

19235. Misbranding of cottonseed screenings. U. S. v. Cooper Cotton Oil Co. Plea of guilty. Fine, \$50. (F. & D. No. 25713. I. S. No. 18301.)

Sample sacks of cottonseed screenings from the shipment herein described having been found to contain less than the declared weight, the Secretary of Agriculture reported the matter to the United States attorney for the Eastern District of Texas.

On April 18, 1931, the United States attorney filed in the District Court of the United States for the district aforesaid an information against the Cooper Cotton Oil Co., a corporation, Cooper, Tex., alleging shipment by said company in violation of the food and drugs act as amended, on or about June 26, 1930, from the State of Texas into the State of Kansas, of a quantity of cottonseed screenings which were misbranded. The article was labeled in part: "100 Pounds Net 'Chickasha Prime' (Composed of Cottonseed Only) * * * Manufactured by or for Chickasha Cotton Oil Company Chickasha, Oklahoma."

It was alleged in the information that the article was misbranded in that the statement "100 Pounds Net," borne on the tags attached to the sacks containing the article, was false and misleading in that the said statement represented that the sacks each contained 100 pounds of the article, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that the sacks each contained 100 pounds of the article, whereas the said sacks did not each contain 100 pounds of the said article, but did contain a less amount. Misbranding was alleged for the further reason that the article was food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the packages, since the sacks contained less than represented.

On December 14, 1931, a plea of guilty to the information was entered on behalf of the defendant company, and the court imposed a fine of \$50.

ARTHUR M. HYDE, *Secretary of Agriculture.*

19236. Alleged adulteration and misbranding of Capon Springs water. U. S. v 94 Half-Gallon Bottles, et al., of Capon Springs Water. Tried to the court. Libels ordered dismissed and product restored to claimant. (F. & D. Nos. 22406, 23209. I. S. Nos. 20264-x, 03231. S. Nos. 501, 1318.)

These cases involved the interstate shipment of two lots of Capon Springs water contained in 5-gallon and half-gallon bottles. Examination of the article showed presence of nitrites, and of organisms of the colon-aerogenes group (*B coli*) in small quantities of the samples. The labels of the half-gallon bottles bore the words "'Ca-Ca-Paon' Healing Water." The Secretary of Agriculture reported to the United States attorney for the Eastern District of Pennsylvania, in whose district the goods were located, the results of the examinations and requested seizure of the product for violation of the law; since the samples examined failed to meet the standard of purity established by the United States Public Health Service; and since the word "Healing," appearing on the label taken in conjunction with certain collateral advertising introduced in evidence at the trial, was deemed to be false and fraudulent when applied to spring water of the chemical analysis of this product.

On January 28 and November 23, 1928, the United States attorney filed libels praying seizure and condemnation of two shipments of the said Capon Springs water, the former covering 94 dozen half-gallon bottles, and the latter 450 five-gallon bottles and 124 cases, each containing 12 half-gallon bottles. The libels charged that the article had been shipped by the Capon Water Co., from Capon Springs, W. Va., in part on January 20, 1928, and in part on November 16, 1928, that it had been transported from the State of West Virginia into the State of Pennsylvania, that it remained in the original unbroken packages at Philadelphia, and that it was adulterated and misbranded in violation of the food and drugs act as amended.

The Capon Water Co., Capon Springs, W. Va., intervened as claimant and owner in both cases, the lawfulness of the seizure of the product libeled November 23, 1928, being first attacked through a motion to quash and a demurrer to the libel. The motion to quash and the demurrer were overruled by the court in the following opinion handed down on January 18, 1929 (Dickinson, J.):

"There are several of these cases but the questions raised are two. One of the questions is the lawfulness of the issue of and return to a search warrant issued by a justice of the peace under the State law; the other is a demurrer to a libel (in the form of a motion to dismiss) upon which an attachment

issued and a seizure was made of the property of the claimant under the pure food and drugs act.

"We will dispose of all of the cases by the finding of answers to the two questions raised, leaving to counsel to submit an appropriate order in each case in accordance with the rulings made.

"The motion to quash. This is based upon the averment that a search warrant was issued by a justice of the peace under the State law which was irregularly issued, served, and returned. The search warrant was in truth a mere subterfuge device to enable the representatives of the Department of Agriculture to get samples of what the claimant was selling in order to found the libel proceedings next discussed.

"We do not see what this court has to do with this search warrant proceeding. If the district attorney seeks to use evidence obtained in an unlawful way, the question whether such evidence can be admitted may be determined when raised in the proper way and at the proper time, but we are unconvinced that we can quash the process of a State court issued under a State law.

"The motion to quash is denied.

"The demurrer. There are a number of grounds of demurrer specially set forth but we see no need to discuss more than two. The cause is before us following the filing of a libel by the district attorney under the pure food and drugs act of 1906 (21 U. S. C. A. S. 1, et seq.); the issuance of a writ of attachment thereon; and the seizure of property to which the Capon Water Co. has laid claim. One of the grounds of demurrer is that possession of the property is jurisdictional and that without a prior seizure no libel can be filed. Here the libel was first filed and a seizure under the judicial process of attachment followed. The claimant cites, among others, the two cases following to sustain this ground of demurrer: *The Brig Ann*, 13 U. S., 289; *Brewing Co. v. U. S.*, 8 F.(2d) 1.

"It may be premised that the instant cases being in rem possession of the rem is essential to the exercise of effective jurisdiction by the court. The word 'jurisdiction' is however used in many different senses. Among them is jurisdiction of the subject matter and also jurisdiction of the person or of the rem. The first is granted by law; the second is acquired by the service of judicial process.

"There are likewise two kinds of seizures. One is an executive seizure which is extra judicial or at least the most quasi judicial; the other is a seizure by judicial process. A revenue officer, for illustration, may be authorized to seize for some infraction of the revenue laws or an officer for a violation of the National prohibition law, and in either case with or without the authority of a search warrant issued by some magistrate. In such cases jurisdiction may be granted to a court to determine that the property thus seized may be confiscated or condemned. Here the seizure is jurisdictional in the sense of the court having jurisdiction of the subject matter. A court may have judicial power over all cases of a given character as, for instance, courts of admiralty over causes maritime. This power can be exercised, however, only when the court has acquired jurisdiction of the person of the defendant or the rem. This it does by issuing its judicial process in the form of a writ of summons or of attachment or otherwise, as the case may be. Here the service or the seizure is not jurisdictional in the sense of the subject matter but only of the person or the rem.

"The cited cases belong to the first class. In the *Ann* case a vessel had been seized by a revenue officer and sought to be condemned by a decree of the court. The seizure was abandoned and possession thereunder given up. The court in consequence was without jurisdiction.

"In the brewery cases the trial court had held that they belonged to the second class and had proceeded to a decree following a seizure under the judicial process of a writ of attachment based upon a libel. The Circuit Court of Appeals reversed, holding that the Trial Court had no jurisdiction to proceed by libel unless there had been a previous seizure under a search warrant as the cases were of the first class.

"In maritime cases the admiralty courts have jurisdiction of the subject matter and always proceed by issuing a writ of attachment based upon a libel. There is never a first seizure.

"The pure food and drugs act clearly contemplates two things. One is a proceeding in personam under section 2; the other a proceeding in rem under

section 10. The latter confers upon the court jurisdiction of the subject matter and hence power to issue judicial process. The procedure is likened to that of proceedings in admiralty.

"The pertinent provisions declare that any article of food adulterated or misbranded within the meaning of the act and entering into interstate commerce 'shall be liable to be proceeded against in any District Court, &c., and seized for confiscation by a process of libel for condemnation.' This surely means the conferring of jurisdiction upon the court to entertain condemnation cases upon the filing of a libel and to acquire jurisdiction of the rem by attachment process, as is done in admiralty cases.

"The demurrer in consequence cannot be sustained on the ground that a previous seizure under a search warrant is necessary.

"The remaining ground of demurrer, which we will discuss, is the broad one that the libel sets forth no cause for the condemnation of the property of the claimant. This is the equivalent of a like demurrer to a statement of claim in an action at law on the ground that no cause of action is disclosed. This calls for a general survey of the act of Congress. It denounces the manufacture of any article of food or any drug which is adulterated or misbranded, so far as Congress possesses the power to legislate on the subject, and declares any violation of the act to be a misdemeanor. It further provides for the condemnation of the article itself by a proceeding in rem such as the instant proceedings. The term 'food' is defined to include drinks and drugs to be 'anything intended to be used for the cure, mitigation, or prevention of disease, &c.' Any drug is adulterated if 'in strength or purity below the quality' it is represented to have, and any food if it 'consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.' Any article is misbranded if statements of what it is are 'false or misleading in any particular.'

"The libel is meant to consist, as stated, of what may be called two counts. The first is that of misbranding and the second of adulteration. The misbranding charge is owing to typographical errors rendered unintelligible. The adulteration charge is simply, in the words of the act, that the said product 'consists in part of a filthy, decomposed, and putrid animal and vegetable substance.' It is often difficult to differentiate an ultimate fact finding from a conclusion of law. An offense consists in the commission of an act and ordinarily would not be sufficiently pleaded in the words of the statute defining the offense without the addition of a statement of the act which is charged to constitute the offense. Here, however, the act is the adulteration which is charged and the words of the act are as descriptive of in what the adulteration consists as any added description could be. There may, it is true, be no information in the libel of the specific act of adulteration meant to be charged but this can be supplied, if need be, through a bill of particulars.

"We do not find the libel in this respect to be insufficient in law. Leave is granted the libelant to amend the libel in respect to the charge of misbranding. Assuming this to be done, we are unable to say that the libel does not state a cause of action as a matter of pleading. It may be, for illustration, that the act of Congress condemns only manufactured products and does not apply to natural waters which are in no sense manufactured products. It may likewise be that the label quoted is not false or misleading or that the water is not sold as medicinal. It may of course be also true that the water is not as described in the libel and that there is not even anything to condemn the water as unwholesome or render it unfit for drinking. The water none the less is stated to be in fact a misbranded and adulterated product and a trial must determine the truth.

"Upon the allowed amendment of the libel being made orders denying the motions may be entered, the other grounds of demurrer not discussed being overruled."

The libels were amended on January 22, 1929, and on February 28 and March 18, 1929, further amendments were made by stipulations.

The libels as amended charged that the article was adulterated in that it consisted in part of a filthy or decomposed animal or vegetable substance, to wit, organisms of the *Bacillus coli* group of bacteria, to wit, more than one out of five 10 c. c. portions of samples examined showed (by method of the Public Health Service) the presence of organisms of the *Bacillus coli* group.

It was further alleged in the amended libels that the article was misbranded in that the statements, "'Ca-Ca-Paon' Healing Water," appearing on the labels, were false and fraudulent, since the article would not produce the curative or

therapeutic effects which purchasers were led to expect by the said statements, and which were applied to the article with a knowledge of their falsity for the purpose of defrauding purchasers thereof.

The claimant filed a motion to strike the evidence obtained under the seizure of November 23, 1928, and also a motion applicable to both cases, to strike out the testimony of experts as to the composition of the samples of water examined by them, and a motion to dismiss the libels, the first of which was allowed and the second and third of which were denied in the following opinion handed down March 11, 1930 (Dickinson, J.):

"The danger we before remarked of the issues in this cause becoming confused has increased. Paper books pro and con the allowance of the motion first above listed had been submitted and the motion disposed of on opinion filed. Counsel for libelant then called our attention to the expectation of counsel that oral argument would be heard upon the motion. We accordingly withdrew the ruling made, and the oral argument has been had. At the argument the two further motions were made. We discuss them in the order listed.

"We feel impelled to apologize in advance for the inordinate length of the discussion in which we have indulged. The only excuse we have to offer arises out of the fullness of the discussion by counsel for the libelant. We have been favored and aided not only by the United States attorney but also by special counsel for the Agricultural Department, whose wide and long experience in cases of this type qualifies him to speak as an expert.

"We are proceeding not quite upon the forlorn hope of convincing counsel for libelant that they are wrong but from the motive of offering evidence that all they have had to urge has had our consideration.

"The unlawful seizure. In view of the opinion filed the discussion naturally assumed the form of a re-argument. We understand there is now agreement upon the proposition that the allowance or refusal of the motion turns upon a single question. This is whether the right protected by the fourth amendment can be invoked by defendants in other than criminal prosecutions. It is admitted that if the claimants had been indicted, as they might have been and may yet be, the evidence here in question would properly be suppressed and could not be used against them. The proceeding here is however a libel proceeding under section 10 of the food and drugs act and not an indictment for the crime denounced by section 1. Counsel for libelant very earnestly press the argument that notwithstanding that the search and seizure by means of which the evidence in question was obtained was one which would be in violation of the claimants' rights if such rights were asserted in a defense to a criminal indictment, no such rights belong to the claimants here because these proceedings are not criminal but civil, and these rights which arise wholly out of the fourth amendment cannot be invoked because that amendment is limited and restricted to criminal prosecutions. There are, as we think, several subtle fallacies hidden in the argument by which this proposition is sought to be supported. One is that the right of a person to enjoy freedom from unlawful searches and from seizures of his property by Government officials has its genesis and origin in the fourth amendment. It might as truthfully be said that his right to life, liberty, and property arises out of the fifth amendment. The legislature, it is true, might give legality to an otherwise unlawful search and seizure unless restrained by a Constitutional provision, and the reason for the fourth amendment was not to create or confer the right but to make its violation legally impossible in any manner short of a change in the Constitution.

"It is confidently asserted that there is no adjudged case which rules that citizens have the right to be secure in their persons, houses, papers, or effects from unreasonable searches and seizures by Governmental agents. If so, it may be because there was never before need for any such ruling. All the instruments which we venerate, Magna Charta, the Petition of Right, the Declaration of Rights, the Declaration of Independence, and the Bills of Rights made part of our Constitution alike claim and proclaim these rights as preexisting. The right to life, liberty, and property antedates the fifth amendment, and the right to be secure against unreasonable searches and seizures did not begin with the adoption of the fourth amendment.

"There is a distinction between power and right. We know that Governments elsewhere having the power have violated these rights. All our Constitutions do is to put it beyond the lawful power of our Governments to violate them. The rights are undoubted. All that is needed is to have a judiciary willing and able to enforce them. There is no more warrant for the proposition that the right to

protection against unlawful seizures can be invoked only in criminal prosecutions than there would be to assert that the protection of the right against the taking of private property for public use could only be asserted by defendants in criminal cases. There would be no difficulty in finding an expression which refers to the right of protection against unlawful seizures as if it were a right to be invoked in criminal cases, as it surely may be. Judicial opinions, as has often been remarked, can only be intelligently read when read in the light of the fact situation to which they relate. Almost always there is in search and seizure cases the element in practical effect of compelled confession of guilt. The compulsion is as real as that which resulted in the good old days from the rack and the boot. Indeed, the modern methods are but a softened form of the latter, and when to the search and seizure methods are added, as often occurs, the methods of the third degree, the difference is not great.

"Underlying the thought urged upon us is one which is an offshoot of that which has a fact basis of truth. This truth is that these safeguards are used to hide guilt and protect malefactors. Such is beyond doubt one result but such is not their purpose. The right to the undisturbed possession of one's property, except only as the right is held in subjection to law, is a near neighbor to the right of personal protection because one cannot be long enjoyed without the other. There is little difference between confiscating a man's property and compelling him to give it up by the imposition of a fine. When, however, as in all the cases cited to us, the feature emphasized is the right to withhold self-incriminating testimony, of course it must be held that this right can be invoked only in criminal prosecutions. Compelling a witness to give testimony against his own interests is a different thing from compelling him to testify against himself. In a civil proceeding a party defendant may be put upon the rack of cross-examination and subjected to a torture in comparison with which the thumbscrew is a mild instrument without any violation of any of his legal rights. This cannot be done in a criminal case. Why the difference? The answer is that in the latter case he has a right to protection; in the former he has not. *Ita lex scripta est*. Because, however, this particular right recognized by the fifth amendment belongs only to defendants in criminal cases is no reason for concluding that another right recognized in the fourth amendment and declared to be inviolable is likewise so restricted. The notion that it is, we suppose is due to the reference in the fourth amendment to the issuance of search warrants following the clause which recognizes the right to protection against unreasonable searches.

"We have already pointed out that the first clause condemns unreasonable searches and seizures; the succeeding clause in no respect modifies this condemnation. Why was it added? The condemnation is visited only upon unreasonable searches and seizures; a search and seizure, as we have before remarked, made in obedience to the mandate of a search warrant could not be said to be either unlawful or unreasonable but it might be unjustified in fact, hence the limitation upon the issuance of search warrants. Surely a provision which was clearly intended to buttress a declared right should not be construed to limit or lessen it.

"As before stated, *Boyd v. U. S.*, 116 U. S., 616, as we view it, settles the question of right. In that ruling four propositions may be found.

- "1. Unreasonable searches and seizures are unlawful.
- "2. A search in aid of a lawful seizure is not unlawful or unreasonable.
- "3. An exploratory search in the hope or for the purpose of the discovery of evidence upon which criminal guilt may be found or confiscation of property be based is unreasonable and hence unlawful.
- "4. Congress is without Constitutional power to make a search and seizure of the latter type lawful and an act of Congress which purports to give it the sanction of law is a nullity.

"We further think it follows that if an act of Congress could not make lawful what the agents here did a fortiori, what they did of their own authority without the sanction of a law is likewise unlawful. This, as before stated, settles the question of right. That of which we are in search here is really not the existence of a right but the existence of a policy of the law and a legal method of enforcing that right. It is admitted that in criminal cases there is a recognized practice of refusing to the Government the use of evidence obtained through a violation of the rights of the defendant. This presents the question first propounded. Should the like policy be enforced in forfeiture cases? If the right is restricted to criminal cases, that of course answers the question in the negative, but if there is no such limitation, as we think we have

found, then the question recurs. The right is one of protection against the assertion of Governmental powers. The policy has for its basis the principle that the Government should not be permitted to take advantage of its own wrong and its own violation of law to enforce another law to the prejudice of one whose rights have thus been violated.

"We would keep very far from accusing the agents of the Agricultural Department of indulging themselves in the luxury of the joys of a tyrant because we have always found them to be considerate of the rights of others, but the suggestion that this law can be enforced only by upholding them in the lawful power to search and seize comes perilously near a plea of necessity. Proverbially necessity knows no law, Constitutional or otherwise.

"We are here and in this case unable to recognize the necessity so urgently pressed upon us. Under section 10 of this act this averred offending shipment might have been confronted with a libel; upon that libel an attachment might have issued; under that attachment these bottles of water might have been lawfully seized, and the condition and composition of the water tested and determined. In truth these very things have been done. The suggestion that a sufficient safeguard of the right in question is afforded by the personal responsibility of the individual agent who abuses the power to seize is not an appealing one. The right is essentially one to protection against the assertion of unlawful power by Governmental agencies. As a rule people can protect themselves against trespasses committed by other individuals. They are helpless against inroads upon their rights by Government. They can only look to the law for protection, and that law is a poor protection which the courts do not enforce.

"The cases to which we have been referred of the policy enforced in civil cases between private litigants and in deportation cases do not strike us as being in point. We are brought back every time to the question several times presented. Is the right of the people recognized in the first clause of the fourth amendment to be 'secure' (mark that word) from unwarranted searches and seizures by Governmental agents, limited and restricted to criminal prosecutions, or does it extend to forfeiture cases? The right was enforced in the Boyd case (supra) in a case which was not a criminal prosecution, and we think a justified corollary is that the same practice which prevails in criminal cases should be extended to forfeiture proceedings.

"The motion to strike out the testimony to which the motion is addressed is allowed.

"The second motion. It may be when this cause comes to be determined that it will be found that the samples tested by the experts are not shown to be samples of the water sought to be condemned. The condition and qualities of the water tested in that event will be no evidence of the filthiness of the water sought to be condemned.

"We are unable to find at this time, however, that the evidence should be struck out.

"The motion is denied.

"The third motion. This is an effort to import into the trial practice of cases tried under a law of the United States, the statutory compulsory nonsuit practice which pertains in the Pennsylvania State courts. What it comes to is that a defendant may test the judgment of the trial court upon the question of whether the libelant has by its proofs made out a case. If the judgment is favorable to the claimant he offers no evidence for the defense; if adverse, he then goes into his defense. Whatever may be said (and much may be said) in favor of the State practice, we have two comments to make. One is that this might require us to take two sips of this water; the other is that under the State practice the defendant would be fully protected against the at least possible error of the trial court because the judgment would be one simply of nonsuit, whereas here the judgment would be one for the defendant. A consequence is that if the judgment were reversed on appeal, final judgment would then go against the defendant. The defendant must decide for himself whether he will offer evidence.

"The motion is denied."

On January 8, 1930, it was stipulated by the Government and claimant that a jury trial be waived and the case, involving 94 half-gallon bottles involved in the first libel filed, was set for trial by the court. Evidence was introduced and oral argument heard on behalf of the Government and claimant, the final hearing being had on October 16, 1930. On December 8, 1930, the court handed down the following opinion dismissing the libel (Dickinson, J.):

"This record will be found to be in a more or less confused state. This is due to the fact that the libel proceedings are directed against a few bottles of no special value in themselves either commercially or with respect to the public interest. The issue in the case is what the condition of the contents of these few bottles were at the time of shipment in interstate commerce. If, for illustration, the wholesomeness of Capon Springs water is not questioned, the fact that a particular shipment of a few bottles of water might be questioned would be of little concern to any one, especially in view of the fact that even if the shipment was open to complaint at the time it was made, the lapse of time would have a correcting effect so that the shipment would be wholesome at the time of hearing, and indeed before the time the shipment would reach the market. The trial judge in consequence suggested that the issue be broadened so that the question of what we will call the wholesomeness of Capon Springs water as it came from the springs and reached the market might be determined instead of the narrow issue of the wholesomeness of the particular shipment. This suggestion was tentatively accepted and the trial proceeded for a time upon this broader issue, but the tentative acceptance of the suggestion was afterwards withdrawn and the issue confined to the narrow one indicated. The result of it has been that there is in this record evidence bearing upon what we will call the general issue of the wholesomeness of Capon Springs water, with which issue we have in strictness nothing to do. There is an unavoidable embarrassment in dealing with a narrow issue, such as that indicated, because of the indirect consequences and effects of a finding.

"The grown or manufactured product of a dealer in a food, for illustration, might be wholesome and nutritious and yet a particular shipment have become unfit for food through what might be called accidental circumstances. The condemnation of the particular shipment might none the less have the effect of the inference drawn by consumers that the consumption of any of the product was harmful and the whole trade of the dealer be thus ruined. There might be no justification for the inference, and yet every one knows that to condemn any part of what a dealer is shipping causes the inference to be drawn by the consuming public, the prospective purchasers of the product, that it is all bad.

"The food and drugs act has a very beneficent purpose, and it is without doubt the duty of the courts to lend their aid to its efficient enforcement. At the same time it would be an unfortunate and unjustified consequence to have the value of the trade in a product wholly destroyed because a small shipment of that product had in some way become contaminated. We are all more or less finicky about the things we take into our stomachs. The slightest suspicion of careless or unsanitary methods in production or distribution might absolutely destroy the value of a large and important trade. The moral to be drawn from this is that a court should declare no condemnation without careful thought being given to the consequences which we have indicated. The wholesomeness of a food or drink cannot even be made the subject of a discussion without the possibility of consequences which would be deplored.

"There is one part of the complaint made against this particular shipment which may, however, be freely discussed. The claimant here deals in a drinking or bottled water, which is also possibly bought with the thought that it has likewise some medicinal qualities. The water is known as Capon Springs water, which is taken from a spring in West Virginia. It is charged that the water as put upon the market is misbranded, evidenced by the labels on the bottles in which the water is marketed.

"Section 8 of the act defines the meaning of the term 'misbranded.' The article is misbranded if the package or label shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular.

"It is charged that Capon Springs water is marketed under a label which describes it to be 'Healing Water,' thereby implying that the drinking of it will have curative and therapeutic results, when in fact the water is more accurately described as drinking water having only the properties of what might be called ordinary spring water.

"There is no meaner or more despicable fraud than that of persuading those afflicted with a disease to buy something on the promise that it will cure them or help them when the hope aroused is wholly delusive and the statements made fraudulently misleading. Anyone would feel the call to aid in the

suppression of frauds of this character. There is nothing in this case which would justify the finding that Capon Springs water is medicinal in the sense indicated. When one is speaking of a drinking water it is difficult to draw the line between an effect which is merely beneficial and one which is medicinal. Anyone may have a prejudice in favor of the water from some favorite well or spring and believe they are benefited by drinking it. So believing they would not be condemned for recommending it to others nor do we think the commercial exploitation of it would come within the condemnation of this act of Congress so long as the line of fraud was not crossed. One has only need to recur to the literature of his youth to recall the incident of the visit of Leather Stocking to the spring from which the famous Saratoga water is now taken, and to the tribute which is paid in *Westward Ho* to tobacco. There is scarcely any locality in the country in which there is not a spring, about the waters of which there are traditions more or less well authenticated, that the waters of the spring were a favorite drink of the Indians. The languages of the different tribes of American Indians had this in common that they were figurative and abounded in metaphors. The names given to individuals ascribed to these high sounding qualities. There is said to be such a tradition connected with the Capon Springs. This water was so highly valued by the Indians that it was given the name 'Capon,' which in the language of the particular tribe which inhabited the surrounding country, is said to have had the meaning of healing or healing water. There is an advertising value in such a tradition, the benefit of which the claimants have undoubtedly sought to get. For some reason, which is inscrutable, many people attach a value to Indian medical lore. Anyone who has a nostrum, for which he desires to create a commercial demand, can do so successfully by panoplying some one in red paint and feathers and proclaiming the nostrum to be a favorite medicine among the Indians. This may be done in such a way as that it is clearly a fraudulent imposition and denounced as an offense against this act of Congress. On the other hand, it may be taken in such a way as to negative the thought of a real fraud and be nothing more than an advertising device to call attention to the thing which is offered for sale.

"We see nothing in the label in this case which would justify a finding that it was fraudulent. The form of the label is: 'Capon Springs Water, Known to the Catauaba Indians as "Ca-Ca-Paon" Healing Water, 2 Quarts Net—Bottled at the Springs.' [Then follows an analysis in type too small to be conveniently read.] 'Natural Mineral Spring Water Famous for Two Centuries. Capon Water Co. Capon Springs, W. Va.'

"There is doubtless an advertising value in the stuttering orthography given to the words 'Catawba' and 'Capon,' but this label is as close an adherence to the truth as is customary in commercial labels and speaks the truth as nearly as would be expected of any advertiser of a commercial product. We would not find as a fact in what measure of esteem the Capon Springs water was held by the Indians, but there is that in the record of this case which would support the statement that the word 'Ca-Ca-Paon' means in the Indian dialect healing water. Whether it does or not we would not find from the evidence, but we do find that there is evidence that the word is said to have this meaning.

"The count in the libel of misbranding is not sustained.

"Some of the literature put out by the claimants may be characterized as not only florid but is almost laughable in its overstatements. Everyone has heard, however, of extravagant claims made by the advocates of a liberal use of ordinary drinking water. This is epitomized in the slogan 'flood your kidneys.' This has no reference to any particular drinking water but applies to any water. All the extravagant claims made for drinking Capon Springs water are made for the liberal use of any drinking water. There is no reason to doubt that those who advocate the liberal use of drinking water honestly believe the practice to be beneficial. We are not prepared to make any finding that it is not, and we are far from finding that all the benefits claimed will be conferred. The point we have in mind to make is that the act of Congress does not interdict anyone from advocating the liberal use of drinking water nor from enforcing the advocacy of it by extravagant predictions of the benefits which will follow. If this can be done in the case of water as water, we do not see how the claimants can be interdicted from saying the same thing about Capon Springs water.

"The next count in the libel is based upon the sixth clause of section 7 of the act. As before stated, this feature of the libel cannot even be discussed without consequences which, although unintended, might none the less be very harmful to the trade of the claimants. As before also stated, we are restricted in any findings which we may make to the few bottles of water which were seized.

"We make the finding that this water at the time of the trial was free from the criticisms made of it and will continue to be free. We make this finding because the claimants have introduced evidence through the testimony of experts to this effect, which is uncontradicted, and also because the offer was made by the claimants to submit the water to analysis and microscopical examination for the Government. This offer was declined, and the testimony itself objected to because the question is asserted to be not what the condition of the water now is but what it was at the time of seizure, and it would seem to be an admitted truth that the water would clear itself after a comparatively short time. The claimants assert that in order to assure the wholesomeness of the water it was their practice to keep it in storage for such a length of time as would leave no doubt of its wholesomeness before it was put upon the market. Whether this practice was in all cases followed it would not clear the claimants of the charge of shipping unwholesome water, if it was at the time of shipment unwholesome, even if the unwholesomeness were afterwards removed. Congress evidently had in mind the injustice which might be done through a charge of unwholesomeness of a particular shipment by being extended in the public mind to a condemnation of the entire product. The regulations are also mindful of this. It is because of this provided that, before any proceedings of condemnation are instituted, that the interested persons shall be notified and given the opportunity to 'show cause why the matter should not be referred for a prosecution as a violation of the Federal food and drugs act.' The purpose of this procedure is manifest. It was, however, for reasons which, in the opinion of the officers of the bureau justified the omission, not followed in the instant case. We think this should have been done, and because of the omission to do it, that this count of the libel cannot be sustained. The purpose of the regulation in consonance with the intent of Congress is that the reputation of a food product shall not be blasted by the institution of proceedings without a full opportunity afforded to the parties concerned to convince the department, if they can, that such proceedings should not be instituted. If the product be one, the shipment of which in interstate commerce, should be interdicted, proceedings may be instituted and the shipment stopped, but if the condemnation of the product is due to something which may be corrected, and the product itself does not call for condemnation, the proceedings need not be instituted.

"This leads to a comment, in the making of which we may be going beyond our judicial duty, but which nevertheless we feel impelled to make. The comment is that the difficulties in which the claimants find themselves are largely of their own making. Apparently, they have failed to appreciate the gravity and importance of the duties which the officials of this bureau are called upon to perform. Instead of recognizing that the activities of the officials are not only justified but demanded of them in furtherance of the protection of the public health, the claimants seem to have resented the intervention of the officials as an unwarranted intrusion into the private business of the claimants. Realizing, as of course the claimants did, how much harm to their trade a charge of unwholesomeness against the Capon Springs water would have, whether the charge was well founded or ill founded, they resented the acts of the officials as if this injury was intended. This attitude on their part was wholly unjustified.

"The department needs no vindication at the hands of this court, but we feel free to express our absolute confidence in the good faith of the action taken and that it was done solely in the performance of duty and for the protection of the public health.

"The resentment of the claimants against the intervention of the department and the general attitude of the claimants was interpreted as meaning a defiance of the department and a challenge to them 'to do their worst.' Because of this, the authorities felt justified in proceeding without any preliminary hearing. This feeling is natural enough and excusable in itself, but is far from justifying any refusal or failure to give the claimants the preliminary hearing called for by the regulations, and should have induced

a careful regard to all the rights of the claimants. The department doubtless viewed the provision for a preliminary hearing as applying only to criminal prosecutions, but there is the same reason for extending it to proceedings in rem.

"Another comment is, we think, likewise within our province to make. It is that many of the claims made of benefit from the drinking of Capon Springs water are so extravagant as to justify the characterization of being ridiculous. No trial judge is in a position to pit his judgment of the benefit to the seller of certain commercial practices against the judgment of commercial men. We venture, however, the statement that those who buy Capon Springs water or other spring water do so because they wish a water to drink which is what is called 'pure' and which is palatable. Very few, if any, users of any of the spring waters would be induced to buy them in the hope that they will prove to be the panacea, which in the literature put out by the claimant company, this water is claimed to be.

"We are not prepared to say that the tradition that this water was highly regarded by an extinct tribe of Indians in the far distant past may not have some real advertising value, and as we have already observed, we think the claimants can avail themselves of the statement of what some Indian, now dead, for many generations, may have thought of the water from this particular spring, but extravagant claims to a panacea should be dropped.

"A final comment is that the parties to this cause, as if upon the preliminary hearing provided by the regulations, should meet and reach a working agreement such as would assure to the authorities a compliance with the law and leave the claimants free to conduct their business undisturbed by any complaints from the department. We see no difficulty in reaching such a working agreement. The claimants are bound to comply with all the requirements of the law and we know that all the authorities wish is assurance that there will be such compliance. What is called for is a get-together attitude.

"The conclusion reached is that the libel should be dismissed, and a form of decree in accordance herewith may be submitted.

"We make the following specific findings of fact and conclusions of law:

"Findings of fact. 1. The Capon Springs water is a natural water obtained from springs near Capon Springs, W. Va.

"2. There is evidence, sufficient to justify the claimants in making reference to it, of a tradition in the neighborhood of the springs that the word 'Capon' is a corruption of the word 'Ca-Ca-Paon,' meaning in the dialect of the Catawba tribe of Indians, 'Healing Water.' There is no evidence, however, that the word ever had this meaning in spite of the tradition to that effect.

"3. No hearing in the nature of a rule to show cause called for by the regulations was given to the claimants, but on the contrary they were refused all information and opportunity to correct the information upon which the libelant had based its libel.

"Conclusions of law. 1. The label used in this case by the claimants is not a misbranding within the meaning of the act of Congress on the subject.

"2. The count in the libel based upon clause 6, section 7 of the act of Congress, is dismissed because of the failure to grant the claimants the preliminary hearing allowed by the regulations.

"3. The libel should be dismissed."

On December 18, 1930, the Government filed a petition for appeal and assignment of errors, and on the same date an order was signed by Judge Dickinson allowing the appeal to the United States Circuit Court of Appeals for the Third Circuit. On August 19, 1931, the Circuit Court of Appeals, Buffington, Davis, and Thompson, Circuit Judges sitting, handed down the following decision overruling the opinion of the District Court that hearing is necessary preliminary to seizure, but affirming the order of dismissal on other grounds (Davis, *C. J.*):

"This is an appeal from a decree dismissing the libel in the above stated cause.

"On January 28, 1928, the United States filed a libel under section 10 of the food and drugs act and prayed for seizure and condemnation of 94 dozen half-gallon bottles of Capon Springs water, which had been shipped on January 20, 1928 from Capon Springs, W. Va., to Philadelphia, Pa., on the grounds that the water was adulterated and the bottles in which it was contained were misbranded.

"An article is adulterated within the meaning of the act, 'if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.'

"An article is misbranded within the meaning of the act, 'if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.'

"The learned trial judge in his second conclusion of law dismissed the count in the libel based upon clause 6, section 7, 'because of the failure to grant the claimants the preliminary hearing allowed by the regulations.' The regulation to which the court referred was regulation 5 (a) which provides as follows:

(a) Whenever it appears that an article is adulterated or misbranded within the meaning of the act, and proceedings are contemplated under sections 1 and 2, notice shall be given to the party or parties against whom prosecution is under consideration and to other interested parties, and a date shall be fixed at which such party or parties may be heard. The hearing shall be held at the office of the Food, Drug and Insecticide Administration most convenient to the parties cited, and shall be private and confined to questions of fact. The parties notified may present evidence, either oral or written, in person or by attorney, to show cause why the matter should not be referred for prosecution as a violation of the Federal food and drugs act.

"This regulation refers to sections 1 and 2 of the act which provide the penalty for conviction in criminal proceedings under section 4. It does not refer to proceedings in rem as provided in section 10 of the act. This section does not require that a preliminary hearing be given to claimants of the articles alleged to be adulterated or misbranded. *United States v. 50 Barrels of Whiskey*, 165 Fed. 966; *United States v. 65 Casks of Liquid Extract*, 170 Fed. 449; *United States v. 9 Barrels of Olives*, 179 Fed. 983; *United States v. 100 Barrels of Vinegar*, 188 Fed. 471; *United States v. 75 Barrels of Vinegar*, 192 Fed. 350. But section 4 does require that when on examination the Board of Chemistry finds an article to be adulterated or misbranded, notice be given the party from whom the sample was obtained and an opportunity to be heard. But under section 5 of the act which also relates to criminal proceedings, it is the duty of the district attorney to whom satisfactory evidence of any violation of the act is reported by the Secretary of Agriculture or by any health officer of any State, to begin proceedings against the offender without notice or an opportunity to be heard. So even in criminal proceedings notice is not always necessary. *United States v. 75 Boxes of Alleged Pepper*, 198 Fed. 934; *United States v. Morgan, et al.*, 222 U. S. 274.

"The Government charged in its libel that the water was misbranded in that the labels on the bottles and circulars contain statements, designs, and devices regarding the ingredients and substances in the water to the effect that it is a 'healing water' and possesses curative and therapeutic properties, which, it alleges, are false and fraudulent. It further charged that the water was adulterated in that it 'consists in part of a filthy, decomposed, and putrid animal and vegetable substance.' These allegations were earnestly denied by the appellee. It appears that several hundred pages of testimony were taken to establish and rebut these allegations. The court made the following general finding: 'We make the finding that this water at the time of the trial was free from the criticisms made of it and will continue to be free.' The 'criticisms made' were that the water was adulterated and misbranded. But the Government has not brought any of the testimony here to establish these allegations. The record before us consists of the pleadings, the opinion, decree, exception, assignment of errors, petition for appeal, order allowing appeal, and citation. These alone are open for consideration. *Relly v. Beekman*, 24 Fed. (2d) 791, 795.

"The third conclusion of law is: '3. The libel should be dismissed.' The decree is: 'And now, to wit, this tenth day of December, 1930, it is ordered that the libel in the above-entitled case be dismissed.'

"The general finding, the specific conclusion of law and decree are based upon the evidence which is presumed to support them and there is nothing in the record before us to rebut this presumption. *Southern Railway v. Lester*, 151 Fed. 573, 575; *Bankers Trust Co. v. Missouri K. & T. Railway Co.*, 251 Fed. 789, 798; *Arena v. Delaware, Lackawanna and Western Railway Co.*, 292 Fed. 1, 4; *Caldwell v. United States*, 256 Fed. 805; *Clarke v. United States*, 255 Fed. 546. *Samuel Olson & Co. v. Voorhees*, 292 Fed. 113, 115.

"It is true that in the second conclusion of law, which the Government says is predicated upon the third finding of fact, the dismissal of the count based upon clause 6, section 7, of the act may have been put upon the wrong ground. This clause and section refer to paragraph 6 only of the libel which charges adulteration. With this paragraph eliminated, the rest of the libel is left standing.

The third conclusion of law, that 'the libel should be dismissed,' is based upon the evidence as a whole and dismisses not only the sixth paragraph but the entire libel. While the record does not disclose any exceptions taken at the trial, embodied in a formal bill, presented to and signed by the trial judge within the term as required by the decisions generally, it is true, as the Government here contends, that in trials by the court without a jury the sufficiency of facts specially found to support the judgment or decree may be reviewed without a bill of exceptions. *Sloss-Sheffield Steel Etc. Co. v. Stover Mfg. Company*, 37 Fed. (2d) 876; *General Motors Co. v. Swan Carburetor Co.*, 44 Fed. (2d) 24; *Seeberger v. Schlesinger*, 152 U. S. 581; *Lewellyn etc. v. Electric Reduction Company*, 275 U. S. 243, 248. But this does not materially help, for as above stated, there is nothing in the record open to us that justifies a reversal. There are 23 assignments of error, but they are not contained in any special finding and there is no bill of exceptions bringing up those portions of the record upon which they are predicated. If we are free to consider them they show findings against the Government presumptively on sufficient evidence or a refusal to find for the Government on insufficient evidence.

"It follows that the decree dismissing the libel must be affirmed."

On January 14, 1932, decrees were entered directing the return of the property to the claimant.

ARTHUR M. HYDE, *Secretary of Agriculture.*

19237. Adulteration of herring. U. S. v. 2 Cases of Herring. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 27956. I. S. No. 50760. S. No. 5977.)

Samples of herring from the shipment herein described having been found to be infested with worms and unfit for food, the Secretary of Agriculture reported the matter to the United States attorney for the Northern District of Illinois.

On March 7, 1932, the United States attorney filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of two cases of herring at Chicago, Ill., alleging that the article had been shipped by Paul Nordley, from Knife River, Minn., on or about February 28, 1932, and had been transported from the State of Minnesota into the State of Illinois, and charging adulteration in violation of the food and drugs act.

It was alleged in the libel that the article was adulterated in that it consisted in part of a filthy, decomposed, and putrid animal substance. Adulteration was alleged for the further reason that the article consisted of a portion of an animal unfit for food.

On April 22, 1932, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

19238. Adulteration of dressed herring. U. S. v. 28 Cases of Dressed Herring. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 27933. I. S. No. 50744. S. No. 5937.)

Samples of dressed herring from the shipment herein described having been found to be infested with worms and unfit for food, the Secretary of Agriculture reported the matter to the United States attorney for the Northern District of Illinois.

On February 19, 1932, the United States attorney filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of 28 cases of dressed herring at Chicago, Ill., alleging that the article had been shipped by George Siegel, from Duluth, Minn., on or about February 18, 1932, and had been transported from the State of Minnesota into the State of Illinois, and charging adulteration in violation of the food and drugs act.

It was alleged in the libel that the article was adulterated in that it consisted in part of a filthy, decomposed, and putrid animal substance. Adulteration was alleged for the further reason that the article consisted of a portion of an animal unfit for food.

On April 22, 1932, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*