

broken packages, and in the possession of the John Barth Co., Milwaukee, Wis., alleging that the product had been shipped by W. Cohn and the Russian Monople Co., Brooklyn, N. Y., on August 31, 1912, and transported in interstate commerce from the State of New York into the State of Wisconsin, and charging misbranding and violation of the Food and Drugs Act. The product was labeled: "Monople Vodka. Made and Bottled in the Russian Monople." There was also on the product a label in Russian which, being translated, was of the following purport: "Belonging to the Crown—Rectified Spirits."

Misbranding of the product was alleged in the libel for the reason that it bore certain representations and statements regarding it and the ingredients and substances contained therein which were false and misleading; that among these false and misleading statements was the following, to wit, the statement "Monople Vodka. Made and Bottled in Russian Monople" appearing on the label, which was calculated to convey the impression and deceive the public into the belief and cause and lead buyers and consumers thereof to believe that said product was a whisky or vodka of Russian origin, made, manufactured, and prepared in Russia, whereas, in truth and in fact, said whisky or vodka constituting and composing the product was not of Russian origin or made, manufactured, or prepared in Russia, but was made, manufactured, and prepared in the United States of America.

On June 12, 1913, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product should be sold by the United States marshal.

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

WASHINGTON, D. C., *February 18, 1914.*

**2914. Alleged misbranding of gins. U. S. v. Alexander M. Finlayson et al. (London Wine & Spirit Co.). Counts 1 and 2 of information nolle prossed. Tried to a jury on count 3. Verdict, not guilty. (F. & D. No. 4522. I. S. Nos. 13191-d, 13193-d.)**

On April 22, 1913, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information in three counts against Alexander M. Finlayson, George H. Armstrong, and Etta E. Parish, doing business under the name and style of London Wine & Spirit Co., New York, N. Y., alleging shipment by said defendants, in violation of the Food and Drugs Act, on June 30, 1911, from the State of New York into the State of Massachusetts, of a quantity of two brands of gin which was misbranded. The first brand of gin was labeled: "London Superior Sloe Colored Club Gin. None genuine unless bearing signature on each label. All shipments of this gin are made in bottles only packed in straw envelopes and all capsules have our signature diagonally upon them. London Wine & Spirit Co. New York, Distillers Sloe Gin, a very delicious liquor distilled from the pure fruit."

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

Artificial color: Amaranth S. & J. No. 107.

Free mineral acids.....	Negative.
Extract (grams per 100 cc).....	14.76
Lead precipitate.....	Heavy.
Ash (grams per 100 cc).....	0.0834
Alkalinity of ash (cc N/10 acid per 100 cc).....	1.2
Polarizations:	
Direct at 20° C. (°V.).....	2.7
Invert at 20° C. (°V.).....	3.8
Sucrose (Clerget) (per cent).....	0.83
Invert sugar (calculated) (per cent).....	11.50

It was also ascertained in connection with the examination of this product that it was manufactured in the United States. Misbranding of the product was alleged in

the first count of the information for the reason that it purported to be a foreign product, to wit, a product of England, when it was not so, but was a product of the United States, and further, in that the statements, designs, and devices on the label thereof regarding the article and the ingredients and substances contained therein were false and misleading, and said label was calculated to mislead and deceive the purchaser thereof in that it would indicate that the article was a foreign product, to wit, a product of England, when it was not so, but was a product of the United States. Misbranding was alleged in the second count of the information for the further reason that the statements, designs, and devices on the label thereof regarding the article and the ingredients and substances contained therein were false and misleading, and said label was calculated to deceive and mislead the purchaser thereof in that it would indicate that the article was a gin manufactured or produced in London, England, containing the natural color of sloe berries, whereas, in truth and in fact, it was a product manufactured in the United States and was artificially colored with a coal-tar dye.

The second brand of gin was labeled: "Genuine Hollands Geneva Gin. Deer's Head Brand. Distilled by London Wine & Spirit Co. New York. Deer's Head Brand is the finest type of pure and well matured gin."

Examination of a sample of this product by the said Bureau of Chemistry indicated that it was manufactured in the United States. Misbranding of this product was alleged in the third count of the information for the reason that it purported to be a foreign product, to wit, a product of Holland, when it was not so, but was a product of the United States, and further, in that the statements, designs, and devices on the label thereof were false and misleading and calculated to deceive and mislead the purchaser thereof in that said label would indicate that the article was a product manufactured or produced in Holland, whereas, in truth and in fact, it was a product manufactured and produced in the United States, and was further misbranded in that it was an imitation of genuine Hollands Geneva gin and was offered for sale under the distinctive name of that article, whereas, in truth and in fact, it was not genuine Hollands Geneva gin, but was a different article.

On October 23, 1913, the defendants having been brought to trial before the court and a jury on the third count of the information charging misbranding of "Genuine Hollands Geneva Gin," after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court (Mayer, J.):

This question before you is apparently an important one, and the case deserves and I have no doubt will receive at your hands very careful and deliberate attention, and I am about to endeavor to instruct you as to the law with considerable care, so that the real issues in the case may be entirely clear to you, and that in such discussion as you may indulge in in the secrecy of the jury room, you may not be led off into subject-matter unrelated to and irrelevant to the issue that you must determine.

At the outset you must dismiss from your minds an impression, if such should perhaps exist—and I feel quite confident that it does not—as to a controversy in this case between different classes of merchants.

This is not a case where these defendants are on trial for some encroachment on a label of another person in the same general line of business. If these defendants or any other persons, at any time, put out goods in some manner that another merchant feels is unfair to him, such question is to be decided in another tribunal, and at another time, and in a proper proceeding, because the case here is a criminal prosecution, specifically brought under a particular statute, whose language, so far as applicable here, will, I am sure, appear very clear and very simple to you.

You will not, I am sure, entertain any prejudice or impression, whatever your individual line of business may be, either for or against importers, or for or against domestic manufacturers, because that is not the question in this case. Nor is there any question here before you of trade competition. Every man living in this country, whether he is engaged in the importation of goods, or in the domestic handling of goods, is entitled to compete fairly with other men in the same line of business and along lines sanctioned by the law.

The sole question that you have to determine is a question of fact which I shall state to you in a few moments, and that question of fact, so far as you are concerned, comes as I have said on several occasions throughout this trial, within a narrow scope.

In this class of cases, the proceeding being of a criminal nature, it is begun usually by what is known as an information, which, to all intents and purposes, has the effect of an indictment. There were more counts in this information than are before you now, but only the last or third count is for you to consider, and I say that so that if you should have occasion to look at the indictment you will not read or pay any attention to the first and second counts.

The third count is brief, and so far as it is relevant I will read it.

It charges that in this jurisdiction the defendants, who are Mr. Finlayson, Mr. Armstrong, and Etta E. Harris, doing business under the name and style of London Wine & Spirit Company, made an interstate shipment of a certain article of food in a bottle labeled as follows—and then follows the label that you have seen and with which you are familiar—“which said article shipped as aforesaid, was misbranded in that it purported to be a foreign product, to wit, a product of Holland, when it was not so, but was a product of the United States. And the said article was further misbranded, in that the statement, design, and device on the label thereof were false and misleading and calculated to deceive and mislead the purchaser thereof, in that said label would indicate that the said article was a product manufactured or produced in Holland, whereas, in truth and in fact, the said article was an article manufactured and produced in the United States, and that said article was further misbranded, in that it was an imitation of genuine Hollands Geneva Gin, and was offered for sale under the distinctive name of that article, whereas, in truth and in fact, the said article was not genuine Hollands Geneva Gin, but was a different article.”

Now the statute under which this information is laid reads as follows, so far as here applicable.

“That the term ‘misbranded,’ as used herein, shall apply to all drugs or 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 to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.”

And then the statute goes on, that for the purposes of this act an article shall also 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.

When Congress passed this act it also passed in the act a provision allowing the Department of Agriculture to make rules and regulations, in accordance with the act, which when made should have the force of law, and so there is this regulation, which has the force of law, and which is applicable to this case, and upon which this case will practically turn. “The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term, and is used to indicate the style, type, or brand, but in all such cases, the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.”

The authorities recognize what many of us knew in one way or the other, that long usage has at times transformed a geographical name into a name that does not designate, necessarily, the place from which the article comes, but designates the style or type or brand of the article, and the further fact that this regulation was made by these experienced men in departmental work, doubtless—when I say “men” by “men” I mean, of course, always by the head of the department, but doubtless upon the advice and investigation of the subordinates under him—the very fact that such a regulation was made is in itself a recognition of the proposition that there are cases where the original meaning of the word has been added to, so that the word has a larger or more comprehensive meaning than it had originally.

“Generic” is a simple word, with which I think you are all familiar. It may be defined, I suppose, as meaning a class, as distinct from “specific,” which might mean a particular member of a class, and when it is used in this regulation, which I have just read, in connection with the word “term,” so as to create the phrase “a generic term,” that word “generic” means a class. “A generic term” means the description of a class of product.

If I have made the simple words of this act clear, and the words of this regulation clear, then we may go on to consider what is the issue before you.

If, as a fact, you believe that the words “Holland” or “Hollands Gin” or “Hollands Geneva Gin” have acquired this generic meaning, so that they are no longer confined to a description of the place from which the gin comes, then the defendants are entitled to an acquittal at your hands, without any further consideration upon your part.

If you believe that those words include domestic gin of the Holland flavor and type, then the use of the word “Genuine” in this label does not add anything to the Government’s position in the case. If that be your construction of the facts in the case, then

"Genuine" may be construed as meaning a gin of the Holland taste or type, as distinctive from the other kinds of gin. To wit, the English gins, such as Tom, Dry, and Sloe Gin.

There is no definition of what "long usage" is. Those words are elastic, because you can readily see that there are certain kinds of products known in our commercial life which have been known for a considerable time; there are other kinds of products which have been known only a very short time, and the words "long usage" are a good deal like the word "reasonable"; they change with time and circumstances and the developments of a complex civilization. You are to determine. I am not going to define "long usage," because I can not do it. You are to determine upon the facts of this case whether the usage that has been testified to may fairly be said to be a "long usage."

The evidence in the case shows that so far as these defendants are concerned they have used this particular label for a matter of, I think, at least seventeen years, excepting, perhaps, the lower part, and that they have used for some fifteen years, so that their use of this term preceded the Food and Drugs Act.

You have also the testimony of other domestic manufacturers as to usage for a considerable number of years.

Have these gentlemen who put out domestic gin under this designation done so fairly and honestly, with no attempt at deception, and in such a manner as to create in the mind of the purchaser the idea that when he asks for a Holland gin he is asking for a gin of a flavor and a taste different from the other kinds of gin?

We are not at all concerned with what the importer thinks about it or what the domestic manufacturer thinks about it. We are concerned to determine whether, on all the evidence in this case, the purchaser, the ordinary, sane, fair-minded man, is purchasing an article that is intended to make him think it comes from Holland, or an article which has become widely known as an article not necessarily coming from Holland, but having a taste different from the other kinds of gin.

Pretty nearly everything but the crucial question in this case is not a matter of contradiction. The defendants do not deny that there was an interstate shipment, which brings the case into this court. They admit and concede, without equivocation, that Holland gin or Hollands Geneva gin was originally the designation of gin made in Holland. They stand, as must the Government, upon the single proposition—the Government says that label means that it is intended to convince or lead any person who buys that article to believe that it was made in Holland, and the defendants say that that is not correct, that that label is intended not to mislead the public but to inform the public that the contents of that bottle are gin of a certain flavor and type, and that that gin by long usage in this country has come to be known, because of its flavor and type, as a Holland gin.

That is the question in this case, and you have got to determine it on the evidence adduced. You have heard all of these witnesses. It seemed to me, although you will exercise your judgment and not take mine, that practically every man was conscientiously giving his point of view as he understood it. One set of men having their minds very much on the imported article, the other set of men being familiar with the course and practices of this particular branch of business in this country.

It is for you to determine, and that is one of the values of sending cases of this particular class to a jury of business men drawn from various kinds of work, because you are to determine the fact in this case, which is what I have said.

But there is another rule or set of rules which apply in this case. We have had in the case the atmosphere of a civil trial. That has been the court-room atmosphere, because counsel, notwithstanding their very natural occasional controversies, are gentlemen who tried the case in courteous fashion, and the whole conduct of the case has been such to make you forget, perhaps, and at times to make the court forget, that the case is not a civil case but a criminal case, and while the penalty under this act for a first offense is not a severe penalty, yet the mere conviction is a matter of profound importance to any reputable merchant.

There is no controversy here as to the contents of this bottle being other than entirely proper. No suggestion in the information, and therefore there will be none in the evidence, that this is other than a perfectly proper domestic gin, which has been put in the bottle that contains this label, so it is not a case where you are to be diverted by any notion of a bad product being put up.

It is also entirely clear in this case that a different process is used for the manufacture or distillation of Holland gin from these other gins, and that that process has long been used in this country and is familiar to persons in the trade, and as presumably is the taste to the man who drinks gin.

So that we get back, and I am repeating myself purposely, to the sole question as to whether this Hollands gin has acquired this extra meaning, and if it has, that is the end of the Government's case, and whether it has is for you to say.

But, as I started to conclude, this is none the less a criminal case, and every man under our system is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and before the Government may look for a conviction, or rather I would put it a little better, before a conviction may be had of any man informed against, or indicted, it is incumbent on the Government to prove his guilt beyond a reasonable doubt.

So that in this case your decision does not necessarily finally determine whether the defendants in some civil relationship may use this designation or not. If you entertain a reasonable doubt, such a doubt as a fair-minded man entertains in a consideration of the important affairs of his own life, then the defendants are none the less entitled to an acquittal at your hands.

Finally, I may say that in regard to the testimony in cases of this kind, it is quite usual to introduce the definitions from dictionaries, but those definitions have no greater force and very frequently not as great a force as the testimony that falls from human lips, where a witness is sworn and able to be examined and cross-examined. What you find in the dictionary is merely the conscientious definition, presumably conscientious, of learned men who have collated their information from various sources, and it has no more effect, and perhaps not as great, as the sworn words of human beings.

I think now that I have covered about all that is necessary to be said, and I hope that I have made the issue to be determined entirely clear, and I sincerely hope that you will confine your deliberations to that particular question that I have referred to under the rules that I have given you and not be misled by anything that occurred in the case to indicate that this was, perchance, a controversy between merchants of various kinds.

The Government has made a certain request to charge. I feel that I have charged sufficiently fully, and I decline to grant the Government's request.

The request last referred to reads as follows:

That it is your duty to determine whether taking the label as a *whole* it is misleading to the average purchaser in that it creates in the mind of the purchaser the impression that he is getting a gin of the Holland type produced in Holland.

Mr. PROSKAUER. I have one request, your honor. May I state it orally?

The COURT. Yes.

Mr. PROSKAUER. I ask your honor to charge the jury that the words "distilled by the London Wine & Spirit Co. New York" is a fair compliance with the second provision of the section, stating that where the word has a generic meaning the label shall also contain a statement of the State where it is distilled or made.

Mr. AUCHINCLOSS. Your honor, it seems to me that is a question for the jury.

The COURT. No; I think that is a question of law. I so charge.

Mr. PROSKAUER. In other words, your honor charges the jury that that is a fair statement that the product is made in New York.

The COURT. Yes; that leaves simply the single question for the jury to determine.

Mr. PROSKAUER. May the jury take this exhibit in place of the label on the bottle, your honor? The label on the bottle is pretty badly rubbed.

The COURT. Yes.

The jury thereupon retired and subsequently returned into court with its verdict of not guilty upon the charge of misbranding of "Genuine Hollands Geneva Gin," which was count 3 in the information. The first and second counts of the information, charging misbranding of "London Superior Sloe Gin," were nolle prossed.

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

WASHINGTON, D. C., February 18, 1914.

**2915. Adulteration of baking powder. U. S. v. The Myers & Hicks Co. Plea of nolo contendere. Fine, \$5. (F. & D. No. 4527. I. S. No. 19445-c.)**

On July 16, 1913, the United States attorney for the District of Maryland, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against The Myers & Hicks Co., a corporation, Baltimore, Md., alleging shipment by said company, in violation of the Food and Drugs Act, on April 24, 1911, from the State of Maryland into the State of North Carolina, of a quantity of baking powder which was adulterated. The product was labeled: "Ideal Baking Powder for Bakers. The Myers and Hicks Co., 104 S. Howard St., Baltimore, Md. Directions: Use 3 Ozs.—Same as if using cream of tartar and soda. Guaranteed under Serial No. 9797."