

Court of the United States for said district a libel for the seizure and condemnation of 103 barrels of root beer, at Chicago, Ill., alleging that the article had been shipped by the Almanaris Mineral Spring Co., Waukesha, Wis., March 27 and August 15 and 17, 1920, and transported from the State of Wisconsin into the State of Illinois, and charging adulteration in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libel for the reason that a substance, to wit, saccharin, had been mixed and packed therewith so as to lower, reduce, and injuriously affect its quality and strength, for the further reason that saccharin had been mixed and packed therewith in a manner whereby damage and inferiority were concealed, and for the further reason that the article contained an added poisonous or deleterious ingredient, to wit, saccharin, which might have rendered it injurious to health.

On December 9, 1920, the Almanaris Mineral Spring Co., claimant, Waukesha, Wis., having entered an appearance and admitted all the material allegations set forth in the libel, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal, and it was further ordered that the containers of said article be delivered to said claimant upon payment of all costs of the proceeding.

E. D. BALL, *Acting Secretary of Agriculture.*

8720. Alleged misbranding of Gingerole. U. S. * * * v. Gingerole Co., a Corporation. Tried to the court. Finding of not guilty. (F. & D. No. 10058. I. S. No. 15258-r)

On July 30, 1919, the United States attorney for the Western District of Pennsylvania, 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 Gingerole Co., a corporation, doing business at Washington, Pa., alleging shipment by said company, on or about October 31, 1918, in violation of the Food and Drugs Act, from the State of Pennsylvania into the State of Maryland, of a quantity of an article, labeled in part "Gingerole," which was alleged to have been misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it was an ointment the base of which was petrolatum, which formed more than 55 per cent of the mixture. Small amounts of volatile oils were present, among them turpentine, menthol, and possibly camphor. The non-volatile portion of the mixture contained besides petrolatum small amounts of oleoresins of capsicum and ginger.

It was alleged, in substance, in the information that the article was misbranded for the reason that certain statements regarding the therapeutic and curative effects thereof, appearing on the labels of the jars and cartons containing said article, falsely and fraudulently represented it to be effective as a treatment, remedy, and cure for pneumonia, rheumatism, neuralgia, pleurisy, croup, and asthma, when, in truth and in fact, it was not.

On June 10, 1920, the case having come on to be tried before the court, a jury having been waived by stipulation, the defendant company was found not guilty, as will more fully appear from the following opinion by the court (Orr, *D. J.*):

Inasmuch as the court will enter at the time of filing this opinion a general finding that the defendant is not guilty, it is proper that the court give some reason therefor lest the inference be drawn that by such finding there is an indorsement of the defendant's product. The real reason for entering such judgment is because the court has not been convinced that the defendant is guilty under the statute. This is a proceeding under the Food and Drugs Act (34 Statutes at Large, 768), as amended by act of August 23, 1912 (37 Statutes at Large, 416), which, among other things, provides a drug shall be deemed to

be misbranded "if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained thereon which is false and fraudulent." The drug in this case is a drug called "Gingerole," which word appears therefrom to be a trade-mark. The carton contains the statement "Will not blister," a statement also of the place of manufacture and by whom it is manufactured. It contains directions "Do not apply to open sores;" "Apply to parts affected;" "For pneumonia or cold in chest apply to chest and cover with flannel cloth;" "For rheumatism, neuralgia, sore or stiff joints, apply by rubbing ointment in well;" and it contains in addition the words "For pneumonia, cold in chest, croup, rheumatism, sore or stiff joints, neuralgia, pleurisy, asthma." The label on the jar contains directions "Apply to parts affected. When applied to children use sparingly," and also "Do not bind." From all that appears upon the carton and jar, the drug is intended for external use only, and in order to produce a secondary irritation. I am satisfied from the evidence that it is a counterirritant, notwithstanding the testimony of certain physicians who had applied some to their hands while preparing to testify in the case. It is a matter of common knowledge that the old-fashioned mustard plaster was prepared by hand and that it took considerable time before it had produced any effect upon the more tender skin of other parts of the body. I am satisfied that the drug in question would not be of any substantial value in the cure of some of the diseases above mentioned, but I am not satisfied that the officers of the defendant company do not believe that their drug would be of benefit to a patient who was suffering from any one of the diseases mentioned. The label may be false in its suggestiveness, but in the absence of a positive statement, which would never be made without some positive belief in its truth, I can not find that there is anything on the carton or the label which is fraudulent within the meaning of the act of Congress. The statement, design, or device regarding the curative therapeutic effect of the drug must be both *false and fraudulent*.

"This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive—an intent which may be derived from the facts and circumstances, but which must be established." (7 Cases *v. United States*, 239 U. S. 510-517.)

I am unable to find under the evidence in this case that any such statement upon carton or jar is both false and fraudulent. It is not necessary to determine which, if any, of the various statements may be false, because that would not be sufficient to establish the guilt of the defendant.

And now, to wit, July 23, 1920, the trial judge finds the defendant not guilty, and directs judgment be entered in accordance with such finding.

E. D. BALL, *Acting Secretary of Agriculture.*

8721. Misbranding of Montauk Santal Compound. U. S. * * * v. 5 Dozen Bottles of Montauk Santal Compound. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 10672. I. S. No. 16533-r. S. No. E-1586.)

On or about June 25, 1919, the United States attorney for the Northern District of Georgia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 5 dozen bottles of a drug, labeled in part "Montauk Santal Compound * * * Montauk Chemical Co., Port Richmond, N. Y.," remaining unsold in the original unbroken packages at Atlanta, Ga., alleging that the article had been shipped on or about February 25, 1918, by the E. J. Dunbar Co., Inc., New York, N. Y., and transported from the State of New York into the State of Georgia, and charging misbranding in violation of the Food and Drugs Act, as amended.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that the contents of the capsules consisted essentially of santal oil.

It was alleged in substance in the libel that certain statements appearing on the labels of the packages containing the drug and in the circular accompany-