in this respect is—did the labels tend to deceive a reasonably intelligent person into believing that the goods sold under that label were a foreign product? It is not the question of whether one person might be misled by what he sees upon the label, but it is the significance that the label in that respect would bear as to whether the macaroni is of foreign origin. The statute, gentlemen of the jury, does not require the place of manufacture to be stated on the label or the name of the manufacturer, so the label is not false or misleading in that respect.

You will notice, gentlemen, that the chief question is the question of fraud and deceit; whether these boxes bore certain designs and devices thereon plainly intended to conceal the contents of the boxes and giving a certain false intimation to the purchaser or user thereof as to the nature and character of the material in the boxes. It is for you, from all of the evidence introduced, to determine whether these words and devices and designs and pictures were intended by the manufacturer to be false and misleading and would convey to the purchaser the idea that this macaroni was manufactured in Gragnano District in Italy. If you believe from the evidence that

this has been proven by the Government—that is, regarding the labels and their allegations that those statements are true and that these labels were so designed as to mislead and deceive the purchaser and intended to represent a foreign product when not so, as a matter of fact—then your verdict will be for the Government; otherwise, if you find this is not true, your verdict will be for the claimant.

Now, gentlemen of the jury, I have been requested to make certain charges, part of which I do make.

In behalf of the Government the term “label,” as used in the Food and Drugs Act, applies to any printed, pictorial, or other matter upon or attached to any package of a food product, or any container thereof, subject to the provisions of the act.

The law requires the manufacturer to be honest in his statement of the contents of a package containing a food product, and it requires him to be honest in stating the truth of the labels put upon it. It is the purchasing public, the ultimate consumer, whom the provisions of this law are primarily intended to protect. “The law is not made for the protection of experts, but for the public, that vast multitude, which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearance and general impressions.” It makes no difference that dealers in the article are not deceived. It is the probable inexperience of the consumer that you should consider.

On behalf of the claimant I charge you as follows:

The law does not require the fact of the presence of harmless coloring to be stated upon the label on all the evidence in this case.

The words “Savoy Brand” indicate nothing as to the place of origin or manufacture of the macaroni or of the ingredients or substances therein.

The statute does not require the place of manufacture to be stated upon the label if the label is not false or misleading in this respect.

The statute clearly does not require, or permit the department to require, that the place where an article is manufactured shall appear on the label.

The statute clearly does not require, or permit the department to require, that the name of the manufacturer of the article should appear on the label.

The statute is drawn in such a way as to expressly permit the omission of the name of the manufacturer and of the place of manufacture.

The importance of this case must impress itself upon you. While the amount involved is insignificant so far as the 30 boxes of macaroni are concerned, which, by the marshal’s return, is the amount received, while the value of that is insignificant, yet the importance of this case must have impressed itself upon you to give it important consideration, weighing in behalf of the Government and in behalf of the claimant the evidence, carefully considered within the rules I have given you, and when you have done so, render your verdict accordingly.

After due deliberation the jury rendered a verdict in which they found the issues for the United States, and thereafter, on September 3, 1914, a decree of condemnation and forfeiture was entered, and it was ordered by the court that the product should be sold by the United States marshal, and that the costs of the proceeding should be paid by said claimant.

CARL VROOMAN, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *May 26, 1915.*