

per) "Gonorrhoea \* \* \* and functional ailments of the Kidneys and Bladder in both Male and Female," (Bick's nerve tonic, wrapper) "Nerve Tonic \* \* \* for Nervous Prostration and bodily aches and pains \* \* \* a nerve \* \* \* tonic \* \* \* for all female complaints \* \* \* for Weakness, Nervousness, Headache, Kidney trouble and loss of Power in either Sex \* \* \* for female weakness, heart trouble and where a general breakdown of the nervous system exists," (LaDerma Vagiseptic discs, wrapper) "for \* \* \* Amenorrhoea and other Uterine and Vaginal Disorders," (circular) "For \* \* \* Amenorrhoea \* \* \* Ulceration of the Uterus and Catarrh of the Uterus \* \* \* Gonorrhoea," were false and fraudulent in that the articles contained no ingredient or combination of ingredients capable of producing the said therapeutic effects.

On November 2, 1922, no claimant having appeared for the property, judgment was entered, finding that the product should be condemned, and it was ordered by the court that the product be destroyed by the United States marshal.

HOWARD M. GORE, *Acting Secretary of Agriculture.*

**12367. Misbranding and alleged adulteration of vinegar. U. S. v. 95 Barrels, more or less, Alleged Apple Cider Vinegar. Case tried to the court on an agreed statement of facts. Judgment for the Government on misbranding charge. Case carried to Circuit Court of Appeals on writ of error. Judgment of lower court reversed. Writ of certiorari to the U. S. Supreme Court. Judgment of appellate court reversed and that of trial court affirmed. (F. & D. No. 12068. I. S. No. 12414-r. S. No. C-1676.)**

On January 12, 1920, 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 a libel praying the seizure and condemnation of 95 barrels, more or less, of alleged apple cider vinegar, at Cleveland, Ohio, alleging that the article had been shipped by the Douglas Packing Co. from Fairport, N. Y., on or about November 24, 1919, and transported from the State of New York into the State of Ohio, and charging adulteration and misbranding in violation of the food and drugs act. The article was labeled in part: (Head of barrel) "Douglas Packing Co. Excelsior Brand Apple Cider Vinegar Made From Selected Apples Reduced to 4 Per Centum Rochester N. Y." (other end of barrel) "Guaranteed to Comply With all Pure Food Laws Douglas Packing Co. Rochester N. Y."

Adulteration of the article was alleged in the libel for the reason that vinegar made from evaporated or dried apple products had been mixed and packed with and substituted wholly or in part for the said article.

Misbranding was alleged in substance for the reason that the statements appearing on the label, "Vinegar made from Selected Apples" and "Manufactured [Guaranteed] to comply with all Pure Food Laws," were false and misleading and deceived and misled the purchaser, since the analysis of the product showed it to be made from evaporated or dried apple products. Misbranding was alleged for the further reason that the article was an imitation of and was offered for sale under the distinctive name of another article, to wit, apple cider vinegar.

On April 29, 1922, the Douglas Packing Co., Rochester, N. Y., having appeared as claimant for the property and having on January 30, 1922, filed a demurrer to the libel, the said demurrer was overruled by District Judge Westenhaver. On November 1, 1922, the case having come on for trial before the court on an agreed statement of facts, the court delivered the following opinion sustaining the Government on the misbranding charge (Westenhaver, *D. J.*):

"The Government has seized and libeled, and now seeks to condemn 95 barrels of vinegar shipped in interstate commerce, on the ground that this vinegar is adulterated and misbranded. The shipper, Douglas Packing Company, has appeared and claimed the vinegar, and makes defense. A jury trial has been waived in writing, and the case tried to the Court on an agreed statement of facts.

"None of the material facts is in dispute. The vinegar is labeled: 'Excelsior Brand Apple Cider Vinegar Made from Selected Apples Reduced to four per centum. Guaranteed to comply with all Pure Food Laws.' This vinegar is not made from the expressed juice of fresh apples as pure cider vinegar is commonly understood to be made, but is made from evaporated apples. Claimant, it is agreed, selects mature, sound fruit, free from rot and ferment, and dehydrates same by the most approved processes. In the process of dehydrating

small quantities of sulphur fumes are used to prevent rot and fermentation and subsequent discoloration. The principal result of dehydration is the removal of about eighty per cent of the water content of the apples. Whether in dehydration any other constituents of the apple are removed, is not beyond controversy, as in the present state of chemical science no accepted test or method of analysis is known to the parties for determining that problem. In manufacturing vinegar from apples thus evaporated, claimant places in a suitable receptacle a given quantity of evaporated apples, to which is then added an amount of pure water substantially equal to the amount previously removed by evaporation. Pressure is applied at the top of this mass, and a stream of water under sufficient head is introduced at the top through a pipe and is applied until the liquid released through a vent at the bottom has carried off in solution such constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar. The liquid product thus obtained, it is agreed, is substantially equal in quantity to that which would have been obtained had fresh apples been used. This liquid carries a small and entirely harmless quantity of sulphur dioxide, which is removed later in the process of fining and filtration by the addition of barium carbonate or some other proper chemical agent which by precipitation eliminates the sulphur compound. The liquid, after this treatment, gives, upon chemical analysis, results similar to those obtained by the chemical analysis of apple cider made from fresh apples, except that it contains a trace of barium. No claim is made that this trace of barium renders the product deleterious or injurious to health. The subsequent process of alcoholic and acetic fermentation is the same as that commonly followed in making vinegar from the expressed juice of fresh apples. The vinegar thus made is similar in taste and composition to the vinegar made in the usual way from fresh apples, except that it contains a trace of barium. No claim is made that this trace of barium renders the product deleterious or injurious to health. Claimant uses in making vinegar in this way, the same receptacles, equipment and process as is used in making cider and vinegar from unevaporated apples. It has been making and selling apple cider and apple cider vinegar thus produced, continuously from a period antedating January 1, 1906. Other cider and vinegar makers have been doing the same. The total amount thus produced and sold has been and is very large. The United States Department of Agriculture has, however, never sanctioned such labeling, and its attitude with respect thereto is evidenced by circulars 13, 17, 19 and 136, and Food Inspection Decision 140. Exhibit samples of cider fermented and unfermented, made from fresh and evaporated apples, and vinegar made from both kinds of cider, have been submitted and were personally examined by me. There are slight differences in appearance and taste, but all have the appearance and taste of cider and vinegar. The foregoing are all the facts material to the determination of this controversy.

"The Government claims that the vinegar in question thus manufactured, is adulterated, in that there is substituted for genuine apple cider vinegar a manufactured product from evaporated apples, in violation of par. 1 and 2, sec. 7, Food and Drug[s] Act, June 30, 1906; also that it is misbranded, in that the statements on the label, 'Apple Cider Vinegar made from Selected Apples and Guaranteed to Comply with all Pure Food Laws,' are false and misleading, in violation of general paragraph, sec. 8, and par. 2 and 4, sec. 8 of said Act; and also that it is misbranded, in that it is labeled in imitation of and offered for sale under the distinctive name of another article, to wit, apple cider vinegar, in violation of par. 1, sec. 8 of said Act. Claimant vigorously and earnestly disputes each and all of these contentions.

"This case has received the careful consideration which the magnitude of the interests and the importance of the question involved, have demanded. My conclusion is in accord with the unreported decision of Judge Geiger of the Eastern District of Wisconsin. In my opinion, this vinegar is misbranded, if not adulterated, within the meaning of said Act.

"Vinegar is a food product, as defined in sec. 6 (U. S. Comp. Stat. 1916, 8722) of said Act. It is probably not adulterated within the meaning of par. 1, sec. 7. Whether it is adulterated within the meaning of par. 2, sec. 7, will not be determined by me. The question of whether it is adulterated within the meaning of that paragraph, turns on whether or not vinegar manufactured by the process above described is a substitution in whole or in part, of one article for another; that is, a spurious vinegar for apple cider vinegar. Claimant's

contention is that apple cider made by expressing the juice of fresh apples, and its liquid product produced as above described, from evaporated apples, are both apple cider, and that the difference resolves itself merely to a controversy over the process by which apple cider and apple cider vinegar are made. However, as I am content to dispose of this case upon the question of misbranding alone, no opinion need or should be expressed upon this aspect of the controversy.

"The applicable provisions of the Food & Drug [Food and Drugs] Act with respect to misbranding, are sec. 8, general paragraph, and paragraphs 1 and 2 and 4 of sec. 8. The general paragraph of sec. 8 provides: 'The term "misbranded" as used herein 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 therein contained which shall be false or misleading in any particular.' Thus it appears that the false or misleading statement which is forbidden, applies as much to the food article as to the ingredients or substances of which it is made; hence any statement regarding the article which is false or misleading, is within the definition of 'misbranding.' Par. 2 provides that in case of foods, an article shall be deemed to be misbranded 'if it be labeled or branded so as to deceive or mislead the purchaser.' Par. 4 says it shall be deemed to be misbranded 'if the package containing it, or its labels, shall bear any statement, design, or device regarding the ingredients or the substance contained therein, which statement, design, or device shall be false or misleading in any particular.' In this paragraph the false or misleading statement applies only to the ingredients or substance of the article, but the language used emphasizes that the object of the law was to prevent the purchasing public from being misled or deceived in the sale and distribution of food products. Par. 1 says an article shall be deemed to be misbranded 'if it be an imitation of or offered for sale under the distinctive name of another article.' The general purpose, as well as the explicit prohibitions of the law, is to be determined from these statutory provisions.

"These provisions have been often considered by the courts. The Food & Drugs Acts, although penal in its nature, is not given a strict construction but one which will reasonably tend to accomplish its general object and purposes. *U. S. v. Antikamnia Co.*, 231 U. S. 654, 665, 666; *Frank v. U. S.* (6 C. C. A.) 192 Fed. 866, 869-70. All the words and terms used therein should be given their proper and usual signification and effect. *U. S. v. Lexington Mill Co.*, 232 U. S., 399, 409-10. The courts take judicial notice of the usual meaning and definition of familiar words. *Nix v. Hedden*, 149 U. S. 304. As regards misbranding, Mr. Justice Day, in *U. S. v. Lexington Mill Co.*, *supra*, says: 'The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality.' In *U. S. v. Antikamnia Co.*, *supra*, 231 U. S. 654, Mr. Justice McKenna, at p. 665, says: 'The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.' Numerous Circuit Court of Appeals and District Court cases have been decided, declaring the same rules and emphasizing more particularly that the prohibition of misbranding is designed to prevent deceiving or misleading the purchasing public, even though the article sold is in itself equally good or not injurious to health. See *Brina v. U. S.* (2 C. C. A.) 179 Fed. 373; *Frank v. U. S.* (6 C. C. A.) 192 Fed. 866, 869-70; *U. S. v. Tepee Apples* (D. C.) 179 Fed. 985; *U. S. v. Scanlon* (D. C.) 180 Fed. 485; *U. S. v. 10 Barrels of Vinegar* (D. C.) 186 Fed. 399; *U. S. v. 100 Barrels of Vinegar* (D. C.) 186 Fed. 471. The decisions of State courts under pure food laws of similar character, are to the same effect. See *People v. Girard*, 145 N. Y. 105; *People v. Niagara Fruit Co.*, 77 N. Y. S. 806, affirmed; 173 N. Y. 629; *People v. Douglas Packing Co.*, 194 N. Y. S. 633. Such, in brief outline, are the rules of law applicable to this controversy.

"Claimant's label does, in my opinion, tend to mislead and deceive the ordinary purchaser and user of vinegar. Cider is defined by Webster as 'the expressed juice of apples.' By the word 'expressed' is meant expelled or forced out. From time immemorial apple cider has been understood to mean the expressed juice of fresh apples and not of dried apples. Apple vinegar or apple cider vinegar likewise in the popular mind has from time immemorial been understood as meaning vinegar produced from apple cider thus defined.

Claimant's label conveys the impression that this vinegar is made from that kind of apple cider and that this apple cider is made in the common and familiar way from fresh or undried apples. The mere fact that the words 'apple cider' and 'selected apples' are brought together in the same label, conveys unmistakably this impression and repels any other or different impression. Apple cider is a well-known product. Apples are a well-known fruit. Cider means nothing else to the ordinary mind than the expressed juice of fresh and undried apples. Apples mean nothing else to the ordinary mind than fresh and unevaporated apples. A merchant who advertises and offers apples for sale could not compel a purchaser to accept dried or evaporated apples. The latter are not apples as that word is understood in the trade or by a person of ordinary intelligence, but are a manufactured product, an entirely different article. Nor, in my opinion, could a merchant who offers apple cider for sale, compel a purchaser to accept a liquid made from evaporated apples in the manner above described, even though it does possess substantially the same chemical constituents and has substantially the same taste as the expressed juice of fresh apples. Claimant's label consequently misleads and deceives. It makes a statement with respect to an article of food which conveys the false notion that this article is vinegar made from the expressed juice of fresh apples.

"Claimant earnestly contends that its product is vinegar because it conforms to the chemical tests prescribed for vinegar by circulars of the United States Department of Agriculture Nos. 13, 17, 19, and 136. It also contends that it is made from apple cider because apple cider is only the juice of apples, and that its process first merely extracts the surplus water, and later restores it, and hence the resulting liquid obtained by pressure is apple juice or apple cider, even if it is not the expressed juice of fresh apples. This being so, it further contends that the Board of Food & Drugs Inspection provided by the Pure Food & Drug [Food and Drugs] Act, have no power under the law to declare, as it did, by Food Inspection Decision 140, that vinegar made from dried or evaporated apples is not entitled to be called vinegar without further designation. It may be admitted that this board has no power to add to or take from the law. It does not, however, follow that the claimant's label is true and does not tend to mislead or deceive, or that what the Government is complaining of is not misbranding but a process of making apple cider and apple cider vinegar. Claimant's argument overlooks certain material and controlling considerations. One is that apple cider as defined in the dictionaries and as commonly and popularly understood, is the expressed juice of fresh apples, and that apple vinegar is commonly and popularly understood to be produced by the alcoholic and acetic fermentation of that kind of cider. Another is that the law was designed to prevent the ordinary purchaser from being deceived and misled as to what he is buying, and that therefore the test of misbranding is the effect of the label or statement upon the ordinary purchaser. A statement that an article is apple cider vinegar made from selected apples, can convey no other idea to such a person in the present state of common knowledge than that the vinegar is made from the expressed juice of fresh apples and not by the manipulation of dried or evaporated apples. If it does, and the ordinary purchaser is or may be thereby misled or deceived, it is no answer to say that he gets a vinegar which is equally good. The object of the law is to let the purchaser know just what he is buying and to let him decide whether he wants it or not. One may not take advantage of his prejudices or want of information to sell him something different from what he thinks he is buying.

"Several authorities have been cited which, while involving facts somewhat different, tend to support my conclusion. Claimant's label was under consideration recently in *People v. Douglas Packing Co.*, 194 N. Y. S. 633. The decision was upon demurrer and is not a final adjudication of any point in controversy, but the reasoning of the opinion impresses me as sound. The New York statute defines cider vinegar and apple vinegar as a product made exclusively from the pressed juice of apples, by alcoholic and subsequent acetic fermentation. These terms, it is said, should be taken in their ordinary and familiar meaning. It is further said: "The statutory definition of 'cider vinegar' and 'apple vinegar' means by this test vinegar made from apple cider. Even if those terms had been undefined in the statute, they nevertheless would have had in the popular mind a well-defined meaning, in that apple cider is known in every household, and cider vinegar is known to be made from it, though the chemical processes by which the one becomes the other are generally unknown. Other vinegars may be perfectly harmless, chemically undistinguishable, it may be, but calculated to deceive, if marketed under a false label.

The popular notion of cider vinegar and the ordinary and obvious meaning attached to the words, exclude the notion of making this common article of domestic use from cider pressed from dried apples. The statute is designed to enable consumers to get what they believe they are getting under the labels "cider vinegar" and "apple vinegar." In *U. S. v. 100 cases of Tepee apples*, McPherson, District Judge, held that canned Arkansas apples and blackberries were misbranded because the label on the cans gave Michigan cities as the place of manufacture, thereby conveying the misleading impression that the apples and blackberries were Michigan fruit. It was contended that Michigan apples and blackberries were superior in quality to the Arkansas fruit, but this consideration was disregarded as immaterial, Judge McPherson saying: 'The other purpose (of the law) was to enable a purchaser to obtain what he called for and was willing to pay for. And under this latter view, it is immaterial whether Michigan fruits are better than those grown in Arkansas. A purchaser of canned goods may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them, he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will buy and which he will receive and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments.' In *Brina v. U. S.* (2 C. C. A.) 179 Fed. 373, cotton seed oil was labeled in large Italian letters 'oil for salad' and in small English letters 'cotton salad oil extra quality'; and this was held to be misbranded. The trial judge, without evidence, charged the jury that 'as a notorious fact salad oil prima facie means olive oil' and that misbranding resulted, unless evidence was produced to show a different meaning in the trade. This ruling was assigned as error. In the opinion of the Circuit Court of Appeals it is pointed out that salad oil is defined as olive oil in Worcester's, Stormont's Imperial, Encyclopedia, and Century dictionaries, and that no error was committed in thus charging. Compare *U. S. v. 10 Barrels of Vinegar* (D. C.) 186 Fed. 399; *U. S. v. Scanlon*, 180 Fed. 485; *Frank v. U. S.* (6 C. C. A.) 192 Fed. 866, 869-70.

"Upon authority as well as upon principle, it must be held that the charge of misbranding is sustained. The label does bear statements regarding the article and the ingredients or substances thereof which are false and misleading, and the vinegar must be held to be offered for sale under the distinctive name of another article as that name is popularly and commonly understood. Judgment of forfeiture and condemnation will be entered."

A decree of condemnation and forfeiture was thereupon entered, based on the finding of the court that the product was misbranded but that the adulteration charge was unsupported, and it was ordered by the court that the product should be released to the said claimant upon payment of the costs of the proceedings and the execution of a bond in the sum of \$1,000, in conformity with section 10 of the act. A motion by the claimant to set aside the finding, judgment, and order of forfeiture and condemnation and for a new trial was made and was refused, to which ruling the claimant excepted.

On February 6, 1923, the claimant having perfected an appeal, the case came up before the Circuit Court of Appeals for the Sixth Circuit on a writ of error. The case was heard by the Circuit Court of Appeals, which on April 3, 1923, handed down a judgment reversing the finding of the district court, as will more fully and at large appear from the following opinion (Donahue, C. J.):

"The United States files a libel in the District Court for the seizure and condemnation of ninety-five barrels of alleged apple cider vinegar, labeled 'Excelsior Brand Apple Cider Vinegar made from Selected Apples,' charging that this vinegar is both adulterated and misbranded in violation of the Food and Drugs Act of June 30, 1906. The Douglas Packing Company, the manufacturer and owner of this vinegar, intervened and denied that it was either adulterated or misbranded and asked restitution.

"A written waiver of trial by jury was filed, and the case was submitted to the court upon an agreed statement of facts. The trial court found that the vinegar was not adulterated, but was misbranded in violation of general paragraph of section 8, and sub-paragraphs 1, 2 and 4 as to foods of section 8 of the Food and Drugs Act of June 30, 1906, as charged in said libel and ordered its condemnation and forfeiture as provided by that Act.

"It appears from the agreed statement of fact that claimant, the Douglas Packing Company, is engaged in the manufacture of apple cider and apple cider vinegar; that during the apple season, from about September 25th to December 15th of each year, sound, mature, unevaporated apples are used by it in the manufacture of its products, and for the balance of the year evaporated apples of like quality are used.

"The principal result of the evaporation process is the removal of 80% of the water contained in the natural fruit. While it is not admitted that there are no other constituents of the apple removed by this process, yet it is admitted, in effect, that if any other constituents are removed by evaporation, the amount thereof is so negligible that the science of chemistry is unable to determine that fact. When the apple season is over and the evaporated apples are used by the claimant, in the manufacture of its products, substantially the same amount of pure water is added to the evaporated apples that was removed by the evaporating process. In all other respects the claimant employs the same receptacles, equipment and process as in the manufacture from the unevaporated apple.

"In the evaporating process small quantities of sulphur fumes are used to prevent rot, fermentation, and decomposition. This is wholly removed therefrom by the addition of barium carbonate, or some other chemical that eliminates itself and the sulphur compound by precipitation. After fining (clarifying) and filtration the cider or liquid obtained from the evaporated apple, upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except a trace of barium,—in other words, an amount too small to be quantitatively measured. No claim is made that this trace of barium renders the product injurious or deleterious to health, and, except for this trace of barium, the vinegar made from this cider or liquid obtained from the evaporated apple is similar in taste and composition to the vinegar made from the cider of the unevaporated apples.

"It was evidently the purpose and intent of the Government and the claimant, in subscribing to the agreed statement of facts, to eliminate from consideration all unimportant matters and confine the issues to important basic questions affecting the substantial rights of the parties. These issues must be determined solely upon consideration of the facts admitted, regardless of the possibility that facts might have been established by evidence, at variance therewith and more in harmony with a supposed public opinion upon this subject.

"The libel charges that this vinegar is adulterated in violation of paragraphs 1 and 2, under Food, of section 7 of the Food and Drug[s] Act of June 30, 1906, which paragraphs read as follows: '1. If any substance has been mixed and placed with it so as to reduce or lower or injuriously affect its quality or strength. 2. If any substance has been substituted wholly or in part for the article.'

"It is clear that this trace of barium, which is admitted to be neither injurious or deleterious, does not constitute adulteration within the meaning of either of the paragraphs of section 7 of the Food and Drug[s] Act above quoted *U. S. v. Lexington Mill and Elevator Co.*, 232 U. S. 399.

"The question whether some other substance has been substituted wholly or in part for the article known as 'apple cider vinegar' in violation of the second paragraph of this section will be considered and discussed in connection with the charge of misbranding.

"It is insisted, however, upon the part of the Government that the barrels are also labeled 'Guaranteed to comply with all Pure Food Laws'; that this means not only the Federal Food and Drug[s] Act, but also the pure food laws of the State where this vinegar is intended to be sold at retail, after it passes beyond the jurisdiction of the Federal authorities. The libel, however, is based solely upon the adulteration and misbranding of this vinegar in violation of the Federal Food and Drug[s] Act. While it is alleged that the vinegar was shipped from Fairport, N. Y., to Fisher Brothers, Cleveland, Ohio, there is no allegation that the vinegar is to be sold in the State of Ohio or that it is adulterated or misbranded in violation of the Ohio Statutes, nor is there anything in the agreed statement of facts in reference to its final destination and place of sale at retail.

"If, however, it were conceded that this libel could be construed as charging that this vinegar is adulterated or misbranded in violation of the terms and provisions of the Ohio law, the same result must follow. Substantially the

same questions are presented under the Ohio Statute (sec. 5789, G. C.) in reference to misbranding, as are presented under the Federal Food and Drug[s] Act, which questions will be discussed later in this opinion. Upon the question of adulteration under the Ohio law, no claim is made that this vinegar contains less than 4% by weight of absolute acetic acid, nor is a mere trace of barium, which is neither deleterious or injurious to health, a 'foreign substance' within the contemplation, intent, or purpose of sec. 5786 of the General Code of Ohio. *U. S. v. Lexington Mill and Elevator Co., supra.*

"Section 8 of the Food and Drug[s] Act provides, among other things, that, in a case of foods, an article shall be deemed to be misbranded if it be labeled or branded so as to deceive or mislead the purchaser, or it be an imitation of, or offered for sale under the distinctive name of another article.

"The important question in each case is whether the product is the identical thing that its brand indicates. If it is the identical thing indicated by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant.

"It appears from the agreed statement of facts that the cider from which this vinegar was made was manufactured from apples and from nothing else. The process of its manufacture differed from the usual method only in so far as necessary to preserve the fruit. This was accomplished by the evaporation process above described. When a quantity of water equal to the amount evaporated is added to the evaporated apples and pressed therefrom it combines with and carries the solvent properties of the apples just the same as in the original state, or if not exactly and identically the same, so near as to defy the science of chemistry to discover the difference. This is the full scope and effect of the dehydrating process as appears by the agreed statement of fact.

"The conservation of our food products is of some concern to the public and, perhaps, second in importance only to the demand for pure and unadulterated food. It is perfectly apparent that the apple season is altogether too short for the economical manufacturing of the crop, during the season, into cider vinegar in sufficient quantities for public consumption. Therefore an efficient and harmless method of preserving the fruit until it can be used for this purpose is in the direct interest of the public, and if this method has accomplished that object without change in the product, it should be encouraged rather than condemned.

"If, after cider has been pressed from unevaporated apples, a large amount of the water that is a constituent part thereof, is evaporated therefrom and later an equal amount of water is added thereto, the constituent elements of cider yet remains and it would hardly be contended that vinegar made therefrom would not be apple cider vinegar, yet so far as the agreed statement of facts discloses, there is substantially no difference between the evaporation of water from the cider and evaporating the water from the apple before the cider is pressed therefrom. The water is not all evaporated, leaving only a hard dried fruit, as may approximately result from sun drying; 20% of the water remains and this continues to be the condensed juice of the fruit ready for restoration by pure water dilution to its original volume. This was the underlying idea of the Allen patent, No. 268972, for a dry mince pie compound, in which it appears that the water was evaporated from the apple for the purpose, as stated by the patentee, 'so that I have the cider in my compound without useless water, which may be added when the consumer wishes to use it.' *Dougherty v. Doyle*, 63 Fed. 475.

"It must also be assumed that legislation upon any subject has some definite and substantial object in view, and is not in furtherance of technical purposes or barren idealities. It was declared by the Supreme Court in *U. S. v. Lexington Mill and Elevator Co.*, 232 U. S. 399, that the primary purpose of Congress in enacting the Food and Drug[s] Act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food. That case involved the manufacture of flour by a new process, called the 'Alsop process,' and while the charge there was adulteration, by adding to articles of food consumption, poisonous and deleterious substances, a much more serious matter than misbranding, yet the court held that in order to condemn a food product upon the ground that it is adulterated, it is incumbent upon the Government to establish the fact that the added substances may render the article injurious to health. This conclusion was reached evidently upon the theory that the legislative

intent was to accomplish a substantial and beneficial result to the public and not merely for the purpose of exercising an arbitrary control over private business.

"It is undoubtedly true that vinegar not made from apple cider, even though chemically equal to cider vinegar, may not be branded as such. On the other hand, vinegar made from apple cider is not misbranded by reason of its failure to meet the chemical test.

"Misbranding is included in the statutory prohibition because it bears some relation to the conservation of the public health and not primarily because a purchaser's whims were to be protected; and, though doubtless the test of misbranding a product is whether it is true to name, there is no occasion for overstrictness in applying this test in a case where the public health cannot possibly be jeopardized.

"In the Standard Encyclopedia, under the caption, "Cider," it is said, 'Apples commonly used for making cider are by no means tempting to the palate and are, in fact, unfit for eating raw or ordinary cooking. \* \* \* In the United States it is considered that a certain proportion of decay in fruit improves the flavor.' Keeping in mind the underlying purpose to protect the public health and the admissions in this case that the present article is made wholly from 'sound and mature apples, free from rot and ferment,' it is clear that condemnation should not be made unless the statute imperatively requires it.

"Definitions of cider, which include the method or process of its manufacture, written long before public needs required the conservation of our food products, are not helpful to the determination of the question presented in the instant case. Even these definitions call only for the juice of apples, and do not literally exclude the pressing of apples dehydrated and later hydrated in equivalent proportions. The missing and essential element for the Government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. The danger of reliance on judicial knowledge founded on past impressions is well illustrated by the salad-oil cases. The very branding which the court, in *Brina v. U. S.*, 179 Fed. 373, said it judicially knew was so untrue as to compel the conclusion of misbranding, two years later, was shown to the same court in *VonBremen v. U. S.*, 192 Fed. 904, to be so true as to require an instructed verdict for the respondent. In the present case it is conceded that this identical product has been sold and accepted by the trade under this name, in great quantities for many years and without challenge until now. While there is nothing in the agreed statement of facts to show how far this acceptance has been with knowledge, yet the court cannot judicially know that this acceptance was so wholly without knowledge of the facts as to be unimportant.

"It is not seriously contended on the part of the Government that the fluid obtained from pressing the evaporated apples, after the water taken therefrom has been restored, is not apple cider. It is suggested that possibly there is some constituent element of the apple removed by the dehydrating process that is never restored thereto. There is no proof of that fact, but there is an admission that even if such constituent element is removed it is so immaterial and inconsequential in quantity, that the science of chemistry can not disclose it. This brings this case clearly within the doctrine announced in *U. S. v. Lexington Mill and Elevator Co.*, *supra*, to the effect that the burden is upon the Government to establish by the evidence, not merely a technical, but a substantial violation of the Federal Food and Drug[s] Act, which may render the article injurious to health or mislead the public to its prejudice or harm or induce the purchase of a different article than the article desired.

"Nor should the fact be overlooked that this is a highly penal statute. The Government in this proceeding is asking the condemnation and forfeiture of ninety-five barrels of vinegar because it is adulterated and misbranded and the burden is upon the Government to establish one or both of these alleged facts.

"While the Government is practically conceding in the agreed statement of facts, that the liquid obtained from evaporated apples by this method, is apple cider, identical in taste, substance and chemical test with apple cider pressed from the unevaporated apples, except that there may, perhaps, be some constituent element lacking, the quantity, if any, being so small that its absence is not shown by chemical test, and further conceding that the same has been sold upon the market for many years as apple cider, and that vinegar made

therefrom has been an article of commerce, at least since January 1, 1906, under the name and brand of apple cider vinegar and sold in quantities by this one manufacturer alone, aggregating 100,000 barrels a year; nevertheless, it is now insisting that the branding of this product as apple cider vinegar, is calculated to deceive and mislead the purchaser into buying an article other than the brand implies.

"It may be true that a large part of the purchasing public has no knowledge whatever in reference to the manufacture of cider from evaporated apples and for that reason might have a distinct prejudice against such a method of manufacture. Undoubtedly the Pure Food and Drug[s] Act contemplates the protection of the public in this regard, but only to the extent that the public shall not be deceived or misled by the brand into buying an imitation of the article or a substitute for the article indicated by the brand. If, however, it is, in truth and in fact, buying the identical article indicated by the brand, manufactured from the same basic elements and none other, the purpose of the statute is accomplished, and the process of manufacture is of no importance.

"A substantial, if not an exact analogy, may be found in the manufacture of maple syrup. The water is partially evaporated from the sap of a maple tree in order to produce maple syrup. If the evaporation process is continued until sufficient of the water is evaporated, the product is maple sugar. If to this sugar there is added as much water as was evaporated therefrom in the process of reducing maple syrup to maple sugar, and the sugar is dissolved and held in solution, the product again becomes maple syrup. It has been held by the Pure Food Department (Circular 136) that maple syrup manufactured in this way may be properly branded 'Maple Syrup.'

"Yet, notwithstanding such syrup responds to the chemical tests, a doubt might be suggested that possibly a constituent element was removed from the maple syrup in the process of reducing it to maple sugar that could not be wholly restored thereto. It is also possible that there might be a popular prejudice against maple syrup manufactured in this way, yet it would hardly be contended that Congress is expending its time in the enactment of laws in furtherance of perpetuating prejudices founded upon mistake and misunderstanding and at war with the conceded facts of the case.

"Another illustration may test the soundness of the proposition that there is a misbranding of this vinegar. Cream is a substance which, by the unaided process of nature, rises to the top of milk. A generation or two ago this would have been the popular definition. The process of its development was well known and required, at the least, some hours of time and favorable conditions. Then it was discovered that the butterfat can be separated from the milk in a few minutes, by a centrifugal separator, and that the product is really cream; yet it is at least probable that for some time a substantial part of the public would have refused to buy butterfat in this form unless it had been labeled 'cream' and without disclosing the substitution of artificial for natural methods. So the catalogue of present-day foods and those that may fairly be developed, will disclose frequent instances of great change in methods of manufacture, or treatment, without any resulting necessity of changing the name of the product.

"We get no controlling direction from the decided cases. The salad-oil cases have been mentioned. In the vinegar case, 186 Fed. 399, the product, was in fact distilled vinegar with a dash of apple cider. It was labeled as a blend of cider vinegar and distilled vinegar. From the view that the court took of the meaning of the label, the misbranding was obvious.

"In the Tee Pee Apple case, 179 Fed. 185, the label was considered to mean that the apples were grown in Michigan, and this became a geographical misrepresentation expressly forbidden by the Act.

"We do not overlook that the New York Supreme Court and the United States District Court for the Eastern District of Wisconsin have held that claimant's vinegar is misbranded. In each case the opinion seems to be based in part upon inferences and testimony not presented by this record and in part upon judicial knowledge that nothing is apple cider unless it is pressed from fresh apples—an inference wholly inconsistent with the facts here conceded.

"For the reasons above stated a majority of the court is of the opinion that the judgment of the district court is not sustained by the agreed statement of facts. The judgment is reversed and cause remanded for further proceedings in accordance with this opinion."

On May 15, 1922, the Government filed a petition for rehearing in the Circuit Court of Appeals, which petition was denied.

The Government thereupon filed a petition for writ of certiorari to the Supreme Court of the United States, which writ of certiorari issued from the Supreme Court during the October term, 1923.

Thereafter the case was heard by the Supreme Court, and on June 2, 1924, the following opinion was handed down, reversing the judgment of the Circuit Court of Appeals and affirming the judgment of the District Court for the Northern District of Ohio, which sustained the contention of the Government on the misbranding charge (*Butler, Justice of Supreme Court*):

"This case arises under the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768. The United States filed information in the District Court for the Northern District of Ohio, Eastern Division, for the condemnation of 95 barrels of vinegar. Every barrel seized was labeled: 'Douglas Packing Company Excelsior Brand Apple Cider Vinegar made from Selected Apples Reduced to 4 Percentum Rochester, N. Y.'

"The information alleged that the vinegar was adulterated, in violation of sec. 7 of the Act. It also alleged that the vinegar was made from dried or evaporated apples, and was misbranded in violation of sec. 8, in that the statements on the label were false and misleading, and in that it was an imitation of and offered for sale under the distinctive name of another article, namely apple cider vinegar.

"The Douglas Packing Company appeared as claimant, and by its answer admitted that the vinegar was labeled as alleged, and that evaporated apples had been used in its manufacture. It averred that nevertheless it was pure cider vinegar and denied adulteration and misbranding. A jury was waived, and the case was submitted on the pleadings and an agreed statement of facts. The court found that the charge of adulteration was not sustained, but held that the vinegar was misbranded. Claimant appealed, and the Circuit Court of Appeals reversed the judgment. 289 Fed. 181. Certiorari was allowed. 263 U. S. 695.

"The question for decision is whether the vinegar was misbranded.

"The substance of the agreed statement of facts may be set forth briefly. Claimant is engaged in the manufacture of food products from evaporated and unevaporated apples. During the apple season, from about September 25 to December 15, it makes apple cider and apple cider vinegar from fresh or unevaporated apples. During the balance of the year, it makes products which it designates as 'apple cider' and 'apple cider vinegar' from evaporated apples. The most approved process for dehydrating apples is used, and, in applying it, small quantities of sulphur fumes are employed to prevent rot, fermentation, and consequent discoloration. The principal result of dehydration is the removal of about 80 per cent of the water. Whether, and to what extent, any other constituents of the apple are removed is not beyond controversy; in the present state of chemical science, no accepted test or method of analysis is provided for the making of such determination. Only mature fruit, free from rot and ferment, can be used economically and advantageously.

"In manufacturing, claimant places in a receptacle a quantity of evaporated apples to which an amount of pure water substantially equivalent to that removed in the evaporating process has been added. A heavy weight is placed on top of the apples and a stream of water is introduced at the top of the receptacle through a pipe and is applied until the liquid, released through a vent at the bottom, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar. Such liquid, which is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used, carries a small and entirely harmless quantity of sulphur dioxide, which is removed during the process of fining and filtration by the addition of barium carbonate or some other proper chemical agent. The liquid is then subjected to alcoholic and subsequent acetic fermentation in the same manner as that followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples. Claimant employs the same receptacles, equipment and process of manufacturing for evaporated as for unevaporated apples, except that in the case of evaporated apples, pure water

is added as above described, and in the process of fining and filtration, an additional chemical is used to precipitate any sulphur compounds present and resulting from dehydration.

"The resulting liquid, upon chemical analysis, gives results similar to those obtained from an analysis of apple cider made from unevaporated apples, except that it contains a trace of barium incident to the process of manufacture.

Vinegar so made is similar in taste and in composition to the vinegar made from unevaporated apples, except that the vinegar made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by libellant that this trace of barium renders it deleterious or injurious to health. It was conceded that the vinegar involved in these proceedings was vinegar made from dried or evaporated apples by substantially the process above described. There is no claim by the libellant that the vinegar was inferior to that made from fresh or unevaporated apples.

"Since 1906 claimant has sold throughout the United States its product, manufactured from unevaporated as well as from evaporated apples, as 'apple cider' and 'apple cider vinegar,' selling its vinegar under the brand above quoted or under the brand 'Sun Bright Brand apple cider vinegar made from selected apples.' Its output of vinegar is about 100,000 barrels a year. Before and since the passage of the Food and Drugs Act, vinegar in large quantities, and to a certain extent a beverage, made from evaporated apples, were sold in various parts of the United States as 'apple cider vinegar' and 'apple cider,' respectively, by many manufacturers. Claimant, in manufacturing and selling such products so labeled, acted in good faith. The Department of Agriculture has never sanctioned this labeling, and its attitude with reference thereto is evidenced by the definition of 'apple cider vinegar' set forth in Circulars 13, 17, 19, and 136, and Food Inspection Decision 140.<sup>1</sup> It is stipulated that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name 'apple cider vinegar.'

"Section 6 of the Act provides that, '\* \* \* The term "food," as used herein, shall include all articles used for food, drink, confectionary, or condiment by man or other animals, whether simple, mixed, or compound.' Section 8 provides, 'That the term "misbranded," as used herein, 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, \* \* \* That for the purposes of this Act an article shall also be deemed to be misbranded: \* \* \* In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article. Second. If it be labeled or branded so as to deceive or mislead the purchaser, \* \* \* Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which \* \* \* shall be false or misleading in any particular. \* \* \*'"

"The statute is plain and direct. Its comprehensive terms condemn every statement, design, and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs, and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. The statute applies to food, and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is. *United States v. Schider*, 246 U. S. 519, 522; *United States v. Lexington Mill Co.*, 232 U. S. 399, 409; *United States v. Antikamnia Co.*, 231 U. S. 654, 665.

"The vinegar made from dried apples was not the same as that which would have been produced from the apples without dehydration. The dehydration took from them about 80 per cent of their water content—an amount in excess of two-thirds of the total of their constituent elements. The substance removed was a part of their juice from which cider and vinegar would have been made if the apples had been used in their natural state. That element was not replaced. The substance extracted from dried apples is different

<sup>1</sup> The definition referred to is, "Vinegar, cider vinegar, apple vinegar, is the product made by the alcoholic and subsequent acetous fermentations of the juice of apples."

from the pressed-out juice of apples. Samples of cider fermented and unfermented made from fresh and evaporated apples, and vinegar made from both kinds of cider were submitted to and examined by the District Judge who tried the case. He found that there were slight differences in appearance and taste, but that all had the appearance and taste of cider and vinegar. While the vinegar in question made from dried apples was like or similar to that which would have been produced by the use of fresh apples, it was not the identical product. The added water, constituting an element amounting to more than one-half of the total of all ingredients of the vinegar, never was a constituent element or part of the apples. The use of dried apples necessarily results in a different product.

"If an article is not the identical thing that the brand indicates it to be, it is misbranded. The vinegar in question was not the identical thing that the statement, 'Excelsior Brand Apple Cider Vinegar made from selected apples,' indicated it to be. These words are to be considered in view of the admitted facts and others of which the court may take judicial notice. The words 'Excelsior Brand,' calculated to give the impression of superiority, may be put to one side as not liable to mislead. But the words, 'apple cider vinegar made from selected apples,' are misleading. Apple cider vinegar is made from apple cider. Cider is the expressed juice of apples and is so popularly and generally known. See *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 570; *Hildick Apple Juice Co. v. Williams*, 269 Fed. 184; *Monroe Cider, Vinegar & Fruit Co. v. Riordan*, 280 Fed. 624, 626; *Sterling Cider Co. v. Casey*, 285 Fed. 885; affirmed 294 Fed. 426. It was stipulated that the juice of unevaporated apples when subjected to alcoholic and subsequent acetous fermentation is entitled to the name 'apple cider vinegar.' The vinegar in question was not the same as if made from apples without dehydration. The name 'apple cider vinegar' included in the brand did not represent the article to be what it really was; and, in effect, did represent it to be what it was not—vinegar made from fresh or unevaporated apples. The words 'made from selected apples,' indicate that the apples used were chosen with special regard to their fitness for the purpose of making apple cider vinegar. They give no hint that the vinegar was made from dried apples, or that the larger part of the moisture content of the apples was eliminated and water substituted therefor. As used on the label, they aid the misrepresentation made by the words 'apple cider vinegar.'

"The misrepresentation was in respect of the vinegar itself, and did not relate to the method of production merely. When considered independently of the product, the method of manufacture is not material. The act requires no disclosure concerning it. And it makes no difference whether vinegar made from dried apples is or is not inferior to apple cider vinegar.

"The label was misleading as to the vinegar, its substances, and ingredients. The facts admitted sustain the charge of misbranding.

"Judgment reversed."

HOWARD M. GORE, *Acting Secretary of Agriculture.*

**12368. Adulteration and misbranding of flour. U. S. v. 240 Sacks, et al., of Flour. Consent decree of condemnation and forfeiture. Product released under bond.** (F. & D. No. 18503. I. S. Nos. 16538-v, 16539-v, 16540-v, 16542-v, 16543-v. S. No. E-4781.)

On March 25, 1924, the United States attorney for the Southern District of Florida, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 1,570 sacks of flour remaining in the original unbroken packages at Jacksonville, Fla., alleging that the article had been shipped by the Empire Mills Co. from Columbus, Ga., on or about February 20, 1924, and transported from the State of Georgia into the State of Florida, and charging adulteration and misbranding in violation of the food and drugs act as amended. A portion of the article was labeled in part: (Sack) "Empire Mills Co., Old Sol Self Rising Flour \* \* \* Columbus, Ga. 24 Lbs. When Packed" (or "12 Lbs. Net When Packed" or "6 Lbs. When Packed"). The remainder of the article was labeled in part: (Sack) "Empire Mills Co. Columbus, Ga. Beech Nut \* \* \* Self Rising Flour \* \* \* 12 Lbs. When Packed" (or "24 Lbs. When Packed").

Adulteration of the article was alleged in the libel for the reason that a substance, excessive moisture, had been mixed and packed therewith so as to