Chicago.", which said statement on the label appearing on the bottle was false and misleading, in that said statement represented to the purchaser that each of the nitroglycerin tablets contained 1/50 of a grain of nitroglycerin, whereas, in truth and in fact, the strength of each of the nitroglycerin tablets packed in the bottle aforesaid fell below the professed standard under which the drug product aforesaid had been sold and shipped, in that each of the nitroglycerin tablets contained not to exceed 0.009 of a grain of nitroglycerin. Misbranding was alleged for the further reason that said statement on the label misled and deceived the purchaser into the belief that each of the nitroglycerin tablets contained 1/50 of a grain of nitroglycerin, whereas, in truth and in fact, the strength of each of the nitroglycerin tablets fell below the professed standard under which the product had been sold and shipped as aforesaid, in that each of the nitroglycerin tablets contained not to exceed, to wit, 0.009 of a grain of nitroglycerin.

On February 13, 1914, the defendant company withdrew its plea of not guilty formerly entered and entered its plea of guilty, and the court took the case under advisement. On June 5, 1914, the case having come on for final disposition, the court imposed a fine of $100 and costs.

D. F. HOUSTON, *Secretary of Agriculture.*

WASHINGTON, D. C., *September 24, 1914.*

3406. Adulteration and misbranding of honey. U. S. v. 6 Cases of Honey. Tried to the court and a jury. Verdict for the United States. Decree of condemnation and forfeiture. Product ordered sold. (F. & D. No. 3495. S. No. 1299.)

On March 1, 1912, the United States attorney for the Eastern District of Pennsylvania, 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 6 cases, 3 of which contained 4 36-pound cans and 3 of which contained 4 [2] 60-pound cans, of honey, remaining unsold in the original unbroken packages at Philadelphia, Pa., alleging that the product had been shipped on or about February 27, 1912, and 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.

Adulteration of the product was alleged in the libel for the reason that a certain article, to wit, invert sugar, had been substituted in whole or in part for pure honey in the said article of food. Misbranding was alleged for the reason that the label upon each of the cans containing the article of food bore a statement regarding it and the ingredients and substances contained therein which was false and misleading, in that said label bore the following statement: "Excelsior Choice Pure Strained Honey. Guaranteed under the National Pure Food & Drugs Act, June 30th, 1906, under Serial No. 14914 by Excelsior Honey Co., N. Y.," which said statement, contained on said label, was calculated and adapted to convey the impression and belief that said article of food was pure honey, whereas, in truth and in fact, said article of food was not pure honey, but was a mixture of honey and invert sugar.

On January 9, 1913, Max Cohen and William I. Cohen, trading as the Excelsior Honey Co., New York, N. Y., filed their answer denying the material allegations in the libel. On November 20, 1913, the case came on for a hearing before the court and a jury, and on November 25, 1913, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Holland, *J.*):

Gentlemen of the jury, the United States Government, through its officer, seized 6 packages or cases containing 18 cans of food product labeled "Excelsior Choice Pure Strained Honey," and it is claimed that it is put up in packages

and labeled in violation of the pure-food act of June 30, 1906. Every man, woman, and child in the United States when hungry needs food and when sick needs drugs, but the individual citizen is unable to see to it that the food purchased or the drugs he must purchase are pure, and the Government has taken on itself the work of performing that for the whole people. So that this is a contest for pure food, for the protection of the individual citizen who has not the facilities or the information to protect himself, and it is a very beneficial and commendatory act, because we all know that impure foods are manufactured and sold, and it is against the manufacturer and vendor of these impure foods and the manufacturer and vendor of these impure drugs that this act is aimed, and it has no terrors for the man who manufactures or sells a pure article and brands it what it is. Notwithstanding the attempt to throw a very great deal of doubt and uncertainty over the work of the experts in this case, chemistry has been brought to such a high point of efficiency that it can be told with certainty, or, at any rate, with that degree of certainty which should authorize us to act, what is contained in almost any substance you put into the possession of the expert chemist. They can tell whether or not honey is pure or whether it has some substance mixed in it, and it may be that they can not tell it with the same degree of certainty that you can work a geometrical demonstration, but they can say, with a degree of certainty that should authorize us to act, in the examination of questions which come before courts, as to whether foods or drugs of a specific kind are pure or adulterated or misbranded.

Now, gentlemen of the jury, this act of Congress, to which I have alluded, says that it shall be unlawful for any person to manufacture any article of food or drug which is adulterated or misbranded within the meaning of this act, and then another section reads that for the purposes of this act an article shall be deemed to be adulterated if any substance has been substituted, wholly or in part, for the article. That is the statutory definition of adulteration, that the term "misbrand" shall apply to all labels which shall bear any statement, design, or device regarding such article or the ingredients or substance contained therein which shall be false or misleading in any particular, and, further, that any article of food that is adulterated or misbranded within the meaning of this act shall be liable to be proceeded against in any district court of the United States, within the district where the same is found and seized for confiscation, by a process of libel for condemnation, and that is what is done here.

Now, you will notice, gentlemen of the jury, that an article is adulterated if any substance has been substituted wholly or in part for the article. It is not the dictionary definition of adulteration. You must take the statutory definition. It makes no difference what the article is; if any substance has been substituted wholly or in part it is an adulteration. There is no question as to whether it is deleterious or injurious to health; it may or may not be; the substitution may be as beneficial or more beneficial than the original article. What the law aims at is to guarantee to the consumer that when he desires to purchase a certain article, and goes to a manufacturer or vendor for that article and states what he wants, that he shall know that he gets what he pays for. That is the object of the law. It is to protect the consumer against adulteration and misbranding of their food and their drugs, so that they may be able to rely on what an article is said to contain, and they may rely that they will not be misled by the label.

The Government in its examination or supervision of matters of this kind concluded that this particular brand of honey which is labeled "Excelsior Choice Pure Strained Honey" is not a pure honey, and they seized these six cases, and they now bring this proceeding, charging that it is an impure or adulterated honey, in one of the counts of their libel and in the other that it is misbranded in that the label on it, "Excelsior Choice Pure Strained Honey," is not true; that it contains other matters besides pure honey, and therefore it is misbranded, and they call their experts to prove what they allege in this libel.

Now, we are entirely dependent upon the testimony of experts, with the sole exception of the defendant himself, who denies that he placed anything but Cuban and buckwheat honey in this mixture and boiled it. The Government experts come forth and they testify and give an account of the analysis which they made for the purpose of ascertaining what this mixture contained. They state positively that they made these examinations and they give the result. They start with what they regard the most significant analysis, which is the one that produced the ash result, and they go through the entire list of known methods in chemistry by which you can ascertain whether honey is pure or adulterated or mixed with some other substance. They take the Fiehe and the

Browne test, the tannin precipitate, the protein, the dextrose, and the levulose, polarization, and finally the tartaric. There are nine tests, and also Mr. Hilts said he looked through the microscope for pollen, and found the pollen, although it was in a scanty amount, which, of course, showed that there was some honey in it.

Now, they say, too, that the ash test revealed the fact that this mixture only showed ash to the amount of 0.028, and the Cuban honey has 0.07 ash, and that buckwheat honey has 0.07. They both have the same amount of ash; and then they reason that if there had been a mixture of buckwheat and Cuban honey, as claimed, that the ash should have been 0.07; but that it was only 0.028, which is only 40 per cent of the ash which would have been contained in it if this mixture had been made up of Cuban and buckwheat honey, as claimed. And the Government experts say that what was done, in their judgment, was that about 40 per cent of that mixture was either Cuban or buckwheat honey, with an ash of 0.07 per cent, and the balance, or 60 per cent, was a substance that had no ash. They do not just say that; but, at any rate, it was made up of a substance that reduced the ash to 0.028. Now, if there be no ash in commercial invert sugar, mark you, and you put 60 per cent of that mixture with 40 per cent of a honey containing 0.07 of ash, and mix them up together, and analyze it, you will produce a result which is produced here, to wit, ash 0.028, and the Government experts tell us they reasoned at once that there was some mixture of invert sugar.

Then they took up the Fiehe test, and they say they found—I will not go through the details of that—they found that there was an indication of invert sugar or adulteration of the mixture. Then they took up the Browne test, and they say that indicated the same thing. They corroborated the ash test and all the other tests, the precipitate test and the protein test, the tannin test (they all corroborated each other); and the dextrose test, the levulose test, and the polariscopic test; and then the tartaric test (they all corroborate each other—even the tartaric test). That was the last test that was made. You will recall that that is the only acid that the evidence shows is used in converting commercial sugar into a substance to be used for a mixture with honey, and they found tartaric acid in this mixture to the amount of 0.08. Now, the defendant himself says that he mixes in his other articles of sale tartaric acid to an amount only two points higher; that is, 0.1, or one-tenth, and this is 8 one-hundredths. So that the Government claims in its examination of this article it has availed itself of all the known processes in chemistry to ascertain exactly what is in this article of food and that every one points, in their judgment, unmistakably, to the one conclusion; and that is that it was a mixture of honey and invert sugar, or another substance than honey, in the proportions of 40 to 60. That is the evidence on the side of the Government, and you will recall with what intelligence or lack of intelligence, satisfaction or lack of satisfaction to you they maintained their position as to the work they had done, and you will judge, of course, of the intelligence with which it was done. and judge whether or not you will accept their conclusions or the conclusions reached by the expert of the defendant. I might say also here, before I go to the defendant's side of the case, that the defendant claims the tartaric-acid test that was testified to was not mentioned until after the case had been closed, practically, and he had no chance to reply to it. That is true; but if it should turn out that he is injured by it, even now if his experts should discover it or if it should be discovered hereafter, if it is taken in time, that there is no tartaric acid there he certainly will be entitled to protection, and, of course, he urges that that fact should be taken into consideration in his favor. So it should be. But, you will say, while you may take that into consideration. whether or not Mr. Hilts would or would not be prejudiced one way or the other in stating the exact truth in this matter as to any of the tests.

Now, as I have said, which will you take, the expert of the defendant or the experts of the Government? The defendant is called, and he tells you that this mixture is made up of Cuban and buckwheat honey, and he told us how he boiled and strained it, and that it was Koschered for the purpose of selling to the Jewish trade, and it was boiled, and he told you when he was on the stand that the Koschering was the straining. When recalled, after the expert testified, he came back and he told you that the skimming was the Koschering, that the whole process was the Koschering; at any rate, he boils this article that is here in question, and whether it was for the purpose of Koschering it or not is not very clear in his statement, because honey is cleaned by straining it, and it is heated to a certain point, but he says he boils and skims the top off

and then strains it, and then he calls it Koschered honey, and he says that he never mixes anything but Cuban and buckwheat honey together in making it. The expert comes upon the stand, Mr. Deghuee, and he tells you just exactly what he did in the examination of this mixture. He had a big quantity of it, and he made a thorough examination, and he says that it was done under, I believe, the polariscopic test. The defendant's expert went through a number of these tests. He tells us he went through the ash test and what he found. He said that the low ash was not conclusive as to whether or not this honey was pure or adulterated, but it was suspicious and suggested a further investigation. He also said that buckwheat honey contained 0.07 and Cuban honey 0.07, and then he made the Browne test, and he found from that test that there was a suspicion and that he should go farther, and in all his tests he found that there was a suspicion and that he should go farther, with the exception of the polariscopic test. The general result of that, he claims, was to lead him to the conclusion that there was no adulteration. He found furfural; he found a red color, which he said lasted more than an hour, but after all, and after thorough deliberation, he said that the general result of the polariscopic test, which he made, led him to believe that there was no adulteration. If there was no adulteration, there was no misbranding, of course. If there was adulteration, there is misbranding. Of course, as I have told you, gentlemen of the jury, you must say which conclusions you will adopt, those produced and testified to by the Government or those produced and testified to by the defendant. There is one other matter that is urged strongly upon you, and that is that it would have been a losing matter with the defendant if he had used sugar instead of honey. The defendant's counsel contends that he would have lost money if he had mixed sugar and honey together, and that it paid him, it was a matter of profit to him to mix the honeys which he claimed he mixed. You can make the calculation yourselves. The honeys which he claimed he mixed were Cuban and buckwheat. He says he mixed 20 per cent of buckwheat at 7½ cents. At 7½ cents, 20 pounds of buckwheat would be $1.50. Eighty pounds of Cuban honey at 4½ cents would be $3.60. One hundred pounds of that mixture would be $5.10. Now, if you substitute sugar and water for that mixture, at the rate of 6½ cents for sugar and nothing for the water, and that mixture is mixed together at the proportion of 3 to 7, you will find 100 pounds of that stuff, of that mixture, will cost $4.55. So that 100 pounds of the sugar and water mixture would cost $4.55, and 100 pounds of the buckwheat and Cuban mixture would cost $5.10. Now, you can very readily say whether it would be profitable or unprofitable to substitute stuff costing $4.55 for stuff costing $5.10, if that calculation is correct. But you can make it. It is a very material matter as to whether it was profitable or unprofitable. We can not see any motive for this defendant adulterating with a more expensive article when it is going to injure him, but there would be some reason for him adulterating with a less expensive article, and especially so if there are other reasons for the combination and the mixture. But that has only a significance as to whether or not a man had a motive. That goes to the motive. It is not any proof as to whether he did or did not adulterate. It simply goes to the motive.

The evidence upon which you will have to rely to ascertain whether it was pure or adulterated, and if adulterated, misbranded, is the evidence adduced upon the stand by the experts for the Government, and by the experts and the defendant for the defendant.

Gentlemen of the jury, you will now retire. I will be here until 6 o'clock. If you come to an agreement by that time I will receive the verdict.

Mr. PRICHARD. I except to that part of the charge which relates to the comparison of the cost of sugar and water with the comparison of the cost of the mixed honeys, because there is absolutely no evidence or charge by the Government that sugar and water could be sold or was sold by the defendant. The charge was that the invert sugar was added to the honey, and the evidence was that it could only be added to buckwheat honey, 20 per cent, as a substitute for Cuban honey. So that the comparison should have been between $4.50, which he paid for the Cuban honey, and $5.10, which the sugar and water would have cost him if he had added it.

The COURT. I do not recollect any evidence to the effect that it would not have been entirely feasible to substitute the water and sugar converted into invert sugar by the addition of one-tenth of 1 per cent of tartaric acid to a mixture of 20 per cent of buckwheat honey and 80 per cent of Cuban honey. I know of no evidence, I say, which would indicate that that substitution for one could not have been made for the other. He could have made that mixture, then

substituted as much per cent of the other mixture as he saw fit, so far as the evidence goes.

Mr. PRICHARD. Your honor will give me an exception to that?

The COURT. Yes; you may have an exception.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to the charge where the court said that it is possible for expert testimony to determine with certainty that invert sugar was added to this substance.

(Exception noted for defendant, as requested, by order of the court.)

Mr. PRICHARD. I also except to the charge of the court where the court said that they might find that this was adulterated, if any substance was added, without confining the jury to the one substance which was specified in the statement.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to as much of the charge as says that the question turns entirely upon the testimony of experts without emphasizing or alluding to and giving importance to the testimony of the defendant himself and of the witnesses whom he called to corroborate him.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to so much of the charge that the Government experts testified that every test corroborated their opinion.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to the charge generally on the ground that it dwelt unduly upon the arguments for the Government without giving equal prominence to the arguments for the defendant.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to the charge where the court said that the evidence was that the only acid used in the preparation of commercial invert sugar was tartaric acid.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to that part of the charge of the court which says that this is a contest for pure food, for the protection of the individual citizen.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to that part of the charge of the court which says that if the defendant is injured by the testimony as to the tartaric-acid test being introduced, when defendant had no chance to reply to it, he will be entitled to protection.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to that part of the charge of the court which says that the defendant testified that Koschering was the straining, but when recalled testified that the whole process was the Koschering, and whether the boiling was for the purpose of Koschering, is not very clear.

(Exception noted for defendant, as requested, by direction of the court.)

Mr. PRICHARD. I also except to that part of the charge of the court which says that Dr. Deghuee testified that in all his tests he found a suspicion, with the exception of the polariscopic test, and that Cuban and buckwheat honey contained 0.07 ash.

(Exception noted for defendant, as requested, by direction of the court.)

The COURT. Gentlemen of the jury, you may now retire.

The jury thereupon retired and, after due deliberation, returned into court with a verdict in favor of the United States, and, on May 13, 1914, final judgment of condemnation and forfeiture was entered, the court finding the product adulterated and misbranded, and it was ordered that that product should be sold by the United States marshal and that Max Cohen and William I. Cohen, trading as the Excelsior Honey Co., owners and claimants, should pay all costs of the proceedings.

D. F. HOUSTON, *Secretary of Agriculture.*

WASHINGTON, D. C., *September 24, 1914.*

3407. Misbranding of Mexican hair tonic and nit killer. U. S. v. Leo A. Hogg (Mexican Roach Food Co.). Plea of guilty. Fine, $10. (F. & D. 3496. I. S. No. 15649-c.)

On November 12, 1912, the United States attorney for the Western District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against