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United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1044.

(Given pursuant to section 4 of the Food and Drugs Act.)

ADULTERATION OF TOMATO CATSUP.

On January 19, 1910, the United States Attorney for the Southern District of Ohio, acting upon the report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying condemnation and forfeiture of 275 cases of tomato catsup in the possession of A. Janszen & Co., Cincinnati, Ohio.

Examination of three samples of this product by the Bureau of Chemistry of the United States Department of Agriculture showed the first to contain yeast and mold spores 79 per one-sixtieth cmm., bacteria estimated at 24,000,000 per cc., with mold tissue in about two-thirds of the microscopic fields; the second yeast and mold spores 80 per one-sixtieth cmm., bacteria estimated at 70,000,000 per cc., with mold tissue in about two-thirds of the microscopic fields; and the third yeast and mold spores 110 per one-sixtieth cmm., bacteria estimated at 30,000,000 per cc., with mold tissue in about two-thirds of the microscopic fields. The libel alleged that the catsup had been shipped from the State of Indiana into the State of Ohio, and was adulterated in violation of the Food and Drugs Act of June 30, 1906, and was therefore liable to seizure and confiscation. Adulteration was charged on the ground that the product consisted wholly or in part of a filthy, decomposed, and putrid vegetable substance.

On May 12, 1910, George Spraul Packing Co. filed an answer, stating that they were owners of the catsup, admitting the interstate shipment, but denying that the product was filthy, decomposed, and putrid. The case came on for hearing, and a jury trial was had, resulting in a verdict in favor of said claimants. Following this verdict the United States Attorney moved for a new trial, which was granted. The opinion of the court follows:

A libel was filed by the District Attorney in the name of the United States, against two hundred and seventy-five cases, more or less, of tomato catsup shipped from Indiana into this State, charging that the catsup was "adulterated

in violation of the Act of Congress of June 30th, 1906, known as the Food and Drugs Act, and liable to seizure and condemnation as provided therein, for the reason that each and every bottle and jug in the two hundred and seventy-five, more or less, cases, contains an article of food and food product consisting wholly or in part of a filthy, decomposed and putrid vegetable substance and is unfit for food."

The case was tried and the jury returned a verdict in favor of the catsup and against the Government.

Among the grounds for a new trial these are noticed.

1. The court erred in charging the jury that although they be satisfied that the catsup consisted wholly or in part of a filthy, decomposed or putrid vegetable substance, yet, that would not be sufficient to warrant the jury in bringing in a verdict for the Government, unless they found that the catsup was unfit for food.

2. The court erred in stating to the jury that it could not be said from the testimony where a point is reached when the amount of the bacteria or germs is so great as to bring about decomposition or filthiness or a condition of putridity.

3. The verdict was contrary to the weight of the evidence.

The Pure Food Act of June 30th, 1906, U. S. Compiled Statutes Sup. 1907, p. 928, provides, section 2, that the introduction into any state * * * from any other state * * * any article of food * * * which is adulterated * * * within the meaning of this Act is prohibited, and the person shipping the same shall be guilty of a misdemeanor, and under section 10, such adulterated food may be seized, following the procedure as nearly as may be, in admiralty giving the right to either party to have questions of fact tried by a jury.

It is provided, section 7,—"That for the purposes of this Act an article shall be deemed to be adulterated," "in cases of food," "sixth, if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

Section 3 provides, that the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act including the collection and examination of specimens of food shipped from one state into another, etc., in unbroken packages.

Section 4 provides, that the examination of specimens of food, etc., shall be made in the Bureau of Chemistry of the Department of Agriculture or under its direction for the purpose of determining from such examinations whether the food is adulterated within the meaning of the Act.

Section 6 defines the word "food" which shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or compound.

Under the authority of the Act of March 3, 1903, 32 Statutes at Large, 1158, the standards of purity for food products which have been established "vegetables are the succulent, clean, sound, edible parts of herbaceous plants used for culinary purposes."

"Catchup (ketchup, catsup) is the clean, sound, product made from the properly prepared pulp of clean, sound, fresh, ripe, tomatoes, with spices and with or without sugar and vinegar." Greeley, "Food and Drugs Act" p. 147.

The libel having charged that this catsup was "unfit for food," and no objection being made to the inclusion of these words by the defense, and upon the

District Attorney's statement that the Department of Agriculture directed their inclusion, the court, while expressing doubt, nevertheless concluded to hold the Government to its charge and directed the jury in the way set forth above, and of which the Government now complains.

Upon further consideration and examination of the Pure Food Laws at length, the court is of opinion that the test of adulteration in this case is not to be determined by the answer to the question whether the article complained of is or is not fit for food.

Section 6 covers a number of different offenses. One is, if the food product consists in whole or in part of a filthy, decomposed, or putrid animal substance. Another is if it consists in whole or in part of any portion of an animal unfit for food, or again, if it is the product of a diseased animal, and again if it is one that has died otherwise than by slaughter. The article is adulterated if it consists in whole or in part of a filthy, decomposed, or putrid substance.

This is not a criminal prosecution, and the language in the libel "unfit for food" may be regarded as surplusage because the other language in it completely and distinctly describes an offense. Even in an indictment such superfluous language is not fatal. Anderson v. United States, 170 U. S. 481.

The question for the jury to determine was whether this tomato catsup was in whole or in part filthy, decomposed or putrid. Counsel for the defense claims that without the allegations that the catsup was unfit for food the law could not stand because not a reasonable exercise of police power. Not so. The power of Congress to regulate interstate commerce is involved, not police power. Strictly speaking Congress has no police power. Keller v. United States, 213 U. S. 138. The motion on the first ground is sustained.

The testimony of the Government chemists, unrefuted, shows that this catsup contained eighty to one hundred millions of bacteria to the teaspoonful, and yeast germs and mould spores in proportion. Home-made catsup and catsup made at factories with similar care, and choice of material, contain very few. There was evidence that when catsup contains over thirty-seven millions, decay becomes apparent to the taste and smell. The evidence is conclusive that the taste and smell may be overcome by spices and vinegar. This particular catsup was a medium spiced catsup, but sufficiently spiced to overcome the taste and smell, although there was to the taste a flatness which indicated the existence of a change to a spoiled condition. The court misapprehended the testimony when the jury were charged that it did not appear from the testimony where the point is reached when the amount of the bacteria or germs is so great as to bring about decomposition, filthiness or a condition of putridity. The motion on the second ground is well taken.

There was no evidence that the catsup contained anything poisonous or deleterious, and the jury were charged that that was not the test. Although the question of fitness or unfitness of food was also not the proper test, yet, the court is of opinion that catsup such as this is not fit for food, and was surprised at the verdict of the jury. No doubt all food products have in them bacteria and most of them yeast germs and mould spores, and it is the action of these which eventually bring about decomposition, and a point is reached when the article becomes rotten, and if rotten, it is certainly not fit for food although it may be that it is not poisonous or deleterious in the sense that some of it taken into the system does not appear injurious on the ancient theory that every man in his lifetime may safely eat a "peck of dirt." It is not strange that the condition of this catsup was, as one of the chemists said, startling. It was made in this way: tomatoes in large quantities were dumped out of wagons on a platform at the factory. Some attempt was made at separating the rotten tomatoes from the mass; the tomatoes were carried in large quantities by boys

into the factory and there placed in wire wicker baskets and immersed in hot water for a short time. The baskets were then placed in front of women or girls, who with knives peeled them and took out the cores. The fine ripe tomatoes were canned and that was the primary purpose of the operation. The cores, the skins, the wormeaten and insect bitten tomatoes, the partly green, and some decayed tomatoes, were thrown into a trough which from time to time was scraped out by boys. This refuse was put into the pulping machine and subjected to heat. The pulp was made in the summer time and there were more or less decayed tomatoes in the vicinity of the factory and opportunity for flies to carry germs. There were no screens. Reasonable efforts were made to keep the place clean by scrubbing it carefully twice a week. There was testimony tending to show that some whole tomatoes were put in the pulping machine. It does not appear how many and what proportion but the probabilities are that very few whole, ripe, first class tomatoes went into the pulping machine. From the pulping machine the pulp was put into old whiskey barrels of some two hundred gallons capacity and were stored in the cellar and most of the catsup made in the fall and winter following. Some of the barrels exploded because, as is said, they were not air tight, but it was the contents of only those that exploded that were rejected in making the catsup. Apparently the spices and benzoate of soda were added when the time came to actually take the pulp from the barrels to make the catsup, although the maker said that he put up some twenty casks as an experiment and did not use benzoate of soda. This experiment failed, for the catsup spoiled.

The court is of opinion that the verdict was contrary to the weight of the evidence even on the theory that the proof must establish that the catsup was unfit for food.

The motion for a new trial is granted.

HOLLISTER, J.
Filed July 12, 1910.

Thereupon the claimants withdrew their answer, by leave of court, and filed a demurrer to the libel on the ground that no seizure of the catsup had been made prior to the filing of the libel by the United States Attorney, which demurrer the court sustained, and ordered that the libel be dismissed. From this decision the United States sued out a writ of error to the Court of Appeals for the Sixth Circuit. On March 7, 1911, the decision of the lower court was reversed.

The opinion of the Circuit Court of Appeals is as follows:

KNAPPEN, Circuit Judge, delivered the opinion of the Court.

The United States filed this libel in the United States District Court for the Southern District of Ohio under the Food and Drugs Act of June 30, 1906 (34 Stats., 768), for the seizure and condemnation of the articles named in the above title.

Section 10 of the act referred to provides "that any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia, or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district

court of the United States within the District where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury on any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States." The section in question contains provisions for the destruction or sale of the articles if condemned, as adulterated or misbranded, as well as for the return of the same to the owner thereof upon the payment of the costs of the proceedings, and the giving of a bond that the articles shall not be sold or disposed of contrary to the provisions of the act, or the laws of any state, territory, district or insular possession.

The libel in question, referring to the articles of food as "contained in original unbroken packages," alleges that the said packages were transported in interstate commerce, that the same were illegally held within the jurisdiction of the court, and that the articles of food contained therein are adulterated in violation of the act referred to "and liable to seizure and condemnation as provided therein, for the reason that each and every bottle and jug in said two hundred and seventy-five, more or less, cases, contains an article of food and food product consisting wholly or in part of a filthy, decomposed and putrid vegetable substance and is unfit for food." It prayed "the process of attachment in due form of Law, according to the course of this Court in cases of admiralty and maritime jurisdiction, so far as is applicable to this case."

An attachment was issued to the marshal, commanding the seizure of the property, and notice to claimants. The marshal returned that he had seized the articles mentioned and held the same in his custody subject to the further order of the Court. The claimants named in the title appeared and demurred "for the reason that it does not appear from an inspection of said libel that the catsup described therein had, prior to the filing of said libel and the issuance and service of process in this case, been seized in any way by any officer of the United States." The libel contains no allegation of previous seizure. The court made an order sustaining the demurrer and dismissing the libel. The United States excepted to this order, and brings this writ of error to review the same.

The sole question presented here is whether previous executive seizure of the goods is necessary to give the court jurisdiction of the libel, as was held by the District Judge in an able and elaborate opinion.

In the case of The Brig Ann, 9 Cranch, 289, which was a case of an information against certain merchandise alleged to have been imported contrary to the non-importation act of March 1, 1809, it was held that the Court had no jurisdiction over the condemnation proceedings until after executive seizure. The statute which was involved in that case expressly provided for seizure by the collector and declared a forfeiture of the offending articles. 2 Stat. at L. 528. Mr. Justice Story based the necessity of previous executive seizure upon the judiciary act of September 24, 1789 (c. 20, sec. 9), which conferred upon the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." The learned justice interpreted this section of the judiciary act as conferring jurisdiction over the condemnation proceedings upon the district courts only of the district in which the seizure was made, saying that "before judicial cognizance can attach upon a forfeiture in rem, under the statute, there must be a seizure; for until seizure, it is impossible to ascertain what is the competent forum." In a

large number of cases since the decision in the case of The Brig Ann it has been held that in proceedings in rem for forfeiture and confiscation previous executive seizure is necessary to jurisdiction, although there are cases not in harmony with this view. Among the cases in which such previous executive seizure has been held necessary to jurisdiction are the following: Gelston v. Hoyt, 3 Wheat. 245; The Silver Spring, Fed. Cas. No. 12,858; The Washington, Fed. Cas. No. 17222; The Fideliter, Fed. Cas. No. 4,755; The Tug May, 6 Bissell, 243; The Idaho, 29 Fed. 187, 191; The Josefa Segunda, 10 Wheat. 312; Dobbin's Distillery v. United States, 96 U. S. 395; United States v. Larkin (C. C. A. 6) 153 Fed. 113. The rule has also been extended to proceedings under laws providing for seizure and confiscation of "the property of rebels." Pelham v. Rose, 76 U. S., 103; The Confiscation Cases, 87 U. S. 92; United States v. Winchester, 99 U. S. 372. In all or nearly all of the cases above cited there is found either express statutory authority for the seizure, or express statutory declaration that the property shall be, or becomes, forfeited to the United States by reason of the acts complained of, and in some cases both such statutory authority and statutory declaration are found. The Statute involved in the case of The Silver Spring expressly provided for a forfeiture of the boat "if found within the district", although not for an executive seizure; 3 Stat. at L. c. 35, Sec. 6. In the statute involved in Gelston v. Hoyt express provision was made for seizure by the revenue officer whenever it should appear that a breach of the laws of the United States had been committed whereby the ship or the goods on board might become liable to forfeiture. The act relating to navigation of steam vessels (Rev. Stat. Sec. 4499), as construed by District Judge Deady in the case of The Idaho, expressly authorizes a seizure by the proper officer of the government in advance of judicial proceeding. The Josefa Segunda involved a statute providing that the property subject to confiscation was liable to be "seized, prosecuted and condemned, in the district where the said ship or vessel may be found or seized." Dobbin's Distillery v. United States arose under an internal revenue act which expressly provided for forfeiture. 15 Stat. c. 186. The Statute involved in United States v. Larkin arose under Revised Statutes, section 3072, which makes it "the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue." In the act for the seizing and confiscating of property of rebels express provision is made for executive seizure. (See Pelham v. Rose, The Confiscation Cases, and United States v. Winchester.)

The present judiciary act (Rev. Stat. Sec. 563, sub-div. 8) gives the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction * * * and of all seizures on land and on waters not within admiralty and maritime jurisdiction", the subdivision mentioned thus omitting the provision found in the section of the judiciary act of 1789 to which we have referred, as to seizures "within their respective districts", and including cases of "seizures on land and on waters not within admirality and maritime jurisdiction." In cases of seizures on land, however, the district court proceeds not as a court ot admiralty, but as a court of common law upon a trial by jury. The Sarah, 8 Wheat. 390; United States v. Winchester, 99 U. S. supra. In Dobbin's Distillery v. United States, Mr. Justice Clifford said: "Judicial proceedings in rem, to enforce a forfeiture, cannot in general be properly instituted until the property inculpated is previously seized by executive authority, as it is the preliminary seizure of the property that brings the same within the reach of such legal process. The Schooner Anne, 9 Cranch, 289." In the Dobbin's case due executive seizure had in fact been made for breach of the internal revenue laws and the above statement was clearly obiter.

Assuming for the purposes of this opinion that, in navigation, customs and revenue cases, the right of executive seizure for violation of the statute exists, even without express statutory provision therefor, and that in such cases such seizure must precede judicial action for condemnation, the real and decisive question before us is simply what was the intention of Congress in this regard as expressed in the food and drugs act. It is noticeable that the act nowhere declares the goods ipso facto forfeited by an infraction of the act. On the contrary, express provision is made for the redelivery of the goods to the owner by order of the Court, upon the payment of the costs and the giving of bond, even in cases where they are found to offend against the act. The act provides that the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, "shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale * * * or which may be submitted for examination by the chief health, food or drug officers of any state, territory, or the District of Columbia * * *"; that the examination of such specimens shall be made in, or under the direction and supervision of, the Bureau of Chemistry of the Department of Agriculture, for the purpose of determining whether such articles are adulterated or misbranded; and in case such adulteration or misbranding appears, for the giving of notice by the Secretary of Agriculture "to the party from whom such sample was obtained", with opportunity to be heard. The act nowhere provides for executive seizure of property offending against the act. On the contrary, the only duty enjoined upon the Secretary of Agriculture (and upon him only), in case it shall appear to him that any of the provisions of the act have been violated, is to "at once certify the facts to the proper United States District Attorney." (Sec. 4.) Not only is the District Attorney given no power of seizure, but section 5 of the act expressly makes it his duty, on receiving from the Secretary of Agriculture (or certain other officers) report of a violation of the act, "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided", thus suggesting by implication the exclusion of right of executive seizure. Nor has the marshal implied power to make executive seizures under the act. He is not by statute charged with the enforcement of the act, as are revenue and customs officers with respect to laws relating to those subjects.

We are not concerned with the question whether the proceedings and notice provided by Sections 3, 4, and 5 of the act are necessary prerequisites to action by the district attorney, nor whether they apply to a proceeding under section 10 of the act. (See United States v. 50 Barrels of Whiskey, 165 Fed. 966; United States v. 65 Casks of Liquid Extracts, 170 Fed. 449.) We call attention to these provisions because they are the only ones expressly relating to proceedings for the enforcement of the penalties provided by the act, as distinguished from criminal prosecutions. The considerations to which we have adverted seem to us to repel rather than sustain, an inference that an executive seizure is necessary, or even contemplated, previous to judicial proceedings in condemnation. In the case of a law of this character while it would not be unnatural to provide for an executive seizure, and while such power of seizure would seem of advantage in the enforcement of the act, on the other hand, if authority to make such seizure was intended, it would be the natural course to expressly so declare. There is no express declaration to that effect, and none by implication, unless contained in the clause of section 10 providing that the offending articles "shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for

confiscation by a process of libel for condemnation", or in the provision that "The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty * * *". It is clear that, as the former clause is punctuated, there is no necessary implication of previous executive seizure. According to the punctuation, the seizure for confiscation would seem to be "by a process of libel"; and although such punctuation is by no means conclusive, and should not be controlling as against the intent of the act as otherwise shown, it is entitled to consideration.

It is urged that the clause "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty" refers to the practice under Admiralty Rule 22, which provides that "the information and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure * * * and the district within which the property is brought and where it then is". But while this rule recognizes the practice of informations and libels upon seizures, it is not declaratory of the necessity of such previous executive seizure. There is, in our opinion, nothing in the reference to "proceedings in admiralty" contained in section 10 of the food and drugs act which adopts rule 22 rather than rule 23, which latter rule applies to "all libels in instance cases, civil or maritime," and which provides that the libel shall state "if the libel be in rem, that the property is within the district." Under rule 23, jurisdiction is obtained by the presence of the property within the district (Henry on Admiralty, sec. 127, 132; The Rio Grande, 23 Wall. 458), and the Court acquires its jurisdiction over the libel by its filing, and over the res by seizure of the same under a process issued after the libel is filed. The Queen of the Pacific, 61 Fed. 213; Pacific Coast S. S. Co. v. Bancroft-Whitney Co. (C. C. C. A. 9) 94 Fed. 180.

The proceeding before us was not in admiralty. The food and drugs act merely provides for conformity of all proceedings for confiscation thereunder "as near as may be, to the proceedings in admiralty." Previous executive seizure is no part of admiralty proceedings. The language in question, to our minds, falls far short of declaring by necessary implication that a condition precedent to jurisdiction in case of forfeitures under the laws relating to impost, navigation or trade, viz: an executive seizure, is necessary to jurisdiction over judicial proceedings in confiscation under the food and drugs act. Nor is there anything in the language of the present judiciary act which limits jurisdiction over condemnation proceedings in rem to the district where the property has been previously seized.

Taking into account the nature of the act, and the various considerations to which we have referred, as well as the embarrassment which might well result from an executive seizure whose validity must depend not only upon the determination by the Court of the question of fact of misbranding or adulteration, but also upon the existence of the other facts necessary to bring the articles under the federal statutes, we are of opinion that the act should not be construed as making a previous executive seizure necessary to the jurisdiction of the court over proceedings for confiscation. We are the better content with this conclusion from the fact that it has been the general, if not the universal practice, under this act, for seizures to be made on warrant issued after the filing of the libel.

In our opinion the order sustaining the demurrer should be reversed.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *August 5, 1911.*

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