

HUTCHESON, *Chief Judge*: "This is an appeal from a judgment of condemnation and forfeiture entered pursuant to a libel charging misbranding under Sec. 301 et seq of the Federal Food, Drug, and Cosmetic Act.¹ Bringing them up for our review, claimant below, appellant here, makes serious complaint of three adverse rulings of the district judge, including his finding that the powder was misbranded.

"The primary one of the rulings and the one of which appellant makes vigorous complaint is the denial by the district judge of appellant's motion filed under Sec. 334 (a),² 21 U. S. C. A., to remove and transfer the cause.

"If the district judge had a discretion to refuse to remove the cause, and we do not think he had because the statute provides that the court 'shall by order unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial,' we think he abused that discretion here. For no good cause to the contrary was shown.

"While it is quite plain that the district judge thought that he was acting in accordance with the statute, it is equally plain that he was laboring under a mistaken opinion as to its provisions and effect.

"In view of the fact that, because of the error in denying removal of the cause, the judgment must be reversed, it is unnecessary, indeed inappropriate, for us to canvass and discuss the other errors assigned.

"For the error, therefore, of denying removal of the cause, the judgment is reversed and the cause is remanded to the district court with directions to 'specify a district of reasonable proximity to the claimant's principal place of business to which the case shall be removed for trial.'

"REVERSED and REMANDED with directions."

In accordance with the above opinion, the case was ordered transferred from the Northern District of Texas to the Eastern District of Washington. On October 5, 1953, the United States District Court for the Eastern District of Washington ordered that the libel action be dismissed since it appeared that the product under seizure had been inadvertently destroyed.

4078. Misbranding of Muscle-Rub. U. S. v. 1 Lot, etc. (F. D. C. No. 32468. Sample Nos. 427-L to 429-L, incl.)

LIBEL FILED: January 30, 1952, Western District of Texas.

ALLEGED SHIPMENT: On or about December 1, 1951, by Muscle-Rub Distributors, from Los Angeles, Calif.

PRODUCT: 1 lot of *Muscle-Rub* consisting of 8 dozen 2-ounce bottles, 33 $\frac{2}{3}$ dozen 6-ounce bottles, and 6 dozen 12-ounce bottles at El Paso, Tex. A leaflet containing statements relating to the product was attached to each bottle.

RESULTS OF INVESTIGATION: To establish the setting in which the labeling statements would be read by the consumer, Muscle-Rub Distributors supplied advertising mats for advertising in various editions of the El Paso newspapers, which pictured for contrast a gnarled, deformed hand of a person suffering from arthritis deformans and a hand in normal condition and which contained the statement in bold type "Rheumatism Arthritis Pains Relieved in a few minutes with Doctor's External Prescription," followed by statements and testimonials relating to the efficacy of the product.

¹ 21 U. S. C. A., Sec. 321 et seq.

² As pertinent here the article provides:

"* * * In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial."

LABEL, IN PART: (Bottle) "Use as an aid in the Relief of Pain and Discomfort from Rheumatism, Arthritis, Neuralgia, Sciatica, & Sprains * * * Muscle-Rub"; (leaflet attached to bottle) "Muscle-Rub A Glorious Aid in the Relief of Pain and Discomfort from Rheumatism, Arthritis, Neuralgia, Sciatica, Sprains * * * Bruises."

NATURE OF CHARGE: Misbranding, Section 502 (a), the labeling of the article was false and misleading because when read in the light of the setting in which it was intended to be read, it conveyed to the public a meaning which represented and suggested that the article was more than a palliative relief for simple muscular pains and was an adequate and effective treatment for rheumatism, arthritis, neuralgia, sciatica, sprains, and bruises, whereas the article was not an adequate and effective treatment for rheumatism, arthritis, neuralgia, sciatica, sprains, and bruises.

DISPOSITION: On February 16, 1952, upon motion of Pauline Harrison, trading as Muscle-Rub Distributors, the claimant, and with the consent of the Government's attorney, an order was entered by the court consolidating for trial the instant case with that reported in the following notice of judgment, No. 4079, and directing that the consolidated cases be removed for trial to the United States District Court for the District of Arizona. The claimant thereafter withdrew her claim, and, on June 3, 1953, the court entered a decree of condemnation and destruction.

4079. Misbranding of Muscle-Rub. U. S. v. 405 Bottles, etc. (F. D. C. No. 32214. Sample Nos. 13274-L, 13275-L.)

LABEL FILED: December 3, 1951, Western District of Texas.

ALLEGED SHIPMENT: On or about December 7, 1950, and October 20, 1951, by Muscle-Rub Distributors, from Los Angeles, Calif.

PRODUCT: 322 6-ounce bottles and 83 12-ounce bottles of *Muscle-Rub* at El Paso, Tex., together with a leaflet entitled "Muscle-Rub" attached to each bottle of the product and an accompanying placard entitled "Prove Free" relating to the product.

LABEL, IN PART: (Bottle) "Muscle-Rub Contains Isopropyl Alcohol 75% Ethyl Alcohol 1.8%, Methyl Salicylate, Camphor, Menthol & Fld. Ext. Witch Hazel."

NATURE OF CHARGE: Misbranding, Section 502 (a), certain statements on the label, in the above-mentioned leaflet, and on the above-mentioned placard were false and misleading in that the statements represented and suggested that the article was an adequate and effective treatment for arthritis, rheumatism, neuralgia, sciatica, neuritis, lumbago, swollen, aching joints, sprains, and bruises, whereas the article was not an adequate and effective treatment for such conditions.

DISPOSITION: On February 16, 1952, upon motion of Pauline Harrison, trading as Muscle-Rub Distributors, the claimant, and with the consent of the Government's attorney, an order was entered by the court consolidating for trial the instant case with that reported in the preceding notice of judgment, No. 4078, and directing that the consolidated cases be removed for trial to the United States District Court for the District of Arizona. The claimant thereafter withdrew her claim, and, on June 3, 1953, the court entered a decree of condemnation and destruction.