

4190. Misbranding of "Matusow's Nulfey." U. S. v. Harry Matusow. Tried to the court and a jury. Verdict of guilty. Fine, \$200 and costs. (F. & D. No. 6387. I. S. No. 9632-e.)

On June 6, 1915, the United States attorney for the Eastern District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district, an information, and on July 29, 1915, an amended information, against Harry Matusow, Philadelphia, Pa., alleging shipment by said defendant, in violation of the Food and Drugs Act, as amended, on or about January 28, 1913, from the State of Pennsylvania into the State of Maryland, of a quantity of "Matusow's Nulfey" which was misbranded. The product was labeled: (On bottle) "Matusow's Nulfey Trade Mark (Reg. U. S. Pat. Office.) A rational remedy for Rheumatism, Paralysis, Gout, Liver, Kidney, Bowel and Bladder Troubles. Uric Acid Solvent and System Regulator. Price, 50 cents. Originated, Owned and Distributed by Harry Matusow, Ph. G., Chemist, 3d St. and Columbia Ave., Philadelphia, Pa., U. S. A. For Sale by All Druggists. Directions Take two tablets, followed by half-a-tumblerful or more of water, four times a day, before or after eating and at bedtime. You must have three bowel movements each day, to get the full benefit of the medicine. If you have more than three movements, take less medicine; if you have less than three, take more medicine. Children less, according to age. For fuller directions, see pages 2 and 3 of booklet. Guaranteed by Harry Matusow under the Food and Drugs Act, June 30, 1906. No. 3213." (On cartons) "Matusow's Nulfey Trade Mark (Reg. U. S. Pat. Office.) (Tablets) A rational remedy for Rheumatism, Paralysis, Gout, Liver, Kidney, Bowel and Bladder Troubles. Uric Acid Solvent and System Regulator. Price 50 Cents Originated, Owned and Distributed by Harry Matusow, Ph. G., Chemist, 3d St. and Columbia Ave. Philadelphia, Pa., U. S. A. For Sale by All Druggists Blood Purifier Matusow's Nulfey is a Blood Purifier of exceptional merit. It tends to remove humors from the Blood and to Clear the Skin and Complexion. It is a Blood Purifier that does not weaken the system—on the contrary it imparts to it tone and strength. It removes that tired, drowsy and ambitionless feeling and increases the appetite. Matusow's Nulfey A Rational System Remedy For Rheumatism, Paralysis, Gout, Liver, Kidneys, Bowels, Bladder, Stomach and the Blood, Guaranteed by Harry Matusow under the Food and Drugs Act, June 30, 1906. No. 3213 Rheumatism Remedy Matusow's Nulfey is a remedy which will cure any case of Rheumatism that is curable. It assists the Kidneys, Liver and Bladder, and tends to restore a healthy activity." The booklet accompanying the product contained, among other things, the following statements: "Mr. Albert F. Rathgeber, of 975 N. Lawrence Street, Philadelphia, Pa., suffered for over five years from a condition which caused him to be perfectly helpless from his hips down; he could not take two steps without falling; his bowels and urinary organs seemed to be paralyzed, which caused chronic constipation and involuntary voidance of the urine. He could not get in or out of bed without assistance. The doctors pronounced his case locomotor ataxia, and incurable. He tried every remedy he heard of, without deriving the slightest relief from any of them. He was recommended by a friend to try Matusow's Nulfey (tablets). The first bottle improved his condition; he continued to use Matusow's Nulfey (tablets) until he was cured. He can now walk, his bowels move regularly, has control in retaining his urine, and tends to his work remarkably well for a man of his age." "Kidney and Bladder Troubles, Bright's Disease, Diabetes, Dropsy, Hydrocele and Stone in the Kidney. As a remedy for disorders of the Kidneys, Bladder and Urinary Channels, the value of Matusow's Nulfey (tablets) has been established, and is already too well demonstrated in thousands of cases

to need any comment on our part. The results it has accomplished, many in cases pronounced incurable and chronic, even in cases diagnosed as Bright's Disease, Diabetes and Dropsy, speak for its efficacy in a manner that the most skeptical cannot disregard. Its combined Diuretic and Tonic properties constitute an effective remedy in such diseases. It assists the kidneys to perform their functions, at the same time that it promotes functional activity in all other organs, thereby providing help for the Kidneys while they are regaining their normal tone. It stops excessive action of the mucous membrane, attendant upon catarrh of the urinary organs, and relieves the urine of unnatural sediment, such as sand or gravel." "Matusow's Nulfey (tablets) is the best remedy for all Stomach Troubles." "Gall Stones The cause of Gall Stones frequently is a bad liver. The bile hardens and forms various sized and shaped stones, which lodge in the tube carrying the bile. The intense and agonizing pains experienced by the poor sufferer are well known. There is no remedy known to science which is of equal benefit as Matusow's Nulfey (tablets) in the treatment of Gall Stones. Use Matusow's Nulfey (tablets) early and persistently and you will not have occasion to go under the surgeon's knife." "Appendicitis. Is generally the result of undigested food fermenting and rotting in the Appendix. A weakened bowel and Constipation help to bring it on. An attack of Appendicitis comes on suddenly, with intense colicky pains. 'Physics' are useless when the Appendix gets weak and helpless. Matusow's Nulfey (tablets) strengthens the Appendix and disinfects the bowels, stopping all fermentation. The safe way to guard against an attack of Appendicitis is to keep the food canal clean and healthy with Matusow's Nulfey (tablets)." "A trial will convince the most skeptical of the merits of Matusow's Nulfey (tablets) in the treatment of all skin diseases."

Analysis of a sample of the product by the Bureau of Chemistry of this department showed the following results:

Sodium salicylate (per cent) ----- 51.8
 Alkaloid (probably berberine): Present.
 Colchicine, quinine, strychnine, morphine, arsenic: Absent.
 Emodin: Present.

Misbranding of the article was alleged in the information for the reason that the following statements regarding the therapeutic or curative effects thereof, appearing on the label aforesaid, to wit, "Matusow's Nulfey * * * A rational remedy for * * * Paralysis, Gout, Liver, Kidney, Bowel and Bladder Troubles * * * Matusow's Nulfey is a Blood Purifier of exceptional merit * * *. A Rational System Remedy for * * * Paralysis, Gout, Liver, Kidneys, Bowels, Bladder, Stomach and the Blood * * *," were false and fraudulent in that the same were applied to said article knowingly and in reckless and wanton disregard of their truth or falsity so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that it was in whole and [or] in part composed of, or contained, ingredients or medicinal agents effective, among other things, as a remedy for paralysis, gout, and liver, kidney, bowel, bladder and stomach troubles, and effective as a blood purifier; when, in truth and in fact, said article was not in whole or in part composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a remedy for paralysis, gout, or liver, kidney, bowel, bladder or stomach troubles, or effective as a blood purifier. Misbranding was alleged for the further reason that the following statements regarding the curative or therapeutic effects of the article, included in the booklet aforesaid, to wit, "Mr. Albert F. Rathgeber * * * suffered for over five years with a condition which caused him to be perfectly helpless from his

hips down; he could not take two steps without falling; his bowels and urinary organs seemed to be paralyzed, which caused chronic constipation and involuntary voidance of the urine. He could not get in or out of bed without assistance. The doctors pronounced his case locomotor ataxia, and incurable.

* * * He was recommended by a friend to try Matusow's Nulfey (tablets). The first bottle improved his condition; he continued to use Matusow's Nulfey (tablets) until he was cured. * * *, " * * * Bright's Disease, Diabetes, Dropsy, Hydrocele and Stone in the Kidney. * * *

The results it has accomplished, many in cases pronounced incurable and chronic, even in cases diagnosed as Bright's Disease, Diabetes and Dropsy, speak for its efficacy in a manner that the most skeptical cannot disregard. Its combined Diuretic and Tonic properties constitute an effective remedy in such diseases. * * *,

"Matusow's Nulfey (tablets) is the best remedy for all Stomach troubles,"

" * * * There is no remedy known to science which is of equal benefit as Matusow's Nulfey (tablets) in the treatment of Gall Stones. Use Matusow's

Nulfey (tablets) early and persistently and you will not have occasion to go under the surgeon's knife," "Appendicitis * * *

Matusow's Nulfey (tablets) strengthens the Appendix and disinfects the bowels, stopping all fermentation. The safe way to guard against an attack of Appendicitis is to keep the

food canal clean and healthy with Matusow's Nulfey (tablets)," "A trial will convince the most skeptical of the merits of Matusow's Nulfey (tablets) in

the treatment of all skin diseases," were false and fraudulent in that, by means of the said booklet, they were applied to said article knowingly and in reckless

and wanton disregard of their truth and falsity so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of purchasers

thereof the impression and belief, that it was in whole and [or] in part composed of, or contained, ingredients or medicinal agents effective, among other

things, for the cure of locomotor ataxia, and effective as a remedy for Bright's disease, diabetes, dropsy, hydrocele, stone in the kidney, and all stomach

troubles, and effective as a remedy in the treatment of gall stones, and effective as a remedy for, and preventive of, appendicitis, and effective in the treatment

of all skin diseases; when, in truth and in fact, said article was not in whole and [or] in part composed of, and did not contain, ingredients or medicinal

agents effective, among other things, for the cure of locomotor ataxia, or effective as a remedy for Bright's disease, diabetes, dropsy, hydrocele, stone in the

kidney, or all stomach troubles, or effective as a remedy in the treatment of gall stones, or effective as a remedy for, or preventive of, appendicitis, or

effective in the treatment of all skin diseases.

On September 20, 1915, the case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury on September 22, 1915, by the court (Thompson, J.):

Gentlemen of the jury, the defendant is charged by the Government in this case with the violation of an act which prohibits the shipping in interstate commerce of certain articles of food and drugs. The specific charge in the case is that he shipped from the State of Pennsylvania into the State of Maryland certain drugs which, within the meaning of the act of Congress, the Government charges were misbranded. The specific charge of misbranding consists, in the charge of the Government, that the package or labels bore or contained statements regarding the curative or therapeutic effect of the article, or of its ingredients, which were false and fraudulent. So that in order to sustain the Government's charge in the case, the fact of shipment from one State to another being admitted, the Government must satisfy you, beyond a reasonable doubt, from the evidence, that the statements contained in the label and on the package were false and fraudulent with regard to their curative or therapeutic effects.

In a criminal case the defendant is presumed to be innocent, and that presumption follows him throughout the case. In other words, the fact that the

Government has made a charge against a man and the district attorney has filed an information against him, or the fact that he is on trial, is not to be regarded by the jury as having any weight in determining the guilt or innocence of the defendant. The presumption is that he is innocent, and the jury must be satisfied from the evidence beyond a reasonable doubt of his guilt, before they are justified in rendering a verdict of guilty.

The charge is that there were statements on the labels and in the pamphlet contained in the packages containing these goods, which were false and fraudulent with regard to their curative or therapeutic effects. So that it is not sufficient for the Government to prove merely that the statements are false, but it must also prove that they are fraudulent, and if the jury are satisfied beyond a reasonable doubt that the statements referred to, which I will refer to in a minute, not only are false, but that the defendant knew them to be false, and that he stated them falsely with the intent to deceive the purchaser, then they would be justified in finding that the statements were false and fraudulent. But if, on the other hand, the jury are not satisfied that the statements are not only false, but that they are fraudulent, beyond a reasonable doubt, then it would be their duty to acquit. So that the mere falsity of a statement would not be sufficient to justify the jury in convicting unless they are satisfied that in stating the falsity the defendant did it knowingly and with intent to deceive and defraud.

The packages are charged in this information with containing certain statements which the Government claims are false and fraudulent. After setting out these statements in the information, the Government charges that the statements were false and fraudulent in that they stated, among other things, that the article contained in the packages was, in whole or in part, composed of or contained ingredients or medicinal agents effective, among other things, as a remedy for paralysis, gout, liver, kidney, bowel, bladder, and stomach troubles, and effective as a blood purifier, when, in truth and in fact, said article was not, in whole or in part composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a remedy for paralysis, gout, or liver, kidney, bowel, bladder or stomach troubles, or effective as a blood purifier.

The other statements are alleged to be false and fraudulent in that they are alleged to have intended to create in the minds of the purchaser the impression and belief that it was an article or drug in whole or in part composed of or containing ingredients or medicinal agents effective, among other things, as a remedy for locomotor ataxia; or effective as a remedy for Bright's disease, diabetes, dropsy, hydrocele, stone in the kidney, or all stomach troubles; or effective as a remedy in the treatment of gall stones; or effective as a remedy for or preventive of, appendicitis; or effective in the treatment of all skin diseases; whereas in truth and in fact these statements are alleged to have been false and fraudulent.

Gentlemen, you have heard the evidence on the part of the Government. The packages with the labels thereon and the pamphlets contained therein, containing the statements which are said to be false and fraudulent, have been offered in evidence before you. The Government has produced witnesses who have analyzed the contents of the packages, and stated what they found upon the analysis of the packages. The Government has called physicians who testified, as you have heard, that in their opinion, the ingredients found in the package were not effective as a remedy for the disorders which it is stated upon the label they are effective for, and that, in their opinion, there are no substances, drugs, which would be effective as remedies, according to the broad statement made on the labels and in the pamphlets. On the other hand, the defendant has called witnesses to show that in the instances in which they have been treated the drug has been effective as a remedy for the disorders for which they stated they were afflicted. Counsel for the defendant also called your attention to the fact that the chemists who put up this article stated that there were nine ingredients in it, which have not been disclosed to you, but six of which, I believe, were not mentioned by the Government's chemists.

You will take all of this evidence into consideration, and determine first whether the statements which are referred to by the Government with regard to the therapeutic and curative properties of this preparation were false. You will take into consideration the evidence of the Government and the expert physicians as opposed to that of the defendant and his witnesses and determine whether the statements were false. If they are false, then it would be necessary for you to go further and be satisfied beyond a reasonable doubt, in your

mind, not only of their falsity, but that the defendant when he made them knew them to be false and intended by making false statements to deceive and defraud. If you are satisfied beyond a reasonable doubt that the statements upon the package as to the therapeutic and curative properties were false and fraudulent, then it would be your duty to return a verdict of guilty. Upon the other hand, if you are not satisfied beyond a reasonable doubt that they were not only false but fraudulent and made with an intent to deceive and defraud the public, then it would be your duty to return a verdict of not guilty. You will bear in mind the general principles that I have called to your attention. In the first instance the presumption of innocence is in favor of the defendant. It follows him throughout the trial, and the burden is upon the Government to overcome that presumption of innocence by proof which satisfies your minds beyond a reasonable doubt.

The defendant has asked me to charge you upon certain points, which are as follows:

"1. The jury are not entitled to convict the defendant unless they are satisfied beyond a reasonable doubt that the statements used by the defendant are false and fraudulent."

That is affirmed.

"2. If the jury find that the defendant used the statements, the subject of the charge, in good faith and believing such to be true, the verdict should be 'not guilty.'"

That is affirmed.

"3. The jury should be satisfied beyond a reasonable doubt as to the guilt of the defendant, and if, upon consideration of the evidence the jury have a reasonable doubt as to the guilt of the defendant, the verdict should be 'Not guilty.'"

That is affirmed.

"4. Before the jury are entitled to consider the guilt of the defendant, the prosecution must have established, beyond a reasonable doubt, all the elements that are required to establish the offense charged, and if it has failed to so do it is the duty of the jury to acquit the defendant."

That is affirmed.

"5. The fact that the prosecution has been instituted by the Government is not to be considered by the jury as evidence of the guilt of the defendant. The defendant is presumed to be innocent, and this presumption stands until overcome by evidence that beyond all reasonable doubt establishes the guilt of the defendant."

That is affirmed.

"6. The jury are not bound to accept as conclusive the opinion of an expert witness as to any fact of the case. The jury are the judges of the evidence, and they must be satisfied in their own minds as to all facts upon which testimony has been offered or opinions expressed."

That is affirmed.

"7. The defendant is entitled to a verdict of 'Not guilty' unless the Government has established by evidence beyond a reasonable doubt that the statements appearing in the shipment of drugs were false and fraudulent regarding the curative or therapeutic effects of the articles, and that the defendant falsely and fraudulently made such statements."

That is affirmed.

"8. The jury must consider all the evidence offered, and if, upon the consideration of the testimony on behalf of both the Government and the defendant, there appears a reasonable doubt as to the guilt of the defendant, the verdict must be 'Not guilty.'"

That is affirmed.

"9. The jury are entitled to consider in support of the charge made against defendant only such statements, printed and published by defendant, as bear upon the curative or therapeutic effect of the tablets."

That is affirmed.

"10. Statements that the tablets are a rational remedy are not statements as to their curative or therapeutic effects."

That is refused.

"11. The jury are to consider no portion of the pamphlet offered in evidence, excepting that to which the Government has offered evidence tending to show a false statement, and this only when such evidence bears upon a statement said to be false, which relates to the curative or therapeutic effects of the defendant's preparation."

That is affirmed.

"12. The evidence of the medical experts is that, except in a few cases, drugs or medicines do not work a cure, but are administered for the relief of the patient, and if the jury find that the statements made by the defendant in no case assert a curative property for his preparation, there can be no conviction."

That is affirmed.

"14. The jury are to disregard any evidence offered by the Government unless the same attaches to the charge set forth in the information, or is in support of an allegation made in the information."

That is affirmed.

"15. The defendant is charged with having misbranded his preparation by the use of false and fraudulent statements as to its curative or therapeutic effects. Unless such has been established beyond a reasonable doubt, the defendant is entitled to a verdict of 'Not guilty.'"

That is affirmed.

"16. One is entitled to boost or puff his own wares and merchandise. He can express his own views as to their worth and merit, and he is not chargeable with any offense for so doing as long as the statements made by him are not false or fraudulent."

That is affirmed.

The Government has asked me to charge you upon certain points, as follows:

"1. It is unnecessary for the Government to prove that all the statements on the label or booklet were false and fraudulent. 'If you believe beyond a reasonable doubt that any one statement as to the curative or remedial properties of this medicine was false in fact, and that the defendant knew that it was false, you may find the defendant guilty.' U. S. v. Johnson, 221 U. S. 488."

That is affirmed.

"2. If you believe beyond a reasonable doubt that this product is not a rational system remedy for paralysis, and that the defendant must have known this, you may find the defendant guilty."

That is affirmed.

"3. If you find beyond a reasonable doubt that this product is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty."

That is affirmed provided it is one of the things which is charged in the information.

"4. If you believe beyond reasonable doubt that any one of the therapeutic claims as to its effect upon paralysis, liver, kidney, bowels, stomach, and the blood and the skin is absolutely false, and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may find the defendant guilty."

That is affirmed.

"5. If you believe beyond reasonable doubt that the defendant knew that any one of these therapeutic statements as charged in the information was false and misleading, you may infer a fraudulent intent and find the defendant guilty."

That is affirmed.

Mr. LOGUE. I will ask your honor for an exception to your refusal to affirm the tenth point presented on behalf of the defendant.

(Exception noted for the defendant as requested, by direction of the court.)

Mr. LOGUE. Also an exception to the thirteenth point presented on behalf of the defendant, which was refused.

(Exception noted for the defendant as requested, by direction of the court.)

(The tenth and thirteenth points presented on behalf of the defendant, which were refused by the court, are as follows:

"10. Statements that the tablets are a rational remedy are not statements as to their curative or therapeutic effects."

"13. Under all evidence the verdict of the jury should be 'Not guilty.'")

The COURT. Gentlemen, you may retire.

The jury thereupon retired and after due deliberation returned into the court with a verdict of guilty. The defendant thereupon entered a motion for a new trial which was withdrawn on October 8, 1915, and on said date the court imposed a fine of \$200 and costs.

CARL VROOMAN, *Acting Secretary of Agriculture.*