nothing said either in the English or the Italian to mislead any person of average intelligence that the product is Italian olive oil. This also distinguishes the case from *U. S.* vs. *267 Boxes of Macaroni*, supra. The libellant, however, goes one step further and says that the Italian national colors appear on the can which misleads the public into believing the product is Italian olive oil. On the front and back panels of the can, there are three diagonal stripes of red, white, and green, as a background for the printed matter. There are three vertical stripes of red, white, and green in the national flag of Italy. Is the court to believe that the public has been deceived for years into thinking that "Canada Dry Ginger Ale" is a Canadian product because the word "Canada" is part of its trade name, and because the map of Canada is displayed on its label? Is the court to believe that the public considers "Italian Balm" an Italian or foreign product? Is the court to believe that the public is misled by "Kraft French Dressing" and numerous similar products prepared by reputable dealers and which have been in use for years? The court gives the public credit for not being so gullible. It believes the can in question does not mislead nor is it likely to mislead the public as alleged in the libel.

Exceptions to a libel serve practically the same purpose as a motion to strike because the libel does not disclose a cause of action. The averments in the libel properly pleaded, but not the conclusions of the libellant, are admitted in determining whether the libel sets forth a cause of action. The court, however, is not compelled on the argument of the exceptions to accept as true averments in the libel that are conclusively shown to have no basis in fact. In this particular instance the res was submitted, without objection, to the court for inspection and examination. The court is convinced after such examination that there is no basis in fact for the libel and that it should be dismissed. If the government files a libel in which it avers the article is black, exceptions are taken, and on the argument the court is permitted to examine the article and finds that it is white, the libel should be dismissed forthwith. If this were not so, the government, through its authorized agents, could libel any product that it desired and the manufacturer of the same could be ruined financially before the matter was heard by a jury. What good would it do such a manufacturer if the jury decided in his favor after the damage was done? A summary method of this type must be available at all times. While the court has the power to dismiss a libel as herein set forth, it is a power which should not be used excepting in a case where there is obviously no basis for the libel and where there could be only one possible verdict that a jury could return; otherwise the libel should not be dismissed.

The exceptions are sustained. The motion to dismiss the exceptions is denied. The attachments are vacated and the property seized by the Marshal is to be returned. A decree may be entered in accordance with this opinion.

The government made similar seizures of the same product, that is the same can and label, in the District of Connecticut, and the court's attention has been called to the opinion of Judge Thomas, rendered on April 10, 1935, sitting in the District Court for the District of Connecticut, involving the same exceptions that were taken to similar libels, and this court has reached the same conclusion as was reached by Judge Thomas in his opinion.

On September 8, 1936, judgment was entered ordering that the libel be dismissed and the product returned to the claimant.

W. R. Gregg, *Acting Secretary of Agriculture.*

26103. Alleged misbranding of salad oil. U. S. v. 20 Cases of Salad Oil. Exceptions filed by intervenor; exceptions dismissed. Tried to the court. Libel dismissed. (F. & D. no. 34423. Sample no. 24002–B.)

This product consisted principally of cottonseed oil and was sold as salad oil.

On November 19, 1934, the United States attorney for the Eastern District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 20 cases of salad oil at Easton, Pa., alleging that the article had been shipped in interstate commerce on or about June 6, 1934, by the Agash Refining Corporation, from Brooklyn, N. Y., and charging misbranding in violation of the Food and Drugs Act. The article was labeled in part: "Italian Cook Oil."

The article was alleged to be misbranded in that certain statements appearing in the labeling, together with the use of the Italian national colors thereon, were misleading and tended to deceive and mislead the purchaser, since they created the impression that the product was Italian olive oil, whereas it was not; in that the statement on the label "Pure Vegetable Salad Oil" was mis-

leading and tended to deceive and mislead the purchaser, since the term is also applicable to olive oil; and in that it purported to be a foreign product when not so.

On January 11, 1935, the Agash Refining Corporation, which had been granted leave to intervene, filed exceptions to the sufficiency of the libel, and on January 15, 1935, the Government moved to strike the exceptions. On June 2, 1936, the intervenor's exceptions were dismissed with the following opinion:

DICKINSON, *Judge:* Leave was granted to file Briefs. That of the claimant was delayed because of the illness of counsel. It has now been received.

There is little danger of anyone suffering from dizziness because of the rapidity of movement in this case. The libel was filed November 19th, 1934. The exceptions in question were filed January 11th, 1935. The motion before us to strike off was made January 15th, 1936. The argument was held March 24th, 1936, and counsel were unable to submit final Briefs until May 29th, 1936. Admiralty is made the procedural guide in these libel condemnation cases.

The exceptions filed are intended to serve the purposes of a demurrer and to raise the question of whether the libel discloses a cause of action. The Admiralty Rule authorizing exceptions is Rule 27. This allows an exception to be filed to the "sufficiency" of any pleading, and hence the libel. Our own Rules are 24 and 36. Admiralty Rule 21 requires "notice to all persons concerned in interest" to appear, etc.

The exceptions are four. One of them raises the question of the sufficiency of the libel to disclose a cause of action. The motion to strike off is based upon the averment that the exceptant has no ownership in the seized salad oil.

We have been favored with elaborate arguments upon the right of the exceptant to intervene. Inasmuch, however, as no judgment of forfeiture can be entered unless the libel discloses a cause of action, this question confronts the libellant.

The main objective of the Food and Drugs Act is to save the purchasing public from being deceived. It is the merit and defect of the English language that except in its technical terms the meaning of its words must be gathered as much from their setting as from the words employed. The word "deceive" is an illustration. It is like and indeed included in the word "fraud." Every hearer or reader attaches to it a meaning and yet it is a word which defies definition. The division of facts into evidentiary and ultimate is useful here. The fact that a label bears certain words and marks is an evidentiary fact. What meaning would be conveyed to the mind of the reader is an ultimate fact. It may be said to be a conclusion, and so it is, in that an ultimate fact is an inference drawn from evidentiary facts. It is none the less a fact inference. We have, for illustration, the averment that the label here in question displays the word "Italian." This is an evidentiary fact. The ultimate fact averred is that from seeing the word "Italian", the reader would infer that the article encased in the can which bore the label came from Italy. So he might, but if along with the word "Italian", he saw the words "made in America", he might not. So with the words "Pure Vegetable Salad Oil." The evidentiary fact is averred that the label contains these words. The ultimate fact is further averred that this would be read as meaning that the product was olive oil. The point made is that the ultimate fact averment is an averred fact, not a conclusion which the Court may draw.

The exceptions are dismissed, with leave to the intervening claimant to answer over.

On August 19, 1936, the case having come on for trial before the court, the pleadings, and a stipulation of facts, the court handed down the following opinion:

DICKINSON, *Judge:* This cause was heard as upon final hearing. Exceptions were filed to the libel, and a motion made to strike or dismiss the exceptions. This motion was disposed of upon the well established distinction between evidentiary facts and ultimate fact findings made therefrom. The evidentiary facts are not in dispute. These facts are averred in the libel, and the further ultimate facts are averred that the label in use by the intervening respondent is misleading in that the salad oil referred to in the label is thereby averred to be an olive oil and to be produced in Italy; whereas in fact the oil is not olive oil and is the product of domestic manufacture. The label is because of this asked to be condemned as misleading and in violation of the provisions of the Food and Drugs Act.

Viewing the ultimate fact averments to be averments of fact and not merely an interpretation of the meaning of the language of the label, we held that the

question should be disposed of as a question of fact. The parties thereupon by stipulation duly filed, waived the right to a trial by jury and submitted the case to the Court sitting without a jury. We accordingly thus dispose of it.

Findings of Fact. 1. The evidentiary facts are found in accordance with the stipulation entered into by the parties.

2. The ultimate fact finding is made in favor of the respondent that the salad oil in question is not represented by the label to be an olive oil nor is it represented to have been made in the Kingdom of Italy.

Discussion. Judge Forman, of the New Jersey District, in the kindred case of the United States against cases of salad oil has so well and so satisfactorily discussed the merits of this cause that we deem further discussion unnecessary. We accordingly limit ourselves to a statement of the conclusions of law reached.

Conclusions of Law. 1. The label set forth and complained of in the libel is not in violation of the provisions of the Food and Drugs Act.

2. The libel should be dismissed.

A formal order dismissing the libel may be submitted.

On August 27, 1936, judgment was entered dismissing the libel and ordering the return of the product to the intervenor.

W. R. GREGG, *Acting Secretary of Agriculture.*

26104. Misbranding of salad oil. U. S. v. 27 Cans of Salad Oil. Exceptions to libel filed. Motion to strike exceptions granted. Consent decree of condemnation and destruction. (F. & D. no. 34689. Sample no. 21277-B.)

This product consisted essentially of sunflower oil with some cottonseed oil and was sold as salad oil.

On January 3, 1935, the United States attorney for the District of Connecticut, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 27 cans of salad oil at Bridgeport, Conn., alleging that the article had been shipped in interstate commerce on or about October 8, 1934, by the Agash Refining Corporation, from Brooklyn, N. Y., and charging misbranding in violation of the Food and Drugs Act. The article was labeled in part: "Messina Brand Extra Fine Oil for Salads."

The article was alleged to be misbranded in that the following statements appearing on the label, "Marca Messina Olio Extra Fino Per Insalate, Cucina e Mayonnaise Pure Vegetable Salad Oil L'olio vegetale contenuto in questa scatola viene altamente recommandato per uso di tavola, per insalate, per mayonnaise, e per cucinare. Si garantisce ad essere assolutamente puro", were misleading and tended to deceive and mislead the purchaser since they created the impression that the product was Italian olive oil; whereas it was not. The article was alleged to be misbranded further in that it purported to be a foreign product when not so.

The Lucca Importing Co., Bridgeport, Conn., appeared as claimant for the goods and the Agash Refining Corporation intervened as manufacturer and filed exceptions to the libel. On October 23, 1935, the Government filed a motion to strike the exceptions of the Agash Refining Corporation. On November 15, 1935, the Government's motion to strike was heard and was granted, the court handing down the following memorandum decision:

HINCKS, *Judge:* In this matter the Agash Refining Corporation was admitted as an intervenor upon the representation that it was the manufacturer of the subject matter of seizure. The matter comes before the court upon a motion of the Government, as libellant, to strike the exceptions of the intervenor to the libel.

Thereafter, however, the consignee claiming to be the owner of the goods in question, by answer admitted the allegations of the libel, and influenced doubtless by the small value of the seizure, consented to a forfeiture praying, however, for a return of the goods under bond.

On argument, the intervenor protested against the judicial elimination of its exceptions on the ground that a decree of forfeiture was a reflection, with serious commercial consequences, upon its trade-mark which appeared on the labels on the goods seized. The exceptions, however, seem not to support that contention, for the exceptions contain no reference to any trade-mark owned by the intervenor.

Consequently, by reason of the limited language of the exceptions, it does not appear that the intervenor has any standing to oppose a forfeiture which the Government seeks, and which the claimant has consented to. That being so, there is no need for the court to pass upon the underlying question as to whether an intervenor who has no standing in the case other than its owner-