

a libel praying seizure and condemnation of 42 bottles of Korum at Lincoln, Nebr., alleging that the article had been shipped in interstate commerce on or about March 28, 1934, by the I. D. Russell Co., from Kansas City, Mo., and charging misbranding in violation of the Food and Drugs Act as amended.

Analysis showed that the article consisted essentially of sodium chloride (4.8 percent), potassium chlorate (5 percent), potassium dichromate (4.2 percent), magnesium sulphate (1.6 percent), a nitrate, and water.

The article was alleged to be misbranded in that the following statements regarding its curative and therapeutic effects, appearing in the labeling, were false and fraudulent: "Cholera, Coccidiosis, Chicken-pox, Roup or Diarrhea, * * * Poultry Raiser: 'Do you think it is possible to prevent most of these common diseases of poultry?' Answer: Yes. Poultry Raiser: 'How?' * * * It is very often necessary to keep some solution in the drinking water that will kill germs. * * * Korum aids in getting the intestines in a condition so worms will be expelled easily and it aids in healing walls of the intestines that may have been irritated by worms. * * * Poultry Raiser: 'Don't you make a Roup Remedy, Cholera Remedy, Diarrhea Remedy, etc., or in other words, have a remedy for each disease?' Answer: No, as a rule, poultry diseases that are not caused by effects of lice and worms, are caused by germs. Korum kills germs, has tonic properties and aids the fowl in building up its resistance; acts as a mild laxative, helps the fowl throw off poisons that are in its system. Many of the diseases that affect fowls are contracted through the fowl's drinking water, others may be contracted from moldy feeds or things picked up by the fowl. In either case, Korum gets in its work in the drinking water, in the crop or in the intestines. Our experience and tests, as well as results obtained from actual poultry raisers, both large and small, have proven that Korum when used proves very helpful to poultry raisers everywhere in the treatment of germ and intestinal diseases. In fact, so beneficial, we do not deem it necessary to put out so many different remedies. * * * Korum helps the flock to get into condition, quickly guards against disease, and prevents the drinking water from becoming contaminated. Korum is also highly recommended and very beneficial for baby chicks. It is an aid in protecting them from common ailments—simple diarrhea, bowel troubles, etc."

On March 23, 1935, no claimant having appeared, judgment of condemnation was entered and it was ordered that the product be destroyed.

M. L. WILSON, *Acting Secretary of Agriculture.*

24525. Alleged misbranding of Gizzard Capsule. U. S. v. 18 Packages, et al., of Gizzard Capsule. Tried to the court; judgment for claimant. Libel ordered dismissed and product delivered to claimant. (F. & D. no. 33165. Sample nos. 3330-B, 3331-B, 3332-B.)

On August 8, 1934, the United States attorney for the Western District of Missouri, acting upon a report by the Secretary of Agriculture, filed in the district court a libel (amended January 24, 1935) praying seizure and condemnation of 47 packages of Gizzard Capsule at Kansas City, Mo., alleging that the article had been shipped in interstate commerce in part on or about October 3, 1933, and in part on or about March 6, 1934, by the Geo. H. Lee Co., from Omaha, Nebr., and charging misbranding in violation of the Food and Drugs Act as amended.

Analysis showed that the article consisted essentially of kamala, nicotine (66 milligrams per tablet), copper oxide (371 milligrams per tablet), a small proportion of chenopodium oil, and graphite.

The article was alleged to be misbranded in that the following statements regarding its curative or therapeutic effects were false and fraudulent: (Package) "For * * * Large Tape Worms and Pin (Ceca) Worms in Chickens and Turkeys * * * For the Removal of * * * Large Tape and Pin (Ceca) Worms in Poultry * * * delivers the medicine, undiluted, fresh and full strength directly upon the worms in the intestines"; (circular) "For * * * Large Tape and Pin Worms in Chickens and Turkeys * * * To lay well, hens must be reasonably free from worms * * * Worm your flock with Gizzard Capsules; * * * to expel the worms * * * the exact full strength dose of worm medicine is emptied into the intestines and reaches the worms."

On February 1, 1935, the Geo. H. Lee Co., having appeared as claimant for the property and a jury having been waived, the case was submitted to the court on the pleadings, evidence, written briefs, and arguments of counsel. On February 2, 1935, the court made the following findings of fact and conclusion of law in favor of the claimant (Otis, *District Judge*):

"This case was instituted by the filing here of a libel on August 8, 1934. Thereafter, on January 4, 1935, an amended libel was filed. In the amended libel it is alleged that certain packages of what was called in the caption and in the body of the libel 'Gizzard Capsules', which it is alleged were at the time of the filing of the amended libel in the possession of the McPike Drug Company of Kansas City, Missouri, were packages of a product which had been misbranded in violation of the Food and Drugs Act, in that there appeared upon the packages and within the packages certain statements with reference to the product which were false and fraudulent.

"The George H. Lee Company has filed in this proceeding its answer to the allegations of the amended libel and its claim to the packages therein referred to. In its answer it denies certain of the allegations of the amended libel.

"The libel is based upon that part of the Food and Drugs Act which declares that an article shall be deemed to be misbranded if the package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of the medicine or any of the ingredients or substance contained therein which is false and fraudulent. The libel charges that the packages referred to in it were labeled and that they were accompanied by circulars in each of which it was represented that the product was for large tape worms and pin (*Ascaridia*) worms in chickens and turkeys. It alleges that those statements contained in the label and circular were false and that they were made fraudulently. The answer of the claimant denies that the statements in the libel and circular either were false or fraudulent.

"The controverted issues of fact not disposed of by the stipulation and the admissions in the answer are two. The first of these is: Were the statements made in the labels and circulars false? The second is: Were those statements made fraudulently? The burden is upon the plaintiff in this case to prove both that the statements made in the labels and circulars were false and that they were made fraudulently,—to prove those charges and allegations by the preponderance or greater weight of the credible testimony.

"It may be regrettable that such issues of fact as these especially the first, must be submitted to a judicial tribunal, but however regrettable that is, the law does that. In some countries I have been informed in a case of this kind the judge of the court would call to his assistance a lay judge, so-called, learned in the field of science, to aid him in determining such an issue. That is not our system. A judge trained only in the law, necessarily must have some difficulty in deciding such an issue of fact as the first of the two issues which this case presents.

"It is represented in the labels and in the circulars also—I shall not hereafter speak of the circulars since they do not complicate the case in any way—that the drug called 'Gizzard Capsule' is 'for large round worms, large tape worms and in (*Ascaridia*) worms in chickens and turkeys.' The word 'remedy' does not appear but it may be added because it certainly is implied.

"The evidence clearly discloses the fact that poultry, particularly chickens and turkeys, sometimes are infested with certain parasites known as round worms, large tape worms and pin worms. They are injurious to the poultry which they infest. It is desirable to lessen or entirely to prevent, if that is possible, the injury which follows from the presence of these parasites in the digestive tract of the chicken or turkey. Any remedy which entirely removes large tape worms and therefore puts an end to the injury resulting from their presence if labeled a remedy for large tape worms, certainly could not be said to be falsely so labeled. Any remedy which, although it may not entirely remove such tape worms, may not completely put an end to the injury resulting from their presence, but which lessens that injury, whether permanently or temporarily, if labeled a remedy for large tape worms, cannot be said to be falsely labeled. I cannot believe that anyone reasonably could question that conclusion. The remedy for a disease may not be a complete cure for the disease, but if it lessens the injury which the disease causes, whether temporarily or permanently, is a remedy for that disease and may be truthfully so described. Even a layman may think of many remedies for human diseases which are universally used and whose benefits have been universally recognized which do not cure the disease but only temporarily ameliorate its ravages or perhaps permanently lessen its ill effects. If we may take some very homely illustrations, I do not suppose that aspirin cures headaches but it certainly is a remedy for headaches, having temporarily beneficial effects. I don't suppose Smith's Cough Drops cure colds—I am not trying to advertise Smith's Cough

Drops—but they certainly are a remedy for bad colds and temporarily ameliorate their effects. Passing from such homely illustrations, I have read that for that very severe human disease known as diabetes there is no cure at all but that the injury resulting from it is very greatly stayed by a relatively newly discovered drug known as insulin which puts off the final fatal day and greatly ameliorates the condition of suffering and yet it is not a cure.

“I say that there cannot be any controversy but that any remedy, whether for a human being or for an animal or for a bird which lessens the injury from any particular disease or lessens the injury caused by any particular parasite, if it is represented that it is a remedy for that disease or for that parasite is not falsely so represented. So, the question is this: Does this remedy called ‘Gizzard Capsule’ lessen the injurious effects resulting from the presence in the digestive tract of a chicken or turkey of large tape worms? Does it lessen the injurious effects resulting from their presence? If it does, then it is not falsely labeled when it is represented that it is a remedy for large tape worms.

“Now, with this somewhat narrowed issue in mind I consider the testimony of the witnesses. For the plaintiff there was testimony here of several gentlemen; for the claimant, several. The witnesses for the plaintiff all were scientific men connected with the Department of Agriculture. The witnesses for the claimant were, some of them, learned in science to some extent at least, and some lay witnesses also. All the witnesses impressed me as honorable men, endeavoring to tell the truth as they believed the truth to be. It is no reflection upon the witnesses for the claimant to say that the witnesses for the plaintiff from the standpoint of training were the better qualified, and perhaps also the less interested. I have always believed that the scientific men connected with the Government were men of fine ability. That belief is stronger now than it has been before by reason of the appearance and the testimony of the witnesses who were here for the plaintiff. They are very exceptional and very able men, highly learned and very fair.

“When all of the testimony is considered, can it be said that it has been proved here by the preponderance or greater weight of the credible testimony that the injury resulting from the presence of large tape worms in poultry, are not lessened by this remedy by the contents of these Gizzard Capsules?

“Well, what is the injury which results from the presence of tape worms in chickens? All I know about it is what I have learned here. I never before knew that chickens had tape worms and I am sorry to learn it now. These tape worms have been described by the witnesses, pictures of them have been offered in evidence here, specimens of them have been offered in evidence here. A tape worm, it appears, consists of a head and a neck and a body, if you may use that word; I think it was used by the witnesses. It may be of varying lengths. Large tape worms, it appears, are in length from a half inch to four or five or six or more inches. It fastens itself upon the interior wall of the intestine of the bird and the head of it and part of its body may penetrate at least the inner surface of that wall. It injures the bird in two ways—it seems to me from the evidence it injures it in two ways. The chief injury which it does is that it perforates the intestinal wall of the bird and may cause some infection in that wall. That is the chief injury which it does. It is a strange sort of an organism, this tape worm. It absorbs its own nutriment, not only at the head but in every segment of its body. The nutriment upon which it lives is that which it draws either from the body of the bird or from the food which it has ingested. I do not know whether this remedy here in question destroys the heads of tape worms or does not. I should be inclined to believe that the plaintiff’s witnesses, being the better qualified perhaps and better prepared and less interested right, that is to say that the heads are not destroyed by this remedy. I cannot believe, however, that the presence of a foreign body in the digestive tract in the intestine which may be half an inch or six inches in length, which absorbs food values that otherwise would go to the bird, especially if multiplied by hundreds—I cannot believe that they have no injurious effects whatever on that account. The intestine of a chicken seems to be small. To say that the health of a chicken is not injured by the presence of a great quantity of foreign matter in the intestine attached to the wall of the intestine, and every part of which absorbs something that otherwise would feed the chicken, to say that that is of no injury whatever seems to me would be a conclusion that a scientist could hardly reach. Certainly if a human being had any such mass of stuff in his intestines it would not be thought to be otherwise than injurious to his health. I am unable to escape the conclusion from this testi-

mony that this remedy, this Gizzard Capsule and its contents, or rather its contents does have the effect of sweeping out of the intestine at least the bodies as I have described them, of large tape worms. Almost that was conceded by the witnesses for the plaintiff. The principal of the witnesses for the plaintiff, said—I understood him to say at least, that the reason this drug did not remove or affect the heads of parasitic forms was that it could not reach them, that it only sheered them away from the intestinal walls, swept them away. If it does, it cannot be said that it does not to some degree at least lessen the injury resulting from the presence of the parasites known as large tape worms. It may be only temporarily that it does that, but it does it temporarily. If it lessens the injury resulting from the presence of the parasites, and if on that account it improves the health of the bird it is not falsely labeled when it is labeled a remedy for large tape worms.

“This remedy is also labeled a remedy for pin worms. Without taking up too much time I think it cannot be said that the plaintiff has proved by the preponderance or greater weight of the credible testimony that this remedy does not have some benefit in removing some portion of the pin worms which may infest a chicken. I have no doubt that the quantity of such worms in a given chicken, whether the number is great or small, may have something to do with the injury resulting from their presence; at least there has been no evidence that the number of such worms has nothing to do with the injurious effects on the chicken. I suppose that one worm is less injurious than a thousand and that six are less injurious than a hundred. I am not prepared to say that this remedy is clearly shown to be meritorious so far as pin worms are concerned. I say only that it has not been proven that it is not of some value with respect to them.

“I do not need to say that the purpose of the Pure Food and Drugs Act which is to deprive persons of the use of the channels of Interstate Commerce for furtherance of fraud in any matter of misrepresentations as to foods and drugs, that with that purpose every citizen should have the greatest sympathy. I have, but that sympathy with the purpose of that law cannot change or alter in any way the rules of law which are applicable to cases of this character.

“Now, I come to the second issue of fact, although from what I have said it appears that it is not necessary to pass upon that issue of fact. That issue is: Was there fraud in the preparation and publication of these labels and circulars? There could not be fraud if they were not false. Therefore, the determination of the first issue determines the second but the second issue could be determined upon other considerations, even if it had been determined that the labels were false and that the circulars were false. If the manufacturer or vendor of these Gizzard Capsules honestly and sincerely believed that they were remedies for tape worms and pin worms, then that manufacturer could not have been guilty of fraud, even if they were wholly valueless and ineffacious. It was proper for the manufacturer to endeavor to satisfy himself as to whether the remedy was good for tape worms and pin worms. The point I am making is that the manufacturer was not bound by the conclusions reached by the scientists in the Department of Agriculture. They render a great service but they are not given the power to decide questions finally and ultimately. They can be decided only by courts. The question as to whether a given label is false or a given circular is false, is a question for the courts. The claimant manufacturer had a right to make his own investigations and it made those investigations, and if from them it sincerely believed this remedy was one that was effective for tape worms and pin worms it was not bound to discontinue its business until it could convince the scientists in the Department of Agriculture. It was under no obligation to do that. It had a right to continue its business and to submit the issue ultimately to a court. Even if I should believe that the conclusion testified to by the witnesses for the Government were correct that these capsules were of no value whatever against tape worms and pin worms, I could not believe that the claimant here did not have some support for its contention that it honestly believed that they were effective remedies. Investigations which were made by representatives of the claimant were as thorough as some made by the Department of Agriculture, perhaps by men not so well trained. They were reported to the officers of the claimant by the men who made the investigations and they were honestly reported to the claimant. There can be no question about that last statement. If these investigations had not

been honestly reported to the claimant, if the results were falsely represented by the men who made the investigations, they certainly would have done a better job of making the false statements than they testified to. They testified to the results almost as variable as testified to by the witnesses for the Government.

"I have no doubt that the Government has not proved that there was no fraud in the preparation and circulation of the labels and circulars referred to in the libel.

"1. In addition to the facts which in a general way already have been found, I find that the label and circular referred to in the amended libel introduced in evidence, in so far as they represent that the remedy called 'Gizzard Capsule' was a remedy for large tape worms, do not contain false representations and are not false.

"2. I find that in so far as the label speaks of the 'Gizzard Capsule' as a remedy for pin worms it has not been proven that so much of the label and so much of the circular in which like language appears is false.

"3. I find that the claimant in this case, the George H. Lee Company, in publishing and circulating and attaching to its package labels and circulars referred to in the amended libel, was not guilty of any fraud and that the labels and circulars are not fraudulent.

"*Conclusion of law.*—Upon the facts found I conclude as a matter of law that the plaintiff is not entitled to the relief asked in the amended libel.

"Counsel for the claimant may prepare and submit to the Court for approval an entry a form of judgment in this case.

"To the conclusions of law which the court has stated and also to the findings of fact, and to each of them, the plaintiff is allowed an exception."

On February 18, 1935, judgment was entered ordering that the libel be dismissed and the product delivered to the claimant.

M. L. WILSON, *Acting Secretary of Agriculture.*

24526. Misbranding of Calso Water. U. S. v. 475 Bottles of Calso Water. Consent decree of condemnation. Product released under bond to be relabeled. (F. & D. no. 33166. Sample no. 73665-A.)

This case involved a product the labeling of which contained false and misleading claims as to its composition, also unwarranted curative and therapeutic claims.

On August 7, 1934, the United States attorney for the Western District of Washington, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 475 bottles of Calso Water at Seattle, Wash., alleging that the article had been shipped in interstate commerce on or about April 17 and June 7, 1934, by the Calso Co., from San Francisco, Calif., and charging misbranding in violation of the Food and Drugs Act as amended.

Analysis showed that the article consisted essentially of a carbonated solution of calcium, magnesium and sodium salts including phosphate, chloride, and bicarbonate.

The article was alleged to be misbranded in that the following statements appearing in the labeling were false and misleading: "Made with distilled water and the salts normally present in the human body." Misbranding was alleged for the further reason that the following statements, "It is very efficient in the treatment of the acid conditions of the body fluids and tissues which recent research has shown to be present in most of the acute and chronic diseases", were statements regarding the curative or therapeutic effects of the article and were false and fraudulent.

On March 13, 1935, the Calso Co., claimant, having admitted the allegations of the libel and having consented to the entry of a decree, judgment of condemnation was entered and it was ordered that the product be released under bond conditioned that it be relabeled under the supervision of this Department.

M. L. WILSON, *Acting Secretary of Agriculture.*

24527. Misbranding of Dietene. U. S. v. 36 Bottles [67 Bottles] of Dietene. Default decree of condemnation and destruction. (F. & D. no. 83096. Sample no. 56627-A.)

This case involved a product sold as a reducing diet. Examination showed that it contained no ingredients which would produce the reduction in weight claimed, and that the labeling contained unwarranted curative and therapeutic claims.