

**4330. Adulteration and misbranding of cider. U. S. v. Jacob Shucart (National Bottling Co.). Tried to the court and a jury. Verdict of guilty. Defendant's motion in arrest of judgment sustained and new trial awarded. (F. & D. No. 5486. I. S. No. 36262-e.)**

On September 28, 1914, the United States attorney for the Eastern District of Missouri, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Jacob Shucart, doing business under the name of National Bottling Co., St. Louis, Mo., alleging shipment by said defendant, in violation of the Food and Drugs Act, on or about July 10, 1912, from the State of Missouri into the State of Illinois, of a quantity of cider which was adulterated and misbranded. The article was labeled: "Sweet Cider Produced of Concentrated Pure Apple Juice, preserved with 1-1000 part of Benzoate of Soda The National Bottling Co., 1311 N. Leffingwell Ave., St. Louis, Mo."

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

Solids (grams per 100 cc.)-----	1.60
Ash (grams per 100 cc.)-----	0.058
Saccharin (grams per 100 cc.)-----	0.014
Color (degrees, Brewer's scale, $\frac{1}{2}$ -inch cell)-----	10
Caramel: Present.	

These results show that the product is a highly diluted apple juice product to which saccharin and caramel have been added. The saccharin gives a sweet taste, simulating the taste of sweet cider, and the caramel produces a color like that of an undiluted sweet cider.

Adulteration of the article was alleged in the information for the reason that a substance, namely, saccharin, had been mixed and packed with the article so as to reduce or lower or injuriously affect its quality or strength; further, in that substances other than sweet cider, namely, water, saccharin, and caramel, had been substituted, in whole or in part, for sweet cider, which the article purported to be; further, in that the article had been colored with caramel in a manner whereby its inferiority was concealed; further, in that said article contained an added poisonous or added deleterious ingredient, namely, saccharin, which might render said article injurious to health.

Misbranding was alleged for the reason that the statements "Sweet Cider" and "Produced of Concentrated Pure Apple Juice," borne on the labels of the bottles, were false and misleading, because, as a matter of fact, the article was not sweet cider produced of concentrated pure apple juice, as represented by said statements, but was an imitation cider prepared wholly or in part from water, saccharin, and an apple product artificially colored with caramel; further, in that the article was an imitation of sweet cider, prepared by mixing water, saccharin, and caramel with an apple product, and said imitation so prepared was offered for sale and sold under the distinctive name of another article, namely, "Sweet Cider"; and, further, in that the article was labeled and branded so as to deceive and mislead the purchaser into the belief that it was sweet cider, whereas, in truth and in fact, it was not sweet cider, but was a mixture or compound prepared from water, saccharin, and caramel.

On November 8, 1915, the case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Dyer, J.):

Gentlemen of the Jury: On the 30th of June, 1906, an act was passed by the Congress of the United States and was approved by the President of the

United States. That is, "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded, or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes." That is the style of the act.

Of course, there can be no punishment under this act for anyone who may in this state adulterate or misbrand such products if their sale is made within the State of Missouri and confined alone to the State of Missouri, but the act of Congress regulating the sale in interstate commerce has control of it so that while under the state law the misbranding or adulteration of food or drugs may be prosecuted in the state court for violation within the State, we have to go beyond that before we can convict a man in the Federal court, because he must have sold or shipped or transferred to another State the product so adulterated or misbranded. If there was no such shipment, no such carrying to the other side of the river in the State of Illinois, however much the article may be deleterious to health or otherwise, or however false the brand on it may be, there can be no conviction of the party in the Federal court.

The best and wisest law that has found its way upon the statute books in a half century is this particular statute. It is a statute aimed to protect the consumer against adulterated food, or buying in the belief it is one thing under a brand that is put upon it, and finding out afterwards that it is another thing. It is an act for the protection of the consumer of these products, and it insists that if you brand an article at all you shall tell the truth by your brand, and if you do not tell the truth by the brand that you put on the article then the article is misbranded. That is all there is to this whole business from start to finish. If you sell a food and it has been adulterated and does not represent truly what that food is, then it is a violation of the act to sell such adulterated food, and if you misbrand it by calling it one thing when it is another, then you have violated the law.

You may remember that during the course of this case and during the examination of witnesses the court called the attention of the witnesses on the stand to the averment in this information as to the character of the brand that was upon the article, about which there does not seem to be any dispute at all. Nobody disputed it; it is not disputed, as I understand.

What is it that was sold? As charged in the first count of the information: "Sweet cider produced of concentrated pure apple juice preserved with 1-1000 part of benzoate of soda." That is what was on the bottle, together with the name of the National Bottling Co., 1311 North Leffingwell Avenue, St. Louis, Mo.

That is what the Government complains of in this article—that the defendants claimed to be selling that particular thing when in point of fact, as the Government undertook to show, it was not sweet cider produced of concentrated pure apple juice preserved with 1-1,000 part of benzoate of soda.

What did they do; what is it? To get down to the facts: The testimony here is, and it is uncontradicted—there were not two analyses made of this cider, but an analysis made by the Government, and that analysis shows what the contents of that bottle were. That analysis shows that the bottle that was here shown (the analysis of which had been made in the laboratory of the Government) contained solids of 1.6 per cent; it contained sugar of 0.6 of 1 per cent; it contained ash of 0.06 of 1 per cent; it contained saccharin of 0.014 of 1 per cent; it contained benzoate of soda of 0.003 of 1 per cent.

The testimony further showed, and about which there seemed to be no contradiction, as to what sweet cider should contain; that it should contain solids of from 8 to 16 per cent, whereas the article that was examined, as shown to you by the testimony, contained only 1.6 of 1 per cent of solids.

The testimony shows that sweet cider should contain from 6 to 13 per cent of sugar, whereas this exhibit here was shown to contain only 0.6 of 1 per cent of sugar.

Of ash it should have contained 0.58 of 1 per cent, whereas in the sample shown it contained 0.06 of 1 per cent.

It was stated that saccharin should not be used in sweet cider, but in this case the amount of saccharin used was 0.014 of 1 per cent.

Of benzoate of soda in pure sweet cider none should be used, whereas in this case it showed that 0.003 of 1 per cent was used.

With that showing from the testimony in this case are you able to comprehend and did you understand why the court of its own motion asked witnesses

as to whether sweet cider produced of concentrated pure apple juice preserved with 1-1,000 of benzoate of soda, what that article was?

Pure apple cider: What did you find here? You did not find that? No. Ingredients were put into this product that adulterated the cider. That is the proof. Not necessarily that it should affect the health of anybody. That is one thing, but to keep the product pure is another thing.

What is the label? "Sweet cider produced of concentrated apple juice preserved with 1-1000 part of benzoate of soda." The question is, does the article that is produced here answer to that description?

There are practically but two questions here: If this defendant did not go to Illinois, did not authorize anyone to go to Illinois to sell this product, then he can not be bound by any act done by any other person. You have heard the testimony with reference to that particular matter. You are the judges of the testimony, not the court. You are the sole judges. It is your province, and not the court's province, to see whether in 1912 this defendant was selling this so-called cider on the other side of the river or not.

You have heard it stated here that this foreigner, who spoke very indifferent English, and it was very difficult to hear and understand exactly what he said, stated that he went over there in company with Shucart, in company with both of them, eventually, and that they obtained a wagon license in Granite City and in Madison. He says they got the license in the name of this company. The defendant says they did not. Which of them is telling the truth? That you must decide. Vasiloff said they got the license. It appears here in evidence that a license was issued over there to this company. There is no dispute about that, but, as I say, the defendant says he did not get the license and Vasiloff says they did. Somebody got it. There can not be any doubt about that, because the license was produced here.

All of this testimony you have to take together and see in what way it is corroborated.

The question arose as to when Vasiloff was discharged from the employ of this company. Each of these witnesses, Israel and Jacob Shucart, said that he was discharged in July, somewhere about the 18th or 20th of July, 1912; that they discharged him the evening of the day that they received notice from the Government that Vasiloff had been selling this cider over in Illinois. They say it was for that reason that they discharged him; that he had violated his contract with them and was selling outside of St. Louis instead of selling in St. Louis.

The original notice that was sent to these defendants by the Government was not produced; it had been mislaid or lost, but the Government showed that two notices were sent to this defendant with reference to this particular cider. One of the notices was dated the 30th of September, the other the 17th of October. The Shucarts say that they discharged this man because they received this notice from the Government. Vasiloff says he was discharged because of the purchase of a horse by them for which he had received a check which, when presented, was not paid by the bank. He says that was the reason for the split-up. It is for you to say which of these witnesses is to be believed. You are the sole judges of the testimony. You heard the testimony of all three of these men, and all the facts and circumstances, and it is for you to say which one of them has told the truth at this trial.

This is an information filed under the statute. One count charges adulteration and the other charges misbranding. You are to pass upon both counts: You may, upon the evidence, find the defendant guilty on one or both counts of the information, or you may find the defendant guilty on one or the other count of the information.

This is the act of Congress to which I called your attention before, being section 2 of the act, which provides:

"That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or

offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor."

And he may be prosecuted under that statute.

The court charges you that cider is a food within the meaning of this statute.

I do not know that it is necessary that I should charge you further. I have been asked to charge in several ways by the defendant. I have aimed to cover all their requests in the charge that I have delivered to you.

If you find, first, that Vasiloff took this product across the river into Illinois, and that he did so with the knowledge, consent, and approval of the defendant, then he was the agent of the defendant, and as such, under the law, the defendant is bound.

A contract between these parties was produced here. It is for you to say from all the facts and circumstances involved as to whether that contract offered in evidence was a genuine contract intended to confine Vasiloff to St. Louis alone, or whether it was made for the purpose of protecting these defendants in the event that Vasiloff should go into the State of Illinois.

These are matters for your consideration. You take all the facts and circumstances in this case, and in considering it you may take into consideration the intelligence and the ability of this witness Vasiloff to read, write, and understand what was written.

This is a criminal proceeding under the statute, and it is governed by certain laws that have been found wise in their application. The defendant here entered a plea of not guilty. That raises the presumption of his innocence, and that presumption continues throughout the trial and until it is overcome by testimony which satisfies you beyond a reasonable doubt of his guilt. He is presumed to be innocent. The law gives him the benefit of the doubt, but if you are satisfied beyond any reasonable doubt that this defendant engaged in shipping this product to Illinois, and that this man, Vasiloff, was acting as his agent in so doing, if you believe that from all the evidence in the case, then you should convict him. If you have such doubt arising from the evidence in the case, then it is your duty to return a verdict of not guilty against the defendant on this count.

You may take the case. A form of verdict has been prepared by the clerk. If you find the defendant guilty, sign the verdict as written. If you find him not guilty, insert the word "not" before the word "guilty."

Judge KLENE. If your honor please, I believe the rule is that any exception I have to the charge ought to be made in the presence of the jury?

The COURT. Yes.

Mr. KLENE. I want to except to the action of the court in not granting our several requests for a charge, numbering from 1 to 8.

The COURT. That may be allowed.

Mr. KLENE. I want to except to that part of the charge wherein the court stated that saccharin should not be used.

The COURT. The court did not say any such thing. The court stated what the witnesses said, that saccharin should not be used.

Mr. KLENE. Let me put it that way, then.

The COURT. Very well. I quoted the testimony of the witnesses.

Mr. KLENE. I except to the court stating that a witness should determine whether or not saccharin should be used.

The COURT. I did not say that. I said that the testimony of witnesses had been introduced and the witnesses testified so-and-so.

Mr. KLENE. I except to the court telling the jury that witnesses may say that saccharin shall not be used.

The COURT. You may have that exception.

Mr. KLENE. I except further to the court's instruction wherein he said it was not necessary for the Government to show that the use of saccharin should not affect the health of anyone. That language I took down—

The COURT. My charge will speak for itself. You may have your exception.

Mr. KLENE. I except further to the comment of the court (although I know it is permissible to make comments) that Vasiloff said that they obtained the license, when the court did not also say in that same connection that Vasiloff said he was not present when the license was taken out.

The COURT. You state that and I do not dispute it. Vasiloff says they got the license. He was not present when they got it. It turned out that they had the license.

Mr. KLENE. I except to that statement.

The COURT. I am talking to you.

Mr. KLENE. I except to the insinuation the court made as to the genuineness of this contract when the Government called it in question.

The COURT. You may have your exception to that.

Mr. KLENE. I further except to the fact that the court has not indicated to the jury the maximum of punishment.

The COURT. Gentlemen of the jury, you have nothing to do with the punishment in this case. Your duty will be performed when you find this defendant guilty or not guilty. It is the business of the court to assess the punishment, and not the jury. [To Mr. Klene:] Does that satisfy you?

Mr. KLENE. Yes, sir.

Thereupon the jury retired and, after due deliberation, returned into court with its verdict of guilty, and the court deferred the imposition of sentence. On January 11, 1916, the defendant filed his motion in arrest of judgment, and on January 20, 1916, said motion was sustained by the court and a new trial awarded.

CARL VROOMAN, *Acting Secretary of Agriculture.*