LABEL, IN PART: "Irresistible Brand Unpeeled Whole Apricots in Heavy Syrup * * * Packed by Colorado Mountain Food Co., Grand Junction, Colorado."

NATURE OF CHARGE: Misbranding, Section 403 (h) (2), the product purported to be and was represented as canned apricots, and it failed to comply with the standard of fill of container since there was not present in the container the maximum quantity of optional apricot ingredient which can be sealed in the container and processed by heat to prevent spoilage, without crushing or breaking such ingredient; and the label failed to bear, as specified by the regulations, a statement that the product fell below such standard.

DISPOSITION: December 2, 1947. The Regal Stores, Inc., Indianapolis, Ind., having appeared as claimant, judgment was entered ordering that the product be released under bond for relabeling under the supervision of the Food and Drug Administration.

DRIED FRUIT

17542. Adulteration of dates. U. S. v. 14 Boxes * * *. (F. D. C. No. 19555. Sample No. 58265–H.)

LIBEL FILED: On or about April 6, 1946, District of Montana.

ALLEGED SHIPMENT: On or about December 9, 1945, by Ritter & Co., from Los Angeles, Calif.

PRODUCT: 14 boxes, each containing 24 packages, of dates at Billings, Mont.

LABEL, IN PART: "Golden Ripe Brand Dates Indio, California."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of larvae, beetles, and insect parts.

DISPOSITION: May 15, 1946. Default decree of condemnation and destruction.

FROZEN FRUIT

17543. Alleged adulteration of frozen strawberries, raspberries, loganberries, and boysenberries, and misbranding of frozen rhubarb. U. S. v. Midfield Packers and Herbert H. Huber. Pleas of not guilty; motion to dismiss. Counts dismissed charging partnership and Herbert H. Huber with shipping adulterated frozen berries. Count charging partnership with shipping misbranded frozen rhubarb tried on plea of not guilty; judgment of guilty; fine, $250. (F. D. C. No. 22018. Sample Nos. 32151–H, 38587–H, 57145–H, 58345–H, 58352–H, 58353–H.)

INFORMATION FILED: On or about June 30, 1947, Western District of Washington, against the Midfield Packers, a partnership, Olympia, Wash., and Herbert H. Huber, partner and manager.

The Midfield Packers and Herbert H. Huber were charged with the shipment of frozen strawberries, raspberries, loganberries, and boysenberries. The Midfield Packers alone was charged with the shipment of frozen rhubarb.

ALLEGED SHIPMENT: On or about March 15, June 12, and July 15 and 25, 1946, from the State of Washington into the States of California, Illinois, New York, and Massachusetts.

LABEL, IN PART: "Moon Winks Whole Strawberries [or "Red Raspberries," "Loganberries," "Boysenberries," or "Rhubarb"]."

NATURE OF CHARGE: Frozen strawberries, raspberries, loganberries, and boysenberries. Adulteration, Section 402 (b) (1), valuable constituents, whole strawberries, raspberries, loganberries, and boysenberries, had been in part

omitted; Section 402 (b) (2), water had been substituted in part for the products; and, Section 402 (b) (4), water had been added to the products and mixed and packed with them so as to reduce their quality and make them appear better and of greater value than they were.

Frozen rhubarb. Misbranding, Section 403 (i) (2), the product was fabricated from two or more ingredients, and its label did not bear the common or usual name of each such ingredient.

DISPOSITION: Pleas of not guilty having been entered to all counts of the information, the case was tried to the court without a jury on November 4 and 5, 1947. A motion to dismiss had been filed by the defendants and was argued prior to the taking of the evidence. At that time the court withheld ruling on the motion until the hearing of the evidence. At the close of the Government's case, the motion to dismiss was renewed and the court dismissed the counts charging the partnership and Herbert H. Huber with the shipment of adulterated strawberries, raspberries, loganberries, and boysenberries. The partnership, however, was found guilty of the charge of shipping misbranded rhubarb and was fined $250. The following oral opinion was handed down by the court:

LEAVY, *District Judge:* "The Court is quite conscious of the significance of its ruling in this case, and for that reason I have given the matter very careful consideration and close attention—even some days before the case came on for trial.

"The defendants here, a co-partnership and the individual, Herbert H. Huber, are charged in four counts, eliminating the second count which the Government moved to dismiss, with adulterating food, particularly strawberries, red raspberries, loganberries and boysenberries.

"The charge is brought under 21 U. S. C., Section 342 (b) 1, which deals with adulteration. The indictment on its face would not be subject to a demurrer or a motion to dismiss. It might have been subject to a motion to make more definite and certain. For that reason, the Court at the outset of this case, declined to grant the motion to dismiss, but held the matter in abeyance until the Government's evidence would be heard in support of these four counts. The evidence as to one of them virtually applies to all of them, because the record as it now stands is to the effect that there was an interstate shipment of the products mentioned here as alleged, not only in the one case, but in all of them.

"The question for determination is first, is there any authority in law to classify the product here as an adulterated product. The term 'adulteration,' of course, is one whose meaning is well known to the general public, though sometimes it is given a more restricted meaning than it is given in this case. That is, people sometimes think of an article that is adulterated as being one that is made deleterious.

"Here, it is sought to show that the articles in question were adulterated not by a substance that would in any way injure or affect public health, but by a substance that would make the article that the public was buying less effective as a food. It's freely conceded that there was nothing about any of these berries that would result in damage or injury to the consumer; so we are confronted here with the question, first, is there evidence here that establishes beyond a reasonable doubt that there was an adulteration, accepting that definition as Congress wrote it in the act and as the public generally knows it, and in order to determine that fact, we must have some basis from which to proceed. I think this is particularly true in a case of this nature, being a criminal action, but it would be equally true if the action were brought as a libel proceeding, or as an injunction proceeding, though the evidence of course would not have to be such as to establish the ultimate fact by proof beyond a reasonable doubt in either of the two proceedings that I have suggested.

"The difficulty in making a determination here is not the failure of proof in any respect by the Government, with the single exception—and that's a vital thing, and that is, has there ever been a standard fixed? It is conceded that none was fixed in accordance with the provisions of the law as Congress enacted it, but the agency takes the position that after a consideration of what

the packers generally were doing throughout the country in processing fruits or berries of this character and type and in this manner, they themselves fixed a standard and the agency adopted such a standard. I am of the opinion that that position is not sound in any respect, either in a civil or a criminal case, and certainly not in a criminal case.

"While the Supreme Court of the United States in the very recent case that has been cited, the Dotterweich case, has gone a long way in the majority opinion in determining when liability exists—criminal liability exists under this act—they did not have before them the specific question that this Court has for determination.

"Were I to follow the district court of South Carolina, I think it was, where there was a seizure, 63 Federal Supplement, 915, and no regulation had been made, it may be that I would be warranted in coming to the conclusion that the Government insists is the law in this situation. I am not sufficiently familiar with the facts in that case, except as it has been pointed out to me that it was a civil proceeding rather than a criminal proceeding, to state that I would want to adopt the ultimate conclusions made by the Court there. We have a situation very different here. Tomato processed products have been common for some generations. Canned frozen berries in commercial quantities are a new product in a large measure.

"The testimony here is, and I think the Court would be warranted in taking judicial notice of what is common knowledge, that canned frozen fruits and vegetables were scarcely heard of in commercial lines fifteen or twenty years ago, and as the evidence is here, they really came into an active place in the economic and commercial picture of foods in the last four or five years, since the war—the second world war began. It is testified here that in processing berries, such as are involved in these four counts, a certain amount of sugar and a certain amount of water is an essential. That is, it would be impractical to put them on the market without adding either. I am not going to attempt to review the evidence in that regard.

"It's admitted here that the labeling was not false or misleading in that it recited that the buyer would receive so much fruit and so much sugar, and so much water. The labeling is well within the law. Possibly the agency could promulgate a regulation requiring such labeling to be made more specific, but that wasn't done. The charge is here that there was an adulteration.

"Now in order that there be an adulteration there must be a standard, and if there is no standard you simply cannot determine that there has been an adulteration of the product.

"Congress when they enacted the Pure Food and Drug Act of 1938, which was the third session of the 75th Congress—and I happened to be a member of that Congress, and though not upon that committee, but I was interested in this legislation to the extent that I followed it very closely and even participated in some of the debates in connection with the act. The objects and purposes of the enactment, as the debates will indicate, were to give the general public a greater protection than they were receiving under the somewhat antiquated Pure Food and Drug Act that had been enacted some thirty-two or thirty-three years before.

"Another purpose was to protect the citizen from being unduly harassed or—he or his business destroyed by reason of the activity of the agency. You will find, if you are interested in the debates, that there was constant reference made to the possibility of one accused, or one whose property was seized, having assurance that he could have his day in court, and as I recall, and as I think it is admitted here, there was an addition placed on this new act of 1938, and then there was an amendment in the next year, the 76th Congress in 1940, if I remember rightly, but this amendment was: that since it would be out of the question for the Congress to define in particularity all of the thousand and one different commodities that must be supervised, the Administrator of the act would be empowered to make regulations, and the regulations would be as effective as the act itself. Therefore, we have these two sections in the act. The one is Section 341 of Title 21, U. S. C. A., and insofar as it tends to clarify what I say here, I shall briefly read from it:

> Whenever in the judgment of the administrator such action will promote honesty and fair dealing in the interests of the consumer, he shall promulgate regulations fixing and establishing for any food under its common or usual name, so far as practicable, a reasonable definition and standard of identity, and a reasonable standard of quality.

"Now, Section 371 of the act, covering general administrative provisions, provides for hearing and promulgating these regulations and how these hearings shall be conducted, also the effectiveness of definitions and standards of identity, and even provides for a review of the order. I mention these things to show with what care the Congress sought to protect the individual processor, manufacturer, or seller, as well as the general public.

"In the matter that we have before us, none of these steps were taken, and a more or less arbitrary position was taken by the Administrator, without notice, without warning, or without hearing, that twelve ounces of berries out of the pound would constitute a standard.

"It seems to me to adopt the position that the Government here takes, on the basis of such facts, is to conclude that the agency, without any authority of Congress, could define and establish a standard, which, if not complied with, might send a man to the penitentiary, cause him to pay heavy fines, and result in the entire loss of his business. It was never intended that should be done.

"The agency as a whole has done exceptionally fine work in protecting the American public from the greed and avarice of certain persons who impose upon it. They are given tremendous powers by the Congress in order to carry out that responsibility, but those very powers called for an exceedingly high degree of caution, in order to insure there would be no abuse and no undue hardship wrought upon the citizen.

"There are some early Supreme Court cases, and some rather late ones that have application to what I have just said.

"In order to prosecute criminally—that is what is involved in these two cases that I shall refer to—a person must be plainly and unmistakably within the provisions of the statute, and I go farther and say within the prohibition of the regulation. This was the rule as announced—and it has never been varied, U. S. vs. Lacher, 134 U. S. 624, and U. S. vs. Gradwell, 243 U. S. 476:

> Congress alone has the power to define crimes and to name offenders. In this Pure Food and Drug Act, Congress did that in general terms and then empowered the Administrator by specific regulations to supplement the act, and a violation of the regulation will become an offense.

"There's no regulation in the matter that we have now for consideration, and the principle that I have just stated is the one that is announced in U. S. vs. Westberger, 5 Wheaton 76, opinion written by Chief Justice Marshall in the very beginning days of our national existence. Later cases hold this: Congress must specify persons it desires to punish—that is, the group of classes into which they fall, and it is based upon that principle of law that Justice Frankfurter held as he did in the case that the Government has referred to. Cases supporting the principle I have just stated are United States vs. Harris, 177 U. S. 305, and Sarels vs. United States in 152 U. S. 570.

"I am attempting to make a disposition of this case in a manner, so as not to create a result that would constitute jeopardy and thus make it impossible for the Government to ascertain whether I am right or wrong. To me the issue is so clear, and so free from doubt on the matter of authority to have—or on the matter of having—a fixed standard, that I would be committing a grievous error and doing violence to the rights of the citizen were I to refuse to grant the motion to dismiss.

"However important we may feel that it is to here protect the public from the avarice of the individual who sells a product that was only fifty or seventy-five percent equal to what his competitor is selling for the same price, this could not become a ground and a justification for this Court or any court to do violence to our fundamental principle that we are a government of laws and not of men, and therefore, men, even though they may be the head of a great administrative agency like the Pure Food and Drug agency, cannot, except in compliance with law, announce standards and regulations and make a violation of them, the subject of criminal penalties, or the loss of property, or the loss of business.

"This new business of frozen fruits and berries is a highly competitive business, and if the processors can, as the evidence seems to indicate here, group themselves into associations and adopt voluntary standards, and then secure the aid of a great governmental agency in forcing those who are not members to adopt the same standard, then we would have a deplorable situation, because then we would create a condition that would do violence to affirmative

law, that we have against monopolistic trade and practice. I am not intimating directly that such is the situation here. However, the few trade witnesses seemed to testify along that line.

"If no regulation is promulgated, and a product such as we have here is not limited by the governmental agency as to content, it is my holding that until they do fix some standard, they cannot maintain such an action, because the substance itself is harmless. The major part of it is berries. If it isn't interfered with by action taken by the Food and Drug agency, it would be but a short time until the public knew that these 'Moon Winks' products, the trade name that they use, were so inferior to many of the others they wouldn't buy it, but would buy the product of others who supplied a greater amount of berries.

"Aside from the important legal questions involved here, the practical question is, that the Pure Food and Drug agency wouldn't have enough inspectors and employees and servants if they doubled and trebled and quadrupled their staff, to go into the field of processing if they allowed the particular type of merchandise processors or vendors to fix a standard and they assumed the responsibility of enforcement. I am certain that wasn't the intent of Congress in enacting this law, and if it were the act would be unconstitutional.

"I am going to have to grant the motion to dismiss this case, not alone as it was made at the outset of the case, but as it is made now, upon the ground and for the reason that after hearing and considering the evidence in support of the allegations contained in the four counts of the indictment, there is no sufficient degree of evidence to warrant the Court in doing other than dismissing it, and I want to say in conclusion that if it is desired to appeal from this determination, I certainly would not discourage such an attitude or such a position if that be taken.

"I am conscious of the fact that an appeal to the Government is often limited, and were I to find at this stage of the case that the defendants are not guilty, I am doubtful if an appeal would lie. I am therefore sustaining the motion to dismiss on the ground, in light of the evidence, that there is no crime charged and you may prepare such an order on these four counts."

One witness was thereupon introduced by the defense in regard to the charge of misbranding frozen rhubarb, and the court ruled as follows:

"Under the limited evidence offered by the defendant, it is clear to the Court that the co-partnership is guilty of the offense charged in Count VI, of mislabeling, and I shall so find.

"This being a co-partnership, there would not be under the act, as I interpret it, a possibility of imposing a jail sentence, and the penalty would of necessity have to be a money fine.

"The offense is not a greatly aggravated one, and I think I might as well make a disposition of the matter now, and I shall assess a fine against the co-partnership in the sum of $250.00, without costs, and you may prepare a judgment to that effect."

MISCELLANEOUS FRUIT PRODUCTS

17544. Action to enjoin and restrain the interstate shipment of adulterated apple juice, apple cider, and fermented vinegar stock. U. S. v. Western Food Products Co., Inc., and N. H. Benscheidt, H. J. Henry, and John M. Farley. Permanent injunction granted. (Inj. No. 158.)

COMPLAINT FILED: On February 3, 1947, District of Kansas, against Western Food Products Co., Inc., Hutchinson, Kans., and N. H. Benscheidt, Hutchinson, Kans., president of the corporation and member of a partnership trading at Wichita, Kans., under the name Wichita Vinegar Works which, together with the defendant corporation, owned and operated in Canon City, Colo., the Western Vinegar Works, and H. J. Henry, Hutchinson, Kans., manager, and John M. Farley, supervisor of operations, of the Western Vinegar Works.

NATURE OF CHARGE: That the Western Food Products Co., Inc., and N. H. Benscheidt had been and were at the time of filing the complaint producing