

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

DISPOSITION: May 10, 1948. A plea of nolo contendere having been entered, the court imposed a fine of \$300 and costs.

2419. Alleged misbranding of Protecto. U. S. v. Bess J. Levine (Miracle Food Co.). Plea of not guilty. Tried to the court. Verdict of not guilty. (F. D. C. No. 23588. Sample No. 41022-H.)

INFORMATION FILED: February 13, 1948, Eastern District of Pennsylvania, against Bess J. Levine, trading as the Miracle Food Co., Philadelphia, Pa.

ALLEGED SHIPMENT: On or about January 31, 1947, from the State of Pennsylvania into the State of Tennessee.

LABEL, IN PART: "Protecto contains Milk Whey Powder, Malt Sugar 200,000,000 of Acidurid Bacteria per 1. C. C. 16 ozs. * * * Expir. date Apr. 2, 1947."

NATURE OF CHARGE: Misbranding, Section 502 (a), the label statements "Contains * * * 200,000,000 of Acidurid Bacteria per 1. C. C. * * * Expir. date Apr. 2, 1947" were false and misleading, since the statements represented and suggested that prior to April 2, 1947, the article would contain not less than 200,000,000 acidurid bacteria per 1 cc. The article on a date prior to April 2, 1947, namely, March 17, 1947, contained less than .4 percent of the acidurid bacteria represented.

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

DISPOSITION: A plea of not guilty having been entered, the case came on for trial before the court without a jury on the basis of the stipulation and briefs of the parties. On July 1, 1948, the court found the defendant not guilty and handed down the following opinion:

WELSH, JR., *District Judge*: "This is a prosecution begun by information, containing two counts, charging Bess J. Levine, an individual trading as Miracle Food Company, with violation of the Act of Congress of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. Section 301-392, known as the Federal Food, Drug, and Cosmetic Act.

"The defendant, Bess J. Levine, is registered under the Fictitious Names Act of Pennsylvania as owner of the Miracle Food Company and has her principal place of business at 218 North 62nd Street, Philadelphia, Pennsylvania. The Miracle Food Company is the successor to Miracle Health Food Company, formerly operated at 259 South 11th Street, Philadelphia, Pennsylvania, by the defendant.

"In 1936, the defendant, Bess J. Levine, commenced to operate the business of exploiting a line of 'health foods.' Among the health foods and dietary remedies promoted by the defendant was the product 'Protecto' represented as a culture containing large numbers of Lactic acid bacilli.

"The product is manufactured by the Earp Laboratories, Caldwell (Bloomfield), New Jersey. It is shipped to the defendant unlabeled. It is then labeled by the defendant on the basis of the analysis supplied by the Earp Laboratories. Finally, the product is shipped by the defendant repacked and under her own label in interstate commerce.

"The trial was without a jury and the following is the stipulation entered into by counsel for the government and for the defendant:

STIPULATION

It is hereby stipulated and agreed by and between counsel for the government and counsel for the defendant, Bess J. Levine, an individual trading as Miracle Food Company, that the following facts may be considered by this Court as true and correct for the purpose of the case, and are offered by the respective parties in lieu of evidence thereof; That on or about January 29, 1947 the Miracle Food Company, 259 South 11th Street, Philadelphia 7, Pennsylvania, shipped via Super Service Motor Truck from 259 South 11th Street, Philadelphia 7, Pennsylvania, to Health Food Store, 206 North Cleveland Curb Market, Memphis, Tennessee, certain articles of foods and drugs including 12 bottles each containing 16 ounces, the said bottles bearing labels as follows: and hereinafter referred to as "Protecto"—

"Protecto"
contains
Milk Whey Powder, Malt Sugar
200,000,000 of Acidurid Bacteria
per 1 C. C.
Lactose

16 ozs.

\$1.25

Made for
MIRACLE FOOD CO.
Philadelphia, Pa.
(stamped)

Expir. date

Apr. 2, 1947

Directions

Average dose 2 tablespoons of Protecto after each meal or according to your physicians instructions.

Can be added to Tomato Juice

ENEMAS

Protecto is a splendid culture for Enemas. After taking enema add 2 tablespoons of Protecto to 4 oz. of fresh water and retain as long as possible. Shake well before using.

Keep Protecto in cool place

That on March 7, 1947 Hilding C. Olson, a duly authorized inspector of the Federal Security Agency, Food and Drug Administration, purchased from the said Health Food Store, 206 North Cleveland Curb Market, Memphis, Tennessee, two bottles, each containing 16 ounces of Protecto: That the said inspector designated the said bottles of Protecto as an official sample #41-022 H of the Food and Drug Administration. That at the time this sample was purchased Gladys Norris, owner of the Health Food Store, the consignee, identified the said article as being portion of a shipment received by the Health Food Store on or about January 31, 1947 via Cook Truck Lines, Inc., from the Miracle Food Company, 259 South 11th Street, Philadelphia 7, Pennsylvania, in response to an order previously given by the Health Food Store and covered by freight bill #22365, dated January 31, 1947 issued by Cook Truck Line, Inc. on which freight bill shows as connecting line reference "Super Serv. P. 36907," and an invoice dated January 30, 1947 issued by Miracle Health Food Company, Philadelphia 7, Pennsylvania, to Health Food Store, Memphis, Tennessee. That copies of these records were furnished the inspector by the consignee, Health Food Store, at the time of this sample purchase. That the Miracle Health Food Company, as shown on this invoice, is one and the same as Miracle Food Company located at 259 South 11th Street, Philadelphia 7, Pennsylvania:

That the said inspector paid the sum of \$2.50 by United States Government voucher for the said articles which were immediately securely wrapped and sealed and identified by him upon the labels thereof with the legend "41-022 H 3-7-47 H. C. O." and upon the official seals the legend "41-022 3-7-47 Hilding C. Olson":

That this sample so collected, identified and sealed, was delivered to the laboratory of the Food and Drug Administration. That analysis established that the article labeled in part "Protecto contains * * * 200,000,000 of the Acidurid Bacteria per 1. C. C. contained viable acidophilus types of bacteria less than .4% of the 200,000,000 per C. C. declared on the label.

That the business address of the defendant, Bess J. Levine, trading as Miracle Food Company, through and during January 1947 was 259 South 11th Street, Philadelphia 7, Pennsylvania, and that her present business address is 218 North 62nd Street, Philadelphia, Pennsylvania; that the defendant, Bess J. Levine, was at the time of shipment here involved, and is now, the sole owner of Miracle Food Company.

"1. There can be no doubt under the facts stipulated above that there was a misbranding of the food or drug in question.

"2. A defendant in a prosecution under the Federal Food, Drug, and Cosmetic Act is not entitled to assert as a defense his or her lack of intent to violate the Act. United States vs. Dotterweich, 320 U. S. 277; United States vs. Greenbaum, 138 F. 2d 437. Justice Frankfurter speaking for the Court in United States vs. Dotterweich states:

The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct-awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. United States vs. Balint, 258 U. S. 250. And so it is clear that shipments like those now in issue are punished by the statute if the article is misbranded or adulterated, and that the article may be misbranded or adulterated without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares * * * United States vs. Johnson, 221 U. S. 488, 497-98.

"3. It is the contention of the defendant that she is exempt from prosecution by virtue of Section 303 (c) of the Act. Section 303 (a) provides that any person who violates any of the provisions of Section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine or imprisonment or both. Section 303 (c) provides inter alia:

No person shall be subject to the penalties of subsection (a) of this Section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an Officer or employee duly designated by the Administrator the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated Section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of Section 301 (a), that such article is not adulterated or misbranded, within the meaning of this chapter, designating this chapter, or to the effect, in case of an alleged violation of Section 301 (d) that such article is not an article which may not, under the provisions of Section 404 or 505, be introduced into interstate commerce.

"4. This Court deems it unnecessary to determine whether or not the defendant falls within the scope of the exemption contained in subsection (2) relating to guaranty¹ for the reason that it is satisfied the facts and circumstances of

¹ It should be noted in passing, however, that letters of guaranty should receive a liberal, fair, and reasonable interpretation, so as to attain the object for which the instrument is designed and the purpose for which it is applied. Glaser, Kohn & Company vs. U. S. 224 Fed. 84.

the instant case disclose that the defendant has complied with the conditions set forth in subsection (1) and is therefore exempt from the penalties provided for in the Act. Our conclusion is substantiated by a consideration of the purpose of the exemption found in subsection (1). It is clear that it was designed to protect innocent dealers, such as the defendant, who receive goods shipped in interstate commerce. *U. S. vs. Parfait Powder Puff Company*, 136 F. 2d 1008. Thus, in Senate Report No. 493, 73d Congress, 2d Session, accompanying S. 2800, the Senate Committee reported as follows:

The existing law provides for a guaranty whereby a dealer who buys on faith may be protected from liability under the law. This provision has safeguarded innocent dealers and has been extremely useful in fixing responsibility on guilty shippers. It would be continued in effect by paragraph (e). The bill affords in this paragraph further protection to the innocent dealer who distributes goods he has received from interstate sources. If he has failed to secure a guaranty he can escape penalties by furnishing the records in interstate shipment, thus allowing the prosecution to lie solely against the guilty shipper.

It is clear, we think, that the Act was intended to furnish protection to innocent receivers of goods shipped to them in interstate commerce in violation of the Act. The defendant in the instant case is such an innocent dealer and should be afforded the protection. Further, the defendant is exempt from liability under the Act for the record discloses she cooperated with the Department as required by subsection (1). In April, 1947, Mr. Bell, an Inspector of the Department, came to the defendant's place of business and took some of the Protecto away with him for examination and the defendant, at his request, informed him of the name and address of the Laboratory from which she purchased it and supplied him with all data in connection therewith which he requested.

"Accordingly, a verdict and judgment finding the defendant, Bess J. Levine, an individual, trading as Miracle Food Company, not guilty will be entered."

2420. Misbranding of Johnson's Rheumatic Tonic and Blood Purifier. *U. S. v. Nathan G. Johnson (Johnson Drug & Chemical Co.)*. Plea of guilty. Fine of \$50 and sentence of 6 months in prison; prison sentence suspended and defendant placed on probation for 3 years. (F. D. C. No. 24242. Sample No. 73534-H.)

INFORMATION FILED: April 2, 1948, Northern District of Alabama, against Nathan G. Johnson, trading as the Johnson Drug & Chemical Co., Birmingham, Ala.

ALLEGED SHIPMENT: On or about August 1, 1947, from the State of Alabama into the State of Ohio.

PRODUCT: Analyses disclosed that the product was a turbid brown liquid containing water, isopropyl alcohol, camphor, a resin, and a small amount of nitrite.

NATURE OF CHARGE: Misbranding, Section 502 (a), certain statements on the label of the article were false and misleading, since they represented and suggested that the article would be efficacious in the cure, mitigation, and treatment of rheumatism, paralysis, fits, catarrh of the head, asthma, blood poison, colds, cramps in the stomach, colic, dyspepsia, deafness, headache, palpitation of the heart, palsy or nervous trouble, piles, tumors, indigestion, female complaint, general poison, kidney troubles, spots under eyes, diarrhea, weak nerves, old sores, ulcers, stiff neck, liver complaint, and tonsillitis; that the article would be effective as a rheumatic tonic and blood purifier; and that it contained 50 percent of alcohol. The article contained less than 50 percent of alcohol, and it would not be efficacious for the purposes represented.

Further misbranding, Section 502 (b) (2), the bottles containing the articles bore no label containing a statement of the quantity of the contents in terms of weight or measure.

DISPOSITION: May 21, 1948. A plea of guilty having been entered, the court imposed a fine of \$50 and sentenced the defendant to serve 6 months in prison. The prison sentence was suspended and the defendant was placed on probation for 3 years.

2421. Misbranding of Sa-Nos. *U. S. v. Emil Wolfram (Wolfram Co.)*. Plea of guilty. Defendant fined \$300, given sentence of 6 months in jail, which was suspended, and placed on probation for 6 months. (F. D. C. No. 24259. Sample Nos. 24408-K, 25015-K.)

INFORMATION FILED: June 4, 1948, Southern District of Ohio, against Emil Wolfram, trading as the Wolfram Co., Columbus, Ohio.

ALLEGED SHIPMENT: On or about April 7 and July 26, 1947, from the State of Ohio into the States of Iowa and Minnesota.