United States Department of Agriculture

FOOD, DRUG, AND INSECTICIDE ADMINISTRATION

NOTICES OF JUDGMENT UNDER THE FOOD AND DRUGS ACT

[Given pursuant to section 4 of the food and drugs act]

15601–15650

[Approved by the Secretary of Agriculture, Washington, D. C., December 6, 1928]

15601. Adulteration and misbranding of tuna fish. U. S. v. 18 Cases of Tuna Fish. Default decree of condemnation, forfeiture, and destruction. (F. & D. Nos. 19958, 19959. I. S. Nos. 14735–v, 14736–v. S. No. E–3950.)

On April 6, 1925, the United States attorney for the Western District of Virginia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying seizure and condemnation of 18 cases of tuna fish, remaining in the original unbroken packages at Abingdon, Va., alleging that the article had been shipped by the M. De Bruyn Importing Co., from New York, N. Y., in February, 1925, and had been transported from the State of New York into the State of Virginia, and charging adulteration and misbranding in violation of the food and drugs act.

It was alleged in the libel that the article was adulterated, in that substances, yellowtail and bonita, had been mixed and packed therewith so as to reduce, lower, or injuriously affect its quality and strength, and had been substituted wholly or in part for the said article.

Misbranding was alleged for the reason that the statements, "Selected Quality Net Contents 7 Ounces, Juanita Brand, California Tuna, Standard All Light Meat, Bico Distributing Company, New York, Packed in Salad Oil Made from Cottonseed," borne on the label, were false and misleading and deceived and misled the purchaser, in that the purchaser was led to believe that the article was as represented by the said statements, whereas yellowtail had been mixed with and substituted wholly or in part for the article. Misbranding was alleged for the further reason that the article was offered for sale under the distinctive name of another article.

On April 20, 1925, the court handed down the following opinion as to the necessity for supporting affidavits other than that of the United States attorney before issuance of monition and attachment (McDowell, *D. J.*):

"This is a proceeding for forfeiture under the Food and Drugs Act. The information does not allege previous seizure of the food sought to be condemned, and admits that it is in the possession of its owner, a wholesale dealer in groceries in this district. The information is not verified or supported, otherwise than by an affidavit by an assistant district attorney, which reads: 'The foregoing facts are true to the best of affiant's knowledge and belief.' The prayer is for the issue of monition attachment. For present purposes I shall assume that the Food and Drugs Act (34 Stat. 768 (Comp. St. §§ 8717–8728)) does not contemplate or require previous seizure (see U. S. *v.* Geo. Spraul & Co., 185 F. 405, 406, 407, 107 C. C. A. 569; U. S. *v.* Two Barrels, etc. (D. C.) 185 F. 302; U. S. *v.* One Hundred Barrels, etc. (D. C.) 188 F. 471, 475), and on such assumption I shall discuss the question of verification of informations for forfeiture of food and drugs, where a search warrant is not asked for.

"If the Fourth Amendment forbids the issue of the attachment, except on probable cause, supported by oath or affirmation, or if the conformity provision of section 10 of the Food and Drugs Act (Comp. St. § 8726) requires that the information be on oath or affirmation, the affidavit here is, I think, insufficient. See Rice *v.* Ames, 180 U. S. 371, 375, 376, 21 S. Ct. 406, 45 L. Ed. 577; Ex parte Bollman, 4 Cranch, 75, 130, 2 L. Ed. 554; Salter *v.* State, 2 Okl. Cr.

464, 102 P. 719, 25 L. R. A. (N. S.) 60, 139 Am. St. Rep. 935, 939–944; Mowry *v.* Sanborn, 65 N. Y. 581, quoted in Clarke *v.* Neb. Nat. Bank, 57 Neb. 314, 77 N. W. 805, 73 Am. St. Rep. 512; Ex parte Lane (D. C.) 6 F. 34–38; Ex parte Morgan (D. C.) 20 F. 298, 307; Ex parte Spears, 88 Cal. 640, 26 P. 608, 22 Am. St. Rep. 341, 342; Leigh *v.* Green, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592, 595.

"However, I know of no sufficient reason or authority for a belief that the Fourth Amendment was intended to apply to an attachment for the seizure of property. The bald letter of the amendment suggests that it was intended to apply only to warrants which direct both search and seizure. But, at least as to warrants for the arrest of persons charged with crime there seems no room for doubt that the amendment applies. Ex parte Buford, 3 Cranch, 448, 451, 453, 2 L. Ed. 495; West *v.* Cabell, 153 U. S. 78, 85, 87, 14 S. Ct. 752, 38 L. Ed. 643; in re Rule of Court, 3 Woods, 502, Fed. Cas. No. 12,126; U. S. *v.* Maxwell, Fed. Cas. No. 15,750, pp. 1221, 1222; U. S. *v.* Tureaud (C. C.) 20 F. 621; in re Gourdin (D. C.) 45 F. 842; In re Dana (D. C.) 68 F. 886, 895; Johnston *v.* U. S. 87 F. 187, 30 C. C. A. 612; U. S. *v.* Sapinkow (C. C.) 90 F. 654; U. S. *v.* Baumert (D. C.) 179 F. 735; Weeks *v.* U. S. 216 F. 292, 132 C. C. A. 436; L. R. A. 1915B, 651, Ann. Cas. 1917C, 524.

"A very satisfactory reason for discriminating attachments from search warrants, and from ordinary warrants for the arrest of persons for crime, is that there is no historical evidence, so far as I know, of abuses in respect to writs of attachment, either in England or in America, prior to the adoption of the Fourth Amendment, and therefore there was no reason for an intent that the amendment should include attachments.

"In Boyd *v.* U. S., 116 U. S. 616, 624, 6 S. Ct. 524, 529 (29 L. Ed. 746), is said, obiter: 'The entry upon premises made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution.'

"In Den ex dem. Murray *v.* Hoboken Land, etc., Co., 18 How. 272, 285, 286 (15 L. Ed. 372), in respect to the distress warrant, an extent, authorized by the Act of May 15, 1820, c. 107, § 2 (3 Stat. 592) against delinquent collectors of federal revenues, it is said: 'The remaining objection to this warrant is, that it was issued without the support of an oath or affirmation, and so was forbidden by the fourth article of the amendments of the constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process, in this case, is termed, in the act of congress, a warrant of distress. The name bestowed upon it can not affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause.'

"A distress warrant issued by the order of a treasury agent and directing the seizure and sale of goods and chattels and an attachment issued by order of a court and directing the seizure of goods and chattels, are not identical. But if the Fourth Amendment does not apply to the distress warrant, I see no reason for saying that it applies to the attachment.

"I have discovered only two adjudications relating to the application of the Fourth Amendment to the issue of attachments in forfeiture proceedings under Section 10 of the Food and Drugs Act. In U. S. *v.* Eight Casks of Drug Products, Notice of Judgment 697, the District Court of the Southern District of Ohio in 1910 sustained a demurrer to the information because, inter alia, the 'libel was not properly verified by any persons having knowledge of the facts.' In U. S. *v.* Three Hundred Cases of Mapleine, Notice of Judgment 163, (no opinion filed) the District Court for the Northern District of Illinois, in 1909, overruled, without discussion, an exception to the information on the ground that it was not under oath. In the first case there is some discussion, but it is quite unconvincing and no authority in point is cited.

"The only satisfactory conclusion I can reach is that the Fourth Amendment does not apply to the issue of the writ of attachment in forfeiture cases under section 10 of the Food and Drugs Act.

"Section 10 contains a provision reading: 'The proceedings in such libel cases shall conform, as near as may be, to the proceedings in admiralty * * *.' If it be assumed that the 'proceedings in admiralty' intended were not those followed in forfeiture cases based on previous seizure (Rule 22, of 1854, 3 How.

XIII), but were those in ordinary libels in instance causes (Rule 23 of 1854 and Rule 22 of 1920); still the use of the expression 'as near as may be' authorizes the exercise of some degree of judicial discretion. As was said in Indianapolis etc. R. Co. *v.* Horst, 93 U. S. 300, (23 L. Ed. 898): 'The conformity is required to be "as near as may be"—not as near as may be *possible*, or as near as may be *practicable*.' See also Mexican Central R. Co. *v.* Pinkney, 149 U. S. 194, 207; 13 S. Ct. 859, 37 L. Ed. 699; Shepard *v.* Adams, 168 U. S. 618, 624, 625; 18 S. Ct. 214, 42 L. Ed. 602.

"It is quite possible that food may be so 'adulterated' within the meaning of the Act as to be poisonous. It is also possible that drugs, either because of adulteration or misbranding, may be highly dangerous. And if seizure previous to the drafting of the information is not authorized by the Act, it is clear that great rapidity of action on the part of the district attorney will frequently be necessary. Outside of the District of Columbia and of the insular possessions, the (domestic) article to be condemned must be either in transit or still unloaded, unsold or in original unbroken packages. So far as my experience goes, it is rarely practicable to attach in transit, and it is sometimes necessary to use great expedition to attach before the article has been sold. And where haste is necessary the delay involved in having affidavits by the government agents who know the facts transmitted to the judge may easily be wholly or in part fatal to the effort to condemn. In view of this fact it seems a reasonable exercise of discretion to hold that the information in such cases need not be verified.

"It may be added that the practice in admiralty under old Rule 23, new Rule 22 (254 U. S. appendix), in instance causes in which the United States is the libelant is not and seemingly has never been uniform. In some of the district courts such libels are not required to be verified, and in others they are. See Waples Proceedings in Rem. p. 77; 2 Foster Fed. Pr. (5th ed.) p. 1947; The J. R. Hoyle Fed. Cas. No. 7557; U. S. *v.* 2 Barrels etc. (D. C.) 185 Fed. 302, 307. In this Circuit the affidavit is required in the District of Maryland and in the Eastern District of Virginia. No affidavit is required in the Eastern District of South Carolina, and such, I believe, is the practice also in the Eastern District of North Carolina.

"In section 4 of the Food and Drugs Act (Comp. St. § 8720) is a requirement of verification by the analyst of every analysis of food or drugs found to be adulterated or misbranded. And this verified analysis is to be certified by the Secretary of Agriculture to the proper district attorney. But as there is no requirement for an affidavit showing other equally indispensable facts justifying a forfeiture, such for instance as an interstate transit, and as the affidavit required by section 4 is not directed to be filed with the information for forfeiture, it seems to me that the provision in question was intended either merely to insure accuracy on the part of analyst or as a basis for a warrant for the arrest of a person to be criminally prosecuted under section 1 or 2 of the Act. (Comp. St. §§ 8717, 8718).

"Section 10 of the Act is of very doubtful meaning in several respects. And which of several practices in admiralty was in the mind of the draftsman will, I believe, always be in great doubt. It may have been the practice (under old Rule 22) in forfeiture cases where previous seizures had been made and in which verification was needless; or it may have been the practice (under old rule 23) in those courts which required that all libels in instance causes be verified; or it may have been the practice in these courts which did not require libels in instance causes in behalf of the United States to be verified. But this doubt need not be solved in respect to informations for forfeiture which seek only the issue of monition and attachment. As has been said, the words 'as near as may be' permit the exercise of a reasonable discretion, and as the delays involved in laying before the court affidavits by persons who have first hand knowledge of the facts may frequently be fatal to the efficacy of the proceeding, I believe it permissible and judicious to order the issue of monitions and attachments on informations which are wholly unsupported by oath or affirmation."

On May 25, 1925, the product was seized by the United States marshal.

At the November, 1926, term of court, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

W. M. JARDINE, *Secretary of Agriculture.*