

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1803.

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

ALLEGED ADULTERATION AND MISBRANDING OF MILK CHOCOLATE.

On September 23, 1911, the United States Attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the Circuit Court of the United States for said district an information against A. Leopold Auerbach and Joseph Auerbach, doing business under the firm name and style of D. Auerbach & Sons, New York, N. Y., alleging shipment by them, in violation of the Food and Drugs Act, on or about September 7, 1909, from the State of New York into the State of Colorado of a quantity of milk chocolate which was alleged to have been adulterated and misbranded. The product was labeled: "Auerbach's Red Band Brand Milk Chocolate 5¢ Warranted absolutely pure A delicious confection A wholesome sweet A nourishing food Auerbach's Red Band Brand Pure Milk Chocolate A tempting morsel for all lovers of good chocolate. Smooth in grain, uniform in quality and superior in richness and flavor A treat to eat Manufactured by D. Auerbach & Sons New York City."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed the following results: Moisture, 1.05 per cent; ash, 1.58 per cent; water soluble ash, 0.76 per cent; water insoluble ash, 0.82 per cent; alkalinity of soluble ash (cc N/10 HCl per 100 cc), 50 cc; alkalinity of insoluble ash (cc N/10 HCl, per 100 cc), 125 cc; fat, 26.14 per cent; refractive index of fat at 40° C., 1.457 per cent; sucrose, 54.25 per cent; lactose, 2.01 per cent; Reichert Meissl No. of fat, 2.63 per cent; melting point of fatty acids, 50° C.; microscopical examination, wheat starch present. Adulteration was alleged in the information for the reason that a certain

substance, to wit, wheat starch, had been substituted in part for the product and it was further adulterated in that the aforesaid substance, wheat starch, had been mixed and packed with it so as to reduce, lower, and injuriously affect its quality and strength. Misbranding was alleged in the information for the reason that the product was labeled as set forth above so as to mislead the purchaser or purchasers thereof in that the product was labeled "Pure Milk Chocolate" and "Warranted Absolutely Pure," whereas, in truth and in fact, it was not pure milk chocolate but contained a certain amount of wheat starch.

On April 4, 1912, the case was tried before the court and a jury. In giving the case to the consideration of the jury the following charge was delivered:

THE COURT (Holt, J.): Gentlemen, the charge in the information in this case is that the defendant shipped in interstate commerce on the 25th day of February, 1911, from the City of New York to the City of Colorado Springs, consigned to the J. T. Clough Mercantile Company, a certain article, being and purporting to be an article of food and an article used for food by man, to wit, milk chocolate, in a package containing the label "Auerbach Red Band Brand Sweet Milk Chocolate, Warranted to be a pure and delicious confection," which said article shipped as aforesaid was adulterated in that a certain substance, to wit, wheat starch, has been substituted wholly or in part for the article. And it is further alleged that the article was adulterated, in that the aforesaid substance, wheat starch, has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Now the section of the Pure Food Act under which this information is brought, provides that for the purposes of the act, an article shall be deemed to be adulterated, first, in the case of drugs:

Then follows a description of what is adulteration in the case of drugs.

Then in the case of confectionery:

"If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug."

If any confectionery contains any of those articles, it is adulterated, and the Act does not provide that the introduction of anything else shall constitute the adulteration of confectionery.

Now the defendant claims that this is a confectionery, and it is so described on the outside of the package. It is also described as a food. Now, it is for you to say, gentlemen, in the first place, whether it is a food or a confection, or both. I do not understand that there is any claim that there is any evidence in this case that they violated the provisions of the Pure Food Law in relation to confectionery.

Confectionery, of course, often contains a great many complicated combinations of different substances, and Congress has not undertaken to say that it shall not consist of combinations, but it says that it shall not contain any of these things mentioned in the Act. This milk chocolate does not contain any of such things. Therefore if this is a confection, in your opinion, I charge you that you should acquit the defendant, unless you also hold that it is a food, and violates some food provision of the Act.

Now, the act says in the case of food :

“ First: If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.”

It is urged in this case, that wheat starch had been packed with it so as to reduce its strength and injuriously affect its quality or strength.

“ Second: If any substance has been substituted wholly or in part for the article.”

The Government alleges that wheat starch has been substituted for the article.

Now, the Act in the case of food generally applies—or some part of it at least applies, to a single substance of food such as flour or meat, or some original, simple article, but there are a great many things which constitute food, which are compounds, and the Act makes provisions in regard to that, and it says, “ An article of food which does not contain any added poisonous or other added deleterious ingredients ”—and that is conceded in this case of milk chocolate—shall not be deemed to be adulterated in the following cases :

First, in the case of mixtures or compounds which may be now or from time to time hereafter may be known as articles of food under their own distinctive name which shall not be an imitation of or offered for sale under the distinctive name of another article, and the Act provides that the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Now, this article contains a statement that it is manufactured by Auerbach & Company of New York City, which complies with that provision.

Now this article is sold as milk chocolate, which indicates upon its face that it is a compound or mixture. There is no such thing as milk chocolate as a natural single substance. There is chocolate and there is milk, and there is combined in this, therefore, something that makes milk chocolate. And, if in your opinion, this article comes within this provision relating to mixtures or compounds and is to be regarded as an article of food, and is an article which does not contain any added poisonous or deleterious ingredients, and is known under its own distinctive name, and is not an imitation of or offered for sale under the distinctive name of another article, and the name and the place of manufacture is on the brand, why, then you should acquit the defendant.

So that the question comes down to this whether milk chocolate commercially means something which does not contain any wheat starch. It is admitted that the insertion of starch does not make it unwholesome. The defendant claims that he put in the wheat starch at a time before there was any action by the Government objecting to it; that it was authorized by formulas for the manufacture of milk chocolate before the Pure Food Law was adopted, and that the reason why he put it in was so as to give it greater consistency, so it would be a better commercial article, particularly for warm climates.

Now this, as I say, is a compound. There is milk in it and there is cocoa—a buttery chocolate material. There is powdered sugar—300 pounds of powdered sugar in the formula used—more sugar than all the other materials put together. But the Government does not complain that they do not put outside the package that there is sugar in it. The complaint is, that they do not put outside the package that there is wheat starch in it. Now, that milk chocolate in the ordinary commercial sense includes all those things, that is a term which may be used, but if it does not include, then, if, to the ordinary person, milk chocolate cannot be properly made and is not properly made with wheat starch inserted in it, why, then the act of the defendant is not protected by this pro-

vision of the act with regard to compounds. Now, that is a question for you, gentlemen. In the first place, was it a confection? If it is, and it is not a food, why, you should acquit.

In the second place, is it a food? And, if it is a food, has a substance been mixed with it so as to reduce or lower or injuriously affect its quality or strength, or has a substance been substituted wholly or in part for the article. Now, it is for you to say, in the first place, whether that provision of the Act applies to such a compound as this. If they were simply selling a pure original article, like chocolate, or like sugar, and then there was mixed with it wheat flour, why, the act would undoubtedly apply.

But it seems to me that this article we are dealing with, is a compound called milk chocolate, and the only question in the case is whether this is a milk chocolate; whether it is permissible in the ordinary meaning of the trade term to make milk chocolate, by putting in such a proportion of wheat flour as may in the opinion of the manufacturer improve it as an article of commerce without essentially affecting or injuring it as milk chocolate.

Gentlemen, I leave the case with you.

The jury then retired and subsequently returned and rendered a verdict of not guilty.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *July 11, 1912.*

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