to be carefully dissected with a dictionary at hand, but rather to produce an impression upon the ordinary purchaser of such an article and, when so taken, it was open to the jury to conclude that these representations were intended to produce the belief that one teaspoonful of the product was substantially equivalent to one egg for all the purposes, including nutrition, involved in the use of eggs in baking and cooking. With that interpretation, of course, these statements pass beyond mere commendation; and in the aspect of the case presented by the contention that verdict for respondent should have been directed, it is not necessary to consider what would have been the effect of the label if any part of it had been omitted.

"In our opinion the trial judge did not err in refusing to withdraw from the jury's consideration the question of the comparative nutritive value of Eggno. In view of the statements in the label to which we have just referred, the mere reference to baking and cooking is not, in our opinion, enough to confine the statements of quality to considerations of appearance and flavor. The terms 'baking' and 'cooking' relate to foods, and eggs are a well-known article of food, not only alone, but in combination with other articles of food. Granted that the statement that an article is or may be used as a substitute for another article does not amount to an assertion that it is as good for all purposes as such other article, in our opinion the statements upon the label, considered together, can reasonably mean, and could reasonably have been intended to mean, no less than that in ordinary culinary compounds Eggno would produce the same or similar results as eggs.

"It follows from these views that there was no error in the admission of testimony as to the comparative food value of eggs and Eggno. Nor do we think the court erred in refusing defendant's special requests to charge, many of which were expressly based upon the elimination of food values from consideration. While each of the rejected requests did not in terms declare such elimination, all, as frankly said by defendant's counsel (we do not use his statements in detail or in his exact words), were designed to convey to the jury defendant's contention that the nutritive value of a whole egg for all purposes was not in issue, and that the evidence already admitted as to the tissue-building and energy-supplying elements of eggs was incompetent.

"It is thus not material whether or not in the case of some of the refused requests a sufficient ground of refusal was stated. At least as applied to the facts in this case, we find no error in the instruction that the purpose of the label was to 'truthfully advise the purchasers of the contents.' We say this in full recognition of the fact that a label may, in the absence of fraud, be entirely void of any statement of content, and be entirely outside the provisions of the act; but in this case defendant undertook to state generally the nature of the contents of the package.

"While we have not discussed in detail each argument presented by defendant in favor of its contentions, we have carefully considered them all, with the result that we find no error in the proceedings below.

"The judgment of the district court is accordingly affirmed."

HOWARD M. GORE, *Acting Secretary of Agriculture.*

11712. Misbranding and alleged adulteration of Sparkling White Seal. U. S. v. 9 Cases of Sparkling White Seal and U. S. v. 9 Cases of Sparkling White Seal. First case tried to the court and a jury. Verdict and judgment for Government. Case taken to U. S. Circuit Court of Appeals on writ or error. Judgment of lower court affirmed by Circuit Court of Appeals. Decree of condemnation, forfeiture, and destruction. Answer filed by claimant in second case withdrawn. Decree of condemnation, forfeiture, and destruction entered. (F. & D. Nos. 14224, 14636. I. S. Nos. 7619–t, 7621–t. S. Nos. E–3033, E–3166.)

On January 19 and March 17, 1921, respectively, the United States attorney for the Eastern District of Pennsylvania, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district two libels, and on May 10, 1921, an amendment to each of the said libels, praying the seizure and condemnation of 18 cases of Sparkling White Seal, remaining in the original unbroken packages at Philadelphia, Pa., consigned by the Duffy-Mott Co., New York, N. Y., alleging that 8 cases containing large bottles and 1 case containing small bottles of the product had been shipped from New York, N. Y., on or about January 27, 1920, and that 2 cases containing large bottles and 7 cases containing small bottles of the product had been shipped from Bouckville, N. Y., on or about September 14, 1920, and that both consignments of the article had been transported from the

State of New York into the State of Pennsylvania, and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled in part: (Bottle) "Sparkling * * * White Seal * * * Made By Duffy-Mott Co. Inc. New York;" (neck label) "Sparkling White Seal Original D M Co Inc. Bottling."

Adulteration was alleged with respect to a portion of the article for the reason that a substance, to wit, artificially carbonated apple juice, had been mixed and packed therewith so as to reduce and lower and injuriously affect its quality and strength and had been substituted wholly or in part for the said article. Adulteration was alleged with respect to the remainder of the said article for the reason that apple juice flavored with capsicum had been mixed and packed with and substituted wholly or in part for the article. Adulteration was alleged with respect to the product involved in both consignments of the article for the further reason that it was mixed in a manner whereby its damage or inferiority was concealed.

Misbranding of the article was alleged in the libels as amended for the reason that the retail packages in which the article was inclosed had affixed thereto labels which bore certain statements regarding the said article and the ingredients and substances contained therein, to wit, "White Seal," "White Seal Registered," and "Sparkling," which statements were false, in that they represented the article to be a product known as White Seal beverage, which is White Seal champagne, that it was an article, the name of which was registered according to law, and that it was sparkling, whereas, in truth and in fact, it was not White Seal champagne and was not sparkling, but was an imitation of a sparkling article and was an apple juice, artificially carbonated and containing capsicum, and it was not an article, the name of which was a trade mark registered according to law. Misbranding was alleged for the further reason that the said retail packages had affixed thereto labels which bore the statement, to wit, "White Seal Registered," which was misleading in that the said statement represented the article to be "White Seal Registered," that is, White Seal champagne, the name of which, White Seal, was a trade mark registered according to law, whereas, in truth and in fact, it was not White Seal champagne with a trade mark, "White Seal," registered according to law, but was apple juice artificially carbonated and containing capsicum. Misbranding was alleged for the further reason that the said packages bore the statement, to wit, "Sparkling White Seal Registered," and bore designs and devices regarding the said article and the ingredients and substances contained therein, to wit, the cork and neck of the said packages were wired, tin-foiled, and dressed in the manner and way in which the cork and neck of White Seal champagne are wired, tin-foiled, and dressed, which said statements, designs, and devices were misleading, in that they represented the article to be White Seal champagne, whereas, in truth and in fact, it was not White Seal champagne but was an apple juice artificially carbonated and containing capsicum. Misbranding was alleged for the further reason that the article was an imitation of White Seal champagne, prepared so as to simulate in appearance, in color, and in effervescence the appearance and positive qualities of White Seal champagne, whereas, in truth and in fact, it was not White Seal champagne but was an apple juice, artificially carbonated and containing capsicum.

On November 15, 1921, the first case involving 9 cases of the product came on for trial before the court and a jury. After the submission of evidence and arguments by counsel the court charged the jury as follows (Thompson, *J.*):

"Members of the jury: This proceeding is brought by the United States for the seizure and forfeiture of nine cases of Sparkling White Seal. The proceeding is brought under what is known as the Pure Food and Drugs Act. That act was passed about fifteen years ago, and had for its purpose the prevention of transportation in interstate commerce, going from State to State, of articles of foods and drugs that were adulterated or misbranded. In this case we are not concerned with drugs, we are not concerned with adulteration, but we are merely concerned with the alleged misbranding of an article which comes under the class of foods; that is to say, under this act articles fit for use as drinks are included as foods under the terms of the act.

"The law provides that if any misbranded articles are being transported in interstate commerce, from one State to another, they may be seized, and the district attorney on behalf of the Government brings a proceeding to forfeit those articles. That is how this suit began.

"The particular paragraph of the act under which the Government is proceeding in this case is the one which provides that an article shall be deemed misbranded, in the case of food, 'If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.'

"So that in considering this case you are to consider whether the package or its label bears any statement, design, or device regarding the contents of the bottle, which are false or misleading.

"The test of the question as to whether a statement is misleading, or whether a design or device is misleading, is as to whether it would deceive a person of ordinary intelligence in purchasing the package.

"The Government contends in this case that because the package was marked, 'Sparking White Seal,' it was misleading to the ordinary purchaser in that he would think that he was buying White Seal champagne, and it is contended that not only the statement itself is to be taken into consideration, but the manner in which the product is put up and bottled and the manner of the dress of the bottle, which counsel on both sides have referred to.

"On the question of the shape of the bottle, or the sort of cork or wiring with which the bottle is prepared, a bottler has a perfect right to use any shape bottle which suits his fancy, and he has a perfect right to use any sort of cork and wiring for that bottle. So that those things in themselves intrinsically have nothing to do with this case. It is only in the relation that they bear to the effect on the public of whatever is contained on the label or the design or the device regarding the contents. A cork is not a device regarding the contents; neither is a wire; neither is the shape of the bottle. It is only when what is actually contained on the label itself or when any device or design on the label regarding the contents are so associated with the shape of the bottle or manner in which it is put up that they can be taken into consideration.

"The label on the bottle calls this 'Sparkling White Seal.' The owner or the bottler of the beverage has a perfect right, ordinarily, to use any name that suits his fancy for the beverage which he is selling to the public. He can call it 'Sparkling White Seal' or he can call it 'Coca-Cola' or he may call it whatever name suits his fancy so far as the purpose of this act is concerned, unless the name on the label is such as to mislead the public into thinking that it is something else than it is. So that is the point of view from which it is the duty of the jurors to consider the evidence in this case.

"There has been considerable evidence here on the part of men who are wholesale distributors and retailers as to whether or not the words, 'Sparkling White Seal,' put on a bottle fixed up as this bottle is, would mislead a person into thinking that it was champagne. There seems to be no dispute in the case that a dealer would necessarily not be deceived or misled into the belief that a bottle containing the words, 'Sparkling White Seal,' is champagne. If he did he would know, of course, that the man who was selling it to him had no right to sell him 'Sparkling Champagne' or 'White Seal Champagne,' and I think it is generally conceded in the case that dealers who have their eyes open would not be deceived at all. So that the only question for you to determine is whether a consumer would be deceived into thinking that the contents of this bottle was champagne. It is a question for the jurors to consider as a question that might be put up to them or put up to people whom you know are ordinarily intelligent. Would they be misled by the words, 'Sparkling White Seal,' into thinking that they were getting champagne? That is the point of view from which the jury will have to determine this case.

"Take into consideration the fact that there is such a product as White Seal champagne; that incidentally it has been unlawful to sell that, except under orders of a physician, since February 20, 1920; and that the article in this case, as I recall the evidence—the fact is for you to determine—first came out under this label since that time. It is for you to consider, therefore, whether the statement, 'Sparkling White Seal,' is sufficient in connection with the shape of the bottle, the style of the cork, the wrapping, the tin foil, and so on, taken in connection with everything else that is on the bottle, to lead anyone of ordinary intelligence to think that he was getting champagne when he asked for Sparkling White Seal. A man may call his beverage 'sparkling' if it is sparkling. That is no fraud on the public. He may call it White Seal and adopt that as his name for the article if that suits his fancy, and if he happens to infringe on someone else's trade-mark, that is a matter between him and the

party having the trade-mark, a matter with which we are not concerned in this case except in so far as it will affect the public who are buying the article.

"If the jury believe that the use of the words, 'Sparkling White Seal,' taken in connection with the way the bottle is put up, is a misleading statement, and taken in connection with everything else that is contained on the label the jury believe that the public generally would be deceived into thinking that they were buying champagne when in fact they were getting carbonated apple juice, with some capsicum in it, then the Government has made out its case.

"A statement may be misleading in many respects. It may be misleading by what it says. It may be misleading by what it fails to say. Under the charge in this case, you must find, if you find in favor of the Government, that it was misleading in the sense that it would be mistaken for champagne. The fact that it does not show it is apple juice, or it does not show that it has capsicum in it, or that it does not show that it is carbonated,—those are matters of no consideration at all unless they deceive a person into thinking that it is what the Government says that its label in this case would deceive a person into thinking it was. In other words, the Government has stood on the charge of similarity in labels. The jury must find not that they might think it was some other kind of apple juice, or they might think it was some other kind of beverage, but they must think it was champagne. If the public is not deceived into thinking it is champagne, then the Government has failed to make out a case.

"The burden is on the Government in this case to satisfy the jury by a preponderance of the evidence that the charge against this particular article is made out. If the Government has failed to convince you that the public generally would be misled, then your verdict should be for the defendant. If the Government has produced sufficient evidence from which you believe that the ordinary purchaser would be misled into supposing that he was buying champagne when in fact he was getting this other article, then your verdict should be for the Government.

"The defendant has offered in evidence other bottles containing apple juice cider and other things of the same shape. So that it is apparent, that evidence being uncontradicted, that the same shape of bottle has been used for other things than champagne for a considerable time. Therefore, if you find from the evidence that it would be a mere mistake of the purchaser, supposing he was getting one sort of apple juice when he was getting another, he would not be misled within the pleadings in this case. The Government has got to make out its case as it has alleged it.

"The district attorney has asked me to charge you on certain points in the case. The first point is declined.

"The second point reads as follows: '2. You may consider whether the words, "White Seal," is [are] sufficiently known in connection with White Seal champagne as to be misleading when used in connection with an article of the style and general make-up and labeling of this article.' That point is affirmed.

"The third point is declined.

"'4. If you find that the package containing the article or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular your verdict must be for the Government.' That point is affirmed.

"The fifth point is declined. This is not a trade-mark case.

"The defendant has asked me to charge you on certain points.

"'1. There is no claim by the Government that the contents of the bottles, which are the subject matter of this suit, are in any way injurious to public health. The only complaint against the said bottles is that they are misbranded, in that the public is deceived into the belief that the contents are champagne.' That point is affirmed. 'If you find that there is no misbranding of the contents, then your verdict should be for the defendant.' That is part of the same point, and it is affirmed.

"The second point is declined. I am declining these points because they contain a long recital of the contention of counsel for the defendant, which, in my opinion, is no part of the charge.

"The third point is declined.

"'4. It has not been shown by the Government that these bottles have been sold as containing champagne, but even were this so, it might be an offense upon the part of the vendor who misrepresented the goods, but unless the

bottles themselves are branded in such a way as to deceive the public, the fact that someone misrepresented their contents would have no effect upon the situation, and if you find that there was no misbranding, then your verdict should be for the defendant.' That point is affirmed.

"The fifth point is declined.

"'6. There is no provision under the laws of the United States which in any way seeks to prevent the use by vendors of a trade name or title upon the packages containing the goods which they sell, and I charge you that so far as the words, "Sparkling White Seal," are concerned, that was a perfectly legal phrase to be used upon the bottles which are the subject of this suit, provided you find that the use of this phrase was not a statement, design, or device, regarding the article contained in the bottles or the ingredients or substances contained therein, which was false and misleading, and that this branding of this name is of such a character as to deceive or mislead the purchaser into believing that he or she was purchasing champagne. If you find, therefore, the use of this phrase or the branding of the bottle shown was not of such a character as to deceive or mislead purchasers, then your verdict should be for the defendants.' That point is affirmed.

"'7. The Government does not claim that anyone was deceived in the purchase of this product by supposing that they were obtaining champagne excepting those who were thus participating in a sale which would have been illegal if it had been champagne. I charge you, therefore, that the Food and Drugs Act was not enacted to protect those engaged in violating the law. If you find that none others were so deceived, your verdict should be for the defendant.' After reading that point, I conclude to decline it. Parties purchasing champagne under a physician's prescription are entitled to protection.

"'8. By the Service and Regulatory Announcement 366 in S. R. A., Chem. 26, issued December 30, 1920, by the United States Government, the following appears as a statement of the decision of the Government in reference to the use of the word "sparkling": "As a result of prohibition legislation conditions have now changed to such an extent that the use of the term 'sparkling' on fruit juices, which are unfermented, is no longer regarded as deception or misleading." As the plaintiffs in this case, therefore, do not claim that the use of the word "sparkling" on fruit juices of the character contained in the bottles which are the subject of this suit is illegal, and if you find that the use of that word is the basis for the claim that these bottles are calculated to deceive or mislead the public, your verdict should be for the defendant.' That point is affirmed. It only applies in case you find that the sole charge of misbranding is based on the use of the word 'sparkling.'

"'9. The Government is bound to convince you by a fair preponderance of evidence that the markings on these bottles which are the subject of the suit are of such a character as to deceive and mislead purchasers thereof into a belief that they are buying champagne, and if the Government has failed to so convince you, then your verdict should be for the defendants. In a case of this character, the burden is on the United States to satisfy you that the branding is of such a character as will deceive the public.' That point is affirmed.

"The tenth point is declined.

"The plaintiff's first point, which was declined by the court, reads as follows: '1. You may consider whether the style of dress and general make-up of this bottle containing this article, without any word or words plainly descriptive of the article, is misleading.'

"The plaintiff's third point, which was declined by the court, reads as follows: '3. I charge you that the purpose of a label is to truthfully advise the purchaser of its contents. This is the purpose of the label or should be.'

"The plaintiff's fifth point, which was declined by the court, reads as follows: '5. A trade-mark is not by itself such property as can be transferred, and the right to use it can not be assigned except as incidental to the transfer of the business or property in connection with which it has been used. A transfer of the right to use it in connection with a different article, or one of a different manufacture, would result in deceiving the public as to the article or its origin, which it is the sole legitimate purpose of a trade-mark to present.'

"Defendant's second point, which was declined by the court, reads as follows: '2. It is necessary that the Government should establish to your satisfaction that the bottles which are the subject of this suit are branded in such a way as to deceive the purchasers of the same, in that they are induced

to believe that the contents of the bottles consist of champagne. It is contended by the defendants that no such deceit can possibly arise by reason of the fact that there is no mark or indication upon the bottles that the same contain champagne, and that there is no champagne in existence which has been sold under the name of "Sparkling White Seal;" there is or was a champagne known by the name of "White Seal" but the word "sparkling" was not attached to the same, and the bottle of this champagne which has been offered in evidence does not bear either labels or marks which in any way resemble the bottles which are the subject of this suit. It is necessary for you to find that these bottles about which complaint is made are marked and dressed in such a way as would deceive the public into believing that they were buying champagne, and unless you can find that the marking and dressing of the bottles is of such a character as would so deceive the public, your verdict should be for the defendants.'

"Defendant's third point, which was declined by the court, reads as follows: '3. It is contended by the defendants that no purchaser could be deceived by the marking or dressing of the bottles which are the subject of this suit by a belief that he or she was purchasing champagne. Since the prohibition law went into effect it is illegal or criminal for anyone to sell champagne excepting under the orders of a physician and, as the vendors and purchasers of drinks at the present time are presumed to be innocent of any intent to break the laws of their country, it is contended by the defendants that there is a presumption which applies to both vendor and purchaser of drinks that neither of them will violate the law and that this presumption enters into the question of deceit as regards these bottles, since no person can be accused without evidence of intending to violate the law by the purchase of an unlawful drink, and if you find this to be the condition you may presume that neither the vendors or the purchasers of these bottles could be deceived into believing that they were purchasing champagne, and if you so find, your verdict should be for the defendants.'

"Defendant's fifth point, which was declined by the court, reads as follows: '5. It is further contended that those who are familiar with champagne could not by any possibility be deceived into purchasing the contents of those bottles as champagne, since there is no name upon them which refers to the contents as being champagne and the bottles themselves are marked and dressed in a manner entirely different from any bottles containing champagne which have been produced by the Government. It is contended that those who do not use champagne could not be deceived for they would not purchase these goods as champagne, and those who are familiar with champagne would not purchase the goods because they would be certain from their experience that they were not getting champagne in a bottle marked and dressed as these bottles are.'

"Defendant's seventh point, which was declined by the court, reads as follows: '7. The Government does not claim that anyone was deceived in the purchase of this product by supposing that they were obtaining champagne excepting those who were thus participating in a sale which would have been illegal if it had been champagne. I charge you, therefore, that the Food and Drugs Act was not enacted to protect those engaged in violating the law. If you find that none others were so deceived, your verdict should be for the defendant.'

"Defendant's tenth point, which was refused by the court, reads as follows: '10. Under all the evidence in this case, your verdict should be for the defendant.'

"The COURT. I will say to the jury in this case that your verdict must either be for the plaintiff or for the defendant. There will be no damages of any sort. It will be merely a verdict for the plaintiff or for the defendant."

The jury then retired and after due deliberation, on November 16, 1921, returned a verdict for the Government. On January 9, 1921, a motion for a new trial was denied by the court. On March 18, 1922, judgment was filed. On January 15, 1923, the case having been taken to the Circuit Court of Appeals for the Third Circuit on a writ of error, the judgment of the lower court was affirmed as will more fully and at large appear from the following opinion (Buffington, *C. J.*):

"In the court below, the Government seized for forfeiture nine cases of Sparkling White Seal, which the Duffy-Mott Co. appeared and claimed. Thereupon, the alleged cause of forfeiture was tried by a jury and a verdict having been found for the Government and judgment entered thereon, claimant brought this writ of error.

"The decisive question is the alleged error of the court in refusing claimant's request for binding instructions. After examination of the issue and proofs, we are of opinion the point was properly refused.

"The proceeding was under the Pure Food and Drugs Act which provides: "'an article shall [also] be deemed [to be] misbranded * * * In the case of food: * * * If the package containing it or its label shall bear any statement, design, or device * * * which statement, design, or device shall be false or misleading in any particular.'

"The proofs show a well-known brand of champagne, called White Seal, was sold in a distinctive bottle, the mouth of which was sealed with a white cap or covering. Such champagne could be sold by a druggist on prescription under legal permit. The claimant put carbonated apple juice, with capsicum added, into bottles, which in form and dress bore semblance to the White Seal champagne, and labeled them 'Sparkling White Seal.'

"Referring to some, but not all of the testimony, one witness, experienced in the champagne trade, testified: 'The appearance of the bottle is misleading. At a distance I would think it was a pint of champagne.' The testimony of another experienced witness was:

"'Q. In "design" and "device," can you say whether or not that bottle is misleading?'

"'A. It appears to me from here a bottle of champagne, as I would understand it.'

"'Q. Can you say whether or not in its general make-up it is misleading?'

"'A. In its general make-up it is, to my mind.'

"'Q. In the trade, would it be generally misleading to the trade, to the consuming trade?'

"'A. It all depends. It would depend on where the goods were sold. If they were sold in a grocery store I do not think so. If in a drug store, they might.'

"'Q. But I mean in its make-up without respect to where it was sold?'

"'A. In the style of the package you mean, in other words?'

"'Q. Yes.'

"'A. The style of the package is misleading.'

"'Q. The style of the package is misleading?'

"'A. Yes, sir.'

* * * * * * *

"'Q. And if you could have read the words "Duffy-Mott" from your seat upon the witness stand, you would not have answered, would you, that it looked like champagne?'

"'A. On the table there it looks like a champagne package, and I might say it looks like a bottle of champagne, unless I looked at the bottle closely and saw the label, then I would know it was not.'

"The court below rightly summed up the substantial question involved in the case in these words: 'If the jury believe that the use of the words, "Sparkling White Seal," taken in connection with the way the bottle is put up, is a misleading statement, and taken in connection with everything else that is contained on the label the jury believe that the public generally would be deceived into thinking that they were buying champagne when in fact they were getting carbonated apple juice, with some capsicum in it, then the Government has made out its case. * * * The jury must find not that they might think it was some other kind of apple juice, or they might think it was some other kind of beverage, but they must think it was champagne. If the public is not deceived into thinking it is champagne, then the Government has failed to make out a case.'

"Under such proofs, manifestly the court would have been in error had it withdrawn the case from the jury.

"Finding the mode of submission and charge to the jury were fair and without error, the judgment below is affirmed."

On May 21, 1923, a decree of the court was entered adjudging the product to be misbranded and ordering its condemnation, forfeiture, and destruction.

On June 13, 1923, the answer of the Duffy-Mott Co., claimant in the remaining case, having been withdrawn, judgment of condemnation and forfeiture was entered with respect to the remaining cases of the product, and it was ordered by the court that it be destroyed by the United States marshal.

HOWARD M. GORE, *Acting Secretary of Agriculture.*