

Wis., alleging that the article had been shipped on or about October 21, 1940, by Nu-Pak-Ej, Inc., from Chicago, Ill.; and charging that it was misbranded. It was labeled in part: "'Oomph' Candy and Reducing Program."

Analysis of a sample of the article showed that it consisted essentially of sugars, protein, fat, soybean flour, and small amounts of sodium chloride, phosphates, and calcium compounds.

The article was alleged to be misbranded in that representations in the labeling that it would be efficacious in the safe reduction of weight; that when used in conjunction with the dietary program included in the labeling, it would provide a proper method of "slenderizing" or losing excessive weight, were false and misleading since it would not be efficacious for such purposes.

It also was alleged to be misbranded under the provisions of the law applicable to foods, as reported in F. N. J. No. 2537.

On January 23, 1941, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

512. Misbranding of Mineralaid. U. S. v. 48 Packages of Mineralaid. Default decree of condemnation and destruction. (F. D. C. No. 4236. Sample No. 11250-E.)

On April 7, 1941, the United States attorney for the Southern District of Texas filed a libel against 48 packages of Mineralaid at Houston, Tex., alleging that the article had been shipped by W. L. Jameson from Denver, Colo., on or about March 17, 1941; and charging that it was misbranded.

Analysis of a sample of the article showed that it consisted essentially of silicates, small proportions of iron and calcium compounds, sulfates, a trace of fluorides, and nondescript organic matter.

The article was alleged to be misbranded in that statements in the labeling which represented that it would be efficacious to give the user health; that it would afford relief in cases of hay fever, asthma, sinus trouble, nervousness, arthritis, goiter, stomach ulcers, lumbago, anemia, prostate trouble, neuritis, disorders of the liver, kidney and bladder, cancer, acne, acidity, bronchial affections, diabetes, rundown conditions, poor hearing, infantile paralysis, stroke, heart leakage, partial paralysis, varicose veins, pyorrhea, colds, sciatica, rheumatism, hemorrhoids, cataracts, old-age ailments, ringworms and athlete's foot, pregnancy, pneumonia, and angina pectoris; and that it would reduce weight and correct dietary mineral deficiencies, were false and misleading since it would not be efficacious for such purposes.

On May 26, 1941, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

513. Misbranding of Merlek Mineral Water. U. S. v. 32½ Cases of Merlek Mineral Water. Trial by jury; verdict for the Government. Judgment of condemnation and destruction. (F. D. C. No. 2234. Sample No. 7399-E.)

On June 22, 1940, the United States attorney for the District of Arizona filed a libel against 32½ cases of Merlek Mineral Water at Phoenix, Ariz., alleging that the article had been shipped in interstate commerce on or about May 18, 1940, by Lee Bros. from Oakland, Calif.; and charging that it was misbranded.

Analysis showed that the article had the approximate composition of sea water.

It was alleged to be misbranded in that the statement on the bottle label, "Merlek is sold only to help supply minerals for mineral deficiencies," was false and misleading as applied to an article that had the approximate composition of sea water. It was alleged to be misbranded further in that representations appearing in an accompanying circular entitled "Have You Eaten Today? Did You Get the Necessary Minerals?" which recommended it for persons who were "cross, tired, misbehaving, naughty," or suffering from nervous collapse, excess acid, run-down conditions, and many other diseases, and that it was valuable in the maintenance of health, for proper growth, for the teeth, for the blood and for life, were false and misleading when considered in the light of its composition and the dosage recommended.

It was also charged to be misbranded under the provisions of the law applicable to foods, as reported in F. N. J. No. 2824.

On July 20, M. E. Lee and Ned Johnson, claimants, filed an answer to the libel admitting the shipment in interstate commerce but denying that the product was a drug or that it was misbranded when shipped in interstate commerce. On December 10, 1940, the case came up for trial before a jury.

The taking of testimony was concluded on December 19, 1940, on which date the court delivered the following instructions to the jury:

THE COURT: "It now becomes the court's duty, gentlemen, to instruct you as to the law that applies to this particular controversy.

"This case was brought under the provisions of the Federal Food, Drug and Cosmetic Act, which is intended to prevent the movement in interstate commerce of adulterated and misbranded food, drugs, devices, and cosmetics. The statute provides, among other things, that 'any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into, or while in interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter,' and shall be liable to seizure and condemnation.

"The act also provides that interested persons may claim property so seized, and 'that on demand of either party, any issue of fact joined in any such case shall be tried by a jury.'

"In this case, the Government has caused 12 2-quart jugs of an article known as Merlek Mineral Water to be seized. The Government, in its libel filed in the case, has alleged the article to be misbranded in violation of the statute, and Mr. M. E. Lee, of Oakland, Calif., and Mr. Ned Johnson, of Phoenix, Ariz., who have claimed the property under seizure, have denied in their answer filed in this case that the article is misbranded in violation of the statute.

"There is no dispute that the goods under seizure were shipped in interstate commerce by Lee Bros. from Oakland, Calif., to Mr. Ned Johnson, Phoenix, Ariz., on or about May 18th, 1940, or that they were in the possession of Mr. Ned Johnson, of Phoenix, Ariz., when they were seized. I, therefore, charge you that the sole question for you to determine, from the evidence in the case, is whether or not the article under seizure is misbranded in violation of the statute, as alleged by the Government.

"If you find from the evidence that the article is misbranded, then your verdict should be for the Government. If you find from the evidence that the article is not misbranded, then your verdict should be for the claimants.

"This action is one of rem: that is, the Government's complaint is against the Merlek Mineral Water that has been seized, and not against the gentlemen that have appeared to claim it. The intent of the claimants has no bearing on this case. Your part in this proceeding is to determine a question of fact. This question of fact is very simple. Is this water misbranded because of false or misleading statements made about it in the label and circular that has been received in evidence? You are entitled to read and consider the statements made about this water in the label and in the circular, and decide whether or not they are false and misleading in any particular.

"You gentlemen would have no objection to the jury taking the exhibits into the jury room?"

Mr. PERRY: "No, your honor."

Mr. WOOD: "No, your honor."

THE COURT: "Very well. In reaching your decision, you should take into consideration the nature of this water and what it is composed of. Under the law, this water can be considered both a food and a drug. The reason for this is that the directions for its use recommend that some of it be placed in drinking water or in milk. Drinking water and milk are both foods under this law, and anything used as a compound of a food is also declared to be a food. If you should find that the water is also intended for use in the treatment and prevention of mineral deficiency diseases of the human body, it would then also be a drug under the law. So, no matter whether you believe that Merlek Mineral Water is a food or a drug, or both a food and drug, your duty is the same, that is, to decide whether or not it is misbranded, as alleged in the libel.

"In reaching a determination as to whether or not the water is misbranded, you should base your decision entirely on the evidence you have seen and heard at this trial, and should be guided by no other considerations.

"If you decide that this water will do all the things that are claimed for it in the label and circular, and that the labeling is not false and misleading in any respect, you should render a verdict for the claimants; but if you should find from the evidence that while the water may be of help in doing some of the things claimed for it in the label and circular, if you find that it will not do all of the things claimed for it, and that in such respect the labeling is false or misleading, it is your duty to find the water to be misbranded, and your verdict should be for the Government. That is the libelant.

"The statute under which this case has been tried condemns every statement in the labeling of the article Merlek Mineral Water which may mislead or deceive. Deception may result from the use of statements not technically false, or which may be literally true. The aim of this statute is to prevent that resulting from

indirection and ambiguity, as well as from statements that are false. It is not difficult to choose statements that will not deceive.

"If you find from the evidence that there are any false and misleading statements in the labeling involved in this case, your verdict should be for the Government, as I have stated before.

"In determining whether or not any statements made in the labeling of the article Merlek Mineral Water are misleading, you should take into account, among other things, not only representations made or suggested by such statements, but also the extent to which the labeling may fail to reveal facts material in the light of such representations.

"If you find from the evidence that there is a material weight of medical and scientific opinion contrary to any of the representations made in the labeling of Merlek Mineral Water, and no mention is made of the existence of such contrary opinion in said labeling, you may find that said article is misbranded.

"The law casts upon the Government the burden of proving this case by what is known as the preponderance of evidence. Preponderance of evidence simply means the greater weight of the evidence. It is not dependent upon the number of witnesses who have testified in the case, but it is rather the quality of the evidence instead of the—or the quality rather than the quantity. If the evidence should be in your minds equally divided, then the Government, of course, hasn't sustained this burden of proof, and your verdict should be for the claimants.

"You are the sole judges of the credibility of the witnesses; that is to say, the extent to which you will believe the witnesses who have testified before you. It is your duty to reconcile the conflicting testimony of various witnesses and conflicting statements, so far as it may reasonably be done.

"Witnesses, those who are supposed to know more than the ordinary person about such subjects, such as chemists and physicians, have been permitted to give their opinions as to various matters. Opinion evidence is not binding upon you, but should be considered in connection with all other evidence in the case. Should you believe it, you may accept and follow it. By an opinion, I mean a statement or a conclusion arrived at by the witness from experience or from knowledge, as distinguished from testimony concerning the direct fact.

"That is, I might say that this building was constructed of brick. That would be a statement of fact. If I'd say it was worth twenty thousand or a hundred thousand dollars, that would merely be my opinion.

"You are the sole judges of the value of opinion evidence. Of course, an opinion is worthless unless it is the honest opinion of the man who states it. If you deem it is his honest opinion, then its value depends upon how much he knows about the subject concerning which he is testifying. If he is fairly experienced, fairly grounded in his subject, if his opinion is the result of mature reflection, if he is a man of strong logical intellect, his opinion would be entitled to great value. If, on the other hand, he was incapable of logical thinking, or if he was not well grounded in his subject, nor familiar with the facts upon which his conclusion is assumed to be based, then, of course, his opinion would be of little or no value; and it is for you to decide what value you will give to the opinion evidence that you have heard.

"Now, a great deal of the evidence of the witnesses who have testified concerning their own ailments is in the nature of opinion evidence. Those witnesses who testified that they had well known, easily discernible diseases, or easily told diseases, I will say, such as headaches and constipation, or something of that sort, of course, there will be very little reason to doubt that they knew what they had. But if one testified that he thought that he had some more obscure disease, more difficult to diagnose, and his diagnosis of what he had depended entirely upon his own opinion, and he was unable to make such a diagnosis, his opinion would be of very little value. Those are matters for you to take into consideration in weighing the testimony of the witnesses.

"You may also consider the interest of the witnesses, if they have any, in the outcome of the case, their affiliation with either of the parties, their manner of testifying, their appearance upon the witness stand, whether their testimony was logical or otherwise, these and any or all other subjects touching the credibility of the various witnesses, you may take into consideration; and having considered all matters, you will give the testimony of each and every witness such weight as you find it is entitled to receive. That is entirely within your province, and if upon a consideration of all the evidence you find that the statements charged in the libel are false in any substantial part, you will find the product to be misbranded. Upon the other hand, if you do not find that the statements

charged in the libel are false, then, of course, your verdict should be for the claimants, and you will find that the article has not been misbranded.

"Any suggestions, gentlemen, or any objections?"

Mr. PERRY: "No, your honor."

Mr. WOOD: "No, we have none."

THE COURT: "Forms of verdict have been prepared for your guidance. One form reads: 'We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths do find for the libelant.' The libelant, you understand, is the Government.

"The other one: 'We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths do find for the claimants, Mr. Johnson and Mr. Lee.'

"After you retire to your jury room, you will select one of your number to act as your foreman, and proceed with your deliberations. After you have agreed upon a verdict, you will have it signed by your foreman and returned to open court. Any verdict agreed upon must, as you know, be unanimous. Swear the bailiffs."

The jury, after deliberation, returned a verdict for the Government and on January 6, 1941, judgment was entered condemning the product and ordering that it be destroyed.

514. Misbranding of Elsaco Mineralized Water. U. S. v. 100 Bottles of Elsaco Mineralized Water. Default decree of condemnation and destruction. (F. D. C. No. 3602. Sample No. 32657-E.)

On January 2, 1941, the United States attorney for the District of Arizona filed a libel against the above-named product at Phoenix, Ariz., alleging that it had been shipped by the Electrovida Co. from Redwood City, Calif., on or about December 3, 1940; and charging that it was misbranded.

Analysis of a sample of the article showed that it consisted essentially of lime water containing traces of sulfates and chlorides and a small amount of potassium iodide.

The article was alleged to be misbranded: (1) In that the combination of letters "Elsaco," appearing on the bottle label, constituted a false and misleading device since as a result of statements in a leaflet entitled "Elsaco Mineralized Water A Biologically Pure Mineral Water," which had been shipped by the Electrovida Co. on or about August 10, 1940, and was distributed by one of its agents, the said combination of letters meant to purchasers that the article was an appropriate and effective treatment for run-down, nervous condition, arthritis, swollen, stiff and painful joints, gall-bladder trouble, headaches, nervousness, mucous colitis, ulcer of the stomach, neuritis, stomach and kidney trouble, sinus trouble, toxic diseases, severe intestinal trouble, nerve trouble, rheumatism, eczema, pleurisy, varicose veins, asthma, chronic fistula, ulcerated colitis, anemia, gallstones, tumors, weak eyes, hemorrhages, and that it was "one of the greatest means for the rebuilding of the body tissues, cell life, and blood that has yet been discovered"; whereas it was not an appropriate or effective remedy for the disease conditions listed nor was it a means of rebuilding the body tissue, cell life, and blood. (2) In that statements in the aforesaid circular were false and misleading as applied to an artificially prepared mineral water; the labeling failed to reveal that any treatment by electrolysis to which the water had been subjected had had any significant result on its therapeutic or curative effects, a fact material in the light of the statement that the article had been treated by electrolysis and that it contained electrically treated mineral elements; and that the article contained but inconsequential proportions, if any, of many of the elements listed.

On February 6, 1941, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

515. Misbranding of mineral water. U. S. v. 9 Bottles and 12 Bottles of McFadden 3 Sisters Springs Mineral Water. Default decree of condemnation and destruction. (F. D. C. No. 2814. Sample No. 15891-E.)

On September 13, 1940, the United States attorney for the Eastern District of Missouri filed a libel against 9 1-gallon bottles and 12 5-gallon bottles of mineral water at Flat River, Mo., alleging that the article had been shipped from McFadden 3 Sisters Springs, Hot Springs National Park, Ark., on or about August 8, 1940; and charging that it was misbranded.

Examination showed that the article contained calcium bicarbonate (2.77 grains per quart) and smaller proportions of other mineral constituents commonly found in ground waters.