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Indiana Law Journal

Volume 32 | Issue 3 Article 3

Spring 1957

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Recommended Citation
(1957) "Proving the Falsity of Advertising: The McAnnulty Rule and Expert Evidence," *Indiana Law Journal*: Vol. 32: Iss. 3, Article 3.
Available at: https://www.repository.law.indiana.edu/ilj/vol32/iss3/3

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PROVING THE FALSITY OF ADVERTISING: THE McANNULTY RULE AND EXPERT EVIDENCE

In 1902 the Supreme Court, in *American School of Magnetic Healing v. McAnnulty*,[1] set out a principle which prescribed one of the boundaries of a valid Post Office fraud order. In the past half century, respondents in administrative proceedings under several federal statutes have urged the principle as substantiation for such a variety of contentions that considerable confusion has resulted.[2]

At the turn of the century, a number of organizations advocated the proposition that the mind of a human being was largely responsible for the ills of the body, and was a discernible factor in the treating and curing

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1. 187 U.S. 94 (1902).

2. An indication of the variety of contentions can be had from noting the several situations for which applicability of the rule has been urged. It was significant in three criminal mail fraud cases: Stunz v. United States, 27 F.2d 575 (8th Cir. 1928); Bruce v. United States, 202 Fed. 98 (8th Cir. 1912); Harrison v. United States, 200 Fed. 662 (6th Cir. 1912). Justice Brandeis, in his dissenting opinion to Pierce v. United States, 252 U.S. 239 (1920), applied the principle of *McAnnulty* to statements made by defendants convicted of violating the Espionage Act of 1917. The rule has also been advanced in argument in various civil and state court cases. Dilliard v. State Board of Medical Examiners, 69 Colo. 575, 196 Pac. 866 (1921) (revocation of doctor's license); Fougera & Co. v. City of New York, 224 N.Y. 269, 120 N.E. 642 (1918) (violation of sanitation ordinance—failure to disclose contents or curative effect of medicine on the label); Moxie Nerve Food Co. v. Holland, 141 Fed. 202 (D. R.I. 1905) (in defense to a suit brought to enjoin the distribution of a product with a confusingly similar name); Weltmer v. Bishop, 171 Mo. 110, 71 S.W. 167 (1902) (suit for libel by partners in an organization similar to the American School of Magnetic Healing; motion for rehearing based on the decision in the *McAnnulty* case, denied).

of these ills.[3] The Postmaster General issued a fraud order against one such group, the American School of Magnetic Healing. The organization then filed suit to enjoin the enforcement of the order. The bill alleged that the business of the school was to accomplish this process of healing. Further, it was alleged that there was no connection with any religious tenets, such as those held by the Christian Scientists. The alleged basis for the healing was "the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to."[4] The Supreme Court reversed the sustaining demurrer and remanded the case to the lower court with leave to the Postmaster General to answer. The statute under which the Postmaster General had acted authorized him to issue a fraud order in those circumstances where the respondents were engaged in a "scheme or device for obtaining money through the mails by false or fraudulent pretenses, representations, or promises."[5] In interpreting the statute, the Court declared that the representations had to deal with matters of fact in order to be a proper subject of a fraud order, because the statute did not apply to mere matters of opinion which are not capable of being proved false. A statement can be shown to be matter of fact or matter of opinion either by judicial notice or by trial evidence.[6] With respect to the allegations, the Court took judicial notice that the effectiveness of any product was a fruitful source of opinion, even though the great majority may be of one way of thinking. Upon this premise the court held that the statements in the allegations were matters of opinion, because the current state of medical knowledge, so far as it could be judicially noticed, indicated that the statements were matter of opinion. That is, lacking judicial notice that the statements were matters of fact, the conclusion was that they were matters of opinion.[7] In such situations, the Postmaster

3. The report of Weltner v. Bishop, 171 Mo. 110, 71 S.W. 167 (1902), discloses that the belief and advocation of the principles of healing through control of the mind was advanced by several groups.

4. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 96 (1902).

5. REV. STAT. § 3929 (1890), as amended, 39 U.S.C. § 259 (1926). It is interesting to note that while the statute is worded in the disjunctive—"false or fraudulent," the courts have interpreted that phrase as though the words were joined with an "and." See, for example, Rosenberger v. Harris, 136 Fed. 1001, 1003 (W.D. Mo. 1905).

6. Whether this is shown by judicial notice or by trial evidence depends, in most instances, on the procedural context in which the issue is raised. If the issue arises on demurrer, the court must base its decision on the allegations of the parties and on what it could judicially know. But when the case has proceeded on the merits, the court may either determine the issue on the basis of the evidence which the parties have introduced through the testimony of experts or it may decide the issue on the basis of its own knowledge—judicial notice.

7. A convention should be established at this point: "Matter of opinion" refers to the substance of the representation or advertising claim. It represents the notion that the subject matter of the representation is in an area where there are not reliable professional conclusions. "Matter of fact" refers to the opposite situation, where such

General may not, without anything more in the way of proof, issue a fraud order.[8] Of course, since this case came up on demurrer, no other proof could be shown.[9]

It is to be noted that the principle of the *McAnnulty* case is simply that if a statement on its face is matter of opinion, that is, one which by the standard of judicial notice cannot be regarded as matter of fact, a fraud order should not be issued. The *McAnnulty* case set no standard other than judicial notice for making this determination.[10] Although the rule of the case has been invoked by respondents in many instances, no case has been discovered where the same issue—demurrer—was ever again raised.[11] Before examining the context in which the courts have given effect to the rule, it would be proper to further examine the rule.

In the prior discussion the issue is presented by demurrer. Where, however, the case proceeds to trial and evidence is introduced, two other issues are presented. First, does the evidence show that the representation[12] is matter of opinion or fact? If the evidence directed to this issue shows that the representation is matter of opinion then this concludes the case, and the judgment will be against the government.[13] If, however, the evidence shows that the representation is matter of fact, then the second question arises: If it is matter of fact, is it true or false, It is quite conceivable that a representation can be categorized as matter of

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conclusions are possible. Occasionally, the courts and the respondents have used the word "opinion" in different connotations. Where that is the case, the use they have employed is to be distinguished from "matter of opinion."

8. In the *McAnnulty* case, the Court placed its ultimate conclusion on this ground. "Unless the question may be reduced to one of fact, as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter." 187 U.S. 94, 106 (1902). "The opinion entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved, as matter of fact, that those who maintain them obtain their money by false pretenses or promises as that phrase is generally understood, and as, in our opinion, it is used in these statutes." 187 U.S. 94, 107 (1902).

9. The Court carefully preserved the right of the Postmaster General to show a factual violation of a law at a later stage. "In overruling the demurrer, we do not mean to preclude the defendant from showing on trial, if he can, that the business of the complainants, as in fact conducted, amounts to a violation of the statutes as herein construed." 187 U.S. 94, 111 (1902).

10. The Court's opinion does not suggest how matters of fact can be distinguished from matters of opinion, but rather is concerned only to show that the statements are matters of opinion in this case.

11. Alhough the issue of demurrer may not have occurred again, similar situations—ones calling for judicial notice—have been presented in circumstances where no expert evidence has been introduced. Gottlieb v. Schaffer, 141 F. Supp. 7 (S.D. N.Y. 1956); Neher v. Harwood, 128 F.2d 846 (9th Cir. 1942) *cert. denied,* 317 U.S. 659 (1942); Farley v. Simmons, 99 F.2d 343 (D.C. Cir. 1938) *cert. denied,* 305 U.S. 652 (1939). These cases will be discussed in detail at a later point in the text.

12. The word "representation' as it is used throughout the text refers to the advertising claim itself. Its use is not intended to signify the conventional legal connotation which requires that the statement be one of past or presently existing fact.

13. See note 8 *supra.*

fact and yet not be false. If the respondent has contested both issues, he must succeed on at least one of them in order to prevail. The government must succeed on both or lose the case for failure of preponderant proof.

No cases have been discovered where the courts have enunciated this analytical approach; they have not made it clear that there is a two step problem. Most frequently they have appraised the evidence and recited that since it showed that the representation was false, the representation could not concern matter of opinion. While this is a correct result, it combines what are properly two separate conclusions. This has a tendency to obfuscate the two issues. The confusion is manifest in some lower court decisions which say that since the proof was not sufficient to show falsity the statement was matter of opinion.[14] Such a conclusion does not necessarily follow, for even though a statement may not be false, it may still be matter of fact. It appears that where the court takes this approach it is assuming that "opinion" is the antithesis of "falsity."[15] This assumption is incorrect. However, what a court might really be doing in such a situation is concluding that it cannot resolve the conflict of evidence going to the issue of falsity; and, then, instead of saying that the government has failed in sustaining its burden of persuasion, the court uses the word "opinion" as a talismanic label.

The rule of the *McAnnulty* case has been improperly cited as authority for several other propositions. A strict application of the rule would necessarily limit it to Post Office fraud orders.[16] Nevertheless, the rule has been used by respondents in appealing from the cease and desist orders of the Federal Trade Commission and judgments under the food and drug laws.[17] The *McAnnulty* case has also been urged upon the courts as announcing a rule applicable to fraudulent intent.[18] Such an interpretation or application is completely erroneous. The issue of fraud was never reached in the *McAnnulty* decision. Moreover, to say that the

14. In Farley v. Simmons, 99 F.2d 343 (D.C. Cir. 1938), *cert. denied,* 305 U.S. 652 (1939), the court noted the conclusions of the lower court were that since the proof of falsity had not been established, the representation was mere matter of opinion.

15. The antithesis of "falsity" is "truth." This is the second step determination. The first issue that must be resolved is whether the substance of the representation is matter of fact or matter of opinion.

16. A respectable application of the doctrine of stare decisis dictates confining the authority of the case to the jurisdiction exercised by the Postmaster General under the fraud order statutes. Moreover, the conclusions reached by the Court in *McAnnulty* are cast in terms of the postal statutes.

17. However, the issues in all three of these areas have at least a common denominator, viz., proof of falsity. Therefore, its application to the other two areas is justified analytically.

18. Atlanta Corporation v. Olesen, 124 F. Supp. 482 (S.D. Cal. 1954); Jeffries v. Olesen, 121 F. Supp. 463 (S.D. Cal. 1954); Pinkus v. Walker, 61 F. Supp. 610 (D. N.J. 1945).

McAnnulty rule goes to the question of fraudulent intent is to confuse the substance of the representation with the state of mind of the publisher. These are two entirely different propositions, though it will be developed below that the former may be evidence of the latter.

There have been several cases in which the court has eliminated the initial question of matter of opinion or fact at the outset. In these instances the court was justified in finding that there was no room for any opinion, *i.e.,* that it was obviously matter of fact. In *Farley v. Simmons,*[19] the appellee had advertised his pulp magazines so as to convey the notion that they contained obscene matter.[20] To be sure, the standard of obscenity is perhaps a subjective one. This is because the line of demarcation becomes more hazy as one approaches the area that is not obscene. However, the language of the opinion suggests that this advertising was well beyond the hazy marginal area. Therefore, a "matter of opinion" argument could not properly be raised.[21] In *Neher v. Harwood,*[22] the appellant had constructed and operated a machine which he called a cosmic generator. He represented that when he placed cards, autographed by the mail customer, into the machine, the machine would generate rays which would improve the physical condition of the customer. Presumably the rays would reach the customer wherever he was. In contesting the validity of the fraud order, the appellant argued that his statements were matters of opinion within the meaning of the *McAnnulty* rule. The court denied the petition for injunction on the ground that the claims were so patently absurd that there were no reasonable grounds upon which an opinion could even be based. Therefore, the representations were factual and false.[23] In *Gottlieb v. Shaffer,*[24] the petitioner contended that there was no substantial evidence to support the fraud order. The petitioner had advertised that the purchasers of his luck charms and perfumes would experience the same good fortune experienced by former

19. 99 F.2d 343 (D.C. Cir. 1938), *cert. denied,* 305 U.S. 652 (1939).

20. The proof before the court showed that in fact the booklets were not obscene. The curious twist here is that the fraud order was based on the finding that the representation was false and fraudulent, not that the magazines were obscene.

21. This case presents the peculiar situation where the issue, though not raised on demurrer, was decided as a matter of law. The determination of whether a representation contained or suggested obscenity was a question of law. No expert witnesses were needed to educate the court on this matter. Moreover, when the court determined as a matter of law that the questionable matter was not obscene, then it also foreclosed any argument based on "matter of opinion." In such a situation, *McAnnulty* is completely excluded. The significant factors are that it was done by the court without the assistance of any trial evidence, and that it was done as a matter of law.

22. 128 F.2d 846 (9th Cir. 1942), *cert. denied,* 317 U.S. 659 (1942).

23. "The facts of the two cases are not parallel. There was involved a school for the understanding mind; here no understanding of any kind is premised." Neher v. Harwood, *supra* note 22 at 853.

24. 141 F.Supp. 7 (S.D. N.Y. 1956).

purchasers. At the hearing, the petitioner conceded that the articles were common things, not in themselves superstitious. Then, somewhat inconsistently, he argued that the government had failed to introduce the expert evidence which would be necessary to support the findings. To this argument the court replied, "The short answer is that where claims are completely opposed to common knowledge, their falsity may be inferred from their preposterous character."[25] The court clearly foreclosed the possibility of there being any question of opinion. That is, the court judicially noticed that the representations were so absurd that they were false on their face.[26] Therefore, the statements were matters of fact.[27]

At common law, the manner in which the representation is expressed may be crucial. The general rule is that statements with reference to the

25. Gottlieb v. Schaffer, *supra,* note 24 at 16.

26. In reviewing the record, the court said, "The hearing officer found the plaintiff's claims 'so preposterous and opposed to common knowledge and experience as to carry within themselves, without more, evidence of their falsity.'" With respect to fraudulent intent the court declared, "Also it is not without interest that the Supreme Court has held 'an intent to deceive might be inferred from the universality of scientific belief that the representations are wholly unsupportable. . . .' In this instance the claims defy universality of experience." Furthermore, the court said, "The very advertisements furnish sufficient evidence to support this finding and there is no basis upon which to overrule it." Gottlieb v. Schaffer, *supra* note 24 at 17.

27. In both *Neher v. Harwood* and *Gottlieb v. Schaffer,* the court determined the fact-opinion issue without the aid of evidence. These were both cases where judicial notice was the vehicle employed to decide the issue. In this respect they are somewhat similar to the *McAnnulty* case. Furthermore, the two cases bear a resemblance to *McAnnulty* on the procedural aspects of that case. In *Neher v. Harwood,* the district court had sustained the government's motion to dismiss. In this respect, then, the result reached in the case is the direct converse of the *McAnnulty* holding under similar circumstances. The government had moved to dismiss on the ground that the plaintiff had failed to join the Postmaster General as an indispensable party. The circuit court affirmed the dismissal on this ground. The appellant argued that the district court had also ruled that there was no constitutional question involved. It is in the discussion of this issue that the circuit court considered the application of the *McAnnulty* rule. *Gottlieb v. Schaffer* was decided on cross motions for summary judgment. Although in summary judgment procedure affidavits of evidence are submitted, the court disclosed that all that was necessary in this case was the advertising itself. Here also, under a comparable procedural status, the result reached was the opposite of that reached in *McAnnulty.* In two other cases, the court could have used this approach. The first of these was Missouri Drug Co. v. Wyman, 129 Fed. 623 (E.D. Mo. 1904). The complainant represented that "after years of research eminent physicians have at last discovered a remedy which is endorsed by the medical profession as permanent in its effect." Whether there had been an endorsement by the leading members of the medical profession was wholly a matter of fact. Similarly, in Leach v. Carlile, 258 U.S. 138 (1922), the complainant represented, among other things, that "there are in America today millions of men between 17 and 65 years of age who are earnestly seeking relief from sexual weaknesses in some form or stage." Here, too, the court could have found that the representation was a matter of fact only. In the *Neher* and *Gottlieb* cases, the court not only took judicial notice that the representations were matters of fact but also that they were false and fraudulent. In the *Wyman* and *Leach* cases, the court could only have used the judicial notice technique to determine the fact-opinion issue.

future, being predictive in nature, are not actionable.[28] These predictive statements have been dubbed "expressions of opinion." This is not the same connotation given the word "opinion" by the court in the *McAnnulty* case. Typically, prospective help-verbs such as "will," "shall," or "would" are found in "expressions of opinion." The "opinion" in the *McAnnulty* rule is applied where there is a lack of proof to show that the substance of the statement is a matter of fact. Therefore, if the representation of curative effect is stated prospectively, the *McAnnulty* rule is not automatically applicable. The court will treat the representation as though the prospective element were not there.[29] In *Dr. J. H. McLean Medicine Co. v. United States,* the reprehensible claim was stated prospectively: "Gall Stones—Dr. J. H. McLean's Liver and Kidney Balm will aid in the dissolving of kidney stones. . . ."[30] This representation was apparently the sole representation upon which the fraud order was issued. The fact that it was prospectively phrased did not prevent the court, on the strength of the evidence, from holding that the fraud order was valid.[31] This compels the conclusion that representations which are "expressions of opinion" do not automatically invoke the *McAnnulty* rule, nor does their presence prevent a valid finding for a fraud order.

Having noted that in some situations the court has made a determination that the representation is matter of fact and, further, that pre-

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28. This was the rule set out in Pasley v. Freeman, 3 Term Rep. 51 (K.B. 1789). Generally, however, the rule has been riddled by so many exceptions based on special circumstances that it is of questionable value as a general proposition. The trend appears to be toward finding an exception wherever possible. One of the principles upon which exceptions are posited is when there is implicit in the expression of opinion an assertion that the publisher knows facts which make his opinion a representation upon which the reader may justifiably rely.

29. The rationale behind the treatment accorded these predictive phrases may be that either the court does not intend to follow the common law rule or that the circumstances of the cases present the necessary grounds constituting an exception to the general rule. That the latter is more likely can be seen from Missouri Drug Co. v. Wyman, 129 Fed. 623, 626 (E.D. Mo. 1904), where the complainant argued that his advertising claims were mere expressions of opinion and, as such, could not accomplish a fraud. Although the court held that some of the representations were matters of fact, it further noted that expressions of opinion could also be the basis upon which a fraud order is posited.

30. 253 Fed. 694, 697 (8th Cir. 1918).

31. In addition to the *McLean* case and the *Wyman* case, there have been several other instances where representations, prospectively stated, have been the subject of valid fraud orders. In Fanning v. Williams, 173 F.2d 95 (9th Cir. 1949), the appellee had advertised that his weight reducing plan *would* aid obese persons to lose weight easily and safely. On the basis of the evidence, the court held the representation false and fraudulent. In Seven Cases v. United States, 239 U.S. 510 (1916), the appellants had represented, "We know it . . . will cure Tuberculosis." Chief Justice Hughes, speaking for the Court, squelched any remaining notions that all expressions of curative effect were opinions protected by the *McAnnulty* rule. He declared that only representations—be they predictive in nature or not—which could not be established as matter of fact fell within the rule.

dictive phraseology is no bar to a fraud order, we now turn to the application of the *McAnnulty* rule to situations arising under statutory regulation of advertising other than the postal statute used in that case.

Federal Trade Commission Act

The Federal Trade Commission Act proscribes false advertising as an "unfair method of competition."[32] One of the early applications of the *McAnnulty* rule to the act occurred in the *L. B. Silver Co.* case.[33] The petitioner, appealing from a cease and desist order, contended that the commission's findings of fact were not supported by substantial evidence. One of the petitioner's advertising claims was that it was marketing a separate and distinct breed of hogs. Although the experts agreed on the basic facts, they could not agree that the petitioner's hogs were a separate and distinct breed. Both groups of experts agreed that whether there was a separate breed was a matter of fact; they differed, of course, in their conclusion. The court remarked that the expert evidence was equally balanced. In dismissing the commission's order to this count, the court said that there was an honest difference of "opinion." By this the court could have meant one of two things: either that the conflict of the expert evidence was so substantial that the court felt that the representation was not really a matter of fact; or that even though the court considered the representation matter of fact the government had not proved it false. Under the circumstances of the case—the balanced expert conflict—the first rationale would have been a very logical and correct one. Although the second would not be a logical one, it was just as probable an alternative, inasmuch as this has been the typical phraseology of the lower courts in applying the *McAnnulty* rule. If in truth, the court did accept the petitioner's proposition as a fact, then it would have been more accurate to have placed the decision on the grounds of failure of proof, rather than on "opinion."[34]

32. 38 STAT. 719 (1914), 15 U.S.C. § 45(b) (1952). In Ford Motor Co. v. Federal Trade Commission, 120 F.2d 175 (6th Cir. 1941), *cert. denied,* 314 U.S. 668 (1941), it was held that "unfair methods of competition" may consist generally of the false advertising of a product.

33. L. B. Silver Co. v. Federal Trade Commission, 289 Fed. 985 (6th Cir. 1923).

34. In another case, Proctor & Gamble v. Federal Trade Commission, 11 F.2d 47 (6th Cir. 1926), *cert. denied,* 273 U.S. 717 (1926), the commission found the advertising of the plaintiff to be false because it represented that its soap was a "naphtha" soap. The commission found as a fact that the soap product contained a maximum of ½ of 1% naphtha. The manufacturer urged on appeal that the amount of naphtha which would be effective as a cleansing agent was matter of opinion only. The court conceded that there might be difficulty in determining the minimum amount of naphtha which would be effective, but held that the question as to whether the plaintiff's soap contained a sufficient amount of naphtha to be effective in any degree was an ultimate fact which the commission could properly find. Since the claim "naphtha" was not matter of opinion according to the ruling of the court, the representation could properly

Beginning with *Justin Haynes & Co. v. Federal Trade Commission,*[35] the court, in a new line of cases, declined to upset the commission's findings of fact where there was a conflict of expert testimony. The attitude was that this question concerned the weight of the evidence and, as such, was not a proper matter for the courts to review.[36] In the *Haynes* case, the essential finding was that there was such an insignificant amount of aspirin in the petitioner's compound that it had no therapeutic value for the pains it was represented to relieve. These findings of fact were supported by the testimony of three experts called by the commission. It was admitted that these experts had had no personal experience with the compound. Further, from the report of the case, it does not appear that they were purporting to report the views of a substantial majority or of the entire medical profession. Rather, the opinion indicates that the experts based their conclusions solely on their own general medical and pharmacological knowledge.[37] Despite the fact that the petitioner called experts who expressed contrary conclusions and also testified as to the experiments which they had conducted, the court sustained the cease and desist order.[38] The significant aspect of the case is the standard for proof of falsity which the court adopted. Implicit in the finding that the advertising was false was also a finding that the substance of the representations were matters of fact. The standard

be subjected to proof of falsity. Consequently, the court expressly excluded the application of the rule of the *McAnnulty* case. Here the court had resolved the fact-opinion issue on the basis of the evidence which had been presented at the hearing. Note further, in Raladam Co. v. Federal Trade Commission, 42 F.2d 430 (6th Cir. 1930), *aff'd.*, 283 U.S. 643 (1931), the expert witnesses for the parties could not agree on the proper meaning of "scientific" and "safe." The court found the divergence of competent opinion as to these definitions to be so great that it was impossible for the commission to make a finding of fact. However, the court expressly distinguished the instant case from *McAnnulty*, ruling that the latter was inapplicable.

35. 105 F.2d 988 (2d Cir. 1939), *cert. denied,* 308 U.S. 616 (1939).

36. "That this court is not permitted to pass upon the weight of the evidence is too well established to require the citation of authorities." Justin Haynes & Co. v. Federal Trade Commission, *supra* note 35 at 989.

37. "General medical and pharmacological knowledge" has gained general acceptance by the courts in reviewing the cease and desist orders of the commission. John J. Fulton Co. v. Federal Trade Commission, 130 F.2d 85 (9th Cir. 1942), *cert. denied,* 317 U.S. 679 (1942); Neff v. Federal Trade Commission, 117 F.2d 495 (4th Cir. 1941); Dr. W. B. Caldwell, Inc. v. Federal Trade Commission, 111 F.2d 889 (7th Cir. 1940).

38. The real temper or attitude of the court can only be appreciated by noting the manner in which the opinion was expressed. "It is true that the witnesses had no personal experience with Aspirub and based their opinions upon their general medical and pharmacological knowledge. They were, however, well-qualified expert witnesses, and the fact that other experts called by the petitioner expressed a contrary opinion and testified to experiments cannot enable the petitioner to contend successfully that there was no substantial evidence to support the Commission's findings." 105 F.2d 988, 989 (2d Cir. 1939), *cert. denied,* 308 U.S. 616 (1939).

accepted here was a minimal one.[39] Actual experiments with the product need not have been conducted, nor did the experts need to express the general views of the medical profession. All that was required was that th experts rely on their own general medical and pharmacological knowledge, even though there was contravening expert testimony coupled with experimental results. This standard or method of proof was adopted by the courts in many of the succeeding Federal Trade Commission cases.[40]

39. "Minimal" is used in a comparative sense. It anticipates the somewhat higher standards that will be discussed at a later point. It is not used as connoting the lowest possible standard.

40. In four cases the test was specifically adopted: Charles of The Ritz Distributing Corporation v. Federal Trade Commission, 143 F.2d 676 (2d Cir. 1944) (rejuvenating qualities of petitioner's face cream); John J. Fulton Co. v. Federal Trade Commission, 130 F.2d 85 (9th Cir. 1942), *cert. denied*, 317 U.S. 679 (1942) (effectiveness of petitioner's product on diabetes); Neff v. Federal Trade Commission, 117 F.2d 495 (4th Cir. 1941) (therapeutic value of petitioner's product as a remedy affording relief to those suffering from prostatitis, cystictis, urethritis, catarrhal conditions of the urinary tract, sugar diabetes, dropsy, etc.); Dr. W. B. Caldwell, Inc. v. Federal Trade Commission, 111 F.2d 889 (7th Cir. 1940) (therapeutic value of pepsin in Dr. W. B. Caldwell's Syrup Pepsin). In three other cases the disparity in the qualifications of the witnesses was so great that the expert opinion evidence for the government completely overweighed the evidence introduced by the petitioner. Bristol-Myers Co. v. Federal Trade Commission, 185 F.2d 58 (4th Cir. 1950) (government: four expert dentists who were leaders in their field; petitioner: one witness who had been educated in medicine, had been a medical director in an industry and of an army hospital, and who was employed regularly by the petitioner; issue: therapeutic value of petitioner's toothpaste); J. E. Todd, Inc. v. Federal Trade Commission, 145 F.2d 858 (D.C. Cir. 1944) (government: a chemist who made an analysis, and three doctors—two of whom were specialists; petitioner: two osteopathic physicians; issue: therapeutic value of petitioner's arthritis preparation); Irwin v. Federal Trade Commission, 143 F.2d 316 (8th Cir. 1944) (government: three doctors who had had wide experience in the special area; petitioner: two chiropractors; issue: therapeutic value of petitioner's elaborate enema device). In still other cases, the only expert evidence was that presented in support of the complaint. Excelsior Laboratories, Inc. v. Federal Trade Commission, 171 F.2d 484 (2d Cir. 1948) (The issue was the therapeutic value of petitioner's garlic tablets for the treatment of high blood pressure. On the basis of a chemical analysis, a doctor who had worked twenty-five years for the U.S. Public Health Service testified that modern medical tests with the product disproved the petitioner's claims. This was held to be substantial evidence.); Aronberg v. Federal Trade Commission, 132 F.2d 165 (7th Cir. 1942) (Here the issue was whether petitioner's medicinal compounds—claimed to relieve delayed menstruation—were dangerous. Gynecologists and obstetricians testified that in their opinion the product was not safe if used as the petitioner directed. The court held this to be substantial evidence.) There are also several pertinent cases which did not get into the courts. In Evis Manufacturing Co., 3 CCH TRADE REG. REP. ¶ 26,002 (1956), the only expert testimony was that given on behalf of the complaint. Their testimony was materially impaired when it was shown that their experiments were faulty. Though the experts also contended that the device—a water conditioner—could not operate as claimed because to so operate would violate the laws of physics, they did not rule out the possibility that it might work. In view of this admission the examiner recommended dismissal of the case, saying, "We must not take the risk of interfering with the development of a device which may prove to be the first practical application of a scientific principle heretofore undiscovered." The commission, on hearing before the full body, remanded the case for the taking of additional evidence. 3 CCH TRADE REG. REP. ¶ 26,320 (1956). In Pioneers, Inc., 3 CCH TRADE REG. REP. ¶ 25,986 (1956), the commission dismissed a complaint based on alleged false advertising of a battery additive. While it was agreed that the scientific evidence for the government out-

In these cases the commission and the court had expert evidence from which to determine whether the matter was fact or opinion. Assuming that the first alternative was the one adopted by the court in the *Silver* case—that the expert evidence was so evenly matched that the court said that the matter was really not fact—then this was a perfect application of the *McAnnulty* principle to a situation where the court has heard the evidence.[41] In the other FTC cases, of which the *Haynes* case is representative, the initial determination whether the matter was fact or opinion was implicit in the express conclusion that the advertising was false. Moreover, the method of proof used to show falsity—the individual expert's testimony based on his general medical and pharmacological knowledge—was also sufficient to show that the substance of the representation made in the advertising was a matter of fact.

Statutory Regulation of Food and Drugs

The "opinion" problem and the method of proof required to prove a representation matter of fact and false also became important in the cases under the food and drug statutes. Beginning with the 1912 Sherley Amendment,[42] jurisdiction under the Food and Drug Act of 1906[43] was extended to curative claims and representations.[44] The statute proscribed

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weighed that of the respondent, the commission held that the total weight of the evidence favored the respondent in view of the significant user testimony. For further explanation of this case consult S. REP. No. 1092 83rd Cong., 2d Sess. 125 (1954). In two recent cases the commission has dismissed the complaint on the ground that the reliable clinical reports put in evidence by the respondent's experts refuted the government expert testimony. The Knox Co., TRADE REG. REP. ¶ 25,173 (1954); Hato Co., TRADE REG. REP. ¶ 14,669 (1951).

41. That is, in this case, the court achieved a result similar to *McAnnulty* except that the procedural stages of the cases differed. In *McAnnulty*, the Court decided the fact-opinion issue on its own knowledge. In the *L. B. Silver* case, this decision was based on the court's interpretation of the evidence.

42. 37 STAT. 416 (1912), 21 U.S.C. § 10 (1926).

43. 34 STAT. 768 (1906), 21 U.S.C. § 1 (1926).

44. In United States v. Johnson, 221 U.S. 488 (1911), Justice Holmes declared that the 1906 statute did not apply to representations of curative effectiveness. The disposition of the case was actually determined by this statutory interpretation. Nevertheless, in several instances, the case has been cited as authority for the proposition that the *McAnnulty* principle applied to cases under the 1906 law before it was amended. Such a use of the case was quite erroneous. Justice Hughes, in a vigorous dissent, felt that the majority had interpreted the statute much too narrowly. In his view, Congress intended that representations of curative effect be included within the 1906 statute. A month after the Court had decided the *Johnson* case, the House Committee on Interstate Commerce reported, "The decision of the Supreme Court in the Johnson case was considered so serious . . . by the President that . . . he transmitted to Congress a special message calling for the necessity of passing at an early date an amendment to the law. . . ." In 1912, the Sherley Amendment was passed. It recited that an article was misbranded "if its package or label shall bear any statement, design, or device regarding the curative or therapeutic effect of such an article or any of its ingredients or substances contained therein, which is false and fraudulent." The report of the House Committee also dwelt at some length on the phrase "false and fraudulent." 48 CONG. REC. APP. 675 (1911).

any representation "regarding the curative or therapeutic effect of such an article or any of its ingredients . . . which [was] false and fraudulent."[45] The defendant in *Seven Cases v. United States*[46] had manufactured a remedy which was heralded as a palliative for respiratory ailments. He claimed that it was "[e]ffective as a preventative for pneumonia" and that "[w]e know that it has cured and that it has and will cure Tuberculosis."[47] The defendant argued that the new amendment invaded the realm of speculation proscribed by the *McAnnulty* case. Chief Justice Hughes said that Congress did not intend that all curative claims should fall within that rule; had they so intended, the amendment would have been a nullity.[48] Without indicating what the method of proof was, the court declared that the statements were false, inasmuch as the proof showed that no medicine known would cure tuberculosis. Having found the matter false and, therefore, implicitly that it was also a fact, the court said that this was not a matter of opinion.[49] In *Dr. J. H. McLean Medicine Co. v. United States,*[50] the defendant advertised his nostrum as being able to dissolve kidney stones. Competent medical experts testified for the government that there was no known medicine that would dissolve kidney stones and that there was no dispute among the medical profession on this point. The defendant did not introduce any expert testimony in its behalf. The court said that the testimony which revealed the general agreement of medical opinion—"the uniform course of medical opinion"—was competent to show the falsity of the representation. Again, the court said that since the representation was false, it was not matter of opinion. The method of proof accepted by

45. The report of the House Committee indicates that Congress deliberately included the element of fraudulent intent, ascribing to it the usual common law meaning. After the enactment of this amendment, the statutory standard under the Food and Drug Act of 1906 was the equivalent of the postal statute which authorized the Postmaster General to issue fraud orders. 48 CONG. REC. APP. 675, 676 (1911).

46. 239 U.S. 510 (1916).

47. Seven Cases v. United States, *supra* note 46 at 514.

48. Justice Hughes said that Congress ". . . deliberately excluded the field where there are honest differences of opinion between schools and practitioners. It was, plainly, to leave no doubt upon this point that the words false and fraudulent were used. . . . That false and fraudulent representations may be made as to the curative effect of substances is obvious." 239 U.S. at 517.

49. Justice Hughes continued, discussing the good faith which the publisher must have. "It is said that the owner has a right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances or compositions are in a position to have superior knowledge and may be held to good faith in their statements. . . . Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions, but constituted absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose." 239 U.S. at 517. *Cf.* Missouri Drug Co. v. Wyman, 129 Fed. 623, 628 (E.D. Mo. 1904).

50. 253 Fed. 694 (8th Cir. 1918).

this court in proving falsity (and fact) was the uniform course of medical opinion.[51] This had very liberal overtones, for it meant that specific tests of the questionable product would not necessarily be required. Presumably, the government's burden of persuading the court was materially eased by the adoption of this method of proof. That "uniform" was not meant to be taken as the same thing as "without exception" can be inferred from the court's language when it described the standard in terms of "general agreement." However, the court does say that the "general agreement" must be more than the testimony of an individual expert based solely on his own knowledge where there is expert evidence to the contrary.

In 1938, Congress completely revised the food and drug laws.[52] The new statute proscribed all curative claims which were "false and misleading in any particular."[53] This revision of the law left out the requirement of fraudulent intent. The defendant in *United States v. 7 Jugs*

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51. Note how this method of proof was forecast by the House Committee report. "[I]t is undesirable to permit misleading claims to be made simply because a few experts can be found on the occasion of a trial to support them. . . . One of the important application of section 201 (m) relates to this problem. [Section 201(m) defines "labeling" as meaning "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."] If only a few experts regard a label statement as true but the great body of qualified experts in that particular field regard the statements as untrue, then there may be substantial ground for concluding that the curative claim is misleading unless it is qualified in such a way to show the existence of conflicting opinion as to its truth." The discussion of the committee as to a rejected clause which the Senate Bill had contained offers further insight into the problem. Section 17 (a) of the Senate Bill included the explanatory sentence, "Any representation concerning the effect of a drug or device shall be deemed to be false and misleading under this paragraph if such representation is not supported by persons who, by reason of scientific training and experience, are qualified as experts on the subject to which such representation relates." As a reason for excluding the sentence, the committee said, "It was felt that if a maker were able to obtain two or more persons who could qualify as experts and would testify in support of the label claims, the Government's case would be lost despite the fact that every competent expert in the country would unqualifiedly declare the claims to be false." H.R. REP. No. 2139, 75th Cong., 3d Sess. 7 (1938).

52. Federal Food, Drug, and Cosmetic Act, 52 STAT. 1040 (1938), 21 U.S.C. § 301 (1952).

53. 52 STAT. 1040, 1050 (1938), 21 U.S.C. § 352(a) (1952). "A drug or device shall be deemed misbranded—(a) If its labeling is false or misleading in any particular." One of the significant changes in this statute was the deletion of the requirement of fraudulent intent. The reason for this deletion was discussed in the committee report. "Section 502 defines misbranded drugs and devices. In its first paragraph it makes an extremely important contribution to existing law in defining a drug as misbranded if its labeling is false or misleading in any particular. The present law contains this provision with respects to representations concerning identity, strength, quality, and purity of the drugs, but therapeutic claims are amenable to actions only if they are false and fraudulent. The persuasive effect of a false label on a consumer's mind is the same whether the representations were made in good faith or not. It has been demonstrated that effective protection of the public from falsely labeled nostrums is in many cases impossible under this language." H.R. REP. No. 2139, 75th Cong., 3d Sess. 7 (1938).

of Dr. Salsbury's Rakos[54] claimed that his remedy was a cure for various animal diseases. Contending that curative claims were opinions within the meaning of the *McAnnulty* rule, the defendant requested an instruction to the jury that if his claims were directed to curative effects of his product, the verdict should be for him. The court denied the request, ruling that all curative claims were not protected by the *McAnnulty* rule; only those claims which were matters of opinion fell within that rule. If the claim was susceptible to proof of falsity, then a fortiori it was a fact and was capable of being "false and misleading" as denoted by the statute. Government experts had made exhaustive tests with the defendant's product which showed that the solution was absolutely worthless with respect to the claims made for it.[55] The court accepted the expert testimony based on these tests as sufficient proof of falsity.

Both of the methods of proof just reviewed—the uniform course of medical opinion and the specific tests with the product—were accepted with approval in *Research Laboratories v. United States.*[56] The defendant had represented that his drug was effective in the treatment of arthritis, rheumatism, neuritis, sciatica, and lumbago. His defense was patterned on the *McAnnulty* case. The court ruled that *McAnnulty* was not applicable to the case because each of the three "limitations" on the *McAnnulty* rule was present. By "limitations," the court was referring to the methods of proof which could be employed to show the falsity of a claim. Here again, the court went immediately to the question of falsity, omitting to find expressly at the outset that this was matter of fact. First, there was testimony with regard to the specific tests which had been conducted with the product. Second, there was expert testimony reporting the consensus of medical opinion.[57] Third, there was testimony of

54. 53 F. Supp. 746 (D. Minn. 1944).

55. The several experts for the government had conducted extensive experiments, both in the laboratory and in the field. The appellant's experts were veterinarians employed by him. They testified to the results of their relatively few experiments. In their opinion the compound was effective. The appellant urged that since the evidence was in the nature of opinion—though the opinion of experts, it was within the "opinion" rule of the *McAnnulty* case. The court dismissed this argument.

56. 167 F.2d 410 (9th Cir. 1948), *cert. denied,* 335 U.S. 843 (1948).

57. The consensus method was also approved as substantial evidence in a subsequent case. In United States v. Wood, 226 F.2d 924 (4th Cir. 1955), the government prosecuted an appeal from the dismissal of its libel by the district court. The appellee made and distributed Diabena, representing it to be an effective cure for diabetes. Government experts testified that it was their opinion and the opinion of the consensus of the medical profession that no remedy taken orally—such as Diabena—could be a cure for diabetes. The appellee called no witnesses to testify in his behalf, but submitted affidavits from several doctors who attested to the success they had had with Diabena. The circuit court, relying on Research Laboratories v. United States, 167 F.2d 410 (9th Cir. 1948), *cert. denied,* 335 U.S. 843 (1948), held that the evidence of the consensus was substantial evidence to support the government's case.

experts who had not performed experiments that in their own professional opinion the claims were false.[58] The impact of all three of these methods of proof compelled the conclusion that the defendant's claims were false. In a like manner, the conclusion that the representations were matter of fact also followed.

Of the three methods just enumerated, the test method and the consensus method had already been approved for proving falsity in previous cases.[59] The third method had never before been advanced as an acceptable one in food and drug adjudications.[60] It should be recalled that the *McAnnulty* rule was based on the premise that some representations are in substance only opinion. In the situations where evidence has been heard by the court, the evidence has aided the court in making a determination (implicitly at least) that the representation is either matter of fact or matter of opinion. In most instances, this determination is not expressly made before the falsity of the representation has been pronounced. That is, the court has looked immediately to the true-false issue. If the government has introduced the testimony of a competent expert based on his own professional capacity, the court is likely to consider this evidence in terms of the falsity issue. If the defendant wishes to establish that this area of knowledge is still so unsettled that it is only matter of opinion, it is incumbent upon him to demonstrate that there is such a conflict of professional views on the subject that no consensus can be found.[61] The same approach should be used by the defendant if he wishes to contend that even if it is matter of fact it is not false. The defendant, in the instant case, did not introduce contravening

58. The court described this third "limitation" as expert testimony "where the witness has neither tested the product nor purports to report the consensus of medical opinion. . . . " Research Laboratories v. United States, 167 F.2d 410, 416 (9th Cir. 1948), *cert. denied,* 335 U.S. 843 (1948).

59. United States v. 7 Jugs of Dr. Salsbury's Rakos, 53 F. Supp. 746 (D. Minn. 1944); Dr. J. H. McLean Medicine Co. v. United States, 253 Fed. 694 (8th Cir. 1918).

60. Twenty-four years earlier under the old statute, a similar situation was presented. The appellant had bottled mineral waters claiming for them great healing powers. A government expert witness testified that in his opinion the appellant's claims were unfounded. On appeal the court stated that if the witness was qualified to speak with respect to the product, his testimony would support the verdict of the jury that the claims were false. Goodwin v. United States, 2 F.2d 200 (6th Cir. 1924).

61. Presumably, the defendant could show that there was no consensus either by materially damaging the testimony of the government experts on cross-examination or by introducing the testimony of his own experts. It would be well to point out that no case has been found under this statute where the government has lost because the testimony of its experts was badly shaken on cross-examination. Note, however, the success of the plaintiff in the *L. B. Silvers* case where the testimony of his experts effectively upset the force of the government expert's testimony. (Of course, this was not a food and drug case.) The logical inference seems to be that the defendant would have a better chance of demonstrating that the representation was matter of opinion if he used the testimony of his own experts. See further, The Knox Co., TRADE REG. REP. ¶ 25,173 (1954); Hato Co., TRADE REG. REP. ¶ 14,669 (1951).

evidence which might have shown a divergence of competent medical opinion.[62] In a case where there is positive, competent, and uncontroverted expert evidence, perhaps this third method has some merit. Certainly, however, if contravening expert evidence has been introduced, the third method would not be sufficient; if it were then the consensus method would be unnecessary. Note that the court in the *McLean* case expressly declared, "The testimony of the physicians as to their individual opinions of the efficacy of the preparation would have been properly rejected if there had been disclosed a difference of medical opinion . . ., as a conviction could not properly rest . . . upon mere matters of opinion. . . ."[63] That is, where two medical experts give opposing views which are based solely on their own individual professional convictions, the matter should not be interpreted and classified as matter of fact upon which legitimate administrative determinations could be posited.[64] Thus, it appears that the better reasoning would be that the third method advocated by the court in *Research Laboratories v. United States* has merit only in those instances where there is no conflict of competent expert evidence.

In the food and drug cases just considered, the court, in every case, decided the fact-opinion issue in favor of fact by the decision that the defendant's advertising representation was false. How do these cases compare with those decided by the Federal Trade Commission? After the 1938 revision in the food and drug laws, the statutory proscriptions in the two areas became the same, viz., false representations. The only difference manifest in the two sets of cases has been in the different methods utilized to prove falsity.[65]

62. Furthermore, as authority for its third "limitation," the court relied upon four cases. Only one case was a food and drug case—Goodwin v. United States, discussed in note 60 *supra*. There was no expert testimony controverting that given by the government's expert witnesses. The remaining three cases were Federal Trade Commission cases. In Charles of the Ritz Corporation v. Federal Trade Commission, 143 F.2d 676 (2d Cir. 1944), the petitioner offered no opposing expert testimony. In both Irwin v. Federal Trade Commission, 143 F.2d 316 (8th Cir. 1944) and John J. Fulton Co. v. Federal Trade Commission, 130 F.2d 85 (9th Cir. 1942), *cert. denied,* 317 U.S. 679 (1942), the opposing experts did not purport to give an opinion on the general value of the product, but limited their testimony to revealing the results of their experiences with the product. This testimony was accorded little probative value since the court ruled that the tests were not properly controlled. The testimony of the government's experts was accepted. In all four of these cases, therefore, it would be improper to say that a real conflict of expert opinion testimony existed.

63. Dr. J. H. McLean Medicine Co. v. United States, 253 Fed. 694, 696 (8th Cir. 1918).

64. This assumes, of course, that the experts have relatively equal qualifications and that their testimony carries about the same probative weight.

65. The method of proof acceptable by the courts in Federal Trade Commission adjudications has been the testimony of the expert witness speaking from his general medical and pharmacological knowledge. This has been sufficient even where opposing

Post Office Fraud Orders

The first significant case after the *McAnnulty* decision to consider the applicability of the *McAnnulty* rule to Post Office fraud orders was *Leach v. Carlile*.[66] The appellant represented that his "Organo Tablets" were a "reliable treatment for all Nervous Affections, Nervous Debility, Physical Weaknesses, and Functional Disorders."[67] In his argument before the Supreme Court, the appellant contended that the question decided by the Postmaster General was that the substance which the appellant was selling did not produce the results represented; and that, since there was a conflict of expert opinion, the representations were insulated by the *McAnnulty* rule. The Court, however, decided that the Postmaster General had not determined that the nostrum was entirely worthless—as to which there was conflict of opinion—but rather that only some of the claims were false. The Court interpreted the postal statute in such a way that it could be directed against *any* of the claims of the appellant. Therefore, it did not matter that as to some of the claims the *McAnnulty* rule might have been a defense.[68]

In *Elliot Works, Inc. v. Frisk*,[69] the court approved specific tests as a method for proving falsity. The respondent had represented that his battery additive would charge batteries instantly, retain battery charge indefinitely, eliminate corrosion, etc. Government experts, basing their testimony on the elaborate tests made on the product by the Bureau of Standards, testified that the advertising representations were false. The claimant argued that these findings were based on the evidence of opinion, and that opinion was insufficient as substantial evidence under the *McAnnulty* rule.[70] The court disagreed, noting that not only have the opinions of experts been accepted as substantial evidence by the

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experts with seemingly good qualifications testify to the contrary and also indicate the results of their experiments. Compare that method with those in the cases just discussed, viz., consensus of professional opinion, specific tests on the subject product, and, in some instances, the opinion of the individual expert.

66. 258 U.S. 138 (1922). Note that in point of time, the Dr. J. H. McLean Medicine Co. v. United States, 253 Fed. 694 (8th Cir. 1918) and Seven Cases v. United States, 239 U.S. 510 (1916) preceded this decision.

67. Leach v. Carlile, 267 Fed. 61, 67 (7th Cir. 1920).

68. It is somewhat unusual that the court even considered the argument of the appellant. No reasonable interpretation of the statute could possibly afford the inference that in every case the government must show the nostrum to be entirely worthless. Therefore, the decision of this case in declaring that any of the representations may properly be the subject of a fraud order did little more than remove doubt as to the meaning of the statute.

69. 58 F.2d 820 (S.D. Iowa 1932).

70. Respondents have frequently made this contention. The courts have consistently refuted it as they did in this case. See for example, Shaw v. Duncan, 194 F.2d 779 (10th Cir. 1952); Dr. J. H. McLean Medicine Co. v. United States, 253 Fed. 694, 696 (8th Cir. 1918).

courts, but that in any event the opinion evidence in this case was even more probative in that it was founded on reliable experiments. The court, then, endorsed the specific test as a method for proving the falsity of a claim in fraud order proceedings. By so doing it also accepted the test as a method of proof that a representation is matter of fact. If this standard could be successfully met by the government, then the claim could not be regarded as matter of opinion which would be protected by the *McAnnulty* rule.

The court in *Farley v. Heininger*[71] recognized another appropriate method for establishing the falsity of the advertiser's claims. Heininger represented that if patients would make their own impressions for false teeth and send the impressions to him, he would make them a set of false teeth which would give them complete satisfaction, fully restoring their powers of mastication and enabling them to chew, eat, laugh, and smile with perfect ease. The Post Office Solicitor introduced the testimony of three experts who were extremely well qualified to speak on the subject of false teeth.[72] At the hearing they testified that the appellee's whole system was materially faulty in that it omitted several processes which the dental profession regarded as absolutely essential. The appellee argued that the *McAnnulty* rule was applicable. The court countered, saying that while in *McAnnulty* the representation complained of was not susceptible of scientific proof, in this case the matter dealt with an established professional procedure which made the representations easily susceptible of proof of falsity. This case made established profesisonal procedure a suitable method for proving the falsity of representations.[73] This same method of proof, of course, also proved that the representation concerned matter that was fact.

In 1949, the Supreme Court voiced the most significant interpretation of the *McAnnulty* rule. The appellee in *Reilly v. Pinkus*[74] had developed a reducing plan which, in addition to dietary regimen, included capsules made of kelp. Pinkus represented that persons suffering from

71. 105 F.2d 79 (D.C. Cir. 1939), *cert. denied,* 308 U.S. 587 (1939).

72. One of the experts was a practitioner who for several years prior to the hearing had been a professor of prosthetic dentistry. Another expert was the dental expert on the staff of the United States Public Health Service.

73. The "established professional procedure" method is analogous to the "consensus of professional opinion" method noted earlier in the food and drug cases. Moreover, the court, in a per curiam opinion in Cable v. Walker, 153 F.2d 23 (D.C. Cir. 1945), *cert. denied,* 328 U.S. 860 (1946), applied the consensus method in holding the fraud order valid. The appellant was engaged in the manufacture of a remedy which he represented as being of great worth in the treatment of pyorrhea. Government expert witnesses review the consensus of professional opinion on the subject of the treatment of pyorrhea, and concluded that the appellant's product was worthless. On the basis of this evidence, the dismissal of the complaint for an injunction was affirmed.

74. 338 U.S. 269 (1949).

obesity could "eat plenty and lose 3 to 5 pounds a week surely and easily, without tortuous diet and without feeling hungry."[75] The government expert's testimony was based on the conclusions of the general consensus of the medical profession and was to the effect that the iodine in the kelp was valueless as an anti-fat. An expert witness for the respondent took the opposite view, testifying that iodine did have value as an anti-fat.[76] After reviewing the opinions of the three lower courts, the Supreme Court held that the mere existence of a conflict of expert evidence did not automatically invoke the *McAnnulty* rule. Both the circuit court[77] and the respondent had contended that the testimony of the medical expert could never rise above mere opinion unless that expert had substantiated his testimony with the results of reliable experiments.[78] In reaffirming the consensus method for proving falsity, the Court said,

> "We do not understand or accept [the *McAnnulty* holding] as prescribing an inexorable rule that automatically bars reliance of the fact finding tribunal upon informed medical judg-

75. Reilly v. Pinkus, note 74 *supra* at 271.

76. Even he conceded that the iodine content in the appellee's recommended daily dosage was 50 times less than the amount which might do some good.

77. Reilly v. Pinkus, 170 F.2d 786 (3d Cir. 1948).

78. After the fraud order issued, Pinkus brought suit in a New Jersey district court to enjoin its enforcement. 61 F. Supp. 610 (D. N.J. 1945). The court granted the injunction, finding that there was a "divergence of opinion as to the effectiveness of the Kelpidine reducing plan and the inherent values of the kelp as used therein. Such a showing is insufficient." *supra* at 614. The holding was based squarely on the *McAnnulty* rule and Leach v. Carlile, 258 U.S. 138 (1922), was distinguished. Two years later, the government—having succeeded in getting the permanent injunction modified to a temporary injunction—returned answer and asked for a summary judgment. On the hearing, the district court found the facts to be exactly the same as they had previously found them. 71 F. Supp. 993 (D. N.J. 1947). The district court made the injunction permanent, denying the government's motion for summary judgment. Two years later, the circuit court found the facts to be substantially the same as the lower court had found them. 170 F.2d 786 (3d Cir. 1948). After agreeing that the *McAnnulty* rule controlled these facts, the court reasoned that Leach v. Carlile, 258 U.S. 138 (1922), was not applicable because the government's case was not posited in such a fashion as would warrant the application of the *Leach* case. The court said that the Postmaster General had to pick one ground or the other. That is the findings should be that the entire product was bad or that just some of the claims were false and fraudulent. This was the first time that the courts had made this interpretation. With respect to both *McAnnulty* and *Leach* the court emphasized that it was not that the evidence could not have been presented to prove the case, but rather that it had not been. This court held that the consensus method was not an acceptable method of proof and suggested that the only method of proof that would be acceptable was the controlled test of the appellee's product. The dissenting judge was of the opinion that the Postmaster General had made findings which would permit the fraud order to be sustained despite the question of expert conflict as to the entire merits of the plan. He felt that it was not the court's prerogative to resolve conflicting inferences, but rather it should confine itself to an examination which would reveal that there was some basis for the order. Following the circuit court's affirmance of the injunctive order, the Postmaster General petitioned the Supreme Court on a writ of certiorari. Because of the questions raised in applying the *McAnnulty* rule, the writ was granted. 337 U.S. 906 (1949).

> ment every time medical witnesses can be procured who blindly adhere to a curative technique thoroughly discredited by reliable scientific experiences."[79]

The Court, by this ruling, did not denounce the specific test method for proving falsity, but, rather, declared that it was not the only acceptable one. The most significant aspect of the case was that the Supreme Court reaffirmed the consensus method as being sufficient to prove falsity in Post Office fraud orders.[80]

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79. Reilly v. Pinkus, 338 U.S. 269, 274 (1949).

80. However, the Court did not exclude the *McAnnulty* rule entirely. It said that the rule was a wholesome limitation on fraud order proceedings, "where the charges concern medical practices in fields where knowledge has not yet been crystallized in the crucible of experience." 338 U.S. at 274. The Court did not press the fraud order to the entire merits of the Kelpidine plan. Instead, it was satisfied that the order could be based on some of the representations, citing Leach v. Carlile, 258 U.S. 138 (1922). Nevertheless, the Court affirmed the circuit court's decree, because the hearing examiner at the Post Office hearings had erroneously refused the respondent the opportunity to cross-examine the government's experts with certain textual material. However, the Postmaster General was free to reopen the hearings.

This case has been cited as authority in several recent cases. A fraud order had been issued against the plaintiff in U. S. Nature Products v. Schaffer, 125 F. Supp. 374 (S.D. N.Y. 1954). The plaintiff manufactured Numal which he represented as an aid to persons who desired to gain weight. In substance, the testimony of the government's expert was that if Numal was taken with a glass of milk three times a day, there would be a gain of 500 calories; that 450 of the 500 calaries would be attributable to the milk; that this would amount to a gain of about one pound per week; and that persons who had a constitutional diathesis for thinness would probably have their appetites decreased because of the filling effects of the milk. In reviewing the evidence, the court said that in some points the government's expert actually supported the claims made for the product, and that in others his testimony was not pertinent. Thus, the court rendered the expert evidence impotent to support the fraud order. Having eliminated any finding of falsity, the court found that the fraudulent intent was also lacking. Both the reasoning and the result of this case are consistent with Reilly v. Pinkus, 338 U.S. 269 (1949).

That the full import of *Reilly v. Pinkus* is still not fully appreciated can be seen in the court's opinion in Jeffries v. Olesen, 121 F. Supp. 463 (S.D. Cal. 1954). It is difficult to determine exactly what the court is saying or doing. From all appearances, however, the court first went to the issue of fraud. The court found that the claims made by the petitioner for his product amounted to no more than puffing, because "no male of sufficient age to have any appreciable experience in such matters could in reason be deceived by anything said in the plaintiff's circular." Jeffries v. Olesen, *supra* at 474. The case takes on special significance, however, because of the manner in which the court regards *Reilly v. Pinkus*. The court used the Supreme Court decision to substantiate its position on fraudulent intent, and then reverted to the circuit court opinion for authority on the fact-opinion dichotomy. It is to be remembered that the Supreme Court completely overthrew the circuit court's reasoning on the applicability of the *McAnnulty* rule to the facts of *Reilly v. Pinkus*. The result of the instant case, however, can be justified if the court's conclusion as to the lack of fraudulent intent is accepted.

Reilly v. Pinkus was directly relied upon for authority in United States v. El-O-Pathic Pharmacy, 192 F.2d 62 (9th Cir. 1951). The lower court had refused to grant the government an injunction—a remedy afforded by the Food, Drug, and Cosmetic Act, 52 STAT. 1040, 1043 (1938), 21 U.S.C. § 332 (1952). The appellee was marketing a product called Vita Hormones. The government based its case on the contention that the label did not adequately apprise the purchaser of the danger of self-application.

One last case remains to be considered. The appellee in *Shaw v. Duncan*[81] represented that his "Bloom Pills" were a cure for acne and would give lasting relief. The experts testified that the pills had little, if any, therapeutic value, and that they certainly could not accomplish a cure or give lasting relief. These experts had no personal experience with the product, but they had based their testimony on their experiences with the various ingredients and on modern medical knowledge as expressed in the medical journals. The trial court, at the instance of the appellee, found that since this was opinion testimony, it was "opinion" within the meaning of *McAnnulty*.[82] The circuit court said that the *McAnnulty* rule could not be applied, inasmuch as there was no conflict of expert evidence. The evidence was all positive and uncontroverted. This holding added one more refinement to the *McAnnulty* rule as applied to fraud orders, viz., that if the appellee wished to invoke *McAnnulty,* at least he had to show that there was a conflict of medical views.[83] Lacking such evidence, the most for which he could hope would be that the government's evidence would not be believed. Quite possibly one

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Government experts, leaders in their profession on the subject gave testimony supporting the position that the tablets were dangerous, especially if not carefully administered by a physician after an examination of the patient. Experts for the appellee, also doctors, testified that they had prescribed Vita Hormones many times, but had never encountered a case of adverse results. In reversing the decision below the court said, "We are not bound to reject informed medical judgment every time medical witnesses can be produced who blindly adhere to a curative technique discredited by reliable scientific experiences." *supra* at 74. The same year in which the Supreme Court considered *Reilly v. Pinkus,* the 9th Circuit considered the case of Fanning v. Williams, 173 F.2d 95 (9th Cir. 1949). The appellee had advertised that his weight reducing plan was safe and that it would pep up the users. Government experts, after a critical analysis of the contents of the tablets, testified that it was not necessarily safe and that the user would not necessarily be pepped up. The appellee had successfully argued in the district court that the opinions of these experts were opinions within the meaning of the *McAnnulty* rule. To a similar argument, the circuit court said, "We are unable to agree with the conclusion that it is unsubstantial and mere opinion. It is the statement of facts to the trained medical mind. These facts have been ascertained by experiments conducted by many engaged in medical research through the years. . . . There is no evidence in the record that trained and medical minds differ on the question that all persons cannot use the same diet with safety." Fanning v. Wililams, *supra* at 96.

81. 194 F.2d 779 (10th Cir. 1952).

82. For similar instances where this contention has been refuted, consult note 70 *supra.*

83. "If there is a substantial divergence in the views of the profession, it was the duty of the appellant [*sic*] to produce evidence showing the same before the trial examiner, but this he chose not to do. The undisputed evidence before the trial examiner supports the finding of fraud." 194 F.2d 779, 782 (10th Cir. 1952). This raises a question whether there is a shifting of the burdens of persuasion and going forward. It does not appear to alter the burden of persuasion; this remains with the government. However, once the government has established its prima facie case, the burden of going forward with the evidence is shifted to the respondent on this issue of opinion-fact. He may accomplish this by introducing the testimony of his own experts. (Presumably, if the respondent's cross-examination of the government experts had successfully weakened their testimony, the government would not have established its prima facie case.)

more inference could be drawn from the case. The experts did not purport to be reporting the consensus of medical opinion. Furthermore, it was noted that they did not base their opinions on the results of any specific tests with the product. One might surmise that even in the fraud order hearings the individual professional opinions of the experts might be sufficient as substantial evidence, provided there was no traversing expert testimony. While this appears to be a rational conclusion, it is not borne out by any of the succeeding cases.[84]

Additionally, in a Post Office fraud order, there must be proof of fraudulent intent. This is not a requisite element under the FTCA or the F, D & C A of 1938. As was indicated at the outset of this discussion, the *McAnnulty* case did not get to the question of fraudulent intent.[85] The principle set out in that case is pertinent only to the initial determination of whether there exists a representation of fact. Only to the extent that fraud requires a representation of fact does the *McAnnulty* rule have any relation to the question of fraudulent intent.[86]

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84. The inference that this analysis suggests has not been expressly promulgated by the courts. Despite the court's rulings on the application of *McAnnulty,* the granting of the injunction was nevertheless affirmed because the appellee had been unduly restricted in his cross-examination of one of the expert witnesses.

85. Refer to the discussion at page —— *supra.*

86. The court in Farley v. Heininger, 105 F.2d 79 (D.C. Cir. 1939), *cert. denied,* 308 U.S. 587 (1939), said that the determinative factor was not whether anyone complained of fraud or was in fact defrauded, but whether the petitioner was using the mails for a scheme which might result in the public being defrauded by false and fraudulent statements. What must be proven is an actual intent to defraud. In 1954, a district court heard the complaint for an injunction against the enforcement of a fraud order in Atlanta Corporation v. Olesen, 124 F. Supp. 482 (S.D. Cal. 1954). While the evidence presented would have raised the question of the applicability of the *McAnnulty* rule, the court was satisfied merely to raise the question. It neglected to resolve that issue, but preferred to decide the case on the ground that the petitioner had been denied procedural due process in that she was refused in her attempts to give testimony that would have negatived any fraudulent intent. It appears that a subjective test has been utilized; various standards have been applied for proving the intent. In Dr. J. H. McLean Medicine Co. v. United States, 253 Fed. 694 (8th Cir. 1918), the court found that a reckless disregard for the truth or falsity of the representation was sufficient to establish fraud. The president of the company testified that he did not know nor had he attempted to learn whether the remedy had any therapeutic value; nor was he a druggist or a doctor. This testimony became significant when the government showed that a year and a half before the hearing the Secretary of Agriculture had notified him that the labels on the bottles of medicine appeared to be misbranded with respect to the therapeutic claims. Similarly, fraudulent intent was found in Cable v. Walker, 152 F.2d 23 (D.C. Cir. 1945), *cert. denied,* 328 U.S. 860 (1946), where the appellant admitted that he had had no scientific training and that ranking testing laboratories had refused to test his product, because they said it manifestly would not accomplish the results claimed for it.

In Reilly v. Pinkus, 338 U.S. 269 (1949), the Court endorsed the standard "universality of scientific belief." That is, if there was a universality of scientific belief that the representations were untrue, fraud could be inferred. This standard was acknowledged in the subsequent case of U.S. Nature Products v. Schaffer, 125 F. Supp. 374 (S.D. N.Y. 1954). The word "universality" has never been expressly defined. "Universality" may have the same meaning as "consensus"; then, again, it might represent

Conclusion

That the *McAnnulty* case has had a significant effect in the three statutory areas examined can hardly be doubted. Frequently, respondents have urged that every representation of curative value falls within the rule, or that the representations are merely the respondent's opinions and, therefore, are "opinions" within the meaning of the rule, or that when the government's evidence consists of the opinion of experts the "opinion" rule of *McAnnulty* applies. These contentions have not been successful, but they have engendered considerable confusion. In each statutory area, acceptable methods of proof have been applied to offset the mitigating effects of the rule. In the Federal Trade Commission area, an individual expert's opinion based on his own general medical and pharmacological knowledge has been sufficient proof that the representation was false and a fact, even when confronted with contradictory expert testimony. In the adjudication of cases under the Food, Drug and Cosmetic Act of 1938, the standard is somewhat higher. Only the specific test method and the consensus of professional opinion method have experienced a general application. One other method—the individual expert's opinion—has not yet achieved as respectable a status. In

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some higher standard. From other cases it would appear that in some circumstances "universality" is no different than "consensus." In Fanning v. Williams, 173 F.2d 95 (9th Cir. 1949), the expert evidence used to prove the falsity of the claims was that of the "consensus" type. There was no conflicting testimony. The court's opinion compels the conclusion that this same evidence was also proof of fraudulent intent. In Shaw v. Duncan, 194 F.2d 779 (10th Cir. 1952), there was also undisputed expert evidence from which fraudulent intent was inferred. In Aycock v. O'Brien, 28 F.2d 817 (9th Cir. 1928), the evidence given by the appellant was his own testimony. He did not purport to have any expert qualifications. Nevertheless, he was distributing a remedy for tuberculosis which the government experts found to be worthless. Here, too, the court found fraudulent intent. The factor common to these cases was that there was no expert testimony opposed to that given by the government experts. The logical inference is that where the government expert evidence is unopposed by other expert evidence, the standard required for proof of fraudulent intent is the same as the standard required for proof of falsity, viz., the consensus of professional opinion. If this is a sound inference, then it may further be concluded that when such a situation is presented fraud is really a constructive fraud, which is another way of saying that the requirement of fraud has been eliminated It remains to be seen whether the courts will permit the "consensus" standard for falsity to be used as the standard for proof of fraudulent intent where there is a conflict of expert evidence. There was a conflict of expert evidence in Reilly v. Pinkus, 338 U.S. 269 (1949), and the "universality" standard was used. The question really becomes—what will be sufficient to show good faith? Could a respondent justifiably rely on the approval of a few doctors and scientists? If so, then he may lack the requisite intent even though the consensus of medical opinion regards his representation as false. In such a case, perhaps, the "universality" standard is a higher standard than "consensus." If he may not rely on the approval of a few doctors and scientists, then the same standard for proof of falsity would apparently apply also to the proof of fraudulent intent. The cases indicate that the former—that he may so rely—is still the more likely rationale, but he must give evidence to that effect.

these cases the manufacturer acts at his peril in representing the merits of his product.[87] The standards of proof in postal fraud orders are at an even higher level. In addition to falsity, fraudulent intent must be proved. The methods for proof of falsity and fact are similar to the food and drug cases, viz., specific tests and consensus of professional opinion. The standards of proof of fraudulent intent are recklessness, universality of scientific belief, and, in some instances, the consensus of professional opinion. The respondent not only acts at his peril with respect to the truth or falsity of the claims, but he must also act in good faith. The required standard of proof is lowest in Federal Trade Commission actions and highest in Post Office fraud orders. This progression is entirely consistent with the severity of the sanctions which are employed by the agencies. The Federal Trade Commission's cease and desist order is the least feared; the respondent is merely ordered to stop advertising in a certain way. The sanctions under the Food, Drug and Cosmetic Act are condemnation[88] or injunction.[89] The former is confiscatory as to those products actually seized; the latter is preventive. The sanction under the postal statute authorizing the fraud orders is the most severe; all the respondent's mail is stopped and returned to the sender marked "Fraudulent."[90]

What, then, is the contemporary influence of the *McAnnulty* rule? While the confusion which has vexed applications of the rule has not been entirely eliminated by the decisions of the courts, the present scope of the rule indicates that the courts have substantially narrowed[91] the area which is matter of opinion by approving several methods for establishing that the substance of the representation is matter of fact.

87. The comments of the House Committee Report are especially pertinent: "In such circumstances, therefore, the manufacturer can easily ascertain by consulting qualified experts in the field whether there is a material weight of opinion contrary to the claims which he desires to make, and there would exist no uncertainty of the kind that would invalidate the statute." H.R. REP. No. 2139, 75th Cong., 3d Sess. 7 (1953).

88. United States v. 7 Jugs of Dr. Salsbury's Rakos, 53 F. Supp. 746 (D. Minn. 1944).

89. For a recent case in which the government used the injunctive device, see United States v. Hoxsey Cancer Clinic, 198 F.2d 273 (5th Cir. 1952), *cert. denied,* 346 U.S. 897 (1953).

90. Justice Black's comments in Reilly v. Pinkus, 338 U.S. 269 (1949), are particularly apropos in this respect. "Unlike the Postmaster General, the FTC cannot bar an offender from using the mails, an order which could wholly destroy a business. [There are] strikingly different consequences [in] the orders issued by the two agencies on the basis of analogous representations. . . ." Reilly v. Pinkus, *supra* at 277.

91. "Moreover, it must be obvious that tremendous advancements in scientific knowledge and certainty have been made since the rule in the McAnnulty case was first announced. Questions which previously were subjects of opinion have now been answered with certainty by the application of scientifically known facts. In the consideration of the McAnnulty rule, the courts should give recognition to this advancement." United States v. 7 Jugs of Dr. Salsbury's Rakos, 53 F. Supp. 746, 759 (D. Minn. 1944).