

BEVERAGES AND BEVERAGE MATERIALS

19101. Alleged adulteration of Bireley's orange beverage. U. S. v. 88 Cases * * *. Tried to the jury. Verdict for the Government; judgment of condemnation and destruction. Appeal to the U. S. Court of Appeals; judgment of District Court reversed and case remanded for new trial. Certiorari denied by Supreme Court. Case dismissed by District Court. (F. D. C. No. 15144. Sample No. 4602-H.)

LIBEL FILED: February 14, 1945, District of New Jersey.

ALLEGED SHIPMENT: On or about January 17, 1945, by Bireley's, Inc., from Philadelphia, Pa.

PRODUCT: 88 cases, each containing 24 6¾-fluid-ounce bottles, of Bireley's orange beverage.

LABEL, IN PART: (Bottle) "Enjoy Bireley's Daily For Real Fruit Taste Bireley's Inc. Phila. Pa. 6¾ fl. ozs. Non-carbonated"; (crown cap) "Bireley's Orange Beverage Contains water, orange pulp & juice, lemon pulp & juice, sugar, lactic acid, orange oil, artificial color."

NATURE OF CHARGE: Adulteration, Section 402 (b) (4), yellow coal-tar dyes had been mixed with the article so as to make it look like a product composed entirely or in large part of a fresh orange juice and thus better and of greater value than it was.

Further adulteration, Section 402 (b) (4), the article consisted of a mixture of a small quantity of concentrated citrus juice, or juices, and water, to which had been added additional water, in excess of that contained in the fresh juices from which the concentrates were made, sugar, lactic acid, and orange oil, which substances so added to the article increased its bulk and gave it the taste and odor of an orange juice or of a beverage containing a large quantity of orange juice, thereby making it appear better and of greater value than it was.

DISPOSITION: On March 23, 1945, Bireley's, Inc., entered its appearance and claim, and on May 24, 1945, filed an answer denying that the product was adulterated as charged in the libel. On November 27, 1945, the claimant filed a notice to take the deposition of Dr. Paul B. Dunbar, Commissioner of Food and Drugs, as an officer or agent of the Government, or such other officer, agent, employee, or representative as he might designate who had knowledge of the matters involved in the action. On February 6, 1946, the Government filed a motion to vacate the claimant's notice to examine Dr. Dunbar or other representative of the Government, and on March 1, 1946, the Government's motion to vacate the claimant's notice was argued. Decision was reserved by the court until September 11, 1946, on which date the court granted the Government's motion with the following opinion:

MADDEN, *District Judge*: "This is a motion by the United States of America, as libelant, to vacate a notice of the taking of oral deposition of Dr. Paul B. Dunbar, Commissioner of Food and Drugs—or such other officer, agent, employee or representative as he may designate—pursuant to Rules 26, 28, 30, 32, and 37 of the Rules of Civil Procedure.

"This is a proceeding under the Federal Food, Drug and Cosmetic Act of June 25, 1938, (21 U. S. C. A. 301, et seq), seizure having been made under Section 334, because the subject matter, namely, an uncarbonated beverage, is alleged to have been adulterated and misbranded.

"The motion by the Government is made upon two grounds. First: That the proceeding being upon a libel is a proceeding in Admiralty and is therefor not

governed by the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, pursuant to which the notice of the taking of depositions was given, and, Second: That if the Federal Rules of Civil Procedure do apply, discovery would not be appropriate in this particular case.

"It therefor follows that a study must be made to determine the first question, and if this is decided in favor of the libellant, there is no need of passing to the second question.

"The particular section of the Food, Drug and Cosmetic Act (21 U. S. C. A. 301 et seq), namely, section 334 (b), provides among other things:

The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury.

"Since the notice sought to be dismissed is brought under the Federal Rules of Civil Procedure, it becomes necessary to determine whether such rules apply. Rule 81 says, '(1) These rules do not apply to proceedings in Admiralty.' Paragraph 2 of Rule 81 says:

In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in Statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity; admission to citizenship, habeas corpus, quo warrant and forfeiture of property for violation of a statute of the United States.

"The footnote concerning this provision of the Rule adds this:

For examples of statutes which are preserved by paragraph (2) see—Title 21, par. 14 (Pure Food and Drug Act—Condemnation of adulterated or misbranded Food; procedure).

"So that if these statutes and rules were all that the court had to guide it in its disposition of the motion, its way would seem clear. However, the rules were adopted in 1939 and we must look to the decisions since their adoption and even prior thereto for further enlightenment.

"In interpreting the statute in question, we must look to the entire statute and not to the single phrase 'and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty.'

"In 1932, Justice Butler, speaking for the Supreme Court in the matter of *D. Ginsberg & Sons, Inc., v. Popkin* (285 U. S. 204) said:

General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *U. S. v. Chase*, 135 U. S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. *Kepner v. U. S.*, 195 U. S. 100, 125. *In re Hassenbusch*, 108 Fed. 38. *United States v. Peters*, 166 Fed. 613, 615. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. *Market Co. v. Hoffman*, 101 U. S. 112, 115. *Ex parte Public National Bank*, 278 U. S. 101, 104.

"And in *Jones v. York County*, 47 Fed. 2d., 837, Judge Gardner, speaking for the Eighth Circuit, said:

It is a recognized rule of construction or interpretation that the legislative intent is to be deduced from a view of the whole and every part of the statute taken and compared together, and, if possible, this act should be so construed as to render it a consistent and harmonious whole, and that construction should be favored which will render every provision operative, rather than one which would make some of its provisions idle or nugatory.

"In 1912, the Supreme Court had before it the question of interpreting this very phrase in the then Food and Drug Act, in the matter of *443 Cans of Frozen Egg Products v. United States* (226 U. S. 180) and there Mr. Justice Day said:

A statute, practically the same, with some slight changes, was embodied in par. 563 of the Revised Statutes, subdivision 8, giving the District Courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction . . . and of all seizures on land and on waters not within admiralty and maritime jurisdiction," the subdivision mentioned omitting the provision found in the section of the Judiciary Act of 1789 to which we have referred as to seizures "within their respective districts," and including case of "seizures on land and on waters not within admiralty and maritime jurisdiction." *Under this statute it has been uniformly held that the District Court as to seizures on land proceeds as a court of common law with trial by jury and not as a court of admiralty.*

"In the present matter the seizure is a seizure on land and well recognized as such.

"The counsel for the government strenuously urges for consideration the case of *United States v. 720 Bottles*, 3 Federal Rules Decision 466. This case is identical with the present case and there District Judge Byers held that the Admiralty Rules applied and sustained the government's motion.

"However, the Second Circuit has felt otherwise, in other cases, for in the matter of *Eureka Productions, Inc., v. Mulligan* (108 Fed. 2d., 760) Judge Patterson said:

(1, 2) Since the seizure took place on land, the suit by the United States to condemn the film for violation of customs law was an action at law rather than a suit in admiralty. In the case of seizures on land, suit for condemnation of the thing seized, though brought in the form of a libel of information in admiralty and governed to some extent by Admiralty Rule 22, 28 U. S. C. A. following section 723, is inevitably an action at law. *The Sarah*, 8 Wheat, 391, 5 L. Ed. 644; *Morris's Cotton*, 8 Wall. 507, 19 L. Ed. 481; *Confiscation Cases*, 20 Wall. 92, 22 L. Ed. 320. The district court in such cases proceeds as a court of common law on the equivalent of an information in rem, its jurisdiction being like that of the old Court of Exchequer in seizures for forfeiture of property to the Crown. 1 Kent's Commentaries, page 375; 3 Blackstone's Commentaries, page 261.

The resemblance to a suit in admiralty does not go beyond the process and the initial pleadings, even in cases where the statute providing for confiscation directs that the proceedings shall conform to proceedings in admiralty as near as may be. In *re Graham*, 10 Wall. 541, 19 L. Ed. 981; *443 Cans of Frozen Egg Product v. United States*, 226 U. S. 172, 33 S. Ct. 50, 57 L. Ed. 174. It follows that the decree of condemnation and writ of destruction remained in full force, notwithstanding the appeal, and justified the marshal in destroying the film.

"And the Supreme Court reiterated its position as stated in the *443 Cans of Frozen Egg Product* case as recently as 1943 when our late Chief Justice Stone, in the case of *C. J. Hendry v. Moore* (318 U. S. 133 at page 153) said:

The Court has never held or said that the admiralty jurisdiction in a forfeiture case is exclusive, and it has repeatedly declared that, in cases of forfeiture of articles seized on land for violation of federal statutes, the district courts proceed as courts of common law according to the course of the Exchequer on informations in rem with trial by jury.

"Likewise, in the Sixth Circuit, June, 1943, Judge Martin, in the case of *U. S. v. 935 Cases, Tomato Puree* (136 Fed. 2d., 526) said:

Recognition that proceedings under the provisions of Section 10 of the Pure Food Act of June 30, 1906, 34 Stat. 768, 21 U. S. C. A. Par. 14, where this procedure was originally prescribed by Congress, shall be by libel in rem and shall conform as nearly as may be to proceedings in admiralty was given by the Supreme Court in *Four Hundred and Forty-Three Cans of Frozen Egg Product v. United States*, 226 U. S. 172, 178, 183, 33 S. Ct. 50, 57 L. Ed. 174. *It was commented there that the provision of the Act giving to either party the right to demand a jury trial of issues of fact was inserted with a view to removing any question*

as to the constitutionality of the Act, and that it was not intended to liken the proceedings to those in admiralty beyond seizure of the property by process in rem.

"And as recently as December, 1945, the Fifth Circuit passed on the matter in the case of *Reynal v. United States* (153 Fed. 2d., 929) and Judge Hutcheson said:

We agree with the government that, except as to filing the libel and obtaining jurisdiction, admiralty procedure does not apply. A forfeiture proceeding after these preliminaries takes the character of a law action, and under Rule 81 (a), (2), Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c, is now governed by those rules. Therefore, appellant may not invoke Admiralty Rule 39 for setting aside a default.

"So that I must overlook the opinion by District Judge Byers in the matter of *United States v. 720 Bottles*, supra, even though it is directly on point and hold that the present proceeding, while commencing as a libel under the Admiralty Rules, nevertheless, is a seizure upon land and at this stage of the proceedings the Federal Rules of Civil Procedure apply.

"It therefor becomes necessary to consider the second grounds urged in support of the government's motion, namely: Is discovery appropriate in this case?

"The libel filed by the government is, for the purpose of this motion, full and complete in informing the claimant how the seized article is adulterated and misbranded. Paragraph III of the libel alleges:

—that the said article is adulterated—in that yellow coal tar dyes have been mixed therewith so as to make the said food look like a product composed entirely or in large part a fresh orange juice and thus better and of greater value than it is.

"Paragraph IV alleges:

—that it consists of a mixture of a small quantity of concentrated citrus juice or juices and water, to which have been added additional water, in excess of that contained in the fresh juices from which the concentrates were made, sugar, lactic acid and orange oil, which substances so added to the said food increases the bulk thereof and gives it the taste and odor of an orange juice or of a beverage containing a large quantity of an orange juice, thereby making the said food appear better and of greater value than it is.

"It is therefore quite apparent that discovery is not needed to inform the claimant what the government alleges and it is likewise apparent that what is sought by an examination of the government's chemists doubtless consists of expert testimony or opinions on the part of the chemists who have made analysis of samples of the commodity which has been seized. Therefore, is discovery appropriate?

"In the case of *Lewis, et al. v. United Air Line Transportation Corporation, et al.*, D. C. W. D. Penna. (32 Fed. Supp. 21) Judge McVicar said:

To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation therefor. To permit parties to examine the expert witnesses of the other party in land condemnation and patent actions, where the evidence nearly all comes from expert witnesses, would cause confusion and probably would violate that provision of Rule 1 which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

"And in *Boynton v. R. J. Reynolds Tobacco Co.*, (36 Fed. Supp. 593) D. C. Mass., Judge McLellan, speaking of examining expert witnesses, said:

(3) But there are cases where the tender of compensation should have no such effect. An expert employed by one of the parties ought not to be

compelled to furnish expert testimony to the other just because the latter offers him compensation. It is his privilege, if not his duty to refuse compensation from one of the parties when he has already accepted employment from the other, and such refusal ought not of itself to result in his being ordered to testify.

(4) To recapitulate, the court has the power, in the exercise of its discretion, to allow this motion or to deny it. Such is the view indicated in *Barrus v. Phanseuf*, supra. And to me it seems that as a discretionary matter, under the circumstances of the instant case, the defendant should not be permitted to obtain from an expert witness an opinion for which the plaintiff has to pay. Nothing here said is intended as an intimation that if the defendant had tendered a fee to the witness, who had declined it, any different result would have been reached.

"I therefore feel that an analysis and the conclusion based thereon constitute the kind of evidence that the government should not be required to disclose to the claimant in this type of litigation.

"The motion to vacate claimant's notice to examine party is, according to the views expressed herein, granted."

On January 31, 1947, an order was entered substituting General Foods Corp. as claimant in lieu of Bireley's, Inc. On March 7, 1947, the court denied a motion by the claimant for reargument of the Government's motion to vacate the claimant's notice to examine party, and on March 21, 1947, the court ordered that the decision and opinion on the Government's motion be reaffirmed.

On October 3, 1949, the case came on for trial before a jury. The trial continued through October 26, 1949, on which date the claimant moved for the dismissal of the libel and for a directed verdict in its favor. This motion was denied. On October 27, 1949, the taking of testimony and the arguments of counsel were concluded, and the case was submitted to the jury, which returned a verdict for the Government that the article was adulterated. On November 4, 1949, the claimant filed a notice for a new trial and for a judgment for claimant Non Obstante Verdicto (notwithstanding the verdict), which motion came on for hearing on November 18, 1949, and was denied. On December 20, 1949, the court entered judgment of condemnation and destruction.

On February 16, 1950, the claimant filed a notice of appeal to the United States Court of Appeals for the Third Circuit. The appeal was argued on December 19, 1950, and on March 23, 1951, the court of appeals handed down the following opinion reversing the judgment of the district court:

HASTIE, Circuit Judge: "Pursuant to its libel charging economic adulteration of certain food within the meaning of Section 402 (b) (4) of the Federal Food, Drug and Cosmetic Act,¹ the United States seized for condemnation 88 cases of an article of food labeled 'Bireley's Orange Beverage.'² The charges thus asserted were tried to a jury in the District Court for the District of New Jersey with a resultant finding of adulteration and a decree of condemnation. This appeal by General Foods Corporation, the owner of the food, followed.

"Section 402 (b) (4) declares that:

A food shall be deemed to be adulterated . . . (b) . . . (4) if any substance has been added thereto, or mixed or packed therewith so as

¹ 52 Stat. 1046-47 (1938), 21 U. S. C. § 342 (b) (4) (1946).

² The article is described in the libel, in detail, as follows: 88 cases, more or less, each containing 24 6¼ fluid ounce bottles of an uncarbonated beverage labeled: (Crown cap) "Bireley's Orange Beverage Contains water, orange pulp & juice, lemon pulp & juice, sugar, lactic acid, orange oil, artificial color Bireley's, Inc., Phila., Pa." and (bottle label) "Enjoy Bireley's Daily for Real Fruit Taste Bireley's, Inc., Phila., Pa., 6¾ fl. ozs. Non-carbonated."

to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

In this case the United States charged and undertook to prove that the 'food' in question—Bireley's Orange Beverage—was 'adulterated' within the meaning of the statute in that 'substances'—particularly, yellow coal tar dyes, sugar, lactic acid, and orange oil—had been 'added thereto or mixed therewith . . . so as to make it appear better or of greater value than it is.'³ The appellant, General Foods Corporation, raised questions concerning the meaning and application of the statute, the sufficiency of proof, the correctness of the trial charge, and the admissibility of certain evidence.

"Preliminarily, we consider an argument that the types of processing and manufacture covered by Section 402 (b) (4) should be limited by a strict grammatical application of the words of the statute. Such an approach suggests that the noun 'food' used in the introductory line of the section, and the articles and adverbs referring back to it be applied precisely and consistently to denote either an adulterated end product or an unadulterated original food. Further, it is argued that the statutory description of adulteration in terms of substances 'mixed with' or 'added to' a 'food' limits the application of the section to situations in which the process of manufacture has been the modification of a basic identifiable and unadulterated article of food through the introduction of some additive.

"We reject this restrictive analysis. In Section 402 (b) (4) we think Congress has employed a very brief text, informally phrased in nontechnical language, to cover generally a very considerable and diverse, but not precisely delimited, field of processing and fabrication. We view the language of the section as a comprehensive, if not always grammatically precise and consistent, description applicable to the manufacture and processing of foods generally, whether a recognized food is altered or sundry ingredients are combined or compounded to make what is essentially a new article of manufacture. Moreover, we think this broad coverage of diverse procedures is sufficiently clear for common understanding and practical application.

"Such broad and non-technical construction of the language in question is supported by the only two cases which have come to our attention where Courts of Appeals have had to consider the scope of the section. In *United States v. 2 Bags [Poppy Seeds]*, 147 F. 2d 123 (6th Cir. 1945), the product seized was white poppy seeds which had been artificially colored with charcoal. The result was that they looked like naturally dark poppy seeds. The market for the naturally dark seeds was substantially better than that for white seeds. The court held that the product, artificially colored white seeds, was adulterated under 402 (b) (4) because it appeared to be the naturally dark seeds although in fact it was not. 'Food' in the introductory line of the section under this construction thus meant the artificial product. The Court in effect held that the processed article, artificially colored white poppy seeds, is an adulterated product because it is made by mixing with white poppy seeds (the base food) an additional product, charcoal, to cause the white poppy seeds to appear to be naturally dark poppy seeds, and thus better or of greater value than they, the white poppy seeds, in fact are. Under no technically grammatical reading of Section 402 (b) (4) could this result have been reached. Yet, under no circumstances could it be considered an unfair, improper, or surprising conclusion as to the meaning of the section in relation to the facts of the case.

"A substantially similar problem was presented in *United States v. 36 Drums [Pop'n Oil]*, 164 F. 2d 250 (5th Cir. 1947). There, mineral oil artificially colored yellow to resemble butter, and used in popping corn in theatre machines, was held to be an adulterated product. The sense of the statute in relation

³ In terms, the libel charged that this article of food was adulterated first, "in that yellow coal tar dyes have been mixed therewith so as to make the said food look like a product composed entirely or in large part of a fresh orange juice and thus better and of greater value than it is," and second, "in that it consists of a mixture of a small quantity of concentrated citrus juice or juices and water, to which have been added additional water, in excess of that contained in the fresh juices from which the concentrates were made, sugar, lactic acid and orange oil, which substances so added to the said food increase the bulk thereof and give it the taste and odor of an orange juice or of a beverage containing a large quantity of an orange juice, thereby making the said food appear better and of greater value than it is." Neither at the trial nor on appeal has much point been made of the water content or the added bulk.

to this process was clear. The grammar of its application was not treated as important.

"In the context of the present case, it is our conclusion that the language of Section 402 (b) (4) covers a situation in which the challenged process of manufacture was the inclusion of one or more designated ingredients among the primary integral components of a distinct fabricated article. It is not important whether the final product has been achieved by a direct dilution of orange juice or, as here, by a more complex process of fabrication.

"More difficult questions arise in construing and applying the requirement of the statute that admixture shall have made the food 'appear better than it is.' To whom must the food appear better than it is? And how is it to be determined whether the food 'appears better than it is'?

"With reference to the first question, the trial judge charged the jury as follows: 'Your function in this case is to determine whether any part of the public, the vast multitude which includes the ignorant, the unthinking and the credulous, and those who do not stop to analyze in making a purchase would be so misled.' We have found nothing else in the charge which modifies the impression created by this statement. The jury was told that deceptive appearance to 'any part' of the public sufficed and the significance of 'any part' was emphasized and underlined by the accompanying reference to 'the ignorant, the unthinking and the credulous.' This was error.

"The correct standard was the reaction of the ordinary consumer under such circumstances as attended retail distribution of this product. When a statute leaves such a matter as this without specification, the normal inference is that the legislature contemplated the reaction of the ordinary person who is neither savant nor dolt, who lacks special competency with reference to the matter at hand but has and exercises a normal measure of the layman's common sense and judgment. What constitutes the norm of common sense and judgment is peculiarly the province of the jury to decide by relating common experience in the conduct and reaction of people to the circumstances at hand and by weighing such evidence as may be offered of the actual reactions of numbers of ordinary people in similar circumstances. Congress has indicated no extraordinary standard in this section under consideration and we find no basis for imposing one.

"In Section 403 (f) of the Act which deals with misbranded food, it is expressly stated that the branding must be such as is 'likely to be read and understood by the ordinary individual under customary conditions of purchase and use.' It would be reasonable to conclude that an abnormal and more burdensome standard results from the fact that Congress did not deem it necessary to specify a test in Section 402 (b) (4). We think that essentially the same standard should be applied to the determination of consumer reaction under both sections.

"This formulation also disposes of an issue that has arisen whether such matters as bottling, labeling, and retail price, as well as the taste and physical appearance of the food, constitute appearance under the statute. In our view, all customary circumstances of retail acquisition and consumption are relevant. Thus, the bottling and labeling of the labeled article are properly considered unless it is shown that some considerable part of the retail trade acquires the beverage without such packaging. Compare *United States v. 62 Cases, More or Less, Containing Six Jars of Jam*, 183 F. 2d 1014 (10th Cir. 1950); cert. granted, 340 U. S. 890 (1950). Of course, consumer habits in observing or not observing details of packaging are relevant and may be weighed by a jury in determining the effect of container markings upon the consumer.

"We next consider what is meant by a description of food as appearing 'better than it is' and what criteria are applicable to the determination of such apparent superiority over actual quality. It is not disputed that Bireley's orange drink is in a category of non-carbonated orange flavored soft drinks which has enjoyed a considerable public acceptance and for which there exists a substantial market. Several states have recognized this by establishing standards of quality and identify for such orange drink. This type of beverage has no great nutritive value but it is not deleterious.

"The parties agree that Bireley's orange drink contains about 6% orange juice, 2% lemon juice, 87% water, and small quantities of various other harmless substances. Undoubtedly, any percentage increase in the orange juice

content with a corresponding decrease in water content would represent some improvement in food value. Hence, literally the product appears better than it is if it appears to the consumer to contain more than 6% orange juice.

"But here we encounter serious difficulties of vagueness. The statutory test in Section 402 (b) (4) is unreasonable and unenforceable if it requires manufacturers in first instance to anticipate and the trier of fact thereafter to measure anything so speculative or even whimsical as the customer's guess whether an artificial beverage contains five, six, seven, or some other percentage of orange juice. Popular judgments as to degree of dilution, more or less than actuality, are in our view too vague and speculative for meaningful guidance or fair and practical administration of a prohibition against the introduction of otherwise unobjectionable food into commerce. The difficulty with this entire approach is that the 'adulterated' food is made to serve as its own only standard.

"The solution to the problem and the correct construction of the statutory language are to be found in the rationale of the legislative exclusion of products from commerce for economic adulteration where no hygienic adulteration exists. In such cases a product is recognized as wholesome but is excluded from commerce because of the danger of confusing it with something else which is defined, familiar, and superior. Cf. Comments of Congressman Lea at 83 Cong. Rec. 7773 (1935). There is no evidence to indicate a legislative intent to bar from the market foods which are wholesome merely because they may in fact be of relatively little value. So long as they are not confused with more wholesome products, their presence does no harm. Compare Stone, Ch. J. in *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 232 (1943). Without a finding that a marketable inferior product is likely to be confused with a specified superior counterpart, we think there can be no appearing 'better than it is' within the scope of disapproval of a section patently concerned only with confusion.⁴ Thus, in the case before us, proof of violation of the statute requires first description and definition of the superior counterpart, and second, proof that the consumer is likely to mistake the inferior for the superior.

"*United States v. Ten Cases, More or Less, Bred Spred*, 49 F. 2d 87 (8th Cir. 1931) which was decided under the 1906 forerunner of the present Act is helpful in indicating the scope of this problem. This was a libel charging misbranding, and adulteration under the subsection which then read 'An article shall be deemed to be adulterated . . . In the case of food . . . if it be mixed, colored, coated, powdered, or stained in a manner whereby damage or inferiority is concealed.' Apparently, Bred Spred, which bore some resemblance to jam, contained approximately 17 parts fruit to 55 parts sugar, whereas most commercial jams were made up of 45 parts fruit to 55 parts sugar, and that of most housekeepers contained fruit and sugar in a 50-50 ratio. The court held that the product was not adulterated, pointing out: 'There was no proof that Bred Spred contained any harmful or deleterious substance. The word "inferiority" in the statute raises the question, what is the other member of the comparison? Or, in other words, inferior to what? . . . The mere fact that the product contained fewer strawberries than some other product, e. g., jam, . . . does not . . . show that a comparison with jam was called for by the statute unless Bred Spred was being palmed off on the public as jam. No showing of this kind was made.'

"Concealment of inferiority to jam could not be in issue until the relevance of a comparison with jam was established. This, in turn, depended on whether Bred Spred was likely to be confused with the defined commercial or household product called jam. The court did not think it was justified in reaching such a conclusion from the record before it. Thus, the *Bred Spred* case demonstrates the necessity and significance of showing the relationship in public contemplation between the allegedly adulterated product and some familiar and defined standard which it resembles. It makes little sense to speak of

⁴ Sen. Rep. No. 493, 73rd Cong., 2d Sess. (1934) at p. 10 recites the following: ". . . under the present law and under the bill, a food is defined as adulterated if any substance has been mixed or packed with it so as to reduce its strength, or if any substance has been substituted wholly or in part therefor. These provisions in themselves imply the existence of definitions and standards of identity, since no one can tell when an article is adulterated under them without first determining definitely what constitutes the unadulterated product."

concealment of inferiority except when we add to *what*. It makes equally little sense to speak of misleading enhancement of appearance except in relation to some standard which by some reasonable technique has been made relevant.

"Recently, the Court of Appeals for the Tenth Circuit has held that the addition of water to canned tomatoes resulted in adulteration of that product. *United States v. 716 Cases, More or Less, Del Comida Brand Tomatoes*, 179 F. 2d 174 (1950). The court states the purpose of the Act to be the protection of the consumer 'From "economic adulteration" by which less expensive ingredients are substituted, or the proportion of more expensive ingredients are [sic] diminished so as to make the commonly identified article inferior to that which the consumer would expect to get when purchasing it, although not in itself deleterious.' 179 F. 2d at 176. Again, the conclusion on adulteration is rested squarely on the deception potential of the product sold in relation to a familiar standard.

"In the instant case, undiluted orange juice is the only defined and familiar food pointed out in the label and in evidence as possibly to be confused with Bireley's Orange Beverage. We therefore agree with the claimant that the issue on this aspect of the case is squarely this: Would the ordinary consumer confuse claimant's product with undiluted orange juice? Cf. *United States v. Nesbitt Fruit Product*, 96 F. 2d 972 (5th Cir. 1938).

"Legislative consideration of the problem of standards under the Act gives further support to our conclusion that Section 402 (b) (4) is not applicable if the allegedly adulterated food is its own only standard. The inability of the government to establish enforceable standards for fabricated foods, considerably hampered the work of enforcement of the 1906 Act. The solution to this problem suggested in the course of legislative consideration of the 1938 bill, and in due course adopted, was the enactment of provisions giving the Secretary of Agriculture power to promulgate standards of identity for foods. Such standards were to be imposed only after full and fair hearing.⁵

"Questions of various permissible degrees of dilution which were regarded below as relevant and in issue are peculiarly appropriate for disposition by this administrative technique. Under the required administrative procedure, the whole industry can participate in the determination whether orange-flavored soft drinks are capable of satisfactory definition, how their composition should be restricted, and even whether such a food as orange drink, or any of its variants, should be permitted in commerce. Cf. *Federal Security Administrator v. Quaker Oats Co.*, *supra*.

"However, we agree with the government that it is not necessary that this channel be used. We agree that the statute does not foreclose the procedure used here. But as already indicated, we think the procedure used here permits condemnation only where there is confusion with a defined superior product. If the government would go further it must undertake the formulation of standards of identity in this area.

"The trial court's instruction to the jury did not ask simply and directly whether the Bireley product could be confused with undiluted orange juice. Nor did it ask anything sufficiently close so that we can say that the issue was in effect determined. The court did charge that the government was required to prove that, by virtue of the additions made, the product 'has the capacity to deceive.' And it also charged that 'one type of economic adulteration is

⁵ The House Report on the Act of 1938 stated: "Section 401 provides much needed authority for the establishment of definitions and standards of identity and reasonable standards of quality and fill of container of food. One great weakness in the present food and drug laws is the absence of authoritative definitions and standards of identity except in the case of butter and some canned foods. The Government repeatedly has had difficulty in holding such articles and commercial jams and preserves and many other foods to the time-honored standards employed by housewives and reputable manufacturers. The housewife makes preserves by using equal parts of fruit and sugar. The fruit is the expensive ingredient, and there has been a tendency on the part of some manufacturers to use less and less fruit and more and more sugar.

"The Government has recently lost several cases where such stretching in fruit is involved because the courts held that the well-established standards of the home, followed also by the great bulk of manufacturers, is not legally binding under existing law. By authorizing the establishment of definitions and standards of identity this bill meets the demands of legitimate industry and will effectively prevent the chiseling operations of the small minority of manufacturers, will in many cases expand the demand for agricultural products, particularly for fruits, and finally will insure fair dealing in the interest of the consumer."

that which makes the product, although not deleterious, inferior to that which consumers expect to receive when purchasing a product under the name by which it was sold.' But the jury was left free to find economic adulteration if it concluded merely that consumers considered the drink less diluted than in fact it was. Thus, we think the charge of the trial judge did not make the issue clear. It fell short of laying bare the decisive question whether in all the circumstances of acquisition the food was likely to be confused with or mistaken for orange juice. In a new trial that issue should be made entirely clear to the jury.

"Several additional issues were raised. Disposition of two of them seems desirable in view of the fact that the case is to be retried.

"Appellant objected to the admission by the district court of certain surveys taken on behalf of the government. These surveys collate answers given by some 3539 persons to questionnaires prepared by the government to determine what they thought was contained in the Bireley product. Many objections were made to the manner in which the surveys were taken. The principal contention, however, was that the surveys were hearsay and therefore inadmissible. The hearsay objection is unfounded. For the statements of the persons interviewed were not offered for the truthfulness of their assertions as to the composition of the beverage. They were not offered to prove that Bireley's Orange Beverage is or is not orange juice. They were offered solely to show as a fact the reaction of ordinary householders and others of the public generally when shown a bottle of Bireley's Orange Beverage. Only the credibility of those who took the statements was involved, and they were before the court. The technical adequacy of the surveys was a matter of the weight to be attached to them. And claimant was properly permitted to introduce elaborate testimony on this point.

"Appellant has also challenged the trial court's admission of testimony and exhibits showing the harmful and painful effects of lack of vitamin C in the diet. It was admitted that Bireley's does not contain vitamin C and that fresh orange juice does. Libellant was permitted to introduce testimony of an expert who had conducted an experiment with sixteen guinea pigs, six of which had been fed a teaspoonful of orange juice per day, six of which had been fed Bireley's, and four of which had been given still a different diet containing no vitamin C. After 21 to 26 days of this, the six orange-juice-fed guinea pigs were in fine condition, but the other ten pigs had all died in apparent agony. The expert produced pictures of the guinea pigs with their legs drawn up in apparent agony. Moreover, later evidence was permitted to be introduced showing the development of scurvy in children who drank an orange flavored drink but received no vitamin C.

"We agree with appellant that the admission of such testimony was neither necessary nor proper. It is impossible to calculate the effect of such testimony in creating prejudice rather than objective conviction in the minds of the jurors. The only proper issue was the relative food value of orange juice and the Bireley product. It would hardly be disputed, certainly it could be proved simply and impressively yet without sensationalism, that orange juice is much more nutritious, much better in a dietary sense, than Bireley's. Although sensational and shocking evidence may be relevant, it has an objectionable tendency to prejudice the jury. It is, therefore, incompetent unless the exigencies of proof make it necessary or important that the case be proved that way. There was no such need here. On another trial, such evidence should be excluded.

"For the reasons heretofore given, the decree of condemnation will be vacated and the case remanded to the district court for further proceedings not inconsistent with this opinion."

On May 7, 1951, the Government filed its petition for reargument of the case, and the claimant filed a petition for reargument on the single issue of the admissibility of the surveys. Both petitions were denied by the court on May 28, 1951, after the hearing. On June 5, 1951, the Court of Appeals for the Third Circuit issued its mandate that the judgment of the district court be reversed in favor of the claimant, General Foods Corp. The Government petitioned for a writ of certiorari in the Supreme Court of the United States

and petitioned the court of appeals to recall its mandate and stay further proceedings until determination by the Supreme Court on the question of granting certiorari. The Supreme Court denied certiorari on October 22, 1951, and on October 25, 1951, the mandate of the court of appeals was filed in the district court. The decree of December 20, 1949, was ordered set aside, and the case was restored to the docket for further proceedings, in accordance with the mandate and opinion of the court of appeals.

On June 30, 1952, the case was dismissed without prejudice and without costs; the bond was ordered discharged, and the goods were ordered returned to the claimant.

19102. Alleged adulteration of beer. U. S. v. C. O. & W. D. Sethness Co., and Charles O. Sethness 2d and Walter D. Sethness (Esterex Co.). Defendants' motion granted to dismiss information; amended information and second amended information dismissed on motion of defendants. (F. D. C. No. 25593. Sample Nos. 36197-H, 67358-H, 67441-H, 69312-H.)

INFORMATIONS FILED: January 26, 1949, against C. O. & W. D. Sethness Co., a corporation, Chicago, Ill., and Charles O. Sethness 2d and Walter D. Sethness, individuals, president and secretary-treasurer, respectively, of the corporation and also trading as the Esterex Co., at Chicago, Ill.; information amended July 25, 1949, and January 17, 1950.

INTERSTATE SHIPMENT: On or about September 13, 1946, into the State of Oklahoma, and on or about September 24 and October 3, 1946, into the State of Kansas, by King Cole Breweries, Inc., from Chicago Heights, Ill.; and on or about November 7, 1946, into the State of Michigan, by the Atlantic Brewing Co., from Chicago, Ill.

ALLEGED VIOLATION: The information as amended alleged that within the period from on or about July 1, 1946, to on or about October 3, 1946, the defendants caused to be delivered to King Cole Breweries, Inc., at Chicago Heights, Ill., and within the period from on or about January 24, 1945, to on or about October 2, 1946, caused to be delivered to the Atlantic Brewing Co., at Chicago, Ill., various quantities of Schoenen Chloracetic Acid Solution, a poisonous and deleterious substance, which was manufactured and sold by the defendants for use in food products and which, as the defendants well knew, contained a poisonous and deleterious substance, monochloroacetic acid.

The information as amended alleged further that the defendants knew that the product added to food was unsafe within the meaning of Section 406 and that the introduction into interstate commerce of any food containing the product was unlawful because such food was adulterated within the meaning of Section 402 (a) (2); that King Cole Breweries, Inc., and the Atlantic Brewing Co. were engaged in the manufacture of beer and in the introducing of such beer into interstate commerce; that the defendants intended that the product, Schoenen Chloroacetic Acid Solution, be added to the beer manufactured by the breweries and had reason to know that the breweries would add the product to the beer they were manufacturing, to be introduced and delivered for introduction into interstate commerce; that the defendants counseled and recommended to the breweries that the product be added to the beer they manufactured wherever such beer was sold and delivered, and the defendants sold and delivered the product to the breweries for that purpose; and that the breweries added the product in the manufacture of beer and made the interstate shipments of various quantities of beer to which the