

**6337. Misbranding of A Texas Wonder. U. S. \* \* \* v. 60 Dozen Bottles of A Texas Wonder. Tried to the court and a jury. Verdict for the Government. Decree of condemnation and forfeiture. Product ordered destroyed. (F. & D. No. 7981. I. S. No. 12063-m. S. No. C-621.)**

On January 16, 1917, the United States attorney for the Northern District of Texas, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 60 dozen bottles of A Texas Wonder, remaining unsold in the original unbroken packages at Dallas, Tex., alleging that the article had been shipped on or about November 4, 1916, by E. W. Hall, St. Louis, Mo., and transported from the State of Missouri into the State of Texas, and charging misbranding in violation of the Food and Drugs Act, as amended. The article was labeled in part: "A Texas Wonder—Hall's Great Discovery. Contains 43% Alcohol before Diluted, 5% after Diluted. A Texas Wonder, Hall's Great Discovery, for Kidney and Bladder Troubles, Diabetes, Weak and Lame Backs, Rheumatism; Dissolves Gravel, Regulates Bladder Trouble in Children. One small bottle is 2 months' treatment and seldom fails to cure any case above mentioned. Dr. E. W. Hall, Sole Manufacturer, St. Louis, Mo.," and on circular, "For Kidney and Bladder Troubles, Rheumatism, and Kindred Diseases. A Texas Wonder, Hall's Great Discovery, has been employed with success in Rheumatism, Diabetes, Kidney and Bladder Troubles, cases of Gravel and other kindred diseases as appears from the following sworn testimonials and evidence."

Misbranding of the article was alleged in the libel for the reason that the above quoted statements, borne on the label, were false and fraudulent; and for the further reason that said article was labeled, "Dr. E. W. Hall, sole manufacturer," indicating that the product was manufactured by a physician, whereas E. W. Hall was not a physician, and this statement was therefore false and misleading.

On July 2, 1918, 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 by the court (Meek, *D. J.*):

Gentlemen of the jury: The United States procured what is termed in law a libel against 60 dozen bottles, more or less, of Texas Wonder, and took such bottles of Texas Wonder into its possession, charging that the statement on the package containing that liquid, which is denominated Texas Wonder, is false and fraudulent. Thereafter a claimant appeared in court, that is, E. W. Hall, claiming this liquid known as—put up in cartons—and known as Texas Wonder, and denying the allegations, made by the United States in its libel proceeding, to the effect that the allegations or statements on the cartons were false and fraudulent. The issue now on trial before you, and to be determined by the evidence adduced before you from the lips of the witnesses and from the written testimony, in the light of the law applicable to the case, and which is now given you; the issues to be decided by you, first, the evidence and the facts and circumstances in evidence, and second, the law applicable to that evidence, and to those facts and circumstances in evidence.

In the libel it is alleged as follows: "It is further stated that the said property (having reference to the Texas Wonder) is branded and labeled 'Texas Wonder, Hall's Great Discovery, contains 43 per cent alcohol before diluted, 5 per cent after dilution,' and 'Texas Wonder, Hall's Great Discovery for kidney and bladder troubles, diabetes, weak and lame back, rheumatism, dissolves gravel, regulates bladder trouble in children; one small bottle is two months treatment, seldom fails to cure any case above mentioned. Dr. E. W. Hall, sole manufacturer, St. Louis, Missouri.'"

It is further alleged that on the circular it reads, "For kidney and bladder trouble, rheumatism, kidney diseases; Texas Wonder, Hall's Great Discovery has been employed successfully in rheumatism, diabetes, kidney and bladder troubles, cases of gravel and other kidney diseases appears from the following sworn testimony and evidence."

The claimant of the 60 dozen bottles, more or less, of Teaxs Wonder alleges that the medicine will in fact do exactly what is represented that it will do, and that it is in no sense misbranded as in said libel charged, and as proof whereof, he offers sworn testimony of parties who have taken the same and benefited thereby as to its claim in its brand, of which the Government complains.

These, gentlemen, are the issues made by the pleadings in this case, and it is upon these issues which you have heard testimony from the witness stand, and it is from such testimony and evidence and facts and circumstances in evidence that you will reach your conclusion, as I have indicated, being guided and controlled as to the law of the case by the charge of the court.

Section 8 of the Pure Food and Drugs Act, as mentioned by the act of August 23, 1912, reads in part as follows: "That the term 'misbranded' as used herein, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug therein, shall be falsely branded," etc.

Section 3 reads: "If its package or label shall bear or contain any statement, design, or device, regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent"—that is, the article shall be deemed misbranded under the terms of this law if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances therein, which is false and fraudulent.

You have heard the evidence in this case, gentlemen; I need not review it before you. You have heard the argument pro and con upon this suit. I will be of what assistance I may in construing this statute and giving it application to the facts as they have been presented to you from the lips of the witnesses on the witness stand. You have heard the witnesses testify as to certain ailments, and to the fact that they have, among other remedies, secured and availed themselves of what is designated as Hall's Great Discovery, Texas Wonder. On the wrapper or carton containing the bottle, which is the customary method of getting the medicine to the public, is the following: "The Texas Wonder, Hall's Great Discovery for kidney and bladder troubles, diabetes, weak and lame back, rheumatism, dissolves gravel, regulates bladder trouble in children; one small bottle is two months' treatment and seldom fails to cure any case above mentioned."

You have heard from the physicians who have testified before you under oath the various diseases that are met with and commonly affect the kidneys and the bladder; you have heard them testify in regard to weak and lame backs, and it is in the light of their testimony, as well as the testimony of the defendant and the various witnesses introduced by the defendant, that you will determine whether or not the statement which I have read to you from the label is in any particular false and fraudulent; whether or not any part of this label, in the light of the facts adduced from the lips of the witnesses, is in any particular either false or fraudulent.

It is not difficult to grasp the object of our lawmakers in placing this law or enactment upon the statute books. It is for the protection of our citizens, to prevent medicine, through false statements made for the purpose of gain on the part of the person making them, and by which the individual citizen will be mulcted and defrauded by the purchase of goods which are misrepresented to him or to her. At the same time, the law is placed there on the statute books for the benefit and the protection of those who have remedies which they wish to submit to the citizenship of the country through the various channels of trade, and at the same time receive the protection of the law for their candid, true, and straightforward statements with regard to the result to be expected from the use or taking or the application of the medicine, or whatever pursuit it may be.

The evidence before you—I say this, I think, having considered it carefully and deliberately—is not, on the part of either party to this action, of the most convincing nature. It is not of a nature which is calculated to carry conviction to one who is reaching a conclusion on such evidence and facts and circumstances in evidence, about the correctness of which there can be no question whatever. The question is whether or not it is true in each and every particular thereon, every statement thereof. Witnesses have taken the stand and testified that they had weak backs, or testified that they had trouble with their liver or with their kidneys, and that they were benefited thereby. I believe some said that they were cured thereby, but the question is whether or not this treatment, as stated in the advertisement, seldom fails to cure any case above mentioned, which includes a number of cases, and I have reviewed them to you two or more times. The owner is not upon trial for a violation of the law in a criminal sense, but we are here to determine whether or not the original owner, the one who shipped out these cartons, is entitled to their return from the United States, they having been libeled by the United States, because he has been wrong, and because no such misstatement as it is claimed by the United States occurs in this advertising—that is the question. Is there a false and fraudulent

misstatement made in the advertisement which I have read to you, and which you have been considering for days, which justifies and warrants the United States in taking hold of and appropriating this 60 dozen bottles of Texas Wonder? Is there such false and fraudulent misrepresentation here as justifies the jury in saying these bottles should be appropriated and set aside, put aside, should not be returned to the owner thereof, who is here in court before you gentlemen claiming them? That is the function which you are to perform, sitting as judges of the facts.

Now, if you believe from the evidence, by a greater weight and preponderance thereof, that the advertisement contained in the paragraphs which I have read to you, is, and the statement contained in such advertisement regarding the curative and therapeutic effect of such article—that is, these bottles of Texas Wonder, or any of the ingredients or substances contained therein are false and fraudulent—then, in that event you will deny the application of the intervener to have these 60 dozen bottles, or thereabout, returned to him. On the other hand, if you believe—if you do not find from the evidence and facts and circumstances in evidence, that by a preponderance of the evidence that—that the statement concerning the therapeutic and curative effect of this remedy was false or misbranded—false and misbranded, then, and in that event you will—your verdict will be in favor of the claimant.

There must be in the advertisement or statement concerning drugs contained in the carton, a statement made, which in its nature is false, and which is fraudulently made. Now, then, did it seldom fail to cure any of the ailments stated in the face of the statement, concerning which—concerning the drug, did it, or did it not? That is for you, gentlemen, to decide. If it did fail, was the statement falsely placed there?

You gentlemen are the exclusive judges of the witnesses, and of the facts proved by the testimony given in evidence. If there is anything about the testimony of a witness that you hesitate about believing, you may take that into consideration. Does he testify fully and frankly, or does he exhibit a desire to see one side rather than be perfectly fair? You gentlemen, not the court, are the exclusive judges of the credibility of the witness and the weight to be given to their evidence, and of the facts proved by their evidence.

I believe I have covered in sort of a desultory and rambling way all the issues in this case. You gentlemen will take the case, and if you find against the claimant Hall you will simply say, "We, the jury, find for the United States." If you find for the claimant, your verdict will be, "We, the jury, find claimant entitled to the sixty dozen bottles," or whatever the portion is, "of the Texas Wonder."

Are there any suggestions?

Mr. ATWELL. No suggestions except the formal exception to the refusal of these special charges.

The COURT. I think I have given you this, although I will read it. You are instructed, that inasmuch as the Government charged the medicine was falsely and fraudulently branded, it is necessary to prove this allegation, and if you do not find that proven by a preponderance of the testimony, you will find for the claimant.

Now then, gentlemen, I feel that I should say that evidence pertaining to that is not only—is almost entirely circumstantial evidence, and circumstances which tend, either tend to or do not tend to prove—what were the ingredients of the medicine; what is the testimony as to whether or not they would cure the different ailments set forth and described in the writing or printing on the carton. Are these true? If not true, why was it put there? Is it false? If you should say, "Yes," then was it fraudulently done? What inspired the fraud, if perchance there was fraud? I am simply making these suggestions in order that you may have the views and mind of the court to assist you upon your deliberations. You will retire to your room, gentlemen, select your own foreman, and try to let your verdict reflect the truth of the transaction.

Thereupon the jury retired, and after due deliberation returned a verdict in favor of the Government, and on July 3, 1918, the court ordered the entry of a decree of condemnation and forfeiture, providing for the destruction of the product.

C. F. MARVIN, *Acting Secretary of Agriculture.*