

HULEN, *District Judge*: "Defendant files his motion to strike the affidavit attached to the information filed in this case. The Information, charging misdemeanor, was filed by the District Attorney by leave of Court. The Information is signed by the District Attorney. Attached to the Information is an affidavit of one Henry E. Moskey, a veterinarian connected with the Food & Drug Administration of the United States Government. The Information in two counts charges misbranding of a medicine represented as a preventive of certain poultry diseases. The affidavit purports to state facts showing probable cause. Defendant's Motion to Strike the Affidavit from the Information and from the files in this cause alleges grounds therefor:

"(1) That the affidavit constitutes hearsay evidence and is not legally part of the information:

"(2) That the affidavit could be read to the jury and thereby deprive defendant of his right to cross-examine affiant:

"(3) That the affidavit is hearsay:

"(4) That the affidavit is self-serving:

"(5) That the affidavit is unwarranted in law and is prejudicial.

"It would appear from defendant's motion that he has misconstrued the purpose served by the affidavit attached to the Information. See *Dinger v. United States*, 28 F. (2d) 548 (8th Circuit).

"We make the observation that in our judgment the affidavit is no part of the Information; is not evidence hearsay or otherwise; should not be read to the jury in a trial of the cause, and therefore, without holding that the affidavit is improperly filed, we do find that the affidavit cannot prejudice the defendant in any of the particulars set forth in Motion to Strike.

"Defendant's Motion to Strike is overruled."

On June 5, 1944, the defendant entered a plea of nolo contendere and the court imposed a fine of \$100 on each count, a total fine of \$200.

**1250. Misbranding of veterinary products. U. S. v. 276 Bags of Economy Stock Powder, 85 Bags of Economy Mineral Compound, 8 Bags of Economy Horse Powders, 1 Bag of Economy Drenching Powder, and various quantities of printed matter. Consent decree of condemnation. Products ordered released under bond; printed matter ordered destroyed. (F. D. C. No. 10180. Sample Nos. 37973-F to 37975-F, incl., 37977-F.)**

On July 12, 1943, the United States attorney for the Northern District of Indiana filed a libel against the following articles and printed matter at Fort Wayne, Ind.: 276 50-pound bags of Economy Stock Powder, 85 100-pound bags of Economy Mineral Compound, 8 25-pound bags of Economy Horse Powders, 1 25-pound bag of Economy Drenching Powder, 3,000 booklets entitled "The Key to Success Economy Stock Powder," 450 circulars entitled "Directions for Feeding Economy Stock Powders," 300 circulars entitled "Economy Mineral Compound," 100 circulars entitled "Economy Horse Powder," and 50 leaflets entitled "Directions for Using Economy Drenching Powder." It was alleged that the articles had been shipped from Shenandoah, Iowa, by the Economy Hog & Cattle Powder Co., on or about March 3, 1942, and January 4, 1943. The Stock Powder was labeled in part: "Manufactured by James J. Doty, Ltd. Shenandoah, Iowa"; and the other articles were labeled in part: "Manufactured by the Economy Hog & Cattle Powder Co. Shenandoah, Iowa."

Analysis disclosed that the Stock Powder consisted essentially of sodium sulfate, calcium carbonate, sodium bicarbonate, sulfur, charcoal, small amounts of iron oxide, manganese sulfate, sodium thiosulfate, plant drugs including American wormseed, and not more than 0.004 percent of iodine; that the Mineral Compound consisted essentially of calcium carbonate, sodium sulfate, small amounts of sodium bicarbonate, charcoal, sulfur, iron oxide and manganese sulfate with traces of an iodide, a phosphate, anise, and molasses, and contained not more than 0.4 percent of phosphorus and not more than 0.009 percent of iodine; that the Horse Powders consisted essentially of sodium sulfate, sodium bicarbonate, sodium carbonate, sulfur (3.3 percent), charcoal (3.7 percent), small amounts of manganese sulfate, sodium thiosulfate, potassium iodide, and plant drugs including American wormseed, and contained not more than 0.006 percent of iodine; and that the Drenching Powder consisted essentially of sodium sulfate, sodium bicarbonate, charcoal, sulfur, calcium carbonate, and a laxative plant drug.

The articles were alleged to be misbranded because of false and misleading statements in their labeling, i. e., in the aforesaid printed matter, which represented, suggested, and created the impression, (1) in the case of the Stock Powder, that it would be efficacious in the treatment of worms, thumps, lung trouble, cough, white scours in pigs, necro, gastritis, enteritis, spasmodic colic, and bad stomach; that it was a laxative; that it was a regulator and corrective for all

livestock; that it would restore the healthy functions of the body, act as a cleanser and filter, aid digestion, be valuable in cases of toxic poison conditions, prevent gland troubles, lumbricoid worms, lung worms, thorn-headed worms, whipworms, kidney worms, and constipation; and that it was of value in the care of unthrifty, put-of-condition hogs; (2) in the case of the Mineral Compound, that it would be efficacious to make cattle go on feed quicker, be less apt to stick, and be more free from sour stomach; that by its use there would be less belching of feed; and that it would promote more uniform growth and better health and vitality, and aid greatly in bringing heifer calves into production more quickly; (3) in the case of the Horse Powders, that the article was a standard conditioner, regulator, and worm expeller; and that it would be efficacious in the treatment of horse bots, general run-down condition, colic, distemper, bloating, impaction, smut poisoning, and sleeping sickness in horses (infectious encephalomyelitis); and (4) in the case of the Drenching Powder, that it would be efficacious in the treatment of impaction, bloating, badly deranged stomach, dyspeptic troubles, garget or other forms of udder troubles, colic, founder, and distemper; and that it would give quick relief for an animal suffering from bloat, impaction, digestive disorders, badly deranged stomach, or retained afterbirth.

It was also alleged in the libel that the Economy Hog & Cattle Powder Co. shipped the drugs via its own trucks; that the booklets, circulars, and leaflets were shipped by the James J. Doty Co., Ltd., via its own trucks from Shenandoah, Iowa; that the drugs and printed matter were received in interstate commerce by the branch manager for both companies at their common place of business in Fort Wayne, Ind.; that the printed matter was there brought together with the drugs to which they referred, for distribution to purchasers of the articles; and that the receipt of the drugs and the booklets, circulars, and leaflets relating thereto, after shipment to a common destination for joint distribution to purchasers, constituted a transaction in interstate commerce; and that therefore the drugs were accompanied by the booklets, circulars, and leaflets while they were in interstate commerce.

On October 22, 1943, the Economy Hog & Cattle Powder Co., claimant, having admitted the facts in the libel, judgment of condemnation was entered and the printed matter was ordered destroyed and the products were ordered released under bond for relabeling under the supervision of the Food and Drug Administration.

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### PRODUCTS

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Beawun Vitamin B <sub>1</sub> Tablets.....	1242	Medicated charcoal.....	1248
Bevitin (thiamine hydrochloride).....	1213	Medrix Ointment and Medrix Soap.....	1230
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Carbolic ointment.....	1211	Nelson's Antacid Powder.....	1201
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		West's Imported Sea Vegetable Tablets.....	1246
		Zinc oxide ointment.....	1211

<sup>1</sup> Contains opinion of the court.

<sup>2</sup> Seizure contested. Contains charge to the jury.