

7190. Adulteration and misbranding of Gumbo File (a food flavoring). U. S. v. 31 Cases of Gumbo File. Default decree of condemnation and destruction. (F. D. C. No. 12272. Sample No. 41460-F.)

LIBEL FILED: May 1, 1944, Western District of Louisiana.

ALLEGED SHIPMENT: On or about January 25, 1944, by Gold Medal Coffee Co., Houston, Tex.

PRODUCT: 31 cases, each containing 24 jars, of Gumbo File at Lake Charles, La. The article consisted of sassafras and thyme.

LABEL, IN PART: (Jars) "Victory Brand Genuine Gumbo File 1½ oz. Net Wt."

VIOLATIONS CHARGED: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of rodent excreta and insect excreta; and, Section 402 (a) (4), it had been prepared under insanitary conditions whereby it may have become contaminated with filth.

Misbranding, Section 403 (a), the statement, "1½ oz. Net Wt.," on the label, was false and misleading as applied to the article, which was short-weight; Section 403 (e) (2), the article was in package form and failed to bear a label containing an accurate statement of the quantity of the contents; and, Section 403 (i) (2), it was fabricated from two or more ingredients and its label failed to bear the common or usual name of each such ingredient.

DISPOSITION: August 14, 1944. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

7191. Misbranding of vanilla dessert powder. U. S. v. 516 Packages of Vanilla Dessert Powder. Default decree of condemnation and destruction. (F. D. C. No. 12871. Sample No. 52126-F.)

LIBEL FILED: July 5, 1944, District of Massachusetts.

ALLEGED SHIPMENT: On or about June 3, 1944, by the 6 O'Clock Co., from Norristown, Pa.

PRODUCT: 516 3-ounce packages of vanilla dessert powder, at South Boston, Mass.

LABEL, IN PART: "Vanilla 6 O'Clock Dessert."

VIOLATION CHARGED: Misbranding, Section 403 (d), the container was so filled as to be misleading since the dessert powder occupied less than half the volume of the box.

DISPOSITION: August 8, 1944. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed. Destruction was effected by delivery of the product to a charitable institution.

7192. Misbranding of gift packages. U. S. v. 149 Gift Packages. Counterclaim praying for a declaratory judgment denied and exceptions to the libel overruled. Decree of condemnation and destruction. (F. D. C. No. 10095. Sample No. 11905-F.)

LIBEL FILED: June 14, 1943, Northern District of California; transferred to the Eastern District of New York on August 19, 1943.

ALLEGED SHIPMENT: On or about April 13, 1943, by R. L. Albert & Son, Inc., from New York, N. Y.

PRODUCT: 149 1-pound, 2-ounce gift packages at San Francisco, Calif. The package measured 7½ x 12½ x 1¾ inches and contained 15 fluted paper cups or cookies, candies, nuts, crackers, and a jar of peanut butter. The 3 cups containing cookies were well filled, but the candies and nuts were wrapped in cellophane which increased the bulk. Three cups containing crackers and 1 containing a small jar of peanut butter, which occupied a corner of the package, were covered by an inverted cardboard box and over that a cardboard checker board with a small sticker label reading "Crackers and Peanut Butter Underneath." The peanut butter was in a small ointment jar with thick walls, and did not fill the cup.

VIOLATION CHARGED: Misbranding, Section 403 (d), the container was so filled as to be misleading in that more candy and nuts could have been packed in the individual paper cups, and because the crackers, which were cheaper than the remainder of the package, and the deceptive jar of peanut butter were concealed in a corner covered by an inverted box.

DISPOSITION: August 9, 1943. R. L. Albert & Son, Inc., claimant, instituted in the District Court for the Southern District of New York an action for a declaratory judgment, and filed a petition for an injunction pendente lite with respect to the libel proceedings in the Northern District of California. An

order to show cause was accordingly issued, and on August 11, 1943, argument was heard, after which decision was reserved. On August 19, 1943, the libel proceedings were transferred to the Eastern District of New York, and thereafter the claimant withdrew its motion for an injunction pendente lite and filed notice withdrawing its action for a declaratory judgment.

The claimant then filed an answer in the Eastern District of New York, denying the allegation of misbranding, and containing a counterclaim which attacked the constitutionality of Section 403 (d) of the Federal Food, Drug, and Cosmetic Act, and prayed for a declaratory judgment.

The matter having been argued on November 24, 1943, the court, on December 11, 1943, handed down the following memorandum opinion:

BYERS, *District Judge*: "Motion to strike counterclaim.

"In this cause the Government has libeled 149 Gift Packages of food stuffs, alleging them to be misbranded. They have been claimed by R. L. Albert & Son, Inc., in an answer which denies the alleged misbranding.

"The claimant does not in terms, except in the counterclaim, admit that it shipped the 149 Gift Packages in interstate commerce, although perhaps it meant to do so by inference, since so much of the libel is not denied. This does not meet the requirements of Admiralty Rule 26.

"The answer does deny misbranding within Title 21 U. S. C. (a), Section 343-d, which provides that a food shall be deemed to be misbranded '(d). If its container is so made, formed, or filled as to be misleading', which is charged in the libel.

"The answer contains a subdivision entitled 'Complete Defense and as a Counterclaim', which recites the claimant's corporate status and business; the enactment by Congress of the statute under which the libel is filed; the seizure of these packages in California and the consent to transfer the proceedings thereby initiated to this Court, and that the Federal Security Agency (charged with the enforcement of this law) has threatened similar proceedings elsewhere. That the statute is unconstitutional in that it deprives the claimant of its property without due process of law.

"It is alleged that, as the result of these matters, there is a controversy existing between the United States of America and the claimant, as to whether the enforcement of the Federal Food, Drug and Cosmetic Act does or does not unconstitutionally deprive the claimant of its property, and hence a declaratory judgment is sought to establish the unconstitutionality of the statute and the remedies thereunder.

"The libelant has moved to strike the counterclaim as being inappropriate to a proceeding which, as nearly as may be, is to conform to the procedure in Admiralty (Title 21 U. S. C. (A), Section 334-b).

"The theory of the statute is obviously that the seized articles of food have themselves violated the law, and this is an issue of fact. 'Upon demand of either party any issue of fact joined in any such case shall be tried by jury.' (Section 334-b).

"In view of that provision, it is difficult to see how the requirements of due process have been evaded. Manifestly the burden of proof lies upon the Government to sustain the material allegations of the libel, once issue is joined upon the merits.

"As to the availability of the declaratory judgment statute (Title 28 U. S. C. (A) Section 400) in a proceeding in Admiralty, there seems to be no decision which the Court has been able to find, nor have counsel cited any.

"The conventional method of testing the legal sufficiency of the articles in a libel is by filing exceptions thereto (Admiralty Rule 27); and that course has been found adequate by many years of experience.

"It is open to this claimant, and should be followed if it be advised that the Government is seeking to proceed herein according to methods not sanctioned by the constitution.

"While the counterclaim does not in terms ask for an injunction, if the declaration which it seeks were to be made, there would be in effect a decision upon the constitutionality of a federal statute, having the same force and effect as an injunction, and it might well be argued, I think, that Title 28 U. S. C. (A), Section 380-a, ought to be applicable to such a situation.

"It has not been shown to the satisfaction of this Court, that a multiplicity of suits involving the same issue is threatened, nor can it be said that the make-up or constituency of these particular packages is an issue of such important legal scope that the otherwise non-conforming pleading should be allowed to stand.

"Motion to strike the counterclaim is granted, without prejudice to the claimant's rights to challenge the libel by appropriate exceptions."

On February 2, 1944, the claimant filed exceptions to the libel, and thereafter made a motion for an order sustaining the exceptions and dismissing the libel. At the conclusion of the hearing on the matter, and after due deliberation, the court, on May 2, 1944, handed down the following memorandum opinion:

Moscowitz, *District Judge*: "Exceptions have been filed to the libel based upon two grounds: One, that the libel is insufficient, and the other, that Section 343 (d) of the U. S. Code is unconstitutional.

"Section 343 (d) reads as follows: 'A food shall be deemed to be misbranded * * * (d) If its container is so made, formed or filled as to be misleading.'"

"As I understand claimant's position, it is claimed that this is not sufficiently descriptive and would not afford an opportunity to a seller, packer or shipper to determine what is a proper container. The criticism is that this subdivision (d) also involves a conclusion rather than specifying the grounds sufficiently and for that reason is unconstitutional and that the claimant is thereby deprived of his property without due process of law.

"It seems to me that this provision is specific and does not violate any constitutional rights of the claimant.

"As to the first ground, that the libel is insufficient, there has been produced to the Court for visual demonstration, Libelant's Exhibit 1, which is one of the packages in question, which is substantially similar to the other packages shipped by claimant. I think the libel upon its face is complete and sets forth a prima facie cause of action; an examination of the Exhibit 1 indicates that a purchaser might be misled. It might very well be that upon the trial some other demonstration can be made; that it may very well be, as claimed by the claimant, that it was necessary to ship it in that way. However, I am not passing upon that question; that is to be passed upon by the trial court.

"I will overrule exceptions to the libel."

On May 19, 1944, an order was issued denying the claimant's motion and overruling the claimant's exceptions to the libel. Thereafter the claimant withdrew its claim and answer, and on August 8, 1944, judgment of condemnation was entered and the product was ordered destroyed.

7193. Adulteration of gift packages. U. S. v. 20 Boxes and 31 Boxes of Gift Packages. Default decree of condemnation and destruction. (F. D. C. Nos. 12006, 12007. Sample Nos. 30373-F, 60520-F.)

LIBEL FILED: March 14, 1944, Northern District of California.

ALLEGED SHIPMENT: On or about November 30, 1943, by Golden Brand Nut Products, Inc., from New York, N. Y.

PRODUCT: 51 3-pound gift packages at San Francisco, Calif.

The product was a confection-type pack consisting of assorted cookies, candies, and fruit pastes.

LABEL, IN PART: (Sticker on bottom of box) "Victory Snack-Pack No. 9253."

VIOLATION CHARGED: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence in the fruit pastes of worm and insect fragments and rodent hairs.

DISPOSITION: June 9, 1944. No claimant having appeared, judgment of condemnation was entered and the article was ordered destroyed.

MISCELLANEOUS FOODS

VITAMIN PREPARATIONS AND FOODS FOR SPECIAL DIETARY USES

7194. Adulteration and misbranding of candy. U. S. v. 59 Packages of Candy. Default decree of condemnation. Product ordered delivered to a local hospital. (F. D. C. No. 12911. Sample No. 60938-F.)

LIBEL FILED: July 12, 1944, Eastern District of Louisiana.

ALLEGED SHIPMENT: On or about June 12, 1944, by Joe Franklin Myers, from Dallas, Tex.

PRODUCT: 59 8-ounce packages of candy at New Orleans, La.

Examination showed that the product contained less than 50 U. S. P. units of vitamin A per pound.