

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 875, FOOD AND DRUGS ACT.

(SUPPLEMENT TO NOTICE OF JUDGMENT NO. 555.)

ADULTERATION AND MISBRANDING OF CANNED TOMATOES.

On or about March 25, 1910, the United States District Court for the Northern District of Texas rendered a decree in favor of the libelant in the case of United States v. 2,000 Cases of Canned Tomatoes shipped from the State of Maryland into the State of Texas and seized pursuant to a libel filed alleging adulteration and misbranding, in that a number of said cans contained filthy and decomposed vegetable substance, and also contained salts of tin, a poisonous ingredient which might render said substance injurious to health. R. G. Charles, of Westover, Md., appeared as claimant in the above-entitled case and prosecuted an appeal from the decree of said district court to the United States Circuit Court of Appeals for the Fifth Circuit. The facts of this case are fully set out in Notice of Judgment of this Department No. 555. After a full hearing of said case by the Circuit Court of Appeals for the Fifth Circuit the following judgment was rendered, affirming the decree of the trial court:

Before PARDEE, McCORMICK, and SHELBY, *Circuit Judges*.

By the COURT:

In this case the lower court found and decreed on evidence supporting the same, as follows:

"On this day came on to be heard the above entitled and numbered cause, and R. G. Charles appeared as claimant to the property therein libeled, after having given cost bond as required by the statute, and thereupon came the United States of America, libelants, by their District Attorney, William H. Atwell, and the claimant in person and by his attorneys, and each and all announced ready for trial.

"The matters of law, as well as of fact being submitted to the Court without a jury, the Court is of the opinion, after having heard the pleadings and testimony and being advised as to the law, and having heard the argument of counsel, that the allegations of the libel are true and that the tomatoes libeled are interstate commerce, from the State of Maryland to the State of Texas, intended for food, and that a portion of the two thousand cases of canned tomatoes is unfit for food, in that the same is decomposed and contains putrid matter, and further that the same contains salts of tin, an ingredient deleterious to health; and it further appearing to the court that there are

in said two thousand cases of canned tomatoes some good cans and some bad cans, as hereinbefore described; and it further appearing to the court that the said two thousand cases of canned tomatoes were seized by the United States Marshal under the said libel, and from the return of the said officer it appears that the same said two thousand cases of canned tomatoes are still in his possession:

"Now, therefore it is ordered, adjudged and decreed that the said United States Marshal for the Northern District of Texas, shall separate the good cans from the bad cans, which said bad cans are herein and hereby condemned, and that after such separation the said Marshal shall deliver to the claimant, R. G. Charles, such cans as are good, and shall destroy such cans as are bad.

"It is further ordered, adjudged and decreed that the costs of this proceeding shall be taxed against the claimant, the said R. G. Charles, and that the Marshal shall be reimbursed for such expenses in carrying out this judgment as under the law he is entitled to, to be charged and taxed as other costs."

. This decree was executed by the marshal and acquiesced in by the claimant who received the good cans and paid the costs.

Now whether we consider the case here to be on writ of error or in the nature of an appeal and all of the assignments of error to be well taken, the only actual relief lies in the matter of costs which, in the court below, have been voluntarily paid by plaintiff in error, and in no case can be adjudged against the United States, *Stanley v. Schwalby*, 162 U. S. 255-272; and which in admiralty practice are within the discretion of the Court, from which no appeal lies. *Dubois v. Kirk*, 158 U. S., 58-67, and cases cited, unless perhaps in case of gross abuse of discretion.

We therefore decline to consider the questions argued as to the constitutionality of the Pure Food and Drug Act of June 30, 1906, and as to the construction of that act in regard to whether manufacturers can exempt their goods from seizure thereunder by contract and surety from consignees not to violate the act, and other questions that seem to be academic.

The decree of the District Court is affirmed.

This notice is given pursuant to section 4 of the Food and Drugs Act of June 30, 1906.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *May 12, 1911.*