

DISPOSITION: October 5, 1951. The Martax Botanical Corp., claimant, having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the article be released under bond to be brought into compliance with the law, under the supervision of the Federal Security Agency.

3658. Misbranding of blackstrap molasses. U. S. v. 8 Cartons, etc. Amended libel filed following decision of court that original libel be dismissed. Decree of condemnation. (F. D. C. No. 30780. Sample No. 6754-L.)

LIBEL FILED: March 2, 1951, Western District of New York; amended libel filed May 10, 1951.

ALLEGED SHIPMENT: On or about November 30 and December 7, 14, and 21, 1950, and January 11, 1951, by Nature Food Centres, from Boston, Mass.

PRODUCT: 8 cartons, each containing 24 1-pint jars, and 8 cartons, each containing 12 1-quart jars, of *blackstrap molasses* at Rochester, N. Y., in possession of Nature Food Centres, together with a number of copies of a book entitled "Look Younger Live Longer," by Gayelord Hauser, which related to the product.

LABEL, IN PART: (Jar) "Plantation 'The Original' Recommended and Endorsed by Gayelord Hauser Blackstrap Molasses (Crude Black Molasses)
* * * Packed by Allied Molasses Co., Inc., Perth Amboy, N. J."

NATURE OF CHARGE: Misbranding, Section 502 (a), the labeling of the article, namely, the book entitled "Look Younger Live Longer," by Gayelord Hauser, which accompanied the article, contained statements which were false and misleading. The statements represented and suggested that the article would add five youthful years to an individual's life and was an excellent source of many B vitamins; that it was effective in the treatment of deficiencies of B vitamins, in the prevention and treatment of menopausal difficulties and menstrual abnormalities, and in inducing sleep; that it was effective to prevent and correct nervousness, to grow hair and correct baldness, and to restore gray hair and to restore it to its natural color; that it was effective to promote better digestion, healthy nerves, and healthy heart; that it was effective to prevent and correct constipation, poor digestion, tiredness, heart trouble, neuritis, and gas; that it was effective to prevent changes due to old age; and that it was effective to promote normal functioning of the glands. The article was not capable of fulfilling the promises of benefit made for it, and it was not effective for the purposes stated and implied.

The article was misbranded when introduced into, while in, and while held for sale after shipment in, interstate commerce.

The article was alleged also to be misbranded under the provisions of the law applicable to foods, as reported in notices of judgment on foods.

DISPOSITION: Farrar, Straus & Young, Inc., New York, N. Y., appeared as claimant for the books and moved for an order dismissing the libel insofar as it related to the seized copies of the book. On April 14, 1951, after consideration of the arguments and briefs of counsel, the court handed down the following opinion sustaining the claimant's motion:

BURKE, District Judge: "The government filed a libel of information asking seizure and condemnation under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 301 et seq. of a certain quantity of 'Plantation' blackstrap molasses, packed by Allied Molasses Co., Inc., and certain copies of a book entitled 'Look Younger, Live Longer' by Gayelord Hauser. The libel alleges in substance

that the 'Plantation' molasses and copies of the book 'Look Younger, Live Longer' were shipped via the same carrier on or about November 30, December 7, 14 and 21, 1950, and January 11, 1951, from Nature Food Centres, Inc., Boston, Massachusetts, to Rochester, New York, and that the molasses was misbranded when introduced into, while in, and while held for sale after shipment in interstate commerce, within the meaning of Sections 343 (a) and 352 (a) of Title 21 U. S. C. in that the book accompanied the molasses and thus constituted false and misleading labeling. A quantity of the molasses and a number of copies of the book were seized by the United States Marshal at a retail store owned and operated by Rochester Natural Food Store, Inc., on March 6, 1951, under a warrant issued by this court pursuant to the libel.

"Farrar, Straus and Young, Inc., has filed a claim to the seized copies of the book alleging that it is the publisher and bona fide owner of the books. It moves here for an order, pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, dismissing the libel in so far as it relates to the seized copies of the book, on the ground that the libel in so far as it relates to the books, fails to state a claim upon which relief can be granted under the Act in that book did not and does not constitute 'labeling,' within the meaning of the Act.

"The seizure was based upon Section 334 (a) of Title 21 U. S. C. which provides:

Any article of food, drug, * * * that is * * * misbranded when introduced into or while in interstate commerce or while held for sale * * * after shipment in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

"The claim that the molasses was misbranded is based on the ground that the book constituted 'labeling.' This is based on the assertion that copies of the book and a quantity of the molasses were shipped simultaneously from a Boston wholesaler to Rochester via the same carrier, and thus that the statements of the author contained in the book regarding blackstrap molasses accompanied the molasses so as to constitute the book 'labeling' of the product, and that such statements are false and misleading since the article is not capable of fulfilling the promises of benefit made for it and is not effective for the purposes stated or implied.

"Molasses is a dark colored viscid syrup which drains from sugar in the process of manufacture. The seizure involved molasses packed for sale in pint and quart jars. The pint jars had a selling price of 29¢, the quart jars 49¢.

"'Look Younger, Live Longer' is a full-length book containing 383 pages. It was first published in February, 1950. It has had 16 printings, totaling 340,000 copies. It is currently on the best seller list and has been since February, 1950. It has had a wide distribution and sale in book stores, department stores, health food stores and numerous other retail outlets. The book discusses the merits and uses of many foods, drugs, and cosmetics generally, including blackstrap molasses. It does not mention 'Plantation' blackstrap molasses or any other food, drug, device or cosmetic by trade mark or brand name. It advertises no products. The publisher is engaged solely in the business of publishing books. It has no connection with any manufacturer, processor, packer or seller of food, nor does the libel make any claim that it has, other than such as might be implied from the claim that the statements contained in the book regarding the blackstrap molasses constituted 'labeling' of the product.

"The motion involves the interpretation of the meaning of 'labeling' as used in the Act. Section 343 (a) provides that a food shall be deemed to be misbranded if its 'labeling' is false or misleading in any particular. Section 321 (m) defines 'labeling' to mean '* * * all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.'

"The circumstance of simultaneous shipment of written, printed, or graphic matter with an article of food, or drug via the same carrier, without more, does not constitute the written, printed, or graphic matter 'labeling' of the product. It must have some relation to the food or drug. Otherwise an allegation of

mere physical accompaniment in an interstate shipment would be enough to draw into the condemnation of the statute written, printed, or graphic matter wholly unrelated to the article claimed to be misbranded. Nor is the circumstance that written, printed, or graphic matter alleged to be 'labeling,' did not physically accompany the article in shipment, sufficient to establish that it is not 'labeling,' within the meaning of the Act, so long as 'they were parts of an integrated distribution program.' *Kordel vs. United States*, 335 U. S. 345, 350.

"'Look Younger, Live Longer' is a publication entirely independent in authorship and unrelated to the enterprise of marketing 'plantation' blackstrap molasses. It had attained wide acceptance as a publication long before the alleged violation in question. It had been generally sold in retail stores where books are usually sold. It was a legitimate publication for bona fide sale even in a food store. There is no claim in the libel that the selling price of \$3 per copy was a fictitious selling price nor any claim that a purchaser of 'Plantation' blackstrap molasses could get it for less than \$3 per copy with a purchase of a pint jar for 29¢ or a quart jar for 49¢. It was not an 'easy device of a "sale" of the advertising' to circumvent the Act as in *Kordel*. (Page 305).

"But, the government says, the allegations of the libel must be accepted as true for purposes of this motion and so, counsel argues, the allegation that the book served to misbrand the article while it was being held for sale after shipment in interstate commerce, must be accepted as true. That allegation is nothing more than a legal conclusion. The question presented here is whether the allegations of fact, not legal conclusions, are sufficient to support the seizure. The question whether the use to which the book was put in connection with marketing the molasses, while held for sale after shipment, constitutes 'labeling' is not here for determination, because the libel contains no allegations respecting such use. The seizure of the books rests on the naked claim that the molasses was misbranded because it was simultaneously shipped with the books in interstate commerce via the same carrier.

"There are no allegations of fact in the libel amounting to functional interdependence of the article and the books, so as to constitute the books 'labeling' under the Act.

"The libel in so far as it relates to the book 'Look Younger, Live Longer' should be dismissed and the seizure of the books vacated."

On April 23, 1951, a notice of motion to amend the libel was filed on behalf of the Government; thereafter, a motion to amend was filed, together with the briefs of the parties; and on May 10, 1951, the court ordered that the Government's motion for leave to file an amended libel of information be granted.

The amended libel alleged further that the book entitled "Look Younger, Live Longer" by Gayelord Hauser accompanied the article as labeling when it was introduced into, while in, and while held for sale after shipment in, interstate commerce by reason of the following:

The labels on the jars of the article contained no reference to any disease or condition of the body, or to the vitamin or mineral content of the article, except that the statement "The mineral content is high" appeared on the label.

The labels on the jars of the article bore on the principal panel the legend "Recommended and Endorsed by Gayelord Hauser."

The author of the book "Look Younger, Live Longer" is the said Gayelord Hauser.

The book by Gayelord Hauser contained recommendations and endorsements for *blackstrap molasses* in the treatment of diseases and conditions of the body and as to the vitamin and mineral content of *blackstrap molasses*.

That "Plantation Blackstrap Molasses" was the only *blackstrap molasses* recommended and endorsed by Gayelord Hauser; and *blackstrap molasses* differs from the usual or customary article of food sold as "molasses" in that it is "The poorest, is the final, or exhausted molasses of raw sugar manufacture"

(The Encyclopedia of Food, Artemas Ward, 1941), and is defined in Cane Sugar Handbook, Spencer and Meade, 1945, as—

Refining Sirup, Barrel Sirup. Refining Blackstrap. The end product of the refinery is the sirup purged from the lowest-grade remelt strikes which have been cured in crystallizers. In those plants which do not char-filter their low-grade materials, this product is refinery blackstrap and does not differ materially from cane factory blackstrap, although it is usually less viscous. It is used for the same purposes, viz., alcohol manufacture, cattle feed yeast.

That by reason of such recommendation and endorsement, Gayelord Hauser benefited, was benefiting, and would continue to benefit by the sale of "Plantation Blackstrap Molasses," in that, by the terms of an agreement with the Allied Molasses Co., Inc., the packer of said "Plantation Blackstrap Molasses," a so-called royalty or remuneration was set aside for the benefit of the said Gayelord Hauser, based on the output of such product bearing his endorsement and recommendation.

In addition to the product and the book having a common origin at Boston, Mass., and a common destination at Rochester, N. Y., and accompanying each other in interstate commerce, there was transmitted also in interstate commerce, via the U. S. Mails, on or about January 13, 1951, from Nature Food Centres, Boston, Mass., to Nature Food Centres, Rochester, N. Y., a certain window display poster featuring (1) a reprint of an article by the said Gayelord Hauser which appeared in the January 1951 issue of Cosmopolitan Magazine, (2) a printed list which read, in part, as follows:

Hauser Dieters, Now You Can order all products for the Hauser diet and Gayelord Hauser books by mail * * * Plantation Blackstrap Molasses 33¢ Nature Food-Centres

and (3), in handwriting, "We have all foods and books for the Hauser diet! Come in for full information."

The book and poster were displayed prominently in the store window of Nature Food Centres at Rochester, N. Y., together with a number of jars of "Plantation Blackstrap Molasses."

In response to the invitation to "Come in for full information" with respect to products for the Hauser diet and the Gayelord Hauser books, the customary practice was to hand a prospective purchaser of "Plantation Blackstrap Molasses" a copy of the book "Look Younger, Live Longer," and referring the purchaser to the index of this book wherein references are made to those pages which pertain to the uses and purposes of *blackstrap molasses*. The uses and purposes of *blackstrap molasses* in the book referred to diseases and conditions of the body and the vitamin and mineral content of *blackstrap molasses*.

That by reason of the foregoing uses to which the book "Look Younger, Live Longer" was put and as part of the same interstate transaction and distributional scheme in connection with the marketing of "Plantation Blackstrap Molasses," the book constituted labeling for the article when the article was introduced into, while in, and while held for sale after shipment in, interstate commerce.

Following the filing of the amended libel, the claimant filed a motion to dismiss this libel insofar as it related to the seized copies of the book; and on August 2, 1951, the following decision was handed down by the court in denial of such motion:

BURKE, *District Judge*: "This is a motion by the claimant, the publisher of the book 'Look Younger, Live Longer' by Gayelord Hauser, and the owner of 25 copies of the book seized by the Government, to dismiss the amended libel in so far as it relates to the seized copies of the book, on the ground that the amended libel in so far as it relates to the books fails to state a claim upon which relief can be granted under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 301 et seq. The claim is that the book did not and does not constitute 'labeling' within the meaning of the Act. Heretofore, on April 14, 1951, on motion of the publisher, the original libel in so far as it related to the book 'Look Younger, Live Longer' was dismissed and the seizure of the books vacated.

"The amended libel alleges in part that the book contains statements which represent and suggest that the article (blackstrap molasses) will add five youthful years to an individual's life, is an excellent source of many B vitamins, is effective in the treatment of deficiencies of B vitamins, is effective in the prevention and treatment of menopausal difficulties and menstrual abnormalities, is effective in inducing sleep, is effective to prevent and correct nervousness, to grow hair and correct baldness, to restore gray hair and correct baldness, to restore gray hair to its natural color, is effective to promote better digestion, healthy nerves, healthy heart and to prevent and correct constipation, poor digestion, tiredness, heart trouble, neuritis and gas, is effective to prevent change due to old age, and is effective to promote functioning of the glands, all of which statements are claimed to be false and misleading since the article is not capable of fulfilling the promises of benefit made for it and is not effective for the purposes stated and implied. It alleges that the book accompanied the molasses as 'labeling' when the article was introduced into, while in, and while held for sale after shipment in interstate commerce. It alleges that on or about January 13, 1951, in a store conducted by Nature Food Centres at Rochester, New York, a window display featured a re-print of an article by the author of the book, Gayelord Hauser, which appeared in the January, 1951, issue of *Cosmopolitan* magazine, and a printed list which reads in part as follows:

Hauser Dieters. Now you can order all products for the Hauser diet and Gayelord Hauser books by mail * * * "Plantation" Blackstrap Molasses 33¢, Nature Food Centres

We have all foods and books for the Hauser diet. Come in for full information.

It alleges further that a copy of the book was prominently displayed in the store window of Nature Food Centres at 401 East Main Street, Rochester, New York together with a number of jars of 'Plantation' blackstrap molasses. It alleges further that in response to such invitation to 'come in for full information' that it was the customary practice to hand a prospective purchaser of 'Plantation' blackstrap molasses a copy of the book 'Look Younger, Live Longer,' by Gayelord Hauser, and to refer such prospective purchaser to the index of the book wherein references are made to those pages which pertain to the uses and purposes of blackstrap molasses. It alleges that by reason of the foregoing uses to which the book was put and as part of the same interstate transaction and distributional scheme in connection with the marketing of 'Plantation' blackstrap molasses, such book constituted 'labeling' for the article as defined in the Act, when the article was introduced into, while in, and while held for sale after shipment in interstate commerce.

"The publisher, concededly not a party to the plan of distribution and having no connection with Nature Food Centres in the marketing of molasses, claims that the Act provides no authority for the seizure and condemnation of its books as 'printed matter accompanying' an article. I can see no warrant in reason for such a narrow construction of Section 334 of the Act nor do I find any authoritative decisions indicating that the seizure provisions of the Act should be so circumscribed.

"The publisher further claims that to construe the publisher's book as 'labeling' of 'Plantation' blackstrap molasses would violate the publisher's right of freedom of the press under the Federal Constitution, and that this

summary seizure of copies of the book as 'labeling' of a commercial product violates the constitutional guarantee of freedom of the press. The Administrator by resorting to the seizure provisions of the Act does not undertake to interfere with the publication or circulation of the publisher's book. The seizure has not interfered with the bona fide sale of the book. The publisher may continue to sell its books wherever it finds a market, even in food stores, and even in stores where 'Plantation' blackstrap molasses is sold. The seizure relates not to books offered for bona fide sale but to copies of the book claimed to be offending against the Act by being associated with the article 'Plantation' Blackstrap Molasses in a distribution plan in such a way as to misbrand the product.

"Motion denied. It is hereby so ordered."

On September 10, 1951, the claimant having failed to pursue the matter further, judgment of condemnation was entered and the court ordered that the property, consisting of the molasses and the copies of the book under seizure, be distributed to various charitable organizations.

DRUGS FOR VETERINARY USE

3659. Adulteration and misbranding of Antihep tablets. U. S. v. 23 Bottles
* * *. (F. D. C. No. 31946. Sample No. 3574-L.)

LIBEL FILED: On or about October 26, 1951, District of Maryland.

ALLEGED SHIPMENT: On or about August 13, 1951, by the Hopkins & Hopkins Pharmaceutical Co., from Philadelphia, Pa.

PRODUCT: 23 1,000-tablet bottles of *Antihep tablets* at Chestertown, Md. Analysis showed that the product contained not more than 1.23 grains of 2-amino-5-nitrothiazole per tablet.

LABEL, IN PART: (Bottle) "1000 Soluble Antihep Tablets Each Tablet Contains: 2 Grains 2-Amino-5-Nitrothiazole For Prevention and Control of Blackhead (enterohepatitis) in Turkeys."

NATURE OF CHARGE: Adulteration, Section 501 (c), the strength of the article differed from that which it purported or was represented to possess, namely, "2 Grains 2-Amino-5-Nitrothiazole."

Misbranding, Section 502 (a), the label statement "Each Tablet Contains: 2 Grains 2-Amino-5-Nitrothiazole" was false and misleading since the article contained less than 2 grains of 2-amino-5-nitrothiazole per tablet.

DISPOSITION: January 21, 1952. Hopkins & Hopkins Pharmaceutical Co., claimant, having admitted the allegations contained in the libel, judgment of condemnation was entered and the court ordered that the product be released under bond for relabeling in conformity with the law, under the supervision of the Federal Security Agency, conditioned that the product be delivered to a research institute for investigational use in the treatment of blackhead disease of turkeys.

3660. Misbranding of Hite's Super Culture. U. S. v. 24 Bags * * *
(F. D. C. No. 30825. Sample No. 18913-L.)

LIBEL FILED: February 15, 1951, District of Minnesota.

ALLEGED SHIPMENT: The drug was shipped on or about November 3, 1950, by the Super Culture Sales Co., manufacturer and seller of the drug, from Sioux City, Iowa. A number of circulars entitled "Super Culture Feed" were delivered to the dealer on or about October 1, 1950, by Will Hite, one of the officers and stockholders of the manufacturer and seller.