"The libels in this case charged that the representations contained in the booklets were false and misleading because they represented that the remedies were effective in the treatment of poultry diseases when they were not effective. Whether they were represented to be effective and whether they were effective were the issues in the case. The testimony for the Government, acquiesced in by three witnesses for claimant, was that before these remedies could be effective, a capacity to destroy or inhibit germs was necessary. Under this state of the evidence, it was unnecessary to tell the jury about what would be necessary for the remedies to be curative or therapeutic. Whether the statements appearing in the booklets represented the remedies to be effective was for the jury to say in light of the ordinary meaning of the language used. *Bradley* v. *United States*, (C. C. A. 5, 1920) 264 Fed. 79; *Hall* v. *United States*, (C. C. A. 5, 1920) 267 Fed. 795; *United States* v. *John J. Fulton Co.*, (C. C. A. 9, 1929) 33 F. (2d) 506.

"Claimant assigns as error the action of the court in permitting the experts for the Government to testify as to the ultimate issues in the case, citing *United States* v. *Spaulding*, 293 U. S. 498. All of the opinion evidence given by the Government's experts necessarily involved the use of their experience and training on matters of special knowledge not within the grasp of the untutored. Clearly, it would seem not improper for the court to permit them to express opinions upon the question of the effectiveness of claimant's remedies. *Dr. J. H. McLean Medicine Co.* v. *United States*, (C. C. A. 8, 1918) 253 Fed. 694; *Eleven Gross Packages* v. *United States*, (C. C. A. 3, 1916) 233 Fed. 71; *Kar-Ru Chemical Co.* v. *United States*, (C. C. A. 9, 1920) 264 Fed. 921; *United States* v. *Chichester Chemical Co.*, (App. D. C. 1924) 298 Fed. 829. All opinions given by the experts who testified for the Government were directly or indirectly expressed in relation to this question of effectiveness and did not invade the function of the jury. Moreover, in the examination of its experts, claimant was allowed similar latitude. In fact, in an effort to permit claimant to present to the jury everything which could possibly be of benefit in support of its claims of effectiveness, the court allowed very great latitude in the receipt of evidence, even to the point where opinion evidence from lay persons was received. Accordingly, if any error was committed, it was in claimant's favor and it is now in no position to complain.

"Other claims of error may be summarily dismissed. I see no impropriety in instructing the jury to ignore such portions of the closing argument of claimant's counsel as attempted to impugn the Government's motives in bringing this case at the present time. There was no evidence to justify this statement. See *London Guarantee & Accident Co.* v. *Woefle*, (C. C. A. 8, 1936) 83 F. (2d) 325, 338–344. The claimed impropriety in the argument of Government counsel, if it existed, was prompted by the improper argument of opposing counsel and was not open to censure. *Chicago & N. W. Ry. Co.* v. *Kelly*, (C. C. A. 8, 1934) 74 F. (2d) 31; *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, (C. C. A. 8, 1933) 65 F. (2d) 297, 301–302.

"I feel that claimant's requests to permit the jury to examine all parts of the booklets in determining whether there were representations of effectiveness was properly denied. Much of this matter was wholly unrelated to the remedies involved and would have diverted the jury from the task at hand. Request No. 18, submitted by claimant, was granted and this in my opinion was all that it was entitled to.

"Throughout the trial, evidence as to efficacy of the remedies was offered by both sides without regard to whether it related to prevention or treatment of disease. It was, therefore, entirely proper to permit the Government to amend its pleadings to embrace both. Rule 15 (b) of the Federal Rules expressly sanctions this.

"Any error in the exclusion of Exhibit P was harmless. The materiality of and foundation for this exhibit were not clearly shown. But that aside, it was offered as impeachment evidence only. In view of the admission of Exhibit Q, its only effect would have been cumulative."

On June 27, 1944, judgments were entered ordering that the products be destroyed on or before July 31, 1944. The United States marshal destroyed them on July 8, 1944.

1093. Misbranding of Schilling's Mercutol. U. S. v. 124 Bottles of Schilling's Mercutol. Default decree of condemnation and destruction. (F. D. C. No. 9412. Sample No. 9828–F.)

On February 25, 1943, the United States attorney for Southern District of Mississippi filed a libel against 124 6-ounce bottles of Schilling's Mercutol at Jackson, Miss., alleging that the article had been shipped on or about October 5

and November 7, 1942, from New Orleans, La., by M. K. Schilling; and charging that it was misbranded.

Analysis showed that the article consisted essentially of turpentine oil, gum camphor, nitrobenzene, bichloride of mercury, and calomel (mercurous chloride).

The article was alleged to be misbranded in that the statement appearing in its labeling which represented and suggested that it possessed penetrating and healing properties; that it was a remedy for lameness in horses and mules, due to all causes; that it was effective in the treatment of the disease conditions of horses and mules known as spavin, ring-bone, splint, sweeny, fistula, poll evil, wire cuts, distemper, old sores in general, and for all disease conditions affecting the feet of such animals; and that it was effective in the treatment of the skin diseases of humans known as tetter, were false and misleading since the article would not be effective for those purposes. It was alleged to be misbranded further in that it was a drug that was fabricated from two or more ingredients, and its label failed to state the quantity of bichloride of mercury contained therein; and its label also failed to state that it contained calomel, a mercury preparation, and the quantity thereof.

On November 5, 1943, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

1094. Misbranding of Wel-being. U. S. v. 288 Tins and 24 Tins of Wel-being. Default decree of condemnation and destruction. (F. D. C. No. 9554. Sample No. 12942–F.)

On March 17, 1943, the United States attorney for the District of New Jersey filed a libel against 288 3-ounce tins and 24 12-ounce tins of Wel-being at New Brunswick, N. J., alleging that the article had been shipped on or about February 18, 1943, from Portland, Oreg., by the Wel-being Co.; and charging that it was misbranded.

Analysis showed that the article consisted of a finely ground, dark brown vegetable material such as linseed meal, with a small amount of salt and sugar.

The article was alleged to be misbranded in that the name of the article, "Wel-being," and certain statements in its labeling, were false and misleading since the name and statements represented and suggested that, when taken as directed by cats, dogs, pets, and fur-bearing animals, the article created a feeling of well-being and was a highly concentrated food treatment and supplement; that it was a concentrated food and tonic; that it was effective; that it would overcome itching and scratching; that it aided in body building; that it would restore energy; that it would promote a glossy coat; that it would remove intestinal parasites; that it would aid in whelping and produce vigorous litters; that it would stimulate the appetite; that it was an appetizing, nutritional concentrate; that it would prevent skin irritations due to diet deficiency; that it was effective in stubborn cases; that it would increase body weight; that it was a protective food; that it would supply needed food elements; that it was an appetizing addition to regular rations; that it would avoid starving and dangerous methods of treatment; that it would replace recognized medicinal treatments; that it was a new, simple, scientific pet treatment for any condition; that it was effective for all worms and seasonal skin infections, poor condition, watery eyes, hair falling out, lack of pep, and poor appetite; and that it would maintain good health and guard against worms. The article was not a product of the nature so represented and suggested and would not accomplish the results claimed.

The article was also alleged to be misbranded under the provisions of the law applicable to foods, as reported in notices of judgment on foods.

On July 8, 1943, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

1095. Misbranding of Heath's Calf Powder. U. S. v. 18 Cartons, 6 Cartons, and 3 Cartons of Heath's Calf Powder. Decree of condemnation and destruction. (F. D. C. No. 9715. Sample No. 3338–F.)

On April 2, 1943, the United States attorney for the District of Kansas filed a libel against 18 3½-ounce cartons, 6 ½-pound cartons, and 3 1-pound cartons of Heath's Calf Powder at Topeka, Kans., alleging that the article had been shipped in interstate commerce on or about February 23, 1943, by the Bovine Specialty Company, Hynes, Calif.; and charging that it was misbranded.

Analysis showed that the article contained calcium carbonate, dried blood flour, blackberry root, Krameria, gum kino, ginger root, sodium bicarbonate,