F. & D. No. 878.
S. No. 312

Issued November 30, 1912.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1768.

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

ADULTERATION AND MISBRANDING OF FLOUR.

On September 17, 1909, the United States Attorney for the District of Columbia filed in the Supreme Court of said District, holding a district court, a libel for the seizure and condemnation of 350 sacks of "Princess" flour and 50 sacks of "Fancy Melba" flour, remaining unsold in the original unbroken packages and in the possession of Wm. M. Galt & Co., a partnership composed of Harry T. Galt and Ralph L. Galt, Washington, D. C., alleging that the "Princess" flour had been shipped by the Blanton Milling Co., Indianapolis, Ind., from the State of Indiana into the District of Columbia, and the "Fancy Melba" flour had been shipped by the Majestic Flour Manufacturing Co., Kansas City, Mo., from the State of Missouri into the District of Columbia, dates of shipments not shown, and charging adulteration and misbranding in violation of the Food and Drugs Act. The "Princess" flour was labeled: "Princess Flour from Blanton Milling Co., Indianapolis, Ind."; and the "Fancy Melba" flour was labeled: "140 lbs. Fancy Melba Patent—Trade Mark Registered—From Choice Hard Wheat, Majestic Flour Manufacturing Co., U. S. A., Distributors."

Adulteration and misbranding were alleged in the libel for the reason that the product was in a filthy condition and was infested with worms and other animal matter and was so contaminated by the presence of the worms and other animal matter that it was absolutely unfit for human consumption, and therefore was adulterated and misbranded within the meaning and in violation of the said Act of Congress approved June 30, 1906.

On November 23, 1909, Wm. M. Galt & Co., a copartnership, claimants, filed their answer to the libel, and on February 14, 1912, the case came on to be heard before the court. On March 1, 1912, the court (Barnard, J.) sustained the libel, as appears from the following opinion.

The libelant in this case seeks to condemn the flour described in the libel, because the same consists in part of a filthy, decomposed, and putrid animal and vegetable substance.

The answer of the claimants denies that the said flour is filthy, and denies that it is subject to seizure under act approved June 30, 1906, (34 Stat., 768,) known as the Pure Food Law.

The libel was filed September 17, 1909, and at the same time, an order was made permitting the libelant and the claimants to each take two sacks of flour, one from each of said two lots described, for the purposes of examination and analysis. An answer was filed by the claimants, Nov. 23, 1909, and on the 18th of February, 1910, another order was made, permitting the libelant to take two other sacks, one from each of the said lots described, and also for the claimants to take two other sacks, one from each of said lots, for the purpose of analysis for use at the trial.

December 20, 1911, an amendment was made to the libel, by striking out paragraph three, and inserting the following paragraph in lieu thereof.

"Your libelant further represents that the said sacks of flour, and each and every one thereof, are adulterated within the meaning and intent, and in violation of, the said act of Congress, approved June 30th, A. D., 1906, in that the said flour consists in part of a filthy, decomposed, and putrid animal and vegetable substance."

The answer was a denial of this paragraph, and the issue so made was set down for hearing before the court without a jury. Testimony was taken in open court, which showed the result of the analysis of the four sacks of flour taken by the libelant, under the permission of the orders of the court aforesaid.

It did not appear that the claimants took any samples, or had any analysis made. The result of the examination of the four sacks taken by the government as samples, was that one of them contained worms, insects, and beetles, aggregating 3525, and the other three, worms, insects, and beetles, aggregating 1207, 1448, and 1959, respectively.

Experiments were made by the Department of Chemistry, showing that the said flour contained a large number of bacteria that were supposed to be injurious to the human body; and, in addition, to the worms, insects, and beetles, that had been sifted out of the flour, the evidence showed that there remained in the same, cases or husks made by the worms, as well as the excreta from them, all of which, it was claimed, rendered the said flour filthy within the meaning of said act.

There were a great many weevils discovered, and they were defined as the grain weevil, or wingless insects, which required a period of some six weeks, in warm weather, for full growth and development, during which time they passed through four distinct stages of existence, first in the form of the egg, then the form of the larva, then in the pupa form, and finally reaching the adult form; and that after maturing, these insects might live for several months, and possibly for a year. In cold weather a longer time was necessary for their growth.

That the beetle known as "flour-beetle," comes from a larva, or worm, about half an inch long, and it breeds in flour and grain. Several of these beetles, in the larva state, or in the adult state, appeared to be in said samples.

The evidence was that the flour was injuriously affected by the presence of such worms, insects, and beetles, by reason of their feeding on the gluten, and thereby destroying the strength and value of the flour, and rendering it unfit for making bread, or other domestic use, even if the foreign, filthy matter could be bolted or sifted out of it.

The sixth paragraph of Section 7, of said act of Congress, authorizes condemnation of food offered for sale, if it consists in whole or in part of a filthy substance, and it is under this section of the law that the libel was filed.

No proof was offered by the libelant, or by the claimants, as to the condition of the other sacks of flour that were seized, except such as might be inferred from the condition of the four sacks analyzed by the government; and counsel for the claimants contends that the court is without power to guess at their condition, as the four sacks taken may have been all that were so affected.

It appears that the four sacks taken were from different locations in the several piles of sacks, and it is argued on behalf of the government, that all the sacks seized were in a position to become affected by the dirt and filth from a stable nearby, and that it is fair to presume that all the sacks of flour of the same brand, and being in the same general neighborhood, were all similarly affected by the presence of these worms, insects, and beetles.

No authorities directly in point have been called to the court's attention, which would seem to control a decision under the facts in this case.

In Shawnee Milling Company v. Temple, 179 Federal Reporter, 517, the court considers Section 7 of the said statute, and in respect thereto the act is upheld, notwithstanding no standard for pure food is fixed, or can be fixed, as is done with reference to drugs.

The court says, page 524,

"It is a fact most obvious that no standard could be fixed other than was done by Congress. The one provision as to food is that it shall not be mixed so as to reduce or lower or injuriously affect its quality or strength. Another provision is that some substance shall not be substituted, wholly or in part, for the article. Another provision is that no valuable constituent of the article shall be abstracted. Another provision is that it shall not be mixed, colored, powdered, coated, or stained, in a manner whereby damage or inferiority is concealed. Another provision is that poisonous or other deleterious ingredients shall not be added. Still another provision is that filthy, decomposed, or putrid substances shall not be added."

From the testimony it is not clear that weevils and beetles may not come into flour while in storage, without any fault of the owner, and the argument is made that if they are liable to so infest or inhabit sacks or barrels containing flour, that their appearance is a thing that it was not contemplated by the said act of Congress to prevent. That it is not a false branding, or an adulteration made by the manufacturer or seller, but a natural result liable to happen with the best of care, and that its effect is not to wholly destroy the value or nutritive qualities of the flour, but only to cheapen it, provided the flour is again properly sifted or bolted.

The court is unable to accept this argument in behalf of the claimants, because it seems to the court that the purpose of the act was to prevent the sale of deleterious food stuffs, no matter how they became such; and that if a merchant should have in his stock flour, or other food product, and be offering the same for sale, under names which the public might anticipate guaranteed a good quality, and the said food stuffs had become filthy and deleterious by reason of long standing in exposed situations, and had become inhabited by worms, insects, and beetles, such as shown by the testimony in this case as to the four

sacks which were examined, the law would apply, and such food stuffs would be subject to condemnation under Section 10 of the said act.

Considering the testimony as presented, and the absence of testimony on behalf of the claimants, the court is forced to the conclusion that if other samples had been taken and analyzed, their examination would have shown similar conditions to those in the four sacks actually examined.

That if they had shown to the contrary, it might be assumed that the claimants would have put in evidence to that effect, rather than leave the matter to the presumption necessarily arising from the examination of the samples taken.

Finding as matter of fact from the evidence that the said several sacks of flour are in a filthy condition, under the provisions of said act, by reason of the presence of the said worms, insects, and beetles, in such quantities as shown, and from the condition which they have produced in the said flour, the court is of the opinion that the said several sacks of flour, now in the warehouse of the claimants, should be condemned and destroyed, unless the claimants shall give bond to dispose of the same in some manner not contrary to the provisions of the said act of Congress.

On March 12, 1912, decree of condemnation and forfeiture was entered, and it was further ordered that upon payment by said claimants of all costs of the proceedings and the execution of bond in the sum of $5,000, in conformity with section 10 of the Act, the product should be released and delivered to them. The claimants noted an appeal from the decision of the Supreme Court, which they have perfected, and which is now pending in the Court of Appeals of the District of Columbia.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *July 3, 1912.*

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