

"Factual issues are not to be tried or resolved by summary judgment procedure. Once it is determined that there exists a genuine and material factual issue, summary judgment may not be granted. In making this determination doubts (of course the doubts are not fanciful) are to be resolved against the granting of summary judgment. If a conflict appears as to a material fact the summary procedure does not apply unless the evidence on one or the other hand is too incredible to be accepted by reasonable minds or is without legal probative force even if true. *Dewey v. Clark*, 180 Fed. 2d 766, at 772.

"From the record before us it is clear that on the motion for summary judgment in this case there is a genuine and material factual issue to be determined. That question is, Were the seized goods adulterated within the meaning of the sections of the Food, Drug, and Cosmetic act relied on by plaintiff (21 U. S. C. 342 (a) (3 and 4)) ? This question was not before the court in case No. 2929 and therefore that court did not and could not have decided it. Hence the trial court was in error in sustaining that motion and entering judgment thereon.

"For the reasons hereinbefore indicated, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion."

Subsequently, the Government filed a petition for rehearing, which was denied on 4-9-54. On 12-14-54, the district court overruled the claimant's exceptions to the libels. On 1-10-55, the claimant filed an answer denying that the article was adulterated as alleged. Thereafter, the claimant consented to the entry of a decree, and on 2-4-55, the court entered a decree condemning the goods and ordering that they be destroyed or fed to animals.

**22336. Canned tomatoes, corn, and okra, canned succotash, canned green beans, canned lima beans, and canned tomatoes.** (F. D. C. No. 37252. S. Nos. 77-114/7 L, 80-682 L.)

**INFORMATION FILED:** 2-3-55, Dist. Del., against Torsch Canning Co., a corporation, Milford, Del.

**SHIPPED:** Between 7-27-54 and 8-12-54, from Delaware to Pennsylvania.

**LABEL IN PART:** (Can) "Red River Brand Tomatoes Corn & Okra [or "Royal Clover Brand Succotash." "Town Crier French Style Sliced Green Beans," "Richville Brand Lima Beans," or "Cardinal Brand Tomatoes"] \* \* \* Distributed by Delaware Valley Grocery Co. Philadelphia, Pa."

**CHARGE:** 402 (a) (3)—contained decomposed substance when shipped.

**PLEA:** Nolo contendere.

**DISPOSITION:** 4-27-55. \$1,000 fine.

**22337. Canned tomatoes, corn, and okra, canned succotash, canned green beans, and canned lima beans.** (F. D. C. No. 37065. S. Nos. 77-114/7 L.)

**QUANTITY:** 19 cases, 24 1-lb. cans each, of tomatoes, corn, and okra; 139 cases, 24 1-lb., 1-oz. cans each, of succotash; 39 cases, 24 15½-oz. cans each, of sliced green beans; and 227 cases, 24 No. 303 cans each, and 8 cases, 24 No. 2 cans each, of lima beans at Philadelphia, Pa.

**SHIPPED:** 8-6-54, from Milford, Del., by Torsch Canning Co.

**LABEL IN PART:** (Can) Red River Brand Tomatoes Corn & Okra," "Royal Clover Brand Succotash," "Town Crier French Style Sliced Green Beans," or "Richville Brand Lima Beans."

**LIBELED:** 9-22-54, E. Dist. Pa.

**CHARGE:** 402 (a) (3)—contained decomposed substance when shipped.

**DISPOSITION:** 10-20-54. Default. Portion of products delivered to Department of Health, Education, and Welfare, and remainder destroyed.