F. & D. No. 544.
S. No. 199. Issued February 14, 1911.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 723, FOOD AND DRUGS ACT.

ALLEGED ADULTERATION AND MISBRANDING OF SUGAR.

On or about August 8, 1908, the Corn Products Refining Company, New York, N. Y., shipped from the State of Illinois into the State of Ohio 46 packages or bags, more or less, each purporting and representing to contain 112 pounds of sugar. Analyses of samples taken from this shipment by the Bureau of Chemistry showed this product to have a total ash content of 3.55 per cent, indicating the presence of an added substance not sugar. As it appeared from the findings of the analyst that the product was adulterated and misbranded within the meaning of the Food and Drugs Act of June 30, 1906, and liable to seizure under section 10 of the act, the Secretary of Agriculture reported the facts to the United States attorney for the Southern District of Ohio. In due course a libel was filed against the said 46 packages or bags of sugar, charging that said product was adulterated and misbranded within the meaning of the act because a substance not sugar had been mixed and packed with the article so as to reduce, lower, and injuriously affect its quality and strength; in that the product was labeled on each and every package thereof "112 lbs. Climax Sugar, Manufactured by Corn Products Refining Co., Chicago, U. S. A.", which form of labeling and branding was false and misleading because it was such as to deceive purchasers into the belief that said product was wholly sugar, without revealing and disclosing that there had been mixed with said product a certain substance increasing the ash content and lowering the quality and character of the sugar; and praying seizure and condemnation

Thereupon the Corn Products Refining Company, New York, N. Y., entered its appearance, set up a claim to the said product, and filed an answer to said libel, admitting the shipment, but denying that the product was adulterated and misbranded, as alleged therein. Subsequently, by permission of the court, the claimant withdrew its answer and filed exceptions and demurrer to the libel, in form and substance as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

UNITED STATES OF AMERICA
vs.
46 PACKAGES AND BAGS OF SUGAR. } No. 1964.

Now comes the Corn Products Refining Company, a corporation, by Harmon, Colston, Goldsmith & Hoadly and Lannen & Hickey, its attorneys, and excepts

and demurs to the libel of the United States of America, in the above entitled cause, for the following reasons, to-wit:

FIRST. The said libel and the matters therein contained in manner and form as the same are therein stated and alleged, are not sufficient in law for said libelant to have and maintain its aforesaid action.

SECOND. The facts alleged in said libel do not show that said 46 packages and bags of sugar are adulterated or misbranded within the meaning of the Act of Congress of the United States, approved June 30th, 1906.

THIRD. The said act of the Congress of the United States, approved June 30th, 1906, is unconstitutional and void.

FIFTH. The said act of Congress of the United States approved June 30th, 1906, is unconstitutional and void as applied to this case for the reason that said Act of Congress fails to define or establish any standard for climax sugar, being the class of sugar seized in this case, or for any sugar.

SIXTH. It does not appear from any of the allegations of said libel that said sugar was transported as alleged in said libel from Waukegan, in the State of Illinois, to the city of Cincinnati, in the State of Ohio, for sale.

SEVENTH. It appears from Article Three of said libel that said sugar was owned by, or in the possession of, the said Gerke Brewing Company, for the purpose of being used and manufactured into some other article of food and then sold and consumed as food, and therefore not liable to seizure under section 10 of said act of Congress, approved June 30th, 1906, or under any section of said act.

EIGHTH. The said libel, in article four thereof, alleges that the said packages and bags of climax sugar are adulterated within the meaning of section seven, paragraph one, under foods, of the act of Congress of June 30th, 1906, and liable to condemnation as provided therein, for the reason that 3.55 per cent of ash has been mixed and packed with said climax sugar, but said libel does not allege that 3.55 per cent of ash is not a normal constituent of climax sugar, neither does said libel allege what ingredients climax sugar normally contains.

NINTH. Article five of said libel alleges that said climax sugar is misbranded within the meaning of said act of Congress of June 30th, 1906, for the reason that said label purports and represents that the contents of each of said packages and bags is climax sugar, without revealing and disclosing that there is mixed and packed with said sugar a certain quantity of ash, but said libel does not allege that said certain quantity of ash is not a normal constituent of said climax sugar.

TENTH. Article six of said libel alleges that said packages and bags of sugar have been transported from the State of Illinois to the State of Ohio, and are now in the possession of the Gerke Brewing Company, and are now in the original unbroken packages as the same were transported as aforesaid, but said libel does not allege that the said Gerke Brewing Company were transporters or importers of said sugar into the State of Ohio, neither does said libel allege or show that said sugar has not been sold and delivered by the interstate commerce shipper and the importer in the State of Ohio in the original packages, since the same was shipped into the State of Ohio, or that said sugar and said unbroken packages had not been sold and resold many times in the State of Ohio after having arrived in said State and at and before the time of the filing of said libel and the seizure of said goods.

ELEVENTH. It does not appear from any or all of the facts stated in said libel that said sugar had not passed out of the jurisdiction of this honorable court before and at the time of the filing of said libel and before the issuance of the writ in this case or the seizure of said sugar by the marshal of this court.

TWELFTH. It appears from all the allegations of said libel that said sugar had passed out of interstate commerce and beyond the jurisdiction of this honorable court at and before the filing of the said libel and before the issuance of the writ in this case or the seizure of said sugar by the marshal of this court.

(Signed) HARMON, COLSTON, GOLDSMITH & HOADLY, LANNEN & HICKEY.
Attorneys for the Corn Products Refining Co., Claimant.

The cause coming on for hearing on exceptions and demurrer, the court, after argument of counsel, being fully informed in the premises, sustained the demurrer. The opinion follows:

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

THE UNITED STATES OF AMERICA
vs.
FORTY-SIX PACKAGES AND BAGS OF SUGAR.

No. 1964. On Exceptions and Demurrer.

SATER, *District Judge:*

The libel is filed under section 10 of the Pure Food and Drugs Act. By that section it is enacted that "any article of food, drug, or liquor that is adulterated or misbranded within the meaning of the act, and is being transported from one state, territory, district, or insular possession to another for sale * * * shall be liable to be proceeded against in any district court of the United States within the territory where the same is found, and seized for confiscation by a process of libel for condemnation." The case does not fall within that provision of the law, because the goods were not seized while in transportation. The section also provides in the alternative that "any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act * * * having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against" in like manner. "Having been transported" from where to where? Clearly not from one point in a given state, territory, district, or insular possession to another point in the same state, territory, district, or insular possession, because in that case the article has not passed into interstate commerce. The words "having been transported", &c., are connected by the disjunctive "or" with the preceding portion of the section. Following the words "having been transported", (is an ellipsis) an omission of words necessary to the complete construction of the sentence. Those words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means, "any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one state, territory, district, or insular possession to another for sale, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable", &c. This constuction of the section is not only rational and in accordance with the maxim noscitur a sociis, but is necessary to make the clause applicable to articles which have entered into interstate commerce. The words "is being transported," and "having been transported," are coupled together by the word "or" and are both limited by the same qualifying terms. The view above expressed is in accordance with the ruling in U. S. v. 65 Casks of Liquid Extracts, 170 Fed. Rep., 449; affirmed in 175 Fed. Rep., 1022. The libel does not show that the articles seized were transported for sale. It does not show whether the articles were shipped by some one in Illinois to himself at Cincinnati, or to some other person, or how or from whom the Gerke Brewing Company obtained possession or acquired ownership, if such it has.

There is an averment in the third paragraph of the libel that the packages are "owned by or in the possession of said Gerke Brewing Company, doing business as aforesaid, for the purpose of being used and manufactured, sold and consumed as food." The closing language of the quoted passage is somewhat ambiguous, but giving it the construction most favorable to the Government—that the Brewing Company's purpose is to sell it for consumption as food—I do not see how the otherwise defective nature of the libel is helped out.

In view of the conclusions above reached, it is perhaps unnecessary to rule on the contention that there should be a specific averment that the percentage of ash is greater than that found in standard climax sugar, or as to whether or not the court must take notice of the standard fixed by the circular issued by the Secretary of Agriculture. The fact that there is a doubt as to the court's duty in that respect (see Judge Dyer's opinion) will suggest an averment in future libels that will obviate the objection urged. The exceptions and demurrer are sustained. Exceptions may be noted.

The district attorney disputes the right of the Corn Products Refining Company to interplead or file a brief in the case unless further evidence is offered that it is a party in interest or that it is the bona fide owner of the packages of sugar which have been seized. As Judge Thompson permitted the company to answer, and subsequently another order was granted permitting the answer to be withdrawn and the exceptions to the demurrer to be filed, to which latter the district attorney assented, the objection comes too late.

The exceptions and demurrer are ruled on to the extent above named. Several of them were waived by the defendant.

On October 8, 1910, an order of court was duly entered, dismissing the libel and directing the release to the claimant of the 46 packages of sugar.

Decisions of United States District Courts adverse to the Government will not be regarded as final until acquiescence shall have been published.

This notice is given pursuant to section 4 of the Food and Drugs Act of June 30, 1906.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *December 28, 1910.*

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