3343. Adulteration and alleged misbranding of maple sugar. U. S. v. Huyler's. Tried to the court and a jury. Verdict of guilty on charge of adulteration. Verdict of not guilty on the charge of misbranding. Fine, $200. (F. & D. No. 4603. I. S. No. 19843-d.)

On February 12, 1913, the United States attorney for the District of Columbia, acting upon a report by the Secretary of Agriculture, filed in the police court of said District an information against Huyler's, a body corporate doing business within the District of Columbia, alleging the sale by said defendant on April 17, 1912, at the District aforesaid, in violation of the Food and Drugs Act, of a quantity of maple sugar which was adulterated and alleged to have been misbranded. The product bore no label, but was sold as maple sugar.

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

Weight of cakes (grams)	477 and 468
Sample made to a sirup:	
Dry substance by refractometer (per cent)	63.67
Total ash (per cent)	0.35
Soluble ash (per cent)	0.20
Insoluble ash (per cent)	0.15
Winton lead number	0.93
Malic acid	0.39

This could not be more than 85 per cent maple sugar.

Adulteration of the product was alleged in the first count of the information for the reason that it had been mixed and packed with another substance, to wit, cane sugar, which reduced and lowered its quality and strength. Misbranding was alleged in the second count of the information for the reason that the product was an imitation of and was offered for sale and sold under the distinctive name of another article of food, to wit, maple sugar.

On February 12, 1913, the case having come on for trial before the court and a jury, after submission of evidence and argument by counsel the following charge was delivered to the jury by the court (Mullowney, *J.*):

Gentlemen of the jury, this defendant is charged, in the information here under the act of Congress——

Mr. BOYESEN. If your honor please, I have some requests for charges. May I make them after you charge? I should prefer to, because you may charge them, and then I shall not have to make them.

The COURT (continuing). —in two counts. In the first count this defendant corporation is charged with selling this article of food—that is to say, a certain quantity of maple sugar—which said food was adulterated in that it had been mixed and packed with another substance, to wit, cane sugar, which reduced and lowered its quality and strength.

In the second count of the information, gentlemen, the defendant corporation is charged with selling this quantity of maple sugar, which was a food, misbranded, in that it was an imitation of and was offered for sale and was sold under the distinctive name of another article of food, to wit, maple sugar.

Now, gentlemen, each of these counts you will take and consider as separate cases, and it is your province, after you have investigated and gone over the evidence, to bring in a verdict either of not guilty or guilty as to both counts, or you can treat them as separate and bring in a verdict of not guilty as to one and guilty as to the other, or vice versa.

The act of Congress, gentlemen, reads: "The term 'food,' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound."

There is no controversy in this case, gentlemen, but what this product, this article, was sold by this defendant corporation. But the questions that you are to determine, gentlemen, are, first, Was it adulterated in that it had been mixed and packed with another substance, to wit, cane sugar, which reduced and lowered its quality and strength, and, second, Was it sold in imitation of and offered for sale and sold under the distinctive name of another article of food?

Considering the first count of the information, gentlemen, the Government claims here that this inspector, passing along the street, saw a sign in the window labeled "Maple sugar." A short time after that he went into this store and asked an employee of this corporation for maple sugar; that he was sold the article in question, here in evidence, and received it as maple sugar; that he then and there asked for what he termed a bill of sale and was handed this receipt which is in evidence and which you gentlemen have seen.

Now, then, if you believe that to be a fact, from the evidence, gentlemen, and it turns out that the article which he received was not maple sugar but was an article containing partly cane sugar and partly maple sugar, and you believe from the evidence that the addition of this cane sugar injuriously affected the quality and strength of the article demanded by this purchaser, this inspector, and received by him from this defendant corporation, and you believe such to be the fact beyond any reasonable doubt after you have considered all the evidence in the case, it would be your duty to convict this defendant.

But the defendant claims that they had no such sign in the window as the inspector swears to. That is their claim. They also claim that when a demand was made by this inspector for maple sugar he did not ask for maple sugar, but he asked for maple-sugar candy, and that when it was handed to him it was handed to him as maple-sugar candy and not as maple sugar.

If you believe that to be a fact, gentlemen—and this inspector received this article believing at the time, from the statements made by these people, that he was not receiving maple sugar but he was receiving maple-sugar candy, a preparation made up by this defendant corporation and sold to him as candy—then, gentlemen, if you believe that to be the fact—that it was not an article mixed and packed with this cane sugar, which reduced and lowered its quality and strength—and if you have a reasonable doubt of that, gentlemen, after you have heard all the facts in the case and considered it, it would be your duty to give it the benefit of it and acquit the defendant on the first count of the information.

* * * * * * *

The COURT. Gentlemen, after you have considered all the evidence offered by the Government then you are to take into consideration the evidence offered by this defendant; and, if that raises a reasonable doubt in your mind, then you are to give the defendant the benefit of it and acquit it, and not in regard to the evidence offered by the Government alone.

Mr. BOYESEN. That is to say, our evidence does not require to raise anything more than a reasonable doubt.

The COURT. That is it. The Government must prove their case beyond a reasonable doubt.

In regard to the second count of the information, gentlemen, the claim of the Government is that this inspector, at the time he received the article, received it as maple sugar, and received this receipt, which he termed a bill of sale, and that he made a demand for maple sugar and received this package as maple sugar, and received this bill marked "Maple sugar cakes."

The defendant, though, claims, gentlemen, that that was received by him in connection with the statements of the employees; that is, that he did not demand maple sugar, but he demanded maple-sugar candy. Now, then, you will have the right, therefore, in considering whether this article was an imitation of the distinctive name, maple sugar, to take this label and to take these statements of these clerks that it was sold to him as maple-sugar candy. Or, in other words, I charge you, gentlemen, that you ought not to take this receipt alone, because it was not put on and wrapped with the package, but it was received by this prosecuting witness or the inspector, when he made the demand for it; therefore I charge you to take into consideration, in determining this evidence, the statements of the clerks that they sold it to him as maple-sugar candy. So that, then, if you take the consideration of those statements of the clerk and this label or receipt with the statement that it was sold as maple-sugar candy, and you have a reasonable doubt of it, you are to give this defendant the benefit of it and acquit it.

Now, gentlemen, this defendant corporation comes into this court with the presumption of innocence, and it is your duty to give it the benefit of it, and it is entitled to have this case proven to you beyond all reasonable doubt after you have considered all the evidence in the case, and, as I have stated to you, if you have a reasonable doubt, it is your duty to give it the benefit of it, and you should acquit.

Is there anything else you gentlemen wish?

Mr. SMITH. We have no requests.

Mr. BOYESEN. I want first to except to so much of your honor's charge as intimates that there might, under any circumstances, be a branding through the delivery to the Government's inspector of a bill as a wholly and separate and distinct transaction from the delivery and payment for the product, and to request your honor to charge that it affirmatively appears as a matter of law that there was no branding of the package of goods in question whatever, and that, there having been no branding, there could be no misbranding.

The COURT. All right; you can take an exception to that.

Mr. BOYESEN. I except.

I will ask your honor to charge the jury that upon the first count of the information, charging adulteration, there is no ingredient contained in the defendant's product prohibited by the Food and Drugs Act. That is to say, there was no terra alba, barytes, talc, or any other prohibited ingredient, and that the confectioner, as a matter of right and as a matter of law, has the right to make confectionery according to his own formula, unless the prohibited ingredients are contained.

The COURT. I shall refuse that as not germane to the case. There is no testimony here in regard to it. There is no ingredient of that kind in it.

Mr. BOYESEN. It has been stated that in this product which is in question here there are two ingredients—maple sugar and cane sugar.

The COURT. Yes.

Mr. BOYESEN. And I requested your honor to charge this jury that a formula calling for cane sugar and maple sugar for confectionery is perfectly legal for confectionery.

The COURT. Well, I will let you have an exception to that. There is no proof in regard to the matter to sustain that prayer.

Mr. BOYESEN. I will ask your honor to charge that it is permissible, in the ordinary trade, in confectionery, so far as anything appears in the evidence to the contrary, to compound an article consisting of maple sugar and cane sugar and to sell the same as confectionery.

That is in line with the notice of judgment No. 1803, to which I called your honor's attention.

The COURT. I think I have covered that. I think I told the jury in my charge if they believed from this evidence that if when he came in there he demanded maple-sugar candy and received it as such it was not a violation at all, therefore it was not an article sold in imitation of another article, nor was it sold as an article which reduced or lowered its strength or quality. I think I told the jury that.

Mr. BOYESEN. I am speaking now of the make-up of the article.

The COURT. You may have an exception.

Mr. BOYESEN. I will ask your honor to charge that the jury is entitled, on the question of guilt or innocence of the defendant, to consider that the defendant is a manufacturer of confectionery only and beverages, and not of foods; that it has not advertised in any manner that it sells anything except confectionery and beverages, and that should be taken into consideration by them upon the question of whether any reasonable member of the public should be deceived under the circumstances, and further to take into consideration the fact that the size of the cake was not the usual size in which maple sugar is put up.

The COURT. I will give you an exception.

Mr. BOYESEN. I ask your honor to charge the jury as a matter of law that the article in question here was not sold under the distinctive name of another article.

The COURT. I will give you an exception.

Mr. BOYESEN. I will ask your honor to charge that if any violation of the law was made under the second count by the defendant the transaction was complete when the goods were delivered, and payment therefor was received, and that they are not entitled to take into consideration in any manner the fact that the Government inspector thereafter, when the transaction was complete, asked for a receipted bill and that they are not entitled to take into consideration anything written upon the face of that bill.

The COURT. You may have an exception to that.

Mr. BOYESEN. I will ask your honor to instruct the jury that they are to draw no inference whatever, favorable or unfavorable to the defendant, from your honor's refusal to charge as requested.

The COURT. Yes.

Gentlemen, you are to take no consideration of the refusal or granting of any of these prayers of counsel or any statements made by the court in regard to the offer of prayers.

Mr. BOYESEN. Those that are granted they are to consider, of course, your honor.

The COURT. Oh, yes.

Take the case, gentlemen.

Thereupon the jury retired and after due deliberation returned into court with a verdict of guilty as to the charge of adulteration and not guilty as to the charge of misbranding. The defendant company then gave notice of the filing of a motion for a new trial and in arrest of judgment, and on February 17, 1913, said motion was filed. On March 7, 1913, this motion, having come on for hearing, was argued and overruled, and the court imposed a fine of $200. Exceptions were taken to the rulings of the court on matters of law and notice was given by the defendant in open court of an intention to apply to a justice of the Court of Appeals of the District of Columbia for a writ of error. On March 19, 1913, the defendant company filed its petition for the allowance of a writ of error with its bill of exceptions to said Court of Appeals of the District of Columbia, and on April 7, 1913, the petition for the writ of error was denied.

On June 6, 1913, the defendant company filed in the Supreme Court of the District of Columbia, holding an equity court, a bill for injunction against David F. Houston, Secretary of Agriculture, praying that an order might issue temporarily restraining and enjoining said Secretary of Agriculture from the publication of the notice of judgment against the said Huyler's in relation to the fine imposed by the police court of the District aforesaid, and that on final hearing said order might be made permanent, and on said date a rule was allowed by the court that the Secretary of Agriculture should show cause why the writ of injunction should not issue as prayed; and on June 13, 1913, an answer to the rule to show cause and a demurrer to the bill of complaint were filed on behalf of the Secretary of Agriculture. On June 25, 1913, the cause having come on to be heard in the said Supreme Court of the District of Columbia upon the bill of complaint and rule to show cause issued thereon and the answer to said rule to show cause and demurrer to said bill of complaint, after argument by counsel and consideration by the court, it was ordered, adjudged, and decreed that the said rule to show cause be discharged and that the demurrer to the bill of complaint be sustained and that said bill of complaint be dismissed with costs. The said Huyler's appealed from this order in open court; and bond for costs was fixed at $100, and bond to act as supersedeas at $5,000. The following opinion, preliminary to the issuance of the foregoing order, was rendered by the court (Anderson, *J.*):

This is a bill for injunction to restrain the Secretary of Agriculture from publishing, pursuant to section 4 of the "Food and Drugs Act" of June 30, 1906, notice of a certain judgment of the police court of the District of Columbia imposing a fine of $200 upon the plaintiff in case No. 185115 charging him with offering for sale, and selling, an adulterated article of food to one Rodney A. Griffin.

The plaintiff contended in the police court that that court had no jurisdiction over the alleged offense, because the act of Congress (sec. 5) provides for prosecutions "in the proper courts of the United States," thereby meaning, it was claimed by the plaintiff, only constitutional courts of the United States. The police court, however, overruled the objection, and held that the act meant all legislative courts of the United States. A writ of error to the Court of Appeals was subsequently applied for, but denied.

This suit has, accordingly, been brought to obtain relief against the irreparable injury which, it is contended, will result from the publication by the defendant under said act of notice of said judgment. The case is now before the court upon the defendant's answer to the rule to show cause and also upon the defendant's demurrer to the bill.

QUESTION FOR DECISION.

The sole question for determination herein is one of law, namely, whether Congress intended by the use of the words "in the proper courts of the United States" in this statute to include the police court of the District of Columbia.

In United States *v.* Mills, 11 App. D. C. 500, 507, it was said:

"When there is mention of the courts of the United States in any statute, we may conclusively assume that only the courts of general jurisdiction intended by the Constitution are meant, unless there is special reason to be deduced from the context of the statute for giving to the expression a different meaning."

In the act under consideration the language, it is to be noted, is "the proper courts of the United States," and this language would seem to clearly import that all courts exercising the criminal jurisdiction of the United States, in so far as the penalties prescribed by the act come within their statutory jurisdiction, should have cognizance of these offenses. That the penalties for a first offense under this act come within the statutory jurisdiction of the police court is unquestioned.

It follows from what has been already said that the rule to show cause must be discharged, and the demurrer to the bill sustained, and the bill dismissed.

On August 6, 1913, assignments of error in support of the appeal from the action of the Supreme Court of the District of Columbia were filed, and on September 2, 1913, transcript of record was received and filed in the Court of Appeals of the District of Columbia. On January 6, 1914, the case came on for argument before the court, and on February 2, 1914, the decree of the lower court was affirmed by said Court of Appeals of the District of Columbia, with costs, as will more fully appear from the following opinion by the court (Robb, *J.*):

This is an appeal from a decree o. the Supreme Court of the District sustaining appellee's demurrer and dismissing appellant's bill for an injunction to restrain the appellee, the Secretary of Agriculture, from publishing, pursuant to section 4 of the so-called Food and Drugs Act of June 30, 1906 (34 Stat., 768), notice of a judgment in the police court of the District of Columbia imposing a fine of $200 upon appellant after conviction of the offense of offering for sale and selling an adulterated article of food.

Section 4 of said act provides that a chemical examination of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of that bureau, for the purpose of determining whether such articles be adulterated or misbranded within the meaning of the act, and if the result of that examination shows adulteration or misbranding it is made the duty of the Secretary to notify the party from whom the sample was obtained. Thereupon the party so notified is given an opportunity to be heard, and if, after hearing, it appears that any of the provisions of the act have been violated by such party it is made the duty of the Secretary at once to "certify the facts to the *proper United States district attorney*, with a copy of the result of the analysis or examination of such article duly authenticated by the analyst or officer making such examination under the oath of such officer. *After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.*"

Section 5 of the act makes it the duty of each district attorney to whom such a violation shall be reported by the Secretary, "or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of such violation, to cause appropriate proceedings to be commenced and prosecuted in the *proper court of the United States* without delay for the enforcement of the penalties herein provided."

Appellant was duly convicted in the police court of the District of Columbia and fined $200 for offering for sale and selling adulterated maple sugar. It is the contention of the appellant that the police court is not a "proper court of the United States" within the meaning of said section 5 of the Food and Drugs Act, and hence that the judgment of that court is absolutely void. This contention is easily met. Section 43 of the code confers upon the police court original jurisdiction concurrently with the Supreme Court of the District,

except where otherwise therein provided, "of all crimes and offenses committed in the said District not capital or otherwise infamous and not punishable by imprisonment in the penitentiary, except libel, conspiracy, and violations of the post office and pension laws of the United States." The charge upon which appellant was prosecuted, being a first offense, where the punishment may not exceed a fine of $200, was therefore within the jurisdiction of the police court. That the police court is a court of the United States, although not in the sense of the Constitution, has already been determined. United States *v.* Mills (11 App., D. C., 500). The question here is not whether the police court is a court of the United States in the constitutional sense, but whether it is a "proper court of the United States" within the meaning of the Food and Drugs Act. All other pettty offenses against the United States, except those expressly reserved from its jurisdiction, are triable in that court, and no reason is perceived why one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States. When, therefore, Congress used the words "in the proper courts of the United States," we think it clear that it meant in the courts having jurisdiction of similar offenses. The police court was therefore a proper court within the meaning of this section.

Decree affirmed with costs.

D. F. HOUSTON, *Secretary of Agriculture.*

WASHINGTON, D. C., *September 24, 1914.*

3344. Alleged adulteration of milk. U. S. v. John W. Hart. Tried to the court and jury. Verdict of not guilty. (F. & D. No. 4634. I. S. Nos. 5426-d, 5427-d.)

On November 4, 1912, the United States attorney for the District of New Jersey, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against John W. Hart, of Pennington, N. J., alleging shipment by said defendant in violation of the Food and Drugs Act on June 7, 1912, from the State of New Jersey into the State of Pennsylvania, of a quantity of milk which was adulterated. The cans containing the product were marked "John W. Hart, Pennington, N. J."

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

Determination.	Sample No. 1.	Sample No. 2.
Fat (per cent)	3.60	2.86
Total solids by drying (per cent)	11.73	12.14
Solids not fat (per cent)	8.13	9.28
Ash (per cent)	.66	.73
Specific gravity at 60° F	1.0292	1.0342
Nitrates	Present.	Negative.

It was alleged in the information that the product was adulterated in that, being an article used for food by man, a substance, to wit, water, had been mixed and packed with it so as to wholly reduce and lower and injuriously affect its quality and strength; and said article was further adulterated in that the same contained a substance, to wit, water, which had been substituted wholly for the said article of food; and was further adulterated in that a valuable constituent, to wit, fat, had been wholly abstracted and left out. It was further alleged in the second count of the information that the product was adulterated in that being an article used for food by man as aforesaid, a substance, to wit, water, had been mixed and packed with it so as to partly reduce and lower and injuriously affect its quality and strength; and said article was further adulterated in that the same contained a substance, to wit,