Analysis showed that the article consisted essentially of a hydroalcoholic solution containing volatile oils, ether, emodin-bearing plant material, sodium sulfite, and a trace of alkaloids.

The article was alleged to be misbranded in that statements in the labeling which represented that it was entirely different from all other colic remedies; that the moment it entered the stomach of the animal it neutralized the gases and acids in the stomach caused by the fermentation of food; that after administration, relief was immediate on the same principle as a chemical fire extinguisher; that when it reached the stomach it immediately formed other gases which subdued and neutralized those already there and which had caused colic; that one bottle was sufficient to cure colic in horses, mules, and cattle; that it would be efficacious in the cure, mitigation, treatment, and prevention of cases of kidney, wind or spasmodic colic, grippe, flatulent or acute indigestion; and that it would be efficacious in the treatment of engorgement colic, obstruction colic, worm colic, flatulent colic, and spasmodic or cramp colic, and was a positive remedy for alfalfa or lucerne bloat; that it was a "security" remedy and was an insurance against all forms of colic in horses, mules and cattle, were false and misleading since it was not entirely different from all other colic remedies and would not be efficacious for the purposes recommended.

It was alleged to be misbranded further in that the carton did not bear a statement of the quantity of the contents and in that the label did not bear a list of the active ingredients.

On May 5, 1942, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

792. Misbranding of Brown's Inhalant. U. S. v. 893 Cans and 37 Cans of Brown's Inhalant. Product ordered released to claimant. Amended order filed striking provision for release. Decree of condemnation. Product ordered released under bond for relabeling. (F. D. C. No. 7429. Sample Nos. 54740–E, 54741–E.)

On May 1, 1942, the United States attorney for the District of Delaware filed a libel against 893 gallon cans and 37 5-gallon cans of Brown's Inhalant at Dagsboro, Del., alleging that the article had been shipped in interstate commerce within the period from on or about January 31 to on or about April 9 and 17, 1942, by Brown's Poultry Products Co. from Lancaster, Pa.; and charging that it was misbranded.

Analysis showed that the article consisted essentially of kerosene and volatile oils including oil of citronella.

The article was alleged to be misbranded in that statements in the labeling regarding its efficacy in the treatment of diseases, symptoms, or conditions of the respiratory tract of poultry, such as colds, roup, brooder pneumonia, and other congestions of the respiratory tract, were false and misleading since it would not be efficacious for such purposes.

A. J. Timmons & Sons, Dagsboro, Del., appeared as claimant and denied the allegations of the libel and Edgar W. Brown, Lancaster, Pa., also petitioned for leave to intervene. On May 21, 1942, the court entered an order granting Edgar W. Brown leave to intervene and defend for himself and the other claimants, and also ordered the goods returned to A. J. Timons & Sons on condition that the labels which constituted the misbranding were removed or rendered illegible. On May 26, 1942, the Government moved to amend the order of May 21 by striking those portions which permitted a return of the seized property, which motion was granted after hearing, the court handing down the following opinion:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

LEAHY, *District Judge.* "A libel was filed which sought seizure and condemnation of certain cans containing poultry medicine. The articles were shipped from Pennsylvania into Delaware. The libel charges misbranding of the product within the meaning of the Federal Food, Drug, and Cosmetic Act of June 25, 1938. The marshal made seizure. The claimants, who were in possession of the articles, filed an answer denying the property was misbranded. The manufacturer, Edgar W. Brown, an individual engaged in business under the name of 'Brown's Poultry Products Co.,' in Lancaster, Pa., was permitted to intervene on May 21, 1942, to defend the labeling on his own behalf. In the order permitting the intervention, there was a provision directing that the property be discharged from seizure and delivered to the claimant upon the claimant's filing bond; and that the claimant should not sell said property unless and until the labels were

removed. The reason offered to the court, in support of such procedure, was that it was admitted the contents of the cans were not deleterious and that merely the labels came within the prohibition of the statute. On May 26, 1942, the Government moved to amend the precipitous order of May 21, 1942, by striking out those portions which permitted a return of the seized property.

"In opposing the Government's motion, both the manufacturer and claimant assert that as this is a cause in admiralty, they should be allowed to have possession of the property before final hearing and decree by filing an appropriate bond in view of the fact that the statute provides that the procedure under section 334 (b) 'shall conform, as nearly as may be, to the procedure in admiralty.' Especially is this so in view of the fact that the Government admits, they argue, the contents of the cans are not harmful. The Government contends that there can be no release of seized property under the statute until 'after entry of the (final) decree' of condemnation.[6] A search discloses no decision dealing with the precise question raised.

"Sec. 334 (b) does state that the procedure 'in cases under this section shall conform, as nearly as may be, to the procedure in admiralty.' The argument of the claimants that the application of the admiralty rules should control the procedure as to release of seized products finds no support when we examine the admiralty rules. Rule 11 deals with release of perishable goods. Obviously this rule can hardly apply to non-perishable goods seized under sec. 334 (d). Rule 12 relates to the release of a vessel to the claimant upon the filing of bond to protect the claim of libelant.[7] Hence, it appears that there is no apposite admiralty rule or traditional practice upon the basis of which goods may be released prior to decree of condemnation.

"The legislative history of the present statute throws some light on the procedure intended by Congress. If we turn to sec. 10 of the Federal Food and Drugs Act of 1906,[8] it likewise appears that the release and delivery of the articles to the owners is only after the entry of a decree of condemnation.[9] The language of the various bills considered by Congress from 1933 to 1937 remained unchanged with respect to the release of articles and the giving of

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[6] 21 U. S. C. A. § 334 (d): "Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, divert and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such articles shall not be sold under such decree contrary to the provisions of this chapter or the laws of the jurisdiction in which sold: *Provided,* That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this chapter or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter under the supervision of an officer or employee duly designated by the Administrator and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under section 344 or 355, be introduced into interstate commerce, shall be disposed of by destruction."

[7] For an analogous situation, involving seizure of a vessel for forfeiture, see *The Pietro Campanella,* 41 F. Supp. 656, where the court said: "It is pointed out for the claimant that the statutes of the United States and the practice in admiralty do not permit the surrender of a libeled ship to the libelant except after formal decree of condemnation; and the analogous proceedings for forfeiture of other property are generally to the same effect."

[8] 21 U. S. C. A. § 14: "* * * seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this act, or the laws of any State, territory, district, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except, that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States."

[9] Three cases decided under the 1906 statute passed upon the release of goods to claimants. In *U. S.* v. *9 Barrels of Butter,* 241 F. 499, the application for release was not made until after the entry of a decree of condemnation. In *A. O. Anderson & Co.* v. *United States,* 9th Cir. 284 F. 542, it would seem the court assumed the necessity of a prior decree of condemnation before release. In *U. S.* v. *2 Cans of Oil of Sweet Birch, etc.,* 268 F. 866, it appeared that the claimant moved for release of the product before decree; but if I have failed to read the cases correctly and the motion was made, in fact, after decree, it would seem to make little difference as the court simply held that the motion was one addressed wholly to the court's discretion and the court declined to exercise it in favor of the claimant. Thus, no court, as far as I have been able to find, has held specifically that release may be had before decree, or that release may only be had after decree.

bond.[10] The various Senate Reports as well as the hearings had on the several proposed bills makes it manifest to me that Congress understood the procedure looked to the entry of a decree of condemnation before release of the seized articles.[11]

"Not only is the legislative history of sec. 304 helpful in determining its meaning, but a mere examination of the statute makes it clear that (1) an article may be proceeded against by libel when it is adulterated or misbranded; (2) once such an article is seized the issue of adulteration or misbranding must be determined by the court; (3) if the article is neither adulterated nor misbranded, it is released to the claimant; but (4) if it is adulterated or misbranded it may be disposed of only as provided by sec. 304 (d).. Destruction or release may only be had after decree.

"I reject the contention of the claimants that the articles may be released prior to judicial determination of whether they were misbranded. Accordingly, the motion of the Government to amend the order of May 21, 1942, is granted. An order may be submitted striking out those portions of the May 21st order which permitted a return of the seized goods."

On June 15, 1942, judgment of condemnation was entered and the product was ordered released under bond conditioned that it be relabeled under the supervision of the Food and Drug Administration.

793. Misbranding of Emerson's Dead Shot. U. S. v. 18 Cans of Emerson's Dead Shot. Default decree of condemnation and destruction. (F. D. C. No. 6920. Sample No. 89121–E.)

On February 27, 1942, the United States attorney for the Southern District of New York filed a libel against 18 8-ounce cans of Emerson's Dead Shot at New York, N. Y., alleging that the article had been shipped on or about November 26, 1941, by the Emerson Products Co., Inc., from Newark, N. J.; and charging that it was misbranded.

Analysis of a sample of the article showed that it consisted essentially of calcium carbonate and fenugreek, with a small amount of a potassium compound, and not more than a trace of iron.

The article was alleged to be misbranded: (1) In that statements in the labeling which represented that it would be of value in the control, prevention, and removal of all species of worms infesting animals; in the control, prevention, and treatment of disease conditions of animals; and as a tonic and conditioner, were false and misleading since it would not be of value for such purposes. (2) In that it was a drug fabricated from two or more ingredients and the label failed to bear the common or usual name of each active ingredient.

On April 10, 1942, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

794. Misbranding of ADM Wheat Germ Oil. U. S. v. 141, 32, 21, and 17 Cans of Wheat Germ Oil With Accompanying Labeling. Consent decree of condemnation and destruction. (F. D. C. No. 5228. Sample Nos. 57684–E to 57687–E. incl.)

On July 28, 1941, the United States attorney for the Southern District of Iowa filed a libel against 141 quart cans, 32 4-ounce cans, and 38 pint cans of ADM Wheat Germ Oil with accompanying labeling at Des Moines, Iowa, alleging that the wheat germ oil had been shipped in interstate commerce within the period from on or about April 21 to on or about June 5, 1941, by Archer-Daniels-Midland Co. from Minneapolis, Minn.; and charging that it was misbranded.

Examination of samples of the article showed that it consisted of a bland oil possessing chemical and physical constants corresponding to those of wheat germ oil.

The article was alleged to be misbranded in that statements in the labeling which represented that it would be efficacious in the treatment and prevention of the various causes of breeding difficulties in cattle and other livestock, poultry, dogs, and foxes; that it would be efficacious in the treatment and prevention of sterility, impotency, failure to come on heat, missed breedings, false pregnancy, fetus resorption, abortion, premature birth, stillbirth, weak, puny

[10] S. 1944, 73d Cong., 1st and 2d Sess.; S. 2800, 73d Cong., 2d Sess.; S. 5, 74th Cong., 1st and 2d Sess.; S. 5, 75th Cong., 1st and 3d Sess.

[11] For the various Senate Reports and the hearings on the proposed bills, see Dunn, *Federal Food, Drug, and Cosmetic Act* (1938), pp. 46, 61, 102, 206, 642, and 1,263 *et seq.*