defendant was suspended, and he was placed on probation for a period of 10 days.

COSMETICS ACTIONABLE BECAUSE OF FALSE AND MISLEADING CLAIMS

151. Misbranding of Miracle-Aid. U. S. v. Norval C. Douglas (Miracle Products). Plea of not guilty. Tried to the jury. Verdict of guilty. Sentence of 1 year's imprisonment and fine of $4,000. Judgment reversed on appeal to the Circuit Court of Appeals; case returned to the District Court. Plea of nolo contendere subsequently entered and fine of $2,000 and costs imposed. (F. D. C. No. 14292. Sample Nos. 41209–F, 63481–F.)

INFORMATION FILED: On or about June 20, 1945, Northern District of Illinois, against Norval C. Douglas, trading as Miracle Products, at Chicago, Ill.

ALLEGED SHIPMENT: On or about March 2 and April 26, 1944, from the State of Illinois into the States of Texas and Georgia.

PRODUCT: Examination showed that the product consisted essentially of water, with a small proportion of protein, such as egg white, and perfume.

NATURE OF CHARGE: Misbranding, Section 602 (a), certain statements on the label of the article and in an accompanying circular entitled "For the Preservation and Enhancement of Beauty," and an accompanying counter display card, were false and misleading, since they represented and suggested that the article would be efficacious in the correction and removal of wrinkles and double chin; that it would supply tissue proteins to the body; and that it would be efficacious in the correction and removal of the weather-beaten and mottled condition of the neck just under the ear. The article would not be efficacious for the purposes represented.

The information alleged also that another product, Miracle Slenderizing Cream, was misbranded under the provisions of the law applicable to drugs, as reported in notices of judgment on drugs and devices, No. 2121.

DISPOSITION: The defendant entered a plea of not guilty, and on December 3, 1945, the case came on for trial before a jury. At the conclusion of the trial, the jury, on December 5, 1945, returned a verdict of guilty, and the court sentenced the defendant to serve 1 year in jail and imposed a fine of $1,000 on each of the 4 counts of the information. Subsequently, the case was appealed to the United States Circuit Court of Appeals for the Seventh Circuit, and on June 15, 1946, an opinion was handed down by that court, reversing the judgment of the lower court. The opinion is reported in the above-mentioned notices of judgment on drugs and devices, No. 2121.

A petition for rehearing was filed, and following its denial on July 6, 1946, the case was returned to the district court. On February 25, 1947, the defendant entered a plea of nolo contendere, on which date the court imposed a fine of $2,000 and costs, which included charges against both the cosmetic and drug.

152. Alleged misbranding of Eau de Quinine Compound Hair Lotion. U. S. v. Pinaud, Inc. Plea of not guilty. Tried to the jury. Verdict of not guilty. (F. D. C. No. 20124. Sample No. 5745–H.)

INFORMATION FILED: On or about September 30, 1946, Southern District of New York, against Pinaud, Inc., New York, N. Y.

ALLEGED VIOLATION: The defendant was charged with giving a false guaranty to the Gladiator Co., Inc., New York, N. Y., on or about April 19, 1945. The guaranty was set forth on an invoice covering a delivery of the product, made by the defendant to the Gladiator Co., Inc., on or about April 19, 1945, which guaranty provided that the product was guaranteed by the defendant under the Federal Food, Drug, and Cosmetic Act; and on or about April 20, 1945, the Gladiator Co., Inc., shipped the product from the State of New York into the State of Pennsylvania.

NATURE OF CHARGE: Misbranding, Section 602 (a), the label statement "Eau de Quinine Compound Hair Lotion" was alleged to be false and misleading.

DISPOSITION: A plea of not guilty having been entered, the case came on for trial before a jury on January 22, 1947. At the conclusion of the trial on January 23, 1947, the following charge was given to the jury:

WATKINS, *District Judge:* "At the conclusion of the evidence by counsel in this case it becomes the duty of the Judge to instruct you as to the law of the case, and when you go to your jury room it becomes your duty under your oath

to apply the law as I give it to you to the facts as you found them and reach a just and fair verdict. The Congress of the United States has seen fit to pass what is known as the Federal Food and Drugs Act. That Act is plain and direct. It provides, among other things, that any person or corporation who introduces or delivers for introduction into interstate commerce any food, drug, or cosmetic that is adulterated or misbranded has committed a criminal offense.

"Another provision of the Act provides that a cosmetic is deemed to be misbranded if its labeling, or if the label on it is false or misleading in any particular. Deception may result from the use of statements not technically false or which may be literally true. The purpose of the statute is to prevent that misbranding resulting from ambiguity as well as mere statements which are false. Those which are ambiguous and tend to mislead our public are in violation of the Act. The purpose of the Food and Drugs Act is for the protection of the consuming public. Those who ship in interstate commerce products coming within the scope of its protection must do so at their own risk if the standards of the Act are not observed. In any criminal prosecution such as this there are certain general principles of law which apply. First, a defendant is presumed to be innocent until he is proven guilty. While the accused at the beginning of the trial is presumed to be innocent beyond a doubt, when more proof shows beyond a reasonable doubt that the defendant is guilty, then the presumption of innocence disappears completely from the case. Another proposition which applies in all criminal cases is that this defendant now incorporated cannot be found guilty by the jury until you are satisfied beyond a reasonable doubt that the defendant did that with which it is charged in this Information. By reasonable doubt is meant not a capricious doubt, not a doubt which may flit through the minds in considering this case but a substantial doubt which you are called upon to give. By reasonable doubt, I do not mean to say beyond any possible doubt or any imaginary doubt, the words mean exactly what they say. Beyond a reasonable doubt and until you find that the defendant is guilty beyond a reasonable doubt, you cannot return a verdict of 'guilty' against the Corporation.

"The indictment in this case is founded upon this Food, Drug, and Cosmetic Act. It charges that this defendant in late 1945 sold a quantity of Eau de Quinine to the Gladiator Company located here in the City of New York. It charges that on the invoice of that shipment there was a guarantee to the effect that the product complied with all of the requirements of the Food, Drug, and Cosmetic Act, including that portion of the Act which forbids a misbranding. Later the Gladiator Company shipped that product into the State of Pennsylvania. The indictment charges that the defendant has violated this Act because the indictment charges that the product, Eau de Quinine was misbranded, the label on it was misleading; the indictment charges that it was misleading because the labeling would cause one to believe that there was a substantial or a consequential amount of quinine in it; whereas the indictment charges that as a matter of fact the amount of quinine in the product, Eau de Quinine was in fact very trivial or inconsequential and the Government contends because of the inconsequential amount of quinine in the product that people buying it are apt to be misled in believing that they are getting a product which contains a substantial or consequential amount of quinine when in fact they are not getting it. That is what the indictment charges.

"The defendant has entered a plea of not guilty to these charges and has denied that it has misrepresented or misled the public or that the label on its product in any way tends to mislead the public. The defendant contends that this product was manufactured first more than ninety (90) years ago by Edward Pinaud and that through the spending of much money in advertising and through a continued business to a large degree in this product over a period of almost a century that the words: 'Eau de Quinine' have come to designate to the public the name of a product, and that they do not represent to the buying public, because of this long usage, the name of a product containing any particular amount or any amount of quinine. Now in nearly all criminal cases there are certain facts which are not indisputable, and that is true in this case. There is no dispute over the fact that this product contains only about two parts of quinine to ten thousand of the product, of the finished product, and there is no dispute over the fact that that amount of quinine, such amount of quinine is a very small or very inconsequential amount of quinine.

There is no dispute over the fact that this merchandise was shipped in interstate commerce, but the case therefore can be narrowed down to very narrowest limits and the question for this jury to decide is a single question: Is this product misleading? Now the labeling of a cosmetic which contains two or more ingredients may or may not be misleading by reason of the designation of such cosmetic and such labeling by a name which includes or suggests the name of one or more but not all of such ingredients. The fact that Quinine was mentioned on the name of this product is just one of the many features which this jury must take into consideration along with all of the other evidence to determine whether or not the label on it is misleading.

"In a prosecution under the Food and Drugs Act intent is not a necessary element of the product. It makes no difference whether a person intends to violate the Act or whether he has got bad intentions. It is a crime under the law for any person to ship a product in interstate commerce which violates the Act.

"This matter which the jury has to decide is not entirely a new question. The Courts of our country have held that through long usage of a name that that name some times acquires a secondary meaning, for example, the word 'Coca Cola' the Courts have upheld is not deceptive or misleading even though the product contains no coca and very little cola. The name Coca Cola has acquired a secondary meaning, the product, a drink or beverage itself rather than the ingredients suggested by its name.

"So, therefore, you can say that a product might be in violation of the Food and Drugs Act because of a misleading name in the early period of its sales, whereas that same product after many, many years of use may no longer be in violation of the Act, if because of that long usage the public has come to understand what the name signifies, and if the public believes it and interprets it to mean a product, a drink such as Coca Cola rather than designating by the ingredients, so much coca and so much cola. The defendant here contends that because of this long usage of this name: 'Eau de Quinine' that when the defendant contends that now because of this long usage, when the public buys Eau de Quinine, it is buying a well known hair preparation or tonic by that name and that the public is not buying a preparation which the public believes to contain a substantial or consequential amount of a drug known as 'quinine' or any amount of 'quinine'. A further example of this principle might be well illustrated by the name: 'milk' so far as 'Milk of Magnesia' is concerned, or soda in soda water, and as one Court has said that it is not very reasonable to believe that the use of the word: 'Eskimo Pie' leads the people to believe that it is a pie made by Eskimos, or is a formula obtained from the Eskimos. That by long usage of the name it signifies a product, rather than a product having certain ingredients in it.

"Now, ladies and gentlemen, I have tried to outline to you the respective contentions of the parties. The Government says that it is a label which is misleading,—it says that it is misleading because the label represents to the public that it has a consequential amount of quinine in the product, where the Government says that it doesn't have a substantial amount of quinine and that because of that people are likely, the public are likely to purchase it believing that they are getting something that has some medicinal value to their hair or to their scalp, and I might say that there is another matter that is not in dispute. The evidence shows that the drug 'quinine' is a drug used primarily for the cure of malaria and that the drug 'quinine' has no value whatsoever to the scalp or to the hair in a hair tonic.

"For some reason that name was put in there some years ago and it has continued all down through the years and it is still in that name. The defendant's position I have told you.—The defendant contends that because of the long usage of this name that it is sold to the public, and the public is not misled in believing that it contains so much quinine. The defendant takes the position that the public doesn't care how much quinine is in there and doesn't buy it with any view as to how much quinine is in this product.

"Yesterday a statement was made by the [Government's] counsel, to the effect that if anywhere in these United States, regardless of a person's intelligence or literacy, if anywhere there may be a man or woman who might be misled by this name, 'Eau de Quinine,' that that would probably be a violation of this Act. I want to correct that because I don't think that the statement

correctly states the law. The test is whether or not the public is misled or likely to be misled by this name. The goods are misbranded if they bear any statement which would deceive or mislead any purchasers who are of normal capacity and use that capacity in a common sense way.—That is the test and whether there may be any or few so deceived is not material."

On January 23, 1947, the jury returned a verdict of not guilty.

153. Misbranding of Lustray Egg Shampoo. U. S. v. 77 Bottles * * *. (F. D. C. No. 24351. Sample No. 9163–K.)

LIBEL FILED: On February 17, 1948, Southern District of New York.

ALLEGED SHIPMENT: On or about January 7, 1948, by the J. H. Shufford Beauty & Barber Supply Co., from Richmond, Va. This was a return shipment.

PRODUCT: 77 1-quart bottles of Lustray Egg Shampoo at New York, N. Y. Examination showed that the product was a perfumed, yellow-colored, soapy liquid containing not more than a trace, if any, of egg.

LABEL, IN PART: "Lustray Egg Shampoo Mfd. By Lustray Laboratories Inc., New York, N. Y."

NATURE OF CHARGE: Misbranding, Section 602 (a), the label statements "Egg Shampoo * * * Contains Real Egg * * * The real egg in this shampoo does wonders for your hair. Egg Shampoo in highly concentrated form" were false and misleading as applied to an article which did not contain more than a trace, if any, of egg; and, Section 602 (b) (2), the label of the article failed to bear an accurate statement of the quantity of the contents.

DISPOSITION: March 18, 1948. Default decree of condemnation. The product was ordered delivered to a charitable organization.

154. Misbranding of Rayve Egg Fluff Shampoo. U. S. v. 270 Cartons * * *. (F. D. C. No. 23880. Sample No. 9142–K.)

LIBEL FILED: On or about October 30, 1947, Southern District of New York.

ALLEGED SHIPMENT: On or about May 15 and 16, 1947, by Raymond Laboratories, Inc., from St. Paul, Minn.

PRODUCT: 270 cartons, each containing 12 8-ounce bottles, of Rayve Egg Fluff Shampoo at New York, N. Y. Analysis showed that the product contained not more than one percent of whole egg solids. The whole 8-ounce bottle contained approximately one-fifth of one egg.

LABEL, IN PART: "Rayve Egg Fluff Shampoo."

NATURE OF CHARGE: Misbranding, Section 602 (a), the label statements "Egg Fluff Shampoo * * * enriched with egg * * * contains dehydrated egg" were false and misleading as applied to a product which contained an insignificant amount of egg.

DISPOSITION: December 8, 1947. Default decree of condemnation. The product was ordered delivered to charitable organizations.

155. Misbranding of Richard Hudnut Egg Creme Shampoo. U. S. v. 6 Dozen Bottles * * *. (F. D. C. No. 23878. Sample No. 8013–K.)

LIBEL FILED: October 31, 1947, District of Connecticut.

ALLEGED SHIPMENT: On or about September 12 and 15, 1947, by the Hudnut Sales Co., Inc., from New York, N. Y.

PRODUCT: 6 dozen 8-ounce bottles of Richard Hudnut Egg Creme Shampoo at Hartford, Conn. Analysis showed that the product contained not more than 0.3 percent of whole egg solids, equivalent to about 1/20 of an egg in the 8-ounce bottle.

LABEL, IN PART: "Richard Hudnut Egg Creme Shampoo."

NATURE OF CHARGE: Misbranding, Section 602 (a), the label statement "Egg Creme Shampoo" was false and misleading as applied to a product which contained an insignificant amount of egg.

DISPOSITION: December 16, 1947. Default decree of condemnation. The product was ordered distributed to charitable institutions.

156. Misbranding of Bonat Cream Shampoo (liquid and paste). U. S. v. 11 Bottles, etc. (F. D. C. No. 24348. Sample Nos. 9161–K, 9162–K.)

LIBEL FILED: February 13, 1948, District of New Jersey.