

the court had neither passed upon the allegations of the libel nor upon the contentions of the claimant with respect thereto, and that the order was without prejudice to these allegations and contentions.

23402. Canned boysenberry Nectarade. (F. D. C. No. 39268. S. No. 16-396 M.)

QUANTITY: 29 cases, 24 12-oz. cans each, at Seattle, Wash.

SHIPPED: 1-2-52, from Salem, Oreg.

RESULTS OF INVESTIGATION: Examination showed that the article was undergoing chemical decomposition.

LIBELED: 6-13-56, W. Dist. Wash.

CHARGE: 402 (a) (3)—contained a decomposed substance while held for sale.

DISPOSITION: 8-13-56. Default—destruction.

23403. Green coffee. (F. D. C. No. 38758. S. No. 11-510 M.)

QUANTITY: 41 bags at New Orleans, La.

SHIPPED: 10-6-55, from Vera Cruz, Mexico, by Casa Zardin S. A.

LABEL IN PART: (Bag) "Cafe Casa Zardin S. A. 16 de Septiembre No. 28 70 Kilos Product of Mexico."

LIBELED: 11-15-55, E. Dist. La.

CHARGE: 402 (a) (2)—the article was a raw agricultural commodity and contained, when shipped, a pesticide chemical, namely, benzene hexachloride, which is unsafe within the meaning of the law since no tolerance or exemption from the requirement of a tolerance for such pesticide chemical on coffee has been prescribed by regulations.

DISPOSITION: 1-4-56. Consent—claimed by Hamburg American Line. 5,099 lbs. of coffee of the 6,232 lbs. actually seized was released as fit for food use after reconditioning by a burnishing and roasting operation.

CEREALS AND CEREAL PRODUCTS

BAKERY PRODUCTS

23404. Bakery products. (Inj. No. 212.)

COMPLAINT FOR INJUNCTION FILED: Between 5-18-49 and 7-1-49, E. Dist. Tenn., against the Chattanooga Bakery, Inc., Chattanooga, Tenn., and David A. Parks, president of the corporation.

CHARGE: The complaint alleged that the defendants, since about the year 1939, had been engaged in the manufacture of crackers and cookies and, since about the year 1945, had been introducing into interstate commerce such articles, which were adulterated as follows:

402 (a) (3)—the articles contained insect fragments, insect setae, adult insects, rodent hair fragments, hairs resembling rodent hairs, fly setae, rodent excreta pellets, and other filth; and 402 (a) (4)—the articles had been prepared and held under insanitary conditions at the defendants' Chattanooga plant.

DISPOSITION: The defendants filed an answer to the complaint on 7-1-49, denying that the products were adulterated. The matter came on for hearing on the motion for a preliminary injunction; and, on 11-10-49, the court handed down the following opinion:

DAER, *District Judge*: "This matter is submitted on a motion for a preliminary injunction.

"The action is brought by the United States under section 302 (a) of the Federal Food, Drug and Cosmetic Act (21 U. S. C. sec 332 (a)), claiming that the defendants introduced or delivered for introduction in interstate commerce food products that were adulterated.

"Inspections over a period of three or four years are claimed wherein improper conditions were pointed out to the defendants from time to time and that while some improvement has been made as a result of said complaints, the conditions have not been completely rectified.

"In 1948 an action was brought in the United States District Court against the corporate defendant on account of the breaches of the Act, to which action a plea of nolo contendere was made and a fine of \$800.00 imposed.

"Affidavits filed by the Government Inspectors outline in great detail the insanitary conditions found in the defendants' plant.

"The latest inspection of the Government Inspectors appears to have been made on July 29, 1949, as a result of which the Acting Chief, Cincinnati District, Food and Drug Administration, submits an affidavit outlining numerous insanitary conditions and numerous filthy substances which were found in the manufactured products as well as in the raw materials found on the premises.

"The Inspector says, 'That based upon his experience and training, this bakery is, in his opinion, infested with mice and roaches and that there existed on July 29, 1949, a reasonable possibility that bakery products produced by the Chattanooga Bakery, Inc. in this plant might become contaminated with rodent and insect filth.'

"The Government Inspectors indicate that the defendants have shown a cooperative attitude, have made many improvements in the sanitary conditions, and have in many ways fully complied with the suggestions or requests made by the Inspectors.

"The defendants have answered, denying the existence of the insanitary conditions and denying the existence of filthy substances in the raw materials and manufactured products. It is denied that their activities are violative of the Act. It is admitted that a plea of nolo contendere was entered by the corporate defendant and a fine imposed on account of conditions claimed to have been found by an Inspector more than a year and a half previous to the present action. Since that time it is claimed that conditions have been remedied and that every precaution is being taken to make the premises sanitary and to permit operations in compliance with the Food, Drug and Cosmetic Act.

"The defendants submit affidavits from Inspectors of the Chattanooga-Hamilton County Health Department and from the Tennessee Department of Public Health, who have been requested from time to time to make inspections of defendants' plant and operations. The Inspectors representing the Tennessee Department of Public Health are on loan from the United States Public Health Service.

"The Inspectors representing the Tennessee Department of Health and the Chattanooga-Hamilton County Health Department affirm that insanitary conditions and improper operating conditions observed by them from time to time have been fully rectified by the defendants, and as of July 1, 1949, two Inspectors report that the condition of the plant and the operating materials were found to be in satisfactory condition. These Inspectors have had wide experience in public health operations and undertake to judge defendants' plant in accordance with the detailed specifications and standards of the United States Public Health Service.

"There can be little doubt from the substance of the affidavits, both those submitted by the Government and those by the defendants, that the defendants have been cooperative since the Government inspections began in 1945, and that large sums of money have been expended in obtaining improved machinery, in making new installations in the building, and providing safeguards and precautions against infestation, which has resulted to a large extent in remedying the conditions that occasioned the initial complaints.

"It may be said that the Government Inspectors have been very considerate and have given the defendants opportunity to correct conditions which they considered insanitary and improper; and the defendants have recognized the

merit of the Inspectors' requirements by undertaking, from time to time, to comply therewith and make proper adjustments and corrections.

"The question for immediate consideration is whether the Court should grant a preliminary injunction in advance of hearing the full facts on a trial of the case. The injunction sought is only for a compliance with the Act. Normally there would be no hardship in requiring such compliance. Persons are expected to comply with the law. But, in view of the conflicting opinions of the Inspectors, whose affidavits are before the Court, it would seem difficult to determine, in advance and without hearing the full facts, whether the defendants are in compliance with the Act.

"That certain minor violations would not justify injunction proceedings appears to be contemplated by section 306 of the Act (21 U. S. C. sec. 336). What tolerance may be granted is not clear and appears to be discretionary. What might amount to a practical compliance with the Act would depend upon the circumstances and facts as developed on the hearing of the case.

"The Court is of the opinion that the defendants desire to comply and have used their best efforts in that direction. Representatives of the State Department of Health and the Chattanooga-Hamilton County Department of Health, on loan from the United States Public Health Service, assert that, according to the requirements and standards of the United States Public Health Service, the defendants' plant is in satisfactory condition. The Government Inspectors under the Food, Drug and Cosmetic Act feel differently.

"On motion for temporary injunction, in absence of opportunity to cross-examine witnesses, the conflicting affidavits of each side were entitled to equal weight. *Warner Bros. Pictures, Inc., v. Gittone*, 110 F. 2d 292 (CCA 3).

"The grant or denial of a preliminary injunction is largely within the discretion of the judge hearing the motion. *Federal Broadcasting Co. v. American Broadcasting Co.*, 167 F. 2d 349 (CCA 2).

"The granting of a preliminary injunction should be used with caution and only where there is a clear necessity. *The Hecht Co. v. Bowles*, 321 U. S. 321; *Sun Valley Mfg. Co. v. Sun Valley Togs*, 39 F. Supp. 502 (D. C. N. Y. S. D.).

"To justify granting of preliminary injunction, there must be a showing of irreparable injury during the pendency of the action. *Murray Hill Restaurant Inc. v. Thirteen Twenty-One Locust, Inc.*, 98 F. 2d 578 (CCA 3).

"It is a rule, subject to few exceptions, that a preliminary injunction should not be awarded on ex parte affidavits, unless in a clear case. *Lane v. Harper & Bros.*, 86 F. 481 (CCA 3) cited in *Murray Hill Restaurant v. Thirteen Twenty-One Locust*, *supra*.

"The granting of an injunction is discretionary and not mandatory in the case of clear violations of the law, even in cases involving the public interest brought under statutory authority. *The Hecht Co. v. Bowles*, *supra*. While it might be more imperative to issue an injunction in public interest where the statute directs, yet the equities are somewhat the same as in ordinary injunction actions, as is recognized in the case last cited.

"This is not a case of where the defendant is reluctant to comply and will resume breaches of the law as soon as pressure from the Court is relieved, as in *Securities & Exchange Com. v. Okin*, 139 F. 2d 87 (CCA 2).

"Injunction will not be granted to punish past violations of the law, but its function should be to stop existing violations or prevent future violations if there is reason to believe they may occur. *Walling v. Shenandoah Dives Mining Co.*, 134 F. 2d 395 (CCA 10); *Walling v. Panther Creek Mines, Inc.*, 148 F. 2d 604 (CCA 7).

"It is true that in *Walling v. Helmerich & Payne*, 323 U. S. 37, 43, the Court held that a voluntary discontinuance of the use of split-day contracts after suit was begun did not make it improper for an injunction to be granted to restrain such contracts; but the holding there was based on the statements that 'Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made.'

"And the Court in *Walling v. Hardwood Co.*, 325 U. S. 421, held that notwithstanding the ruling made in *Walling v. Helmerich & Payne*, *supra*, the lower Court's refusal to grant injunction as to future activity when there appeared 'a bona fide intention to comply with the law and not to resume the wrongful acts' was approved.

"During World War II and before any improvement in conditions were required or made by the defendants, contracts for large amounts of defendants' products were made by the War Department to be used for food for the armed services; and during the manufacture of the products under these contracts frequent inspections of the plant and manufacturing processes were made by Inspectors of the Army and no complaint or criticism was received.

"The individual defendant's affidavit says: 'Since 1945, every suggestion ever made by Food and Drug Administration Inspectors, or by other inspectors, in the interests of sanitation in said Bakery's operation, has been followed, as well as all other measures which appeared advisable to assure clean products and plant.'

"The Court cannot say, under the facts admitted, that the defendants are complying with the Act, but the extent to which they may be remiss or what additional precautions, if any, should be taken, is not clear. The Court is of the opinion that in view of the expressed desire and efforts of the defendants to comply with the law that it is unnecessary and perhaps improper, *in advance of a hearing on the merits*, to grant an injunction.

"The motion for preliminary injunction is, therefore, denied."

The case was held in abeyance to permit another inspection to be made of the defendants' plant. After an inspection on 3-23-50 disclosed no significant insanitary conditions, the complaint for injunction was dismissed on 5-18-50.

23405. Bakery products. (Inj. No. 165.)

COMPLAINT FOR INJUNCTION FILED: 5-9-47, Dist. Md., against Community Baking Co., a corporation, Cumberland, Md., and John A. Kreiling, vice president and plant manager.

CHARGE: The complaint alleged that the defendants had been and were, at the time of filing of the complaint, introducing into interstate commerce, bread, rolls, cakes, and sweet bakery products which were adulterated within the meaning of 402 (a) (3) and (4) by reason of the presence in such articles of insect parts, rodent hair, whole larvae, whole insects, and feather barbules, and by reason of the preparation of the articles under insanitary conditions.

DISPOSITION: On 6-4-47, the defendants having consented, the court entered a temporary injunctive decree enjoining the defendants against commission of the acts complained of. Thereafter, the defendants filed a petition for rescission of the temporary injunction; and on 9-13-48, the court entered an order rescinding the injunction and dismissing the proceedings.

23406. Bakery products. (Inj. No. 114.)

COMPLAINT FOR INJUNCTION FILED: 9-21-45, Dist. Md., against Margaret T. McIntyre, t/a McIntyre's Bakery, Westernport, Md., and J. Milton McIntyre.

CHARGE: The complaint alleged that since May 6, 1944, the defendants had operated a plant engaged in the manufacture and shipment in interstate commerce of bakery products which were adulterated as follows:

- 402 (a) (3)—the articles consisted in part of a filthy substance; and 402 (a) (4)—the articles were manufactured under insanitary conditions.

The complaint alleged also that various inspections and examinations had been made by representatives of the Food and Drug Administration; that the defendants had been warned to remedy the defects existing in their method of operating; and that despite such warnings, the defendants had continued to manufacture and ship in interstate commerce adulterated bakery products.

DISPOSITION: On 10-19-45, the defendants having consented, the court entered a temporary injunction enjoining the defendants against introducing into