

24799. Adulteration of tomato puree. U. S. v. 25 Cases of Tomato Puree. Default decree of condemnation and destruction. (F. & D. no. 35329. Sample no. 26050-B.)

This case involved a shipment of canned tomato puree that contained excessive mold.

On April 4, 1935, the United States attorney for the District of Massachusetts, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 25 cases of canned tomato puree at Lynn, Mass., alleging that the article had been shipped in interstate commerce on or about February 2, 1935, by the Oswego Preserving Co., from Holley, N. Y., and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Oswego Brand Tomato Puree * * * Oswego Preserving Company Distributors Oswego, N. Y."

The article was alleged to be adulterated in that it consisted wholly or in part of a decomposed vegetable substance.

On May 27, 1935, no claimant having appeared, judgment of condemnation was entered and it was ordered that the product be destroyed.

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

24800. Agash Refining Corporation v. William R. M. Wharton, et al. Suit in State court to restrain officials of the Department of Agriculture from initiating seizures under the Federal Food and Drugs Act of a product which had been shipped in interstate commerce. Motion for injunction pendente lite denied. Suit discontinued.

On December 1, 1934, the Agash Refining Corporation, Brooklyn, N. Y., filed a complaint in the Supreme Court of the State of New York against William R. M. Wharton, Daniel M. Walsh, Cleon O. Dodge, A. E. Lowe, Daniel M. Walsh, Olaf Olsen, and J. A. Cummings, praying that the defendants be permanently enjoined from initiating seizures under the Federal Food and Drugs Act of edible oils shipped in interstate commerce by the plaintiff.

The complaint averred that complainant refined and marketed edible oils under its trade name "Italian Cook"; that the container was rendered distinctive by coloring and design and bore the words "Italian Cook Brand" and "Pure Vegetable Salad Oil"; that the edible oils so packaged consisted of cottonseed oil, sunflower oil, sesame oil, corn oil, or other similar edible oils, and were correctly described as "Pure Vegetable Salad Oil"; and that the defendants directly or indirectly had initiated seizure of the product on the charge that the label was misleading and that the product therefore misbranded.

The complaint further averred that the labeling was not misleading, but was properly descriptive; that acts of defendants had caused complainant great loss and threatened further loss and irreparable injury unless restrained; and prayed that the defendants be permanently enjoined from directly or indirectly initiating seizures of complainant's said product, and that a temporary injunction of like tenor and effect be granted.

On December 7, 1934, in answer to an order to show cause why the prayer of complainant should not be granted, the defendants with the exception of A. E. Lowe, who was not within the jurisdiction, replied in substance that they were officials of the United States Department of Agriculture whose duty it was to investigate foods and drugs shipped in interstate and foreign commerce, and to report to their superiors at Washington the results of such investigation; that in the opinion of defendants and that of their superiors at Washington, complainant's product was misbranded; that the actions complained of consisted of seizures in various district courts made at the request of the Secretary of Agriculture, and involved goods that had entered interstate commerce; and that the issues involved were determinable solely in the Federal district courts in which libel proceedings had been commenced.

On December 7, 1934, a motion for an injunction pendente lite came on for hearing, was argued and denied, the court delivering the following opinion:

(H. G. Wenzel, Jr., *Judge*): A motion having been made herein by the plaintiff above named for an injunction pendente lite restraining the defendants and others, among other things, from causing to be initiated proceedings against the plaintiff's merchandise, and the said motion having duly come on to be heard before this Court on December 7th, 1934, and it appearing that the defendants herein are in each instance officials of the Government of the United States in the Food and Drug Administration in the Department of Agriculture thereof, that the seizures heretofore made of the merchandise produced or sold by the plaintiff referred to in the complaint herein have been made in