ade * * * Use in hot and cold lemonade * * * lemon meringue pie, lemon sauce, lemon ice, lemon jello," were false and misleading since they represented and suggested that the product was dried lemon juice, whereas it was not dried lemon juice.

Further misbranding, Section 403 (f), the information required by Section 403 (i) (2) to appear on the label, namely, the statement of ingredients, was not prominently placed on the label with such conspicuousness (as compared with other words, statements, designs, or devices in the labeling) as to render it likely to be read by the ordinary individual under customary conditions of purchase and use.

DISPOSITION: July 12, 1951. Default decree of condemnation. The court ordered that the product be delivered to charitable institutions.

CANDY*

17804. Alleged adulteration of candy and chewing gum. U. S. v. A quantity of candy, etc. Tried to the court. Verdict for the Government. Decree of condemnation. Judgment reversed upon appeal. (F. D. C. No. 29666. Sample Nos. 47684–K, 47685–K.)

LIBEL FILED: July 31, 1950, Eastern District of Virginia; libel amended November 15, 1950.

ALLEGED SHIPMENT: On or about June 7 and 8, 1950, from Chicago, Ill.

PRODUCT: A quantity of candy containing trinkets held in one vending machine and a quantity of chewing gum containing trinkets held in another vending machine at Norfolk, Va.

LABEL, IN PART: (Candy machine) "Fresh!–Tasty! One Cent" and (gum machine) "Rail-Blo Ball Bubble Gum 1¢."

NATURE OF CHARGE: Adulteration, Section 402 (a) (1), the products contained deleterious substances, plastic and metal trinkets, which may have rendered the articles injurious to health; and, Section 402 (d), the products were confectionery and contained nonnutritive articles, plastic and metal trinkets. The products were adulterated while held for sale after shipment in interstate commerce.

DISPOSITION: The Cavalier Vending Corp., Suffolk, Va., claimant, having filed an answer denying that the products were adulterated, the case came on for hearing before the court on November 28 and 29, 1950. After considering the evidence and the arguments and briefs of counsel, the court, on February 7, 1951, handed down the following opinion:

BRYAN, *District Judge:* "The contents of two slot machines have been libeled as adulterated food, specifically, balls of candy and chewing gum as containing deleterious and non-nutritive substances, contraband under the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, 21 USCA 301 et seq. With the evidentiary facts undisputed, the lone question is whether the gum or candy was adulterated by the admixture of small metallic and plastic trinkets. The answer depends on whether the gum or candy 'contains' the trinkets.

"The slot machines are identical and no variant in them or their content necessitates separate consideration. The gum is in the form of a small marble, less than a half-inch in diameter, while the candy is somewhat smaller, but also spheroidal—a candy-coated peanut.

"The trinkets are made of plastic and metal, in the design of animals, clocks, hats, boots, balls, rings, and lapel-pins. They are in bright and varied colors,

*See also No. 17850.

like the units of gum and candy, but except for the balls, the trinkets differ from the units in shape, and some are smaller and others larger.

"The machine operates on the coin-in-the-slot principle. Its wares are held within a hollow glass globe, with the candy, gum and trinkets plainly visible, and promiscuously mingled. With the insertion of a coin and the turn of a crank, the purchase pours from the bowl by gravity into a receptacle open to the vendee. Each delivery of candy comprises 8 to 10 pieces, usually with one or more trinkets, while a delivery of gum consists of one gum ball with or without a trinket. In random samples it was found that to a quart of candy there were 840 peanuts and 21 trinkets, and a similar measure from the gum machine produced 225 pieces of gum with 65 trinkets.

"The candy and gum were shipped into Norfolk, Virginia, from Chicago, Illinois, and the trinkets from Dallas, Texas, but they were not mixed until placed in the machines in Norfolk, where they were seized. We think there can be no doubt that the mixture dispensed by each of the machines is within the interstate commerce sweep of the Act, section 304 (a), 21 USCA 334a, as 'held for sale (whether or not the first sale) after shipment in interstate commerce.' United States *v.* Sullivan, 332 U. S. 689. Hence we go to the merits immediately.

"Under the Act food is defined to be '(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.' Sec. 201, 21 USCA 321. A food is declared to be adulterated by section 402, 21 USCA 342, under the following conditions, among others:

402(a)(1): "If it bears or contains any poisonous or deleterious substance which may render it injurious to health; * * *"

(d): "If it is confectionery, and it bears or contains any alcohol or non-nutritive article or substance * * *"

"The contention of the owner is that neither the candy nor the gum, admittedly food in themselves, 'contains' the trinkets, that the trinkets are in no sense ingredients of the sweets, but physically separate as lures to prospective purchasers of the candy and gum, and that the candy and gum have within them no deleterious or non-nutritive substances.

"The Court is of the opinion that the indiscriminate confusion of the trinkets and candy, and trinkets and gum, especially in the low ratio of the trinkets, results in an indistinguishable mass of 'food,' and in this condition it is certain that these articles of food do contain the trinkets, within the intent and purpose of the Act. Obviously the trinkets are deleterious and non-nutritive substances. Except in the boots and lapel-pins, the color, design and intermixture of the trinkets so merge them with the candy and gum as to make them appear, certainly to the juvenile observer, as constituents and components of the store of candy and gum. A glance into the hopper of the slot machine might not distinguish the trinkets as alien substances but simply as another sweetmeat. That the whole contents are edible might well be assumed. In this intimate association we think the candy and the gum 'contains' the trinkets, and in this manner the candy and gum have become adulterated.

"There are thus offered 'articles used for food' potentially injurious to the consumer and against which the Act would protect the public. While the trinkets are not edible, they are easily aspirated and readily swallowed. Customers of these slot machines are the neighborhood children and the case against the gum, candy and trinkets becomes stronger when we consider the imprudence and heedlessness of these penny-patrons—never too discerning in munching tidbits.

"United States v. Lexington Mill Co. 232 U. S. 399, does not preclude our holding—that in the Act 'contains' may mean 'associated with' and not exclusively 'incorporated in,' and that 'food' is not referable only to a unit but includes a serving or portion of units offered for consumption. The English decision therein approved declared that the resulting blend must be detrimental to health; that it was not sufficient that a single ingredient was by itself an injurious element if not so in the combination. The facts there disclosed no confounding, as here, of the good and bad in such a way as to retain the full efficacy of the latter, without dilution to any degree. Nor was there a resemblance in the two, to let the uneatable pass as eatable.

"The case having been submitted without a jury, the Court makes this memorandum as its findings of fact and conclusions of law, and will enter an order granting condemnation in accordance with the prayer of the libel."

On March 16, 1951, judgment of condemnation was entered and the court ordered that the products contained in the vending machines be destroyed and that the machines themselves be returned to the claimant. Thereafter, an appeal was taken by the claimant to the United States Court of Appeals for the Fourth Circuit, and on July 24, 1951, the following opinion was handed down by that court:

PARKER, *Circuit Judge:* "This is an appeal by claimant in a libel proceeding under the Federal Food, Drug and Cosmetic Act (21 USCA 301 et seq.) in which an order was entered condemning certain candy, chewing gum and metal plastic trinkets contained in vending machines. The principal question presented by the appeal is whether under the facts of the case the candy and gum are adulterated within the meaning of the act.

"There is no dispute as to the facts. It is conceded that the candy and gum are not adulterated and do not of themselves fall within the condemnation of the act. The finding of adulteration is based upon the fact that after arrival in Norfolk, they were placed in vending machines along with the trinkets. The facts are succinctly and accurately set forth in the opinion of the learned judge below as follows:

> The slot machines are identical and no variant in them or their content necessitates separate consideration. The gum is in the form of a small marble, less than a half-inch in diameter, while the candy is somewhat smaller, but also spheroidal—a candy-coated peanut.
>
> Trinkets are made of plastic and metal, in the design of animals, clocks, hats, boots, balls, rings, and lapel-pins. They are in bright and varied colors, like the units of gum and candy, but except for the balls, the trinkets differ from the units in shape, and some are smaller and others larger.
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> The machine operates on the coin in the slot principle. Its wares are held within a hollow glass globe, with the candy, gum and trinkets plainly visible and promiscuously mingled. With the insertion of a coin and the turn of a crank, the purchase pours from the bowl by gravity into a receptacle open to a vendee. Each delivery of candy comprises 8 to 10 pieces, usually with one or more trinkets, while a delivery of gum consists of one ball with or without a trinket. In random samples it was found that to a quart of candy there were 840 peanuts and 21 trinkets, and a similar measure from the gum machine produced 225 pieces of gum with 65 trinkets.
>
> The candy and gum were shipped into Norfolk, Virginia, from Chicago, Illinois, and the trinkets from Dallas, Texas, but they were not mixed until placed in the machines in Norfolk, where they were seized.

"The finding of adulteration was based upon the idea that the mingling of the trinkets with the gum and candy resulted 'in an indistinguishable mass of food' which contained the trinkets within the meaning of sec. 402 (a) (1) of the Act, 21 USCA 342 (a) (1), which provides that food shall be deemed adulterated 'if it bears or contains any poisonous or deleterious substance which may render it injurious to health.'[1] The plastic or metallic trinkets would be injurious to health if swallowed or caught in the air passages of the nose or throat.

"We think it perfectly clear, however, that the trinkets, which correspond to the 'prizes' contained in the candy 'prize boxes' of an earlier day, are not contained within the gum or candy within any possible meaning of the act. If we look to its language the deleterious subject must be contained within the food product offered for sale, and the trinkets are not contained in the pieces of gum or candy but are merely sold along with them. Neither the gum nor the candy contains the trinkets but is contained along with the trinkets in the bowl of the vending machine. The purpose of the statute is

[1] 21 USCA sec. 342 provides: (The court quotes this sec.).

to prevent adulteration, i. e., the 'adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers.' *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409. Surely, the giving of trinkets or prizes along with the sale of candy or gum does not add anything to the 'articles of food consumption' nor do they affect such articles in any way. Cf. *Bourcheix* v. *Willow Brook Dairy, Inc.*, 268 N. Y. 1, 196 N. E. 617, 98 A. L. R. 1492. We cannot imagine that anyone would contend that the statute would be violated if a single trinket were included as a 'prize' in a package of candy or gum; and we see no difference between this and the sale by the slot machine method here employed, where only occasionally is one of the trinkets discharged, and the possibility that this may occur is one of the chief inducements to the purchase. If there is anything objectionable in what is done, it arises not out of any adulteration of the candy or gum but out of the method of sale, which is a local matter. No case has been cited holding that the statute has any application to a case of this sort, and we know of none.

"There is a grave doubt whether, even if the vending of the trinkets along with the candy and gum could be held to be adulteration, the act would have any application since their mingling in the vending machines was a local matter which occurred after their interstate journey had ended and they had come to rest at Norfolk. There was no transmission of the 'adulterated' product in interstate commerce, nor was there an offering for sale of a product which was adulterated when a subject of such commerce. See *United States* v. *Phelps Dodge Mercantile Co.*, 9 Cir. 157 F. 2d 453, cert. den. 330 U. S. 818. We need not pass upon this question, however, as we think it clear that the candy and gum were not adulterated within the meaning of the act merely because the trinkets were placed with them in the vending machines.

"For the reasons stated the order appealed from will be reversed and the cause will be remanded with direction to enter judgment for the claimant. *Reversed.*"

17805. Adulteration of candy. U. S. v. Arthur Heiman. Plea of guilty. Fine, $900. (F. D. C. No. 29160. Sample Nos. 56945–K, 58275–K to 58277–K, incl., 63279–K.)

INDICTMENT RETURNED: October 27, 1950, Southern District of New York, against Arthur Heiman, New York, N. Y.

ALLEGED SHIPMENT: On or about November 28 and December 20 and 29, 1949, from the State of New York into the States of New Jersey, California, and Massachusetts.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in part of a filthy substance by reason of the presence of rodent hair fragments and other miscellaneous filth; and, Section 402 (a) (4), it had been prepared, packed, and held under insanitary conditions whereby it may have become contaminated with filth.

DISPOSITION: April 24, 1951. A plea of guilty having been entered, the court imposed a fine of $900.

17806. Adulteration of candy. U. S. v. Spangler Candy Co. and Norman E. Spangler. Pleas of guilty. Corporation fined $300 and individual defendant $100, plus costs. (F. D. C. No. 31111. Sample Nos. 7070–L, 10319–L, 10321–L, 10768–L.)

INFORMATION FILED: July 3, 1951, Northern District of Ohio, against the Spangler Candy Co., a corporation, Bryan, Ohio, and Norman E. Spangler, vice president.

ALLEGED SHIPMENT: On or about January 9, 11, and 12, 1951, from the State of Ohio into the States of Pennsylvania, Indiana, and Michigan.