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United States Department of Agriculture

FOOD AND DRUG ADMINISTRATION

NOTICES OF JUDGMENT UNDER THE FOOD AND DRUGS ACT

[Given pursuant to section 4 of the Food and Drugs Act]

24351–24400

[Approved by the Acting Secretary of Agriculture, Washington, D. C., January 22, 1936]

24351. Joseph S. Morgan and Ivan C. Morgan (Morgan Packing Co.) v. Val Nolan. Injunction restraining enforcement against canned dry peas of regulations of the Secretary of Agriculture establishing standards for canned peas. Affirmed by Circuit Court of Appeals (Nolan v. Morgan, et al).

On November 22, 1932, Joseph S. Morgan and Ivan C. Morgan copartners, trading as the Morgan Packing Co., Austin, Ind., filed a bill of complaint against George R. Jeffrey, United States attorney for the Southern District of Indiana, and Arthur M. Hyde, Secretary of Agriculture of the United States, petitioning that the defendants be permanently enjoined from enforcing, against canned peas prepared from mature dry peas, packed by plaintiffs, regulations of the Secretary of Agriculture promulgated under the Food and Drugs Act, as amended, establishing a standard for canned peas and the labeling of canned peas which failed to conform to such standard. On November 29, 1932, an amendment in the form of a second paragraph to the bill of complaint was filed. On December 17, 1932, the complaint was dismissed as to the Secretary of Agriculture for lack of of jurisdiction. On January 9, 1933, a motion to dismiss as to George R. Jeffery was overruled.

On January 12, 1933, the parties appeared by counsel, the cause was submitted to the court for trial, evidence was heard and the complaint was taken under advisement by the court. Subsequent to the trial, George R. Jeffrey resigned as United States attorney and on April 7, 1933, Val Nolan who had succeeded to the office was, by consent and adoption, substituted as defendant.

On April 7, 1933, the court entered judgment that defendant be permanently enjoined from enforcing against plaintiffs or plaintiffs' products consisting of canned peas prepared from mature dry peas, the provisions of the regulations complained of. In entering judgment the court delivered the following opinion (Baltzell, *District Judge*):

"The plaintiffs, Joseph S. Morgan and Ivan C. Morgan, comprise a copartnership, and are engaged in the canning business with their principal place of business at Austin, Indiana. The partnership name under which they operate is the 'Morgan Packing Company.' They, however, have several canning factories, all within Indiana, aside from the one at Austin, each being operated under a separate and distinct trade name. The factory at Columbus is styled the 'Columbus Packing Company'; the one at Edinburg, the 'Edinburg Canning Company'; the one at Brownstown, the 'Brownstown Canning Company'; and the one at Scottsburg, the 'Scottsburg Canning Company.'

"While plaintiffs can a variety of food products, yet one that is canned in large quantities and sold extensively throughout the United States is canned peas, prepared wholly from the matured pea, that is, ripened and matured upon the vine. Such peas are purchased by plaintiffs in large quantities from the growers, mostly from Washington, Idaho, and other western states. They purchase annually approximately twenty-five car loads of peas and have them shipped directly to their various factories in Indiana. Upon receipt of these peas at their respective factories, they are carefully inspected and the whole, sound ones are hand picked for the purpose of processing and canning. Being

matured upon the vine, they are naturally hard and dry when received by the plaintiffs. By a process of soaking and heating in water at a certain temperature, by the application of steam, and sometimes by the use of ovens, they are rendered tender and palatable. The only ingredients added are sugar and salt. No coloring or flavoring is added, but by the preparation process they are restored to their natural color and form. After being thus prepared they, together with the liquor formed thereon, are placed in hermetically sealed cans. The cans and packages containing this product all bear labels upon which is inscribed in plain language and in a conspicuous place that such product is prepared from dry peas.

"While plaintiffs have been continuously engaged in the canning of food products for human consumption for more than a quarter of a century, they did not begin canning and selling dry peas until within the last four years. To illustrate the growth and extent of their business in this particular product, they sold approximately twenty-five thousand cases of twenty-four cans each in the year 1929, while in the year 1932 their sales exceeded two hundred thousand cases of an approximate value of two hundred and fifty thousand dollars. With the exception of approximately five per cent of the output of this product, all is transported in interstate commerce.

"During the year 1931 certain regulations were promulgated by the Department of Agriculture concerning canned peaches, canned pears, and canned peas. However, no attempt was made to enforce these regulations in so far as plaintiffs are concerned. Revised regulations were promulgated by the Department in the month of May 1932, in explanation of which it was stated: 'It is the opinion of the Department that canned soaked dry peas belong to the class "canned peas." Being mature, they are thus substandard and must bear the substandard legend.' The substandard legend to which reference is made was 'Below U. S. Standard, Low Quality, But Not Illegal, Soaked Dry Peas.' The regulations provide that this legend must be placed upon the label of all canned food of substandard quality. Dry peas prepared and canned by the plaintiffs fall within the substandard class, according to the regulations of the Department, and must contain such legend in accordance therewith. The plaintiffs have refused to comply with such regulations.

"The Department has instructed its inspectors to locate all of plaintiffs' interstate shipments of such product for the purpose of instituting libel proceedings against the same because of plaintiffs' refusal to comply with the regulations pertaining to the labeling thereof. In fact, a great number of such shipments have been located and seized. Many libel proceedings are now pending, but none, however, within the State of Indiana.

"Pursuant to Equity Rule 70½, Findings of Fact and Conclusions of Law are separately filed in this action.

"The bill of complaint seeks to enjoin the United States attorney from the enforcement of the above regulations against plaintiffs and their canned food products, consisting of canned peas prepared from dry matured peas. The bill, as to Arthur M. Hyde, as Secretary of Agriculture of the United States, was dismissed upon his motion, he claiming the privilege of venue.

"It is the contention of the plaintiffs that the regulations in question are invalid; first, because the provisions of such regulations are unreasonable, arbitrary, and unauthorized under the provisions of the McNary-Mapes Amendment, pursuant to which the same were promulgated; also, that the law, as amended, and applied, is invalid because it violates the fifth amendment of the Constitution of the United States in that it takes plaintiffs' property without due process and without just compensation. Second, plaintiffs contend that the Food and Drugs Act, as amended, is itself unconstitutional. They contend that such law violates not only the fifth amendment of the Constitution of the United States, but that it violates the Sixth Amendment of such Constitution in that no standard of guilt or liability to seizure is set up in the amendment that is ascertainable from the amendment itself, but that guilt or liability to seizure is made dependable upon 'reasonable' standards which may be established by the Secretary of Agriculture.

"In the consideration of this case, if the court should arrive at the conclusion that the regulations in question are unreasonable and inconsistent with the act itself, it will then not be necessary to consider the constitutionality of such act. In order that such regulations may be valid, they must be reasonable and consistent with the law under which they are promulgated. *International Ry. Co.* v. *Davidson*, 257 U. S. 506; 66 LE 341; 42 SC 179. *Waite* v. *Macy*, 246 U. S. 606; 62 LE 892; 38 SC 395.

"The Food and Drugs Act provides for the branding or labeling of food products and defines the instances in which food shall be deemed misbranded (Title 21, Sec. 10, USCA). Prior to the amendment of this act in 1930, no authority was delegated to the Secretary of Agriculture to promulgate regulations for the standards of canned food products. Authority is given by such amendment to formulate such regulations. However, such regulations must be reasonable and consistent with the law which authorizes them. The first question, therefore, to be determined is whether or not the regulations which require plaintiffs to place upon the label attached to each can which is filled with processed dry peas, the legend 'Below U. S. Standard, Low Quality, But Not Illegal, Soaked Dry Peas' are unreasonable and inconsistent with the law. If such regulations are unreasonable and inconsistent with the law, they are illegal, and cannot be enforced.

"It is conceded by the defendant that mature dry peas as processed by the plaintiffs, constitute a wholesome, pure food. There is no contention that such peas are not properly prepared and canned by plaintiffs. The contention of the defendant is, however, that peas thus prepared are substandard and must be labeled as such. It is clear that the purpose of the Food and Drugs Act is to guard against adulterated and misbranded food products. It is also clear that it was the intention of Congress to protect the purchasing public from being imposed upon, and to inform it of the quality of goods being purchased. In construing this law, the Supreme Court of the United States said in the case of *United States* v. *Antikamnia Chemical Co.*, 231 U. S. 654; 58 LE 419; 34 SC 222, 'The purpose of this act is to secure the purity of food and drugs and to inform purchasers of what they are buying.' Thus it is the purpose of that part of the amended act, which prohibits misbranding, 'to inform purchasers of what they are buying', there being no contention that such food is impure. The question, therefore, naturally arises as to whether or not a purchaser can be misled in the purchase of 'canned peas' if the label contains the statement that the contents are prepared from dry peas, as inscribed upon the label of the product sold by plaintiffs. It is inconceivable that a purchaser could be misled when the label contains such clear language.

"The authority given the Secretary of Agriculture, under the law, is 'to determine, establish and promulgate, from time to time, a reasonable standard of quality and condition and fill of container for each class of canned food as will, in his judgment, promote honesty and fair dealing in the interest of the consumer.' It is again demonstrated that the intention is to protect the consumer. The regulations in question limit the standard canned peas to those which are canned in their tender, immature state. Such a standard is not a reasonable one for the class of canned peas prepared from dry peas, such as plaintiffs' product.

"It is apparent that the insertion of the legend required by the regulations, upon the label of dry canned peas will do an irreparable injury to plaintiffs in the sale of such products, for which they have no adequate remedy at law. It will immediately arouse the suspicion of the consumer whose welfare the law is intended to protect. The rapid increase in the amount of dry peas placed upon the market by plaintiffs within the past few years is ample proof of the demand for that particular product by the consumer. To require plaintiffs to comply with such regulations will not only seriously damage their business, but will deprive the consumer of the product which he desires, and to which he is entitled.

"The regulations in question, requiring such labeling of plaintiffs' food products, are unreasonable and inconsistent with the law under which they were promulgated, and are, therefore, invalid. *International Ry. Co.* v. *Davidson*, supra.

"The defendant has asserted that he intends to enforce the regulations against these plaintiffs, and it is apparent that the enforcement thereof will do irreparable damage to them. They have no adequate remedy at law, and are entitled to an injunction permanently enjoining the defendant from the enforcement of such regulations. *Waite* v. *Macy*, supra. *International Ry. Co.* v. *Davidson*, supra. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; 47 LE 90; 23 SC 33. *Philadelphia Co.* v. *Stimson, Secy. War*, 223 U. S. 605; 56 LE 570; 32 SC 340. *Work, Secy. Interior* v. *Louisiana*, 269 U. S. 250; 70 LE 258; 46 SC 92.

"In view of the conclusions reached by the court, it is not necessary to determine the question of whether or not the Food and Drugs Act, as amended, is constitutional.

"A decree will be prepared accordingly.

Exception and notice of appeal were filed by the defendant and on July 3, 1933, petition for appeal to the Circuit Court of Appeals for the Seventh Circuit was granted. On March 14, 1934, the circuit court of appeals handed down the following opinion affirming the judgment of the district court (Alschuler, circuit judge):

"Appellees sued to enjoin appellant, as United States attorney, from enforcing against them certain regulations of the Secretary of Agriculture promulgated under supposed authority of the McNary-Mapes amendment of July 8, 1930, to section 8 of the United States Food and Drugs Act of June 30, 1906. The appeal is from a decree awarding appellees a permanent injunction as prayed.

"Appellees had been for some years in the business of processing, canning, and marketing dry, ripe peas, which were first soaked in hot water to soften them and to swell them to their original shape and color, and this process being followed by further steps. Under the regulations of the Department of Agriculture formerly in force containers of the product designed to move in interstate or foreign commerce were required to be plainly labeled with the words 'Prepared From Dry Peas.'

"After the adoption of the McNary-Mapes amendment, the Secretary of Agriculture promulgated regulations for standardizing and labeling canned peas, requiring the cans containing appellees' product designed for interstate or foreign commerce to bear in conspicuous lettering the legend 'Below U. S. Standard. Low Quality But Not Illegal. Soaked Dry Peas.' Appellees were duly notified to so ship no such product unless so labeled. Declining to comply, they were threatened with prosecution and confiscation of the product undertaken to be so shipped.

"There is no contention that dry peas are of themselves to any degree deleterious or unfit for human food, nor that appellees' process for canning them causes the slightest impairment of the product. It is likewise apparent that such labeling of the container would in a short time practically destroy the industry of canning dry peas designed for interstate or foreign commerce. This is not only apparent, but has been practically the result when this label was placed upon the cans. The evidence shows that it is so well recognized in the trade that such a label would destroy trade in the product, that the label is generally known in the trade as 'crepe label.'

"The production and distribution of canned dry or ripe peas is an industry not less lawful or commendable than the production and distribution of the immature peas, which the regulations prescribe as the standard for canned peas. The canning of ripe peas is not like the other, a seasonal industry. The peas when dry through ripening are gathered, and will keep indefinitely in that state before canning; whereas the immature peas must be gathered and processed at once when they reach the suitable stage of maturity, after which delay of even a very few days will overdevelop them and render them unfit for the prescribed standard.

"The regulations specify certain tests to be applied to give assurance that the immature peas have not passed beyond the degree of ripeness essential to constitute them 'standard canned peas.'

"When the peas become hard and dry through the natural process of ripening they cannot, of course, comply with the standard thus fixed for canned peas. Processing restores their fullness and color, and renders them soft and edible. But they are a product essentially different from that of the canned unripe peas which are made the standard. Different processes are necessary. The long soaking in hot water, cooling, and reheating of the dry peas would disintegrate and ruin the immature variety. The properties of the two products are very different. In the mature peas there is more of starch and less of sugar than in the immature peas, and the mature have more of nutriment and food value than the immature. There is, of course, a difference in the taste, most persons probably preferring the immature peas, although, as was testified, this is a matter of the taste of the individual.

"The canned dry peas sell in the market for considerably less than the immature product, which may be accounted for by the more general preference for the taste and consistency of the immature product, as well as the fact that the dry peas may be kept indefinitely and readily shipped long distances to canneries and may be canned at leisure, while the immature peas must be processed without delay and in canneries conveniently located with reference to the place where the peas are grown.

"All this indicates that, notwithstanding the same vines produce the immature and the full ripened peas, for the purposes of canning the two are products as

essentially different as if taken from radically different plants, and were known by different names. As articles of commerce we think they must be regarded as in separate classes, each having its own properties and peculiarities. There are doubtless good, bad, and indifferent grades of dry peas as well as of immature peas; and to say that canned ripe peas are an inferior grade of canned immature peas is, in our judgment, at once illogical, unreasonable, and unfair.

"To be sure, a customer desiring the immature canned peas should not have the dry peas imposed upon him, and vice versa. The object of such legislation and the regulations thereunder *is* to guard against deception of the public. Statutes and regulations adopted for that end are salutary and should be supported. The right of Congress to adopt such legislation for regulating interstate and foreign commerce, and to empower the making of suitable and reasonable regulations thereunder, must generally be conceded.

"But in view of what has been said we cannot regard as 'reasonable' the regulation which fixes immature, unripe peas as the standard for canned peas generally, requiring the dry peas product to be labeled in a manner which would convey to the public the impression that it is a degraded and inferior article of food, which in fact it is not.

"Appellees' product might well be—as the evidence shows it is—a most excellent quality of the canned ripe peas variety and of high food value, and yet, under the regulation, be required to bear the legend 'Low Quality.' In our judgment the very statement of the proposition carries condemnation of the regulation which requires appellees to so brand their product.

"We do not think that the statute contemplates, with respect to this product, that either immature peas or the dry peas shall be the generic product whereby the other is to be graded. If canned peas are to be considered the generic product, there should be a subclassification as to the immature and the dry products, each of which, if of good quality, is a standard food product and neither a subordinate nor an inferior of the other.

"The McNary-Mapes amendment is not directed toward adulteration of foods, but solely to their misbranding. Its purpose is commendable, but if unreasonably applied may work hardship and injustice wholly beyond its intended and lawful scope. As stated in the amendment itself, the regulations to be made under it should 'promote honesty and fair dealing in the interest of the consumer', and the Secretary of Agriculture is authorized, from time to time, to make modifications therein 'as in his judgment, honesty and fair dealing in the interest of the consumer may require.' It cannot be in the interest of the consumer to drive from the market this useful and cheaper product through branding it so the public will not buy it. If the immature peas have an advantage in flavor or size or color which may give them corresponding advantage in securing a better price, it affords no reason for striking down the other and cheaper product. The amendment does not concern itself with competition between products, but only with so describing products that the public may not be readily deceived by substitution of products.

"In our view the entire legend with which it was demanded appellees should label their product is unwarranted and unreasonable. 'Below U. S. Standard' should not be required, because the fixing of the one article as the standard is arbitrary and unreasonable to the same degree as if it had been required that the canned dry peas be the standard and the immature peas a descent therefrom. 'Low Quality' is of course a statement of what is not a fact, since the evidence all indicates that the product in question is not of low quality, unless indeed, as it not here contended, a low quality of ripe peas or a deleterious method is employed in the product. The words 'Not Illegal' are not enlightening. If the product were illegal it could not lawfully enter into foreign or interstate commerce as human food. The words serve only to 'damn with faint praise' any product whereon they appear. 'Soaked Dry Peas' is a less objectionable but at the same time an unreasonable requirement as a brand. A fair inference therefrom is that the dry peas are simply soaked and then canned. The soaking is only a part of the process, and if the purpose of the regulation is not to condemn a meritorious article, these words carry an imputation respecting a proper food which tends in no degree to protect the consumer, who needs no protection beyond that afforded by information which will reasonably apprise him of what he is buying.

"It is not our function to prescribe a legend to be placed on appellees' containers in order to advise the public that the article in question is produced from ripe or dry peas and not from immature peas. Under a prior regulation of the Secretary of Agriculture appellees had long placed on their containers, in bold face type, and have continued so to do, the statement 'Prepared From

Dry Peas.' To those who pay attention to labels a statement of this nature would clearly indicate that the product was not that of immature, succulent peas, which the Secretary assumed to fix as the standard of excellence for all canned peas. Clearly this or some suitable equivalent would adequately protect the public, so far as any label can, against unwarrantable substitution of this product for that of immature peas.

"Concluding as we do that the regulation complained of, as applied to appellees' product, is unreasonable and unauthorized by the statute, we agree with the District Court, which reached the same conclusion, that there is no need to consider the question of constitutionality of the amendment. We refer with approval to Judge Baltzell's opinion in the District Court, 3 Fed. Sup. 143, particularly to his citation and discussion of authorities and his consideration of some other propositions whereon we have not commented.

"The decree is affirmed."

M. L. WILSON, *Acting Secretary of Agriculture.*

24352. Joseph S. Morgan, et al., v. Arthur M. Hyde (Henry A. Wallace). Suit to enjoin the Secretary of Agriculture from enforcing against canned peas prepared from soaked dry peas, the provisions of the regulations of the Secretary of Agriculture prescribing standards for canned peas and labeling of canned peas which fail to conform to such standard. Permanent injunction granted.

On December 23, 1932, Joseph S. Morgan and Ivan C. Morgan, copartners, trading as the Morgan Packing Co., Austin, Ind., filed a bill of complaint in the Supreme Court of the District of Columbia against Arthur M. Hyde, Secretary of Agriculture, praying that the defendant be restrained from enforcing against canned peas packed from mature dry peas, the provisions of the regulations prescribing standards for canned peas. The complaint sets forth substantially the same allegations as those contained in the complaint filed by plaintiffs in the Southern District of Indiana against George R. Jeffrey, United States attorney, and Arthur M. Hyde, which was dismissed as to the latter for lack of jurisdiction (notice of judgment no. 24351) and prayed, as in the former complaint, that a preliminary hearing be granted on the question of a temporary injunction, that a temporary restraining order be issued, and that upon final hearing the defendant be permanently enjoined from enforcing the said regulations. A motion for a temporary restraining order was denied.

On January 18, 1933, a motion for a preliminary injunction was argued to the court and was granted. Subsequently Henry A. Wallace, who had succeeded Arthur M. Hyde as Secretary of Agriculture, was substituted as defendant.

On January 16, 1935, final hearing having been held, a decree was entered permanently enjoining the Secretary of Agriculture and all subordinate officers and agents acting under his direction and authority, from enforcing against plaintiffs' product, consisting of canned peas prepared from matured dry peas, the provisions of the regulations requiring that they be labeled as substandard, the court holding that they were a separate class of canned food from canned peas canned in their tender immature state.

M. L. WILSON, *Acting Secretary of Agriculture.*

24353. Adulteration of tomato trimmings. U. S. v. Uddo-Taormina Corporation and Angelo Glorioso, trading as the Florida Canning Co. Pleas of nolo contendere. Fines, $400. (F. & D. no. 30233. Sample no. 7122-A.)

This case was based on an interstate shipment of canned tomato trimmings which were found to be in part decomposed and to contain maggots.

On September 14, 1933, the United States attorney for the Eastern District of Louisiana, acting upon a report by the Secretary of Agriculture, filed in the district court an information against the Uddo-Taormina Corporation and Angelo Glorioso, of New Orleans, La., said corporation and individual trading as the Florida Canning Co., at Miami, Fla., alleging shipment by said defendants in violation of the Food and Drugs Act on or about May 17, 1932, from the State of Florida into the State of Louisiana, of a quantity of tomato trimmings which were adulterated. The article was billed as tomato pulp.

The article was alleged to be adulterated in that it consisted in part of a filthy and decomposed vegetable substance; and in that it consisted in part of a filthy animal substance, namely, maggots.

On January 10, 1935, the defendants entered pleas of nolo contendere to the information, and the court imposed fines in the total amount of $400.

M. L. WILSON, *Acting Secretary of Agriculture.*