LABEL IN PART: "Tusan Brand * * * Thompson Seedless Raisins."

CHARGE: 402 (a) (3)—contained insects and insect parts; and, 402 (a) (4)—prepared under insanitary conditions.

DISPOSITION: 4–4–55. Default—destruction.

FRESH FRUIT

22332. Fresh blueberries. (F. D. C. No. 37147. S. Nos. 23–061 M, 23–063 M.)

QUANTITY: 5 crates, 24 1-qt. boxes each, at Boston, Mass.

SHIPPED: 7–14–55, from New Ipswich, N. H., by Leo Somero and Nick Somero.

LIBELED: 7–18–55, Dist. Mass.

CHARGE: 402 (a) (3)—contained maggots when shipped.

DISPOSITION: 8–2–55. Default—destruction.

FROZEN FRUIT

22333. Frozen strawberries. (F. D. C. No. 37223. S. No. 87–388 L.)

INFORMATION FILED: 2–8–55, W. Dist. Wash., against Valley Packers, Inc., Puyallup, Wash., and Cecil F. Johannes, president.

SHIPPED: 7–17–53, from Washington to Louisiana.

LABEL IN PART: (Can) "Whole Marshall Strawberries * * * Net Wt. 30 Lbs."

CHARGE: 402 (a) (3)—contained decomposed strawberry material when shipped.

PLEA: Nolo contendere.

DISPOSITION: 5–12–55. Corporation and individual each fined $150.

VEGETABLES*

22334. Canned dried black-eyed peas. (F. D. C. No. 31525. S. No. 13–435 L.)

QUANTITY: 149 cases, 24 1-lb., 4-oz. cans each, at Denver, Colo.

SHIPPED: 8–7–51, from Phoenix, Ariz., by Arizona Canning Co.

LABEL IN PART: (Can) "Silver Brand * * * Dried Black Eyed Peas."

LIBELED: 9–13–51, Dist. Colo.

CHARGE: 402 (b) (2)—brine was substituted in part for black-eyed peas when shipped.

DISPOSITION: On 3–4–52, Arizona Canning Co., claimant, filed an answer denying the adulteration of the article as alleged in the libel. Subsequently, interrogatories were propounded to the claimant, which were answered, and the case came to trial before the court without a jury on 5–4–53. On 7–14–53, the court handed down the following findings of fact and conclusions of law:

KNOUS, *District Judge:*

FINDINGS OF FACT

I

"On or about August 7, 1951, the Arizona Canning Company, Phoenix, Arizona, shipped from Arizona to Denver, Colorado, an article of food consisting of 149 cases, more or less, of canned dried black eyed peas, part of

*See also Nos. 22336, 22337, 22346, 22350.

which cases consisted of cans coded AH2B and part of which cases consisted of cans coded AH7B.

II

"On September 13, 1951, the United States of America filed a libel of information charging that the article of food involved was adulterated within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 342 (b) (2), in that brine had been substituted in part for black eyed peas.

III

"On September 17, 1951, the United States Marshal of this district seized the article of food pursuant to a monition issued by this Court, which article is now stored in the warehouse of Bankers Warehouse Company at 2145 Blake Street, Denver, Colorado.

IV

"The Arizona Canning Company, Phoenix, Arizona, on or about March 4, 1952, filed herein a claim of ownership to the seized article and an answer to the libel, wherein it denied the allegation of adulteration.

V

"The article involved was processed by the Arizona Canning Company at its canning plant in Phoenix, Arizona, on August 2 and August 7, 1951.

VI

"The cans processed on August 2, 1951, were coded AH2B and those processed on August 7, 1951, were coded AH7B.

VII

"The dried black eyed peas were processed by soaking in water for a period of approximately eight hours, mechanically packing the peas into No. 2 cans, adding packing medium to fill the cans, sealing the cans, and cooking the cans in a retort to prevent spoilage.

VIII

"Each batch of packing medium consisted of a mixture of 128 gallons of water, 18 pounds of salt, and 12½ ounces of garlic salt, differing from ordinary brine only in the addition of the garlic salt.

IX

"No standard of fill of container for canned soaked dried black eyed peas has been promulgated under the authority of 21 U. S. C. 341.

X

"The cans coded AH2B which constituted part of the seized shipment were inadequately filled with soaked dried black eyed peas and space which should have been filled with peas was filled with packing medium.

XI

"The cans coded AH7B which constituted the other part of the seized shipment were adequately filled with soaked dried black eyed peas.

XII

"Qualified chemists of the Food and Drug Administration, Department of Health, Education and Welfare, examined a number of cans from samples collected from the seized article and determined: 1) the head space from the top of the can to the level of the peas; 2) the weight of the peas after draining the packing medium, and 3) the proportion of the volume of the can occupied by the peas.

XIII

"The average head space of the cans examined of code AH2B was $1\frac{3}{16}$ inches; the average drained weight of the peas contained therein was 12.39 ounces.

XIV

"The average head space of the cans of code AH7B so examined was $\frac{15}{16}\frac{2}{}$ inches and the average drained weight of the peas contained therein was 14.37 ounces.

XV

"Cans of soaked, dried black eyed peas processed by other packers which were opened in the Court room and examined at the trial disclosed appreciably less head space, greater drained weight, and a higher percentage of space occupied by peas than did the claimant's cans coded AH2B herein.

XVI

"On the other hand, the head spaces, drained weights and percentage of spaces occupied by peas in claimant's cans coded AH7B compared favorably with the packs of black eyed peas contained in the opened cans of other processors as well as with other 1952 and 1953 packs processed by claimant, disclosing that cans coded AH7B were filled adequately and that the Arizona Canning Company was capable of properly filling No. 2 cans with soaked dried black eyed peas.

CONCLUSIONS OF LAW

I

"The article of food involved was shipped in interstate commerce within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 321 (b) and is now within the jurisdiction of this Court.

II

"Where no specific standard for fill of container exists for a food, the test to be applied is that fill of container which can be achieved by the use of proper and feasible commercial practices.

III

"Cans of food should be as full of the principal food ingredient as practicable without injuring the quality or appearance of the food.

IV

"The amount of packing medium used in a canned food for which no specific standard of fill of container has been established should not exceed the amount necessary for properly processing and preserving such food.

V

"The article of food in cans coded AH2B is adulterated within the meaning of 21 U. S. C. 342 (b) (2) in that brine has been substituted in part for black eyed peas in code AH2B. The article of food in cans coded AH7B is not adulterated within the meaning of 21 U. S. C. 342 (b) (2).

VI

"The United States of America is entitled to a decree condemning the article of food in cans coded AH2B, it having been established by a preponderance of the evidence in open court that the food is adulterated within the meaning of the Federal Food, Drug, and Cosmetic Act.

"The claimant is entitled to a decree releasing to it the article of food in cans coded AH7B."

In accordance with the findings of fact and conclusions of law, a decree was entered on 7–14–53, releasing those cans coded AH7B to the claimant, condemning those cans coded AH2B, and ordering that the condemned cans be delivered to a Federal institution.

Thereafter, both the plaintiff and the claimant filed motions to retax the costs, and on 8–28–53, the court handed down the following memorandum opinion and order:

KNOUS, *District Judge:*

MEMORANDUM OPINION AND ORDER

"Both the plaintiff and the claimant have filed motions to retax the costs.

"The claimant, citing the case of *United States* v. *1590 Cases of Tomato Pulp*, 255 Fed. 228 (Jan. 23, 1919), contends that no costs whatsoever properly may be assessed against it. At the time the foregoing decision was rendered no statute expressly relating to costs and fees in condemnation proceedings under the Food and Drugs Act was in existence. However, in enacting the new federal Food, Drug, and Cosmetic Act (June 25, 1938) the Congress provided by Title 21, U. S. C. § 334 (e) that 'When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.' This provision, in the view of the Court, clearly requires the taxing of lawful costs against an unsuccessful intervening claimant in a condemnation proceeding under the present act. Thus, there can be no doubt concerning the propriety of taxing the fees of the Clerk, $15.00, and docket fee under Title 28 U. S. C. § 1923, $20.00, as costs against claimant. The witness fee of $4.00 claimed for C. I. Ruble, likewise is clearly allowable.

"However, the plaintiff in addition claims as allowable costs witness fees amounting to $210.49 for Rodney D. Lovejoy of Washington, D. C., a government employee, and $124.17 for O. Curran of Siloam Springs Arkansas. The fees for Mr. Lovejoy as computed by plaintiff under Title 28 U. S. C. § 1823 (a) include round trip transportation charges from Washington, D. C., to Denver ($164.74) plus four and three-quarters days' subsistence at $9.00 per day ($42.75).

"The fees claimed for Mr. Curran, computed under Title 28 U. S. C. § 1821, include mileage (180) at seven cents per mile, from Siloam Springs, Arkansas, to Tulsa, Oklahoma ($12.60), plus taxi fares ($2.00) and the round trip air fare from Tulsa, Oklahoma, to Denver ($82.57). Attendance fees ($4.00 per day) and subsistence allowance ($5.00 per day) also are claimed for three days, amounting to $27.00 in all.

"Claimant contends that in view of 45 (e) F. R. C. P., witnesses' mileage and transportation may not be taxed for any distance in excess of one hundred miles from Denver. The plaintiff, on the other hand, asserts that its computation is warranted by Title 28 U. S. C. § 337, which provides that in proceedings under the Food, Drug, and Cosmetic Act subpoenas 'may run into any other district.' Although the latter statute was not involved, the decision of *Barnhart* v. *Jones*, 9 F. R. D. 423, in which many cases involving this question are cited (see also *Deal* v. *United States*, 274 U. S. 227) by analogy supports the contention of claimant. Therefore, the mileage fees and/or transportation charges taxable as costs for the witnesses Lovejoy and Curran should be limited to one hundred miles from Denver. In addition, the subsistence allowances for Mr. Lovejoy and the subsistence allowance and attendance fees for Mr. Curran should be limited to the trial period of two days. So computed, such items shall be taxed as costs.

"As submitted by plaintiff, the Marshal's bill of costs includes fees ($4.90), mileage ($20.40) and publication ($10.53), making a total of $35.83. Such patently are taxable as costs against claimant. In addition, there is included $55.79 for storage and drayage of the seized canned goods. Since at the trial it was adjudged that a portion of the seized items designated by Code AH7B were not in violation, the Court is of the opinion that storage and drayage charges as to Code AH7B items should not be taxed or allowed as costs. Hence the storage charges thereon amounting to $15.68 and drayage amounting to $2.40, according to the Marshal's statement, should be deducted from total

storage and drayage charges of $55.79 so submitted, leaving $37.71 properly taxable therefor. So computed, the total Marshal's bill of costs will be taxed at $53.54.

"IT IS ORDERED that the following costs be taxed and included in the judgment to be recovered from the claimant as follows:

Fees of Clerk		$15.00
Fees of Marshal:		
Fees	$4.90	
Mileage	.40	
Publication	10.53	
Storage AH2B	32.41	
Drayage AH2B	5.30	
		53.54
Witness Fees:		
Lovejoy—		
Fee—2 Days at $4.00		8.00
Subsistence, 2 days at $5.00		10.00
Mileage, 100 miles each way at 7¢		14.00
Curran—		
Fee—2 days at $4.00		8.00
Subsistence, 2 days at $5.00		10.00
Mileage, 100 miles each way at 7¢		14.00
Ruble		4.00
Attorney Docket Fees		20.00
Total		156.54"

On 10–26–53, the Government filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit. On 4–23–54, the court of appeals handed down the following opinion, vacating the judgment of the trial court as to costs and remanding the case:

MURRAH, *Circuit Judge:* "In a libel proceeding brought under the Federal Food, Drug, and Cosmetic Act (§ 304 (a), 52 Stat. 1044), the court gave judgment for the government with costs, but limited the allowance for travel of two government witnesses to 100 miles from the place of trial at Denver, Colorado. In so doing, the court followed what it deemed the mandate of Rule 45 (e) (1), Federal Rules of Civil Procedure, which authorizes the subpoena of a witness at a hearing or trial 'any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.'

"The government has appealed only from that part of the order limiting the assessment of mileage costs and consequent per diem to 100 miles from the place of trial, contending that the power to subpoena and to assess costs therefor is controlled by § 307 (52 Stat. 1046) of the Federal Food, Drug and Cosmetic Act providing that, '. . . Notwithstanding the provisions of section 876 of the Revised Statutes (superseded in 1948 by Rule 45 (e) (1)), subpenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district in any such proceeding.'

"Following the analogous reasoning of Barnhart v. Jones, 9 F. R. D. 423, the court took the view that the power to assess mileage costs was commensurate with the power to subpoena, but apparently rejected as inapplicable to the contingent subpoena powers under Rule 45 (e) (1), the unlimited subpoena powers granted under § 307 in a proceeding of this kind.

"The appellee seems to contend that since under § 304 (b) of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1044, procedure for seizure pursuant to libel in cases of this kind must 'conform, as nearly as may be, to the procedure in admiralty,' and since admiralty Rule 47 limits the assessment of costs for subpoened witnesses to 100 miles from the place of trial, the trial court's judgment is correct and should be affirmed. But, even though discretion to subpoena witnesses and assess costs in excess of 100 miles lies under 45 (e) (1), when construed in connection with § 307, the court's judgment is said to be

correct because within the allowable discretion; and for the further reason that the power to tax costs rests largely in the discretion of the trial court. See Spiritwood Grain Co. v. Northern Pac. Ry. Co., 8 Cir., 179 F. 2d 338; Levine v. Berman, 7 Cir., 178 F. 2d 440; Chicago Sugar Co. v. American Sugar Refining Co., 7 Cir., 176 F. 2d 1, cert. den. 338 U. S. 948; T. & M. Transp. Co. v. S. W. Shattuck Chem. Co., 10 Cir., 158 F. 2d 909; Globe Indemnity Co. v. Puget Sound Co., 2 Cir., 154 F. 2d 249; Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp., 2 Cir., 150 F. 2d 69; Crutcher v. Joyce, 10 Cir., 146 F. 2d 518; Harris v. Twentieth Century-Fox Film Corp., 2 Cir., 139 F. 2d 571.

"The appealability of the judgment for costs is also challenged, but the general rule against appealability is inapplicable when the power of the court to assess the costs is at issue. See Newton v. Consolidated Gas Co., 265 U. S. 78, 83.

"If the trial procedure in a case of this kind must conform to the 'procedure in admiralty,' then admiralty Rule 47 is applicable and the subpoena power of the court is limited to 100 miles from the place of trial, and the trial court's judgment must be affirmed for that reason. But admiralty rules are not applicable in cases of this kind 'beyond the seizure of the property by process in rem.' After seizure pursuant to libel, the proceedings take on the character of a law action. 443 Cans of Egg Product v. United States, 226 U. S. 172; United States v. 935 Cases Tomato Puree, 136 F. 2d 523, cert. den. 320 U. S. 778.

"If § 307 of the Act is specifically and exclusively applicable to the trial proceedings in a case of this kind, the question then arises whether the use of the word 'may' authorizes the court to exercise discretion in the allowance of mileage fees to witnesses subpoened from 'any other district.' In the very nature of things, any doubt concerning the discretion of the court to assess costs incident to the trial should be resolved in favor of the discretion. But in the view we take of this case, it is unnecessary to resolve that point, for we are convinced that § 307 of the Act should be construed in pari materia with Rule 45 (e) (1). As thus construed, the court was empowered, upon proper application and cause shown, to authorize the service of the subpoenas to any district, and since the power to assess costs is inherent in the power to subpoena, see Barnhart v. Jones, supra, the court was empowered to assess the costs in this case as an incident to the issuance of the subpoenas.

"The words, '. . . Notwithstanding the provisions of section 876 of the Revised Statutes (now 45 (e) (1),' contained in § 307 may be susceptible of an intention to exclude 45 (e) (1) from a proceedings of this kind. Indeed, the advisory committee which carried forward section 876 into 45 (e) (1) did not include § 307 as one of the statutes contemplated by the contingent provisions of 45 (e) (1). At the same time, the words, 'when a statute of the United States provides therefor' found in Rule 45 (e) (1) indicate no purpose to exclude § 307, and we can see no good reason for reading it out when to construe the rule in pari materia with § 307 would facilitate the administration of justice by leaving the power to subpoena witnesses and assess costs in proceedings of this kind in the discretion of the trial court where it rightfully belongs.

"No application was made and no cause shown for the issuance of the subpoenas to any other district as provided by the rule. Indeed the record does not show whether a subpoena was in fact issued for the two witnesses, mileage for which is in controversy. But even so, we do not regard such an application and showing prerequisite to the exercise of the court's power under the rule. The court is not powerless at this stage of the proceedings to consider whether the attendance of the two witnesses, one from Washington, D. C., and the other from Siloam Springs, Arkansas, was needful to the establishment of the government's case. That is a matter which the trial court ought to determine in the first instance upon a consideration of the pertinent facts; and it is a matter which the trial court has not considered, feeling itself bound by the limitations of the rule.

"The trial court, not having exercised the discretion committed to it, the judgment is vacated and the case remanded to permit it to do so."

On 9–23–54, the United States district court handed down an order retaxing the costs, allowing the mileage claimed for Witness Curran and disallowing the mileage claimed for Witness Lovejoy for the reason that he was not a necessary witness.