

DISPOSITION: February 23, 1945. The Miami Margarine Co., claimant, having admitted the allegations of the libel, judgment of condemnation was entered and the product was ordered released under bond to be reworked under the supervision of the Federal Security Agency.

EGGS

8886. Adulteration of whole eggs. U. S. v. The Bakery Mart of Newark, Inc., and Samuel Greenbaum. Pleas of not guilty. Tried to the court. Verdict of guilty. Corporate defendant fined \$500; individual defendant fined \$300 and sentenced to 3 months in jail. Judgment against individual defendant affirmed on appeal. (F. D. C. No. 7669. Sample Nos. 90801-E, 90802-E.)

INFORMATION FILED: September 2, 1942, District of New Jersey, against the Bakery Mart of Newark, Inc., a corporation, Newark, N. J., and Samuel Greenbaum, president of the corporation.

ALLEGED SHIPMENT: On or about January 23 and February 2, 1942, from the State of New Jersey into the States of Massachusetts and Rhode Island.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a decomposed substance.

DISPOSITION: Pleas of not guilty having been entered on behalf of the defendants, the case came on for trial before the court on January 26, 1943. At the conclusion of the testimony, the court took the case under advisement, and on February 10, 1943, the court found the defendants guilty. On February 19, 1943, the corporate defendant was fined \$500, and the individual defendant was fined \$300 and sentenced to serve 3 months in jail. Notice of appeal from the judgment against the individual defendant was filed in the United States Circuit Court of Appeals for the Third Circuit, and on October 25, 1943, after consideration of the briefs and arguments of counsel, the following decision was handed down by that court, affirming the judgment of the district court:

Biggs, *Circuit Judge*: "An information was filed against the appellant, Samuel Greenbaum, president of The Bakery Mart of Newark, Inc., and against that company, charging him and it, in two counts, with unlawfully introducing and delivering for introduction in interstate commerce cans of adulterated (i. e., rotten) eggs. The pertinent statutory provisions are set out below.² At the close of the case a motion was made on behalf of both defendants to dismiss the information and for a directed verdict on the grounds that the information did not charge a crime and that the proofs offered were insufficient to sustain a conviction. The motion was denied. The appellant

² See the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. as follows:

Section 331.

"The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

Section 342.

"A food shall be deemed to be adulterated—

(a) (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food;"

Section 321.

"(f) The term 'food' means (1) articles used for food or drink for man or other animals."

Section 333.

"(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine,

"(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 331, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

"(c) No person shall be subject to the penalties of subsection (a) of this section, (2) for having violated section 331 (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 331 (a), that such article is not adulterated or misbranded, within the meaning of this chapter, designating this chapter . . ."

Section 335.

"Before any violation of this chapter is reported by the administrator to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding."

and the company were found guilty on both counts. Greenbaum was sentenced to pay a fine of \$300 and to three months imprisonment. He has appealed.

"The information did not charge that he knew that the eggs were rotten when he shipped them into interstate commerce. No proof was offered of guilty knowledge on his part. He contends that for these reasons the judgment should be reversed.

"Whether allegation and proof of *mens rea* is requisite to a conviction for a crime which carries with it a possible sentence to penal servitude depends upon the legislative intent evidenced by the statute which defines and punishes the particular offense. *United States v. Balint*, 258 U. S. 250, 252. The constitutional requirement of due process is not violated merely because *mens rea* is not a required element of a prescribed crime. *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 69, 70; *United States v. Balint*, *supra*, at p. 252.

"While the absence of any requirement of *mens rea* is usually met with in statutes punishing minor or police offenses (for which fines, at least in the first instance, are ordinarily the penalties) we think that interpretation of legislative intent as dispensing with the knowledge and wilfulness as elements of specified crimes is not to be restricted to offenses differentiable upon their relative lack of turpitude. Where the offenses prohibited and made punishable are capable of inflicting widespread injury, and where the requirement of proof of the offender's guilty knowledge and wrongful intent would render enforcement of the prohibition difficult if not impossible (i. e., in effect tend to nullify the statute), the legislative intent to dispense with *mens rea* as an element of the offense has justifiable basis. Notable among such offenses are dealings in adulterated foods and drugs. Cf. *United States v. Balint*, *supra*, pp. 252-253; see also *Public Welfare Offenses*, Sayre, 33 *Columbia Law Rev.*, 55, 70, et seq., and *Ignorance and Mistake in Criminal Law*, Perkins, 88 *Univ. of Pa.*, 35, 38, et seq.

"The statute under which the appellant was indicted, convicted and sentenced, makes no specific requirement of allegation or proof of the offender's knowledge and wilfulness. While the failure so to provide does not necessarily determine that guilt of the offense may be established without such allegation and proof,³ we conclude that the requirement of § 335, that, before criminal prosecution for a violation of the statute may be instituted, the person against whom such proceeding is contemplated shall be given an opportunity by the Administrator to present his views with regard to such contemplated proceeding⁴, negatives any idea that proof of guilty knowledge and wrongful intent at trial of an offense under § 333 (a) is necessarily implicit. The prescribed inquiry, a preliminary requisite to prosecution, is designed to search out the possible innocent mind of the particular offender by establishing before trial, his good faith or the extent of his actual knowledge and wilfulness.

"We cannot agree with the contention of the government that the fact that an offense under § 333 (b), which deals with the introduction of a prohibited article in interstate commerce 'with intent to defraud or mislead', is more severely punished than the first offense under § 333 (a) furnishes an implication that under § 333 (a), proof of the alleged offender's knowledge and wilfulness is not intended. If 'intent to defraud or mislead' embraced all instances where there was knowledge or wilfulness, then the argument, based on the inclusion of the requirement in the one instance and its exclusion in the other, would be both pertinent and cogent. But, conceivably, there can be instances where the introduction of a prohibited article in interstate commerce is with knowledge and wilfulness and yet without intent to deceive or mislead, e. g., where the consignee of the shipment knows what he is getting and gets what he wants. Hence, the alleged distinction seems possibly to contain the reverse implication.

"Also, it must be conceded that the case of *Baender v. Barnett*, *supra*, upon which the appellant principally relies, is difficult to reconcile with a statutory construction which dispenses with the need of the offender's knowledge and wilfulness. The statute involved in the *Baender* case made penal the possession, without lawful authority, of any die in the likeness or similitude of a die designated for making genuine coin of the United States. There is no requirement in that statute that the condemned possession shall be with the possessor's knowledge and wilfulness. But the Supreme Court said that 'the statute is not intended to include and make criminal a possession which is

³ See *Baender v. Barnett*, 255 U. S. 224.

⁴ See grounds for exculpation specified in § 333 (c).

not conscious and willing.' The basis for the construction thus placed upon the statute in the Baender case is not easy to differentiate. Counterfeiting is a direct and serious affront to the sovereign and usually perpetrated with effort at greatest secrecy, but the particular statutory provision⁵ had originally contained the qualifying words 'with intent to fraudulently and unlawfully use the same', which were eliminated when the subject matter of the original statute was incorporated in the Criminal Code,—a circumstance that might well have been taken to confirm that the deletion was designedly purposeful. None the less, on the authority of *United States v. Balint, supra*, we conclude that the construction of the statute before us presents no more than a question of legislative intent⁶ and we perceive an intent in § 333 (a) to punish persons who introduced adulterated foods into interstate commerce regardless of their lack of knowledge or wilfulness.

"In construing Section 2 of the Food and Drugs Act of 1906, 21 U. S. C. A. § 2, courts have held that guilty knowledge was not necessary to sustain a conviction. See *Strong, Cobb & Co. v. United States* (C. C. A. 6, 1939) 103 F. 2nd 671, and *United States v. Sprague* (D. C. E. D. N. Y., 1913) 208 F. 419. The analogy is obvious."

8887. Alleged adulteration of dried whole eggs. U. S. v. 5 Barrels of Dried Whole Eggs (and 2 other seizure actions against dried whole eggs). Tried to the court. Verdict for claimant. Decree ordering the dismissal of the libels and the release of the product. (F. D. C. Nos. 8617, 9163. Sample Nos. 1417-F, 7315-F.)

LIBELS FILED: On or about October 22, 1942, and January 13, 1943, Northern District of Illinois and Eastern District of Wisconsin; two libels amended on or about July 1, 1943, to include a prayer for injunctive relief.

ALLEGED SHIPMENT: The lot of 5 barrels was shipped by the Wisconsin Dried Egg Co. on or about October 26, 1942, from Oconto, Wis. The remainder of the product was alleged to be in interstate commerce in that it was segregated, identified, and tendered for delivery pursuant to a contract of sale between the Wisconsin Dried Egg Co., vendor, and the Federal Surplus Commodities Corporation, vendee.

PRODUCT: 5 barrels at Chicago, Ill., and 47 barrels and 184 barrels at Oconto, Wis., each barrel containing 175 pounds of dried whole eggs.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of decomposed eggs.

DISPOSITION: On May 25, 1943, the Wisconsin Dried Egg Co. having appeared as claimant in each of the libel actions and having requested the removal of the Illinois action to the Eastern District of Wisconsin for consolidation with the libel actions pending there, an order of removal was entered by the District Court of the United States for the Northern District of Illinois. The claimant filed an answer denying that the 47-barrel and 184-barrel lots were in interstate commerce, and further denying that the product was adulterated. The case came on for trial before the court on or about July 1, 1943, and at the conclusion of the trial on July 3, 1943, the court took the matter under advisement. On December 22, 1943, after consideration of the evidence and briefs of counsel, the court handed down the following decision:

DUFFY, District Judge: "This case is a consolidation of three in rem proceedings under Sec. 304 (a) of the Federal Food, Drug, and Cosmetic Act (21 U. S. C., Sec. 334 (a)). The claimant, Wisconsin Dried Egg Company of Oconto,

⁵ § 169 of the Criminal Code, c. 127, Sec. 1, 26 Stat. 742.

⁶ The legislative history of the statute throws some light on the nature of the penalties. The report to the House of Representatives of Congressman Lea, Chairman of the House Committee on Interstate and Foreign Commerce, (Report No. 2139, to accompany S. 5, 75th Cong. 3rd Sess., p. 4), contains the statement, "[Section 333] . . . increases substantially the criminal penalties of the present law [the Food and Drugs Act of June 30, 1906, 34 Stat. 768, as amended, 21 U. S. C. A. §§ 1-15] which some manufacturers have regarded as substantially a license fee for the conduct of an illegitimate business. Appropriate exemptions are provided for dealers who innocently receive and distribute illegal goods." During the debate upon the bill Congressman Lea stated (Cong. Record, Vol. 83, Part 7, 75th Cong., 3rd Sess., 7775), "Then increased penalties are provided. Under the present law, as I recall, the maximum penalty is \$500 and the ordinary penalty is \$300. The bill we report fixes a maximum penalty of \$10,000 and a maximum time in jail of 3 years instead of 1 year as under the present law."

"The main object of so increasing these penalties is to provide suitable penalties due to the changed conditions since 1906. We have a great many institutions manufacturing drugs and foods that are very strong financially and we thought these higher penalties are justified in view of present conditions and to cover cases of the persistent violator."