in that it contained an oil other than sassafras oil. It was further alleged in the libel that the article was adulterated in violation of section 7 of the act, under food, in that a substance, an oil other than sassafras oil, had been substituted wholly or in part for the said article.

Misbranding of the article under the general paragraph, and paragraph 1 of section 8 of the act, under drugs, was alleged for the reason that the statements on the labels, "5 Cans Oil of Sassafras," "2 Drums of Sassafras," "Sassafras Natural," "Oil Sassafras," and "660# Oil Sassafras," as the case might be, borne on the labels, were false and misleading, and in that the article was an imitation of and was offered for sale under the name of another article. Misbranding of the article in violation of section 8, paragraphs 1, 2, and 4, under food, was alleged for the reason that certain statements on the labels, as above quoted, were false and misleading and deceived and misled the purchaser when applied to an article containing oil other than sassafras oil; and in that the article was offered for sale under the distinctive name of another article.

On October 18, 1929, no claimant having appeared for the property, judgments of condemnation and forfeiture were entered, and it was ordered by the court that the product be destroyed by the United States marshal.

R. W. DUNLAP, *Acting Secretary of Agriculture.*

16780. National Remedy Co. v. Arthur M. Hyde, Walter G. Campbell, and J. J. Durrett. Bill in equity to restrain the Secretary of Agriculture, et al., from making multiple seizures of B. & M. external remedy. Bill of complaint dismissed.

On January 16, 1929, the National Remedy Co., a corporation, Boston, Mass., filed in the Supreme Court of the District of Columbia, holding an equity court, a bill of complaint naming as defendants therein William M. Jardine, Secretary of the United States Department of Agriculture, Walter G. Campbell, Director of Regulatory Work of the Food, Drug, and Insecticide Administration, and J. J. Durrett, Chief of Drug Control of the Food, Drug, and Insecticide Administration, officers of the United States Department of Agriculture, praying relief from a multiplicity of seizures under the food and drugs act, by direction of said defendants, of a certain proprietary medicine manufactured and sold by the plaintiff, known as B. & M. external remedy. On January 17, 1929, the plaintiff moved an injunction pendente lite. On February 20, 1929, the defendants filed a motion to dismiss the bill. On March 1, 1929, an amended bill was filed by the plaintiff and by stipulation the motion to dismiss and the motion for injunction pendente lite were made applicable to the amended bill.

On motion by the United States attorney permission was granted to substitute as party defendant, Arthur M. Hyde, who, on March 6, 1929, succeeded William M. Jardine as Secretary of Agriculture.

On August 19, 1929, the case came on for hearing on the bill and motion to dismiss, and the court entered a decree dismissing the said bill with the following opinion, in which the averments of the bill are recited and the issues of law raised are discussed in detail (Gordon, J.):

"This is a suit by the National Remedy Co., a corporation organized under the laws of the State of Massachusetts, and having its principal place of business in Boston, against William M. Jardine, Secretary of the Department of Agriculture, Walter G. Campbell, Director of Regulatory Work of the Food, Drug, and Insecticide Administration of the United States Department of Agriculture, seeking an order to restrain and enjoin the defendants from prosecuting any of the libels mentioned in the bill, except one as a test case as suggested by the plaintiff, and from instituting any further libels or seizures by defendants, and requiring them to dismiss the several seizures and libels as being res adjudicata.

"The bill alleges that the plaintiff is the owner of the business and good will of the manufacture and sale of a certain proprietary remedy known as B. & M. external remedy as well as the formula and method of preparation thereof, which was purchased in 1913, and has continuously manufactured and sold said medicine to jobbers, to the retail trade, and to consumers for a number of years, and that at the present time the business and good will of said corporation is valued at about $100,000; that the statements and representations concerning said medicine in labels upon the bottles containing the same and the cartons, pamphlets, booklets, and circulars accompanying and circulated with respect thereto are made in good faith, and that nothing contained

in any of them has been false or misleading; that the medicine is manufactured in Massachusetts and is distributed by the plaintiff not only in said State, but also in interstate commerce to all the other States, the District of Columbia, and to foreign countries; that in the year 1919 the Department of Agriculture filed libels against the plaintiff, the said B. & M. external remedy, and seizures were made in various places, among them at Concord, New Hampshire, where packages of said remedy were seized and a libel filed in the United States Court for said district in October, 1919, wherein it was charged said remedy was misbranded and that the representations in the circulars and booklets relative thereto contained false and fraudulent statements. At the trial of which a verdict and judgment were rendered in favor of the claimant January 23, 1923; that since then, until about the time of this proceeding, the said B. & M. external remedy has been distributed in interstate commerce openly and without question, molestation, hindrance, or criticism by the United States or any of its agents or officials; that in December, 1928, and January, 1929, the Department of Agriculture, acting by and through the defendants, and without notice or hearing, as provided in the said food and drugs act, caused libels to be brought against the B. & M. external remedy, and seizures thereof have been made in New York City, N. Y., Pittsburgh, Pa., Baltimore, Md., Oakland, Calif., Portland, Me., Albuquerque, N. Mex., Miami, Fla., and elsewhere; and that said defendants are purposing and intending to institute and prosecute libels in numerous other places in the United States; that the statements contained in the labels, booklets, pamphlets, and circulars under investigation in 1919 by the Department of Agriculture are substantially the same as those contained in the present literature accompanying the medicine; and that the allegations of the libel filed in the District Court of New Hampshire aforesaid contained in substance and effect the same or practically the same allegations or statements set forth in the libels herein mentioned, and that the charges in said last mentioned libels are of adulteration and misbranding of the B. & M. external remedy; that the several libels already instituted by seizures, as aforesaid, and those threatened are identical and are for the purpose of testing the alleged adulteration and misbranding of said B. & M. external remedy, and that there are no separate issues of fact or of law which necessitate such numerous libels in the several States and that no necessity exists for harassing the plaintiff with these numerous libels and suits; that in spite of the provisions of the food and drugs act the plaintiff has been given no opportunity for a hearing before the Department of Agriculture, and did not prior to the institution of said libels have notice or knowledge that said department contemplated action against the plaintiff concerning any adulteration or misbranding of the B. & M. external remedy; that the several libels were filed upon reports issued by said Jardine, Secretary of Agriculture, and were not filed or instituted upon information furnished by any health, food, or drug officer or agent of any State, Territory, or the District of Columbia; that the matters and things alleged in the libel in New Hampshire in 1919, are substantially the same as the matters and things set out in the several libels filed in the several States in December, 1928, and January, 1929, and that the parties are the same and that the verdict of the jury of the Federal District Court of New Hampshire and the judgment entered thereon are conclusive on the present issues and all of the several issues are res adjudicata; that the business and good will of the plaintiff are very valuable and threatened with total destruction by the arbitrary and illegal action of the Department of Agriculture acting through the several defendants; and that numerous customers are refusing to buy its product; that if the libels are prosecuted in widely separated parts of the country the plaintiff's business will be wholly broken up, its good will and its financial success blasted and its property destroyed; that the plaintiff is willing that a trial of the disputed issues contained in the libels be tried in the State of New York, which is near plaintiff's place of business and the plaintiff should not be compelled to try a test case in a court far removed therefrom; that under the Constitution the Secretary of Agriculture has not the unrestrained right claimed by him to make multiple seizures of shipments made in interstate commerce after investigation and finding by his department that articles of food and drugs are adulterated or misbranded; and that the plaintiff has no plain, adequate, and complete remedy at law, and that its property, business, and good will will be ruined and destroyed unless the defendants are restrained or enjoined; and that the plaintiff will suffer great and irreparable loss, injury, and damage

unless the defendants are restrained and enjoined from prosecuting said libels or instituting others.

"The case was heard upon a motion of plaintiff for an injunction pendente lite and a motion of the defendants to dismiss the bill.

"It is the duty of the defendants to administer the food and drugs act. Under section 4 thereof they are authorized to investigate articles of food or drugs which are being shipped in interstate commerce for the purpose of determining whether they are adulterated or misbranded within the meaning of other sections of the act. If they find that such articles are adulterated or misbranded they are required to certify the facts to the proper United States attorney, who is required to institute appropriate proceedings in the proper court of the United States for the enforcement of the penalties prescribed by the statute. By section 2 it is made a misdemeanor for any person, firm, or corporation to ship or deliver for shipment in interstate commerce any article of food or drugs that is adulterated or misbranded.

"Section 10 of the act, the interpretation of the provisions of which are directly involved in the present proceeding is as follows:

"SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel or condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this act or the laws of that jurisdiction: Provided, however, That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this act, or the laws of any State, Territory, district, or insular possession, the court may order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

"It is clear from a careful reading of said section that there is no limitation upon the defendants certifying for seizure more than one shipment of an article of food or drugs found by them to be adulterated or misbranded. On the contrary the section directs them in the discharge of their duty to make a certification to the proper United States attorney of any and all shipments found in interstate commerce, which they find to be adulterated or misbranded. The statute is plain in its requirements that any article or shipment thereof shall be liable to be proceeded against wherever found, upon a finding by administrative officers that the same is adulterated or misbranded whether in single or multiple consignments. The purpose of the statute would be frustrated if power to make multiple seizures of different consignments in various sections of the country were denied. Under such a construction the public could be injured and defrauded at will by numerous shipments of adulterated and misbranded articles made after one consignment had been libeled, and litigation with respect thereto delayed or prolonged, for the purpose of enabling the shipper or manufacturer of such adulterated or misbranded articles to distribute them in interstate commerce. Such articles, after investigation by the defendants, that have been found to be either adulterated or misbranded are outlaws of commerce and may be seized wherever found. The number of seizures would necessarily depend on the number of consignments and their location. There is nothing in the act that indicates that one seizure by the Federal authorities exhausts their power to make other or contemporaneous seizures of the same articles when circumstances require such action in order to prevent traffic in adulterated or misbranded articles.

"It is averred in the bill and urged in argument that the seizures now in question are illegal in that the plaintiff before the institution of the proceedings was not afforded a preliminary hearing as provided by the statute.

"Section 4 of the act provides for a hearing to the persons from whom a sample has been procured. This provision, however, does not require that a hearing be given to the shipper or manufacturer such as plaintiff before the bringing of seizure proceedings. The provision of section 4 as to hearings has been under consideration by the Federal courts and prior to the decision in Morgan vs. United States, 222 U. S. 274, the decisions of the lower Federal courts were divided upon the question as to whether a preliminary hearing was necessary before the bringing of seizure proceedings under section 10 of the act. But in the Morgan case the Supreme Court held that it is not a condition precedent for the prosecution of a violation of the food and drugs act that an investigation be had in the Department of Agriculture and the defendant afforded an opportunity to be heard as provided by section 4 of the act, and that the provision for a hearing was administrative merely and not a jurisdictional requirement for the institution of proceedings under the statute.

"The validity or constitutionality of the food and drugs act are [is] not questioned by the plaintiff, and in cases in which the question of whether articles are misbranded or adulterated is raised, such question is for determination by a jury, or by a court if a jury is waived, and not to be determined in equity if the statute is valid, and in such a situation an equity court should not restrain multiple seizure proceedings under the food and drugs act. Shawnee Milling Co. v. Temple, et al., 179 Fed. 517, 519.

"The question as to whether a particular product is or is not subject to the provisions of the food and drugs act should be raised in a proceeding provided for by the statute itself and not in equity.

"The allegation in plaintiff's bill that its product is not adulterated or misbranded is in effect a defensive plea in bar. That question ought to be determined in the libel proceedings where they have been instituted against its product and do not seem to me to constitute an equitable cause of action.

"It would seem that the defendants in making the seizures and instituting the proceedings complained of exercised a lawful duty in the performance of the ordinary functions committed to them in the administration of the food and drugs act. It seems clear, as herein pointed out, the statute does not limit defendants' actions to one or any other number of seizures, but reposes in them not a mere discretion but a direction to proceed when and where misbranded or adulterated articles are found. The act plainly commits this function to the executive branch of the Government and not to the judicial branch. The judicial function is provided for when proper proceedings are brought to determine the issue of misbranding or adulteration, and the plaintiff's recourse is to test those proceedings where they are brought.

"It is pleaded in the bill and urged in argument by plaintiff that the New Hampshire judgment is res adjudicata with respect to the pending libel proceedings. The averments in the bill are that the libel which was involved in that proceeding is substantially the same as those contained in the present literature accompanying the shipments recently proceeded against. This averment would indicate that the labels were in effect the same but that they were in fact different. Furthermore, according to the averments of the bill, the issue in the New Hampshire case involved only the misbranding of plaintiff's product, whereas the recent libel proceedings and those threatened involved the additional charge that plaintiff's product is also adulterated within the meaning of the food and drugs act.

"Furthermore in Plews v. Burrage, 266 Fed. 347, it was held that a defendant in an action in a Federal court relying upon res adjudicata as a defense has a complete and adequate remedy at law and cannot maintain an action in equity based thereon to enjoin the law action.

"It is the view of this Court that this bill in equity cannot be maintained and should, therefore, be dismissed."

The plaintiff immediately noted an appeal to the Court of Appeals of the District of Columbia. The appeal was perfected and the case is now pending on appeal in said court.

R. W. DUNLAP, *Acting Secretary of Agriculture.*