LABEL, IN PART: (Jars) "Kopper Kettle Brand Pure Red Raspberry Jelly," or "Blackberry Preserves."

VIOLATIONS CHARGED: Adulteration, Section 402 (b) (2), products deficient in fruit juice, in the case of the jelly, and fruit, in the case of the preserves, had been substituted in whole or in part for the red raspberry jelly and blackberry preserves, foods for which definitions and standards of identity have been prescribed by regulations.

Misbranding, Section 403 (a), the names, "Pure Red Raspberry Jelly," or "Pure Blackberry Preserves," or "Pure Preserves Blackberry," were false and misleading; and, Section 403 (g) (1), the articles failed to conform to the definitions and standards of identity since they were made from mixtures composed of less than 45 parts by weight of fruit juice ingredient, in the case of the raspberry jelly, and the blackberry ingredient, in the case of the blackberry preserves, to each 55 parts by weight of one of the saccharine ingredients.

DISPOSITION: June 17, 1944. No claimant having appeared, judgment of condemnation was entered and the products were ordered delivered to charitable institutions.

6946. Adulteration and misbranding of strawberry, blackberry, peach, and cherry preserves. U. S. v. 600 Cases of Assorted Preserves. Consent decree of condemnation. Product ordered released under bond to be relabeled. Subsequent judgment for $1,000 and costs for breach of bond affirmed on appeal. (F. D. C. No. 4332. Sample No. 48801–E.)

LIBEL FILED: April 16, 1944, Eastern District of South Carolina.

ALLEGED SHIPMENT: On or about February 21, 1941, by the Fresh Grown Preserve Corporation, from Lyndhurst, N. J.

PRODUCT: 600 cases, each containing 6 8-pound cans, of assorted preserves at Fort Jackson, S. C.

LABEL, IN PART: (Cans) "Nature's Own Pure Strawberry [or "Blackberry," "Peach," or "Cherry"] Preserve."

VIOLATIONS CHARGED: Adulteration, Section 402 (b) (2), imitation strawberry (or blackberry, peach, or cherry) preserves, deficient in fruit, had been substituted in whole or in part for strawberry (or blackberry, peach, or cherry) preserves, foods for which definitions and standards have been established in the regulations.

Misbranding, Section 403 (a), the names "Pure Strawberry Preserve," "Pure Blackberry Preserve," "Pure Peach Preserve," and "Pure Cherry Preserve," were false and misleading; Section 403 (c), the articles were imitations of other foods and their labels failed to bear, in type of uniform size and prominence, the word "Imitation," and, immediately thereafter, the names of the foods imitated; and, Section 403 (g) (1), the articles failed to conform to the definitions and standards of identity prescribed by the regulations.

DISPOSITION: May 14, 1941. No claimant having appeared, judgment of condemnation was entered and the products were ordered destroyed. However, before all the goods were destroyed, the Fresh Grown Preserve Corporation intervened and secured release of the remainder under bond for relabeling. These proceedings and subsequent suit by the Government on the bond charging breach of the conditions of the decree are set forth in the following opinions:

(Opinion of the Eastern District Court of South Carolina, handed down February 1, 1944.)

TIMMERMAN, *District Judge:*

"This is an action on a bond executed and filed by the defendants pursuant to an order of this Court in the libel proceeding, entitled, 'United States of America, Libelant, vs. 600 Cases, more or less, each containing 6 cans of an article labeled in part "Nature's Own Pure Strawberry Preserve * * * [also "Blackberry, Peach and Cherry"].'

"The complaint alleges the execution of said bond by the defendants, the filing thereof in the aforementioned proceeding and its breach.

"The gist of the Government's case is stated in the 5th paragraph of the complaint, as amended. It reads as follows:

V. The defendant Fresh Grown Preserve Corporation did not abide by the decree hereinabove referred to, dated September 23, 1941, in that (1) it did not pay costs within 30 days; (2) it did not relabel the goods within 30 days; (3) while it did relabel the goods, after the 30-day period prescribed by the decree, it did not relabel them under the supervision of the Food and Drug Administration of the Federal Security Agency; (4) it did not maintain the lot of goods intact for examination or inspection by a representative of the Federal Security Agency; (5) it sold these goods without having obtained a release from the Federal Security Agency; (6) it did not abide by the con-

clusion of the representative of the Federal Security Agency. By reason of these violations of the terms of the decree, compliance with which has been made a condition of the bond, the United States became and is now entitled to receive from the defendants the sum of one thousand ($1,000) Dollars, the amount specified in the aforesaid bond, no part of which has been paid.

"Upon the trial of the case the defendants conceded that they had executed and filed the bond in question. Briefly stated, the contentions of the defendants now are: (a) That there was substantial compliance with the conditions of the bond, although the compliance was belated; and (b) that the bond is one of indemnity and not one of a penal nature.

THE FACTS

"The libel in the aforementioned proceeding was filed April 16, 1941. The 600 cases of condemned cans labeled in part as 'Nature's Own Pure Strawberry Preserves' were originally shipped by the defendant Fresh Grown Preserve Corporation of Lyndhurst, New Jersey, to the Quartermaster at Fort Jackson, S. C., on or about February 21, 1941. It was alleged in the libel that the so-called preserves were adulterated and misbranded in violation of the Federal Food, Drug and Cosmetic Act of June 25, 1938.

"No answer having been filed, on May 14, 1941, Judge Lumpkin entered a decree condemning said goods and ordering their destruction by the Marshal. However, before all of said goods had been destroyed, the defendant Fresh Grown Preserve Corporation intervened in said proceeding and, as the owner and shipper of said goods, filed a claim and a stipulation admitting the allegations of the libel, consenting to a decree of condemnation, and asking to be allowed to reclaim such of the goods as had not been previously destroyed for the purpose of relabeling it before putting it into the channels of commerce again. So upon the formal, written consent of said claimant (one of the defendants herein), the Court entered an order, September 23, 1941, holding and decreeing said seized goods to be adulterated and misbranded as alleged and ordering the forfeiture thereof; but providing that, in case the claimant should, within thirty days from the date of said decree, pay all the costs of said proceeding and execute and deliver to the libellant a good and sufficient bond in the sum of $1,000.00, conditioned as provided in said decree, the condemned goods should be released to the claimant.

"The conditions of said bond or undertaking as required by said decree were as follows:

"1. That claimant would, at its own cost and within thirty days, cause said libeled goods to be reshipped to the warehouse of the claimant in New Jersey and there relabeled under the supervision of the Food and Drug Administration so as to comply with the requirements of the Food, Drug and Cosmetic Act of June 25, 1938.

"2. That the Claimant would retain the entire lot of condemned goods intact for examination or inspection by a representative of the United States Federal Security Agency, and at all times maintain necessary records or other proof to identify said goods to the satisfaction of said representative.

"3. That the claimant would notify the Federal Security Agency of its purpose to do so and then submit to the Agency's representative all of said goods at claimant's said warehouse for the purpose of examination and inspection.

"4. That the claimant would not, under any circumstances, ship or sell, or offer for shipment or sale, for human consumption, any part of said goods until a representative of said Federal Security Agency had been given free access to said goods for the purposes of inspection and he had released the same for sale.

"5. That the claimant would pay $14.00 per day as salary or wages and $5.00 per day as subsistence and expenses for each day a representative of the Federal Security Agency should be engaged in supervising or inspecting the relabeling of said goods.

"6. That the claimant would abide by the decision of the representative of said Agency as to the proper relabeling of said goods, which decision should be final.

"7. That the claimant would furnish evidence, by affidavit or otherwise, satisfactory to the Federal Security Agency, as to the relabeling of said goods, and file the same with the Clerk of this Court.

"The required bond was duly executed by the defendant Fresh Grown Preserve Corporation, as principal, and by the defendant The Century Indemnity Company, as surety, on September 30, 1941, although it was not filed in this court until November 4, 1941. The order did not require the bond to be

filed with the court,—only that it be delivered to the libelant. The condemned goods were shipped from Columbia, S. C., to the defendant Preserve Corporation on November 2, 1941, and they were in due course received by said defendant at its warehouse in Lyndhurst, New Jersey.

"The record discloses no further action in the libel proceeding until August 14, 1942. On that date both defendants herein, Fresh Grown Preserve Corporation and The Century Indemnity Company, filed with the Court a signed written stipulation, in these words:

IT IS HEREBY STIPULATED AND CONSENTED that the decree heretofore entered on the above entitled cause on the 23rd day of September, 1941, be amended to further provide: That the time for the claimant herein to relabel the merchandise in conformity with the decree entered herein, be extended to the 1st day of October, 1942, and that this extension is conditioned upon the claimant furnishing to the Food and Drug Division of the Federal Security Agency satisfactory evidence as to the disposition of the relabeled goods by furnishing said Food and Drug Division a duplicate of the invoice of the sale of such merchandise which said invoice shall contain the amount and description of the merchandise and the name and address of the purchaser.

IT IS FURTHER STIPULATED that in the event that the said merchandise is not relabeled within the period of time as provided for in this stipulation, the claimant will not request a further extension.

"On the date of the filing of this stipulation and in response thereto, Judge J. Waties Waring entered a supplemental order in the libel proceeding. Among other things, Judge Waring held that the merchandise in question had been condemned and forfeited on September 23, 1941 (Judge Paul's order of that date), but with leave to the claimant to repossess certain of said condemned merchandise on certain stated conditions; that the claimant had not carried out all of the conditions prescribed in Judge Paul's order which were made the condition of said bond. It was then ordered by Judge Waring that 'the time for relabeling (said goods) in a manner satisfactory to the said Food and Drug Division and carrying out the other provisions relative to said relabeling and satisfying the said Division, be extended to the 1st day of October 1942,' subject to the following proviso:

* * * that the above extension is contingent upon the claimant paying all costs, disbursements and expenses due to or incurred by the Clerk of this court and by the Marshal of this court in connection with this cause * * * in full within Ten days from the date hereof. Upon failure of such payment within such time then the extension hereinabove granted in this order shall become null and void and the District Attorney is directed to institute suit for the enforcement of the terms of the bond on file in this cause forthwith, etc.

"The costs required to be paid as a condition precedent to the extension of time asked for by the defendants were not paid within the time specified in Judge Waring's order. Thereafter, this action was brought.

"That the defendant Fresh Grown Preserve Corporation, the claimant in the libel proceeding, did not comply with the terms and conditions prescribed in Judge Paul's order of September 23, 1941, within the time limit fixed, which were made the condition of said bond, is not open to serious question. However, the defendants now claim substantial compliance therewith at a later date, and before Judge Waring's order of August 14, 1942.

"This contention is based upon the testimony of one Leo Greenberg, Vice President of the Preserve Corporation, but his testimony is contradicted by the Government's witnesses. I do not deem it necessary to review all of the testimony. Suffice it to say that I resolve the issue of fact in favor of the Government. I hardly think that any other conclusion could be reached in view of the stipulation signed by both defendants and filed in this Court on August 14, 1942, a copy of which appears above. It would not comport with reason to conclude that the defendants would have been asking for time within which to comply with the conditions of the bond in August, 1942, if those conditions had been complied with in November or December, 1941. The concluding words of said stipulation of August 14, 1942, are:

* * * that in the event that the said merchandise is not relabeled within the period of time as provided for in this stipulation, the claimant will not request a further extension.

Could this mean that the defendants wanted a further extension of time within which to do what they had already done? Obviously not.

"I, therefore, find as a matter of fact that the defendants breached said bond prior to the time they applied for and obtained Judge Waring's order of August 14, 1942, and that said order did not operate to relieve the defendants from the effects of such breach since they did not perform the condition which would have made it effective for that purpose.

THE LAW

"Having found as a fact that the defendant Fresh Grown Preserve Corporation did not comply substantially with the condition of said bond at any time prior to the commencement of this action, it follows as a matter of law that such plea cannot avail the defendants, or either of them, in this action.

"The real issue raised on the trial of this cause is: What is the character of the bond; is it a penal bond or one of indemnity? My conclusion is that it is a penal bond.

"This bond was required by the Court to enforce compliance with the Food, Drug and Cosmetic Act, which Act the defendant Fresh Grown Preserve Corporation admittedly had violated in respect to the very food in question in the libel proceeding. Section 304–d of the Act (21 U. S. C. A., Sec. 304–d) specifically provides:

> That after entry of the decree (of condemnation) and upon the payment of the costs of such proceedings and the *execution* of a good and sufficient bond conditioned that such (condemned) article shall not be sold or disposed of contrary to the provisions of this chapter * * *, the Court may by order direct that such article be delivered to the owner thereof to be * * * brought into compliance with the provisions of this chapter under the supervision of an officer or employee duly designated by the administrator, etc. [Emphasis added.]

"The decree providing for the execution of the bond in question was made in strict compliance with the cited Act, and the defendant Fresh Grown Preserve Corporation was accorded thereby every right to which it was entitled under the Act. It received, and presumably retained, every consideration which the execution of the bond entitled it to. The fact that said defendant has played fast and loose with the Government—continually promising and not performing—since the inception of this matter only emphasizes the necessity for a penalty bond in cases of this character, if the law enacted by Congress to protect the general public against unscrupulous vendors of food is to be effective.

"Where a bond is given to a public body as a condition of license or other privilege, or conditioned on compliance with law, the full penalty of such bond may be recovered for a breach thereof, in the absence of a provision to the contrary in the statute which prescribes the bond, or in the bond itself. *Clark* v. *Barnard*, 108 U. S. 436 (1883); *United States* v. *Dieckerhoff*, 202 U. S. 302 (1906); *United States* v. *Montell*, 26 Fed. Cas. No. 15,798 (C. C. D. Md., 1841); *United States* v. *Wandmaker*, 292 Fed. 24 (C. C. A. 8th, 1923); *Illinois Surety Co.* v. *United States*, 229 Fed. 527 (C. C. A. 2nd, 1916); *Eagle Indemnity Co.* v. *United States*, 22 F. (2d) 388 (C. C. A. 4th, 1927), cert. den. 276 U. S. 624 (1928); *United States* v. *United States Fidelity and Guaranty Co.*, 35 F. Supp. 959 (E. D. Pa., 1940).

"In cases where by statute the Government is authorized to take a bond to insure compliance with the law, it is not material that the conditions of the bond are not expressly prescribed by the statute. *Eagle Indemnity Co.* v. *United States*, 22 F. (2d) 388 (C. C. A. 4th, 1927) cert. den. 276 U. S. 624 (1928); *Illinois Surety Co.* v. *United States*, 229 Fed. 527 (C. C. A. 2nd, 1916); *United States* v. *Engelberg*, 2 F. (2d) 720 (W. D. Pa., 1924).

"Section 785, 28 U. S. Code, has been invoked to protect the defendants against a declaration that the bond in question is a penalty bond. I do not think that this section operates to relieve the defendants from the full penalty of their bond. That section in effect provides that 'in suits to recover the forfeiture annexed to * * * (a) bond' courts shall render judgment 'according to equity'. There is a difference between forfeitures and penalties. 'A penalty as distinguished from a forfeiture involves the enforcement of an obligation to pay a sum fixed by law or agreement of the parties as a punishment for the failure to fulfill some primary obligation. A forfeiture deprives a man of what he previously possessed, or at least prevents him from acquiring what he has substantially paid for; a penalty subjects him to a liability beyond the actual damage caused by his breach of the primary obligation.' *Williston on Contracts*, Vol. II, p. 1470, Sec. 770. The obligation of the bond in the instant case was not to surrender something to the Government which the defendant previously possessed or was entitled to receive as a matter of right, but it was simply to guarantee that the said defendant would obey the law as interpreted by the court (to which interpretation the defendants agreed), or pay a fixed agreed sum as a penalty for not doing so. *United States* v. *Dieckerhoff*, 202 U. S. 302; 26 S. Ct. 604; 50 L. Ed. 1041, is in point. That case arose under a statute which provided that imported merchandise subject to duty might be taken from the Collector prior to inspection and appraisal on the

giving of a bond in double the estimated value of such merchandise conditioned for the delivery of the same to the Collector on his order. The defendant filed the bond required and breached it by failing to return the merchandise at the request of the Collector. The defendant contended that his liability on said bond was limited to such damages as the Government alleged and could prove. The Court, among other things, said:

> But we think the purpose of the statute and the purpose of the requirement in the bond provided for therein, and the one given in this case, was to secure the performance of the duty imposed of returning the package or packages, where an importer has availed himself of the privilege of withdrawing merchandise from the custody of the Government officials before it has been examined and appraised . . . we think it was the intention of the law to provide specific damages to be recovered upon the nonperformance of the duty imposed, and to secure a prompt and faithful discharge of which the statute provides for the giving of a bond. . .
>
> We think such undertaking, for this manner of discharging this duty, or paying the value stipulated, *was intended to and does relieve the Government from the necessity of showing any actual damage or loss.* (Emphasis added)

"See also: *United States* v. *Engelberg*, 2 F. (2d) 720; *Eagle Indemnity Co.* v *United States*, 22, F. (2d) 388, (4th Cir.); *United States* v. *Wandmaker*, 292 F. 24 (8th Cir.); *Illinois Surety Co.* v. *United States*, 229 F. 527 (2nd Cir.).

"From the foregoing authorities and others that might be cited it follows as a rule of law that, where the condition of a bond given to the Government is to guarantee compliance with the law, it is a penal bond, and that the Government will be entitled to judgment for the full penalty of such a bond on proof of a breach thereof. Even if it should be conceded that Judge Paul's decree of September 23, 1941, imposed conditions for the bond in question, some of which were not authorized by the Act (a concession I am unwilling to make in fact), that would not relieve the defendants from the full penalty of the bond, for said decree was entered at the instance and for the benefit of the defendant Fresh Grown Preserve Corporation in the first place and it was later ratified by both defendants in the stipulation filed in this court on August 14, 1942, for the purpose of gaining an extension of time within which to do the things that would save the penalty of the bond. The defendants got the extension they asked for on a very simple condition; and it is their own fault that they did not perform that simple condition and thereby make the extension effective for their protection. Since no appeal was taken from Judge Paul's order and since it appears that said order was entered at the instance and for the benefit of the claimant in the libel proceeding, it is the law of that proceeding and should be respected as such in this case. The defendants are now estopped to deny its full validity.

"I conclude as matters of law that the bond in question is a penal bond; that it has been breached in material respects; and that the plaintiff is entitled to judgment against both defendants for the full penalty of said bond.

"An order for judgment in accordance with the views herein expressed will be signed on presentation in proper form."

(Opinion of the Circuit Court of Appeals for the Fourth Circuit; handed down July 31, 1944)

NORTHCOTT, *Circuit Judge:*

"This is an action brought in the District Court of the United States for the Eastern District of South Carolina in September 1942, by the appellee, United States of America, here referred to as the plaintiff, seeking to recover the full penalty of a bond in the sum of $1,000.00 given by one of the appellants, Fresh Grown Preserve Corporation, here referred to as a defendant. The appellant The Century Indemnity Company, here referred to as a defendant, was the surety on the bond.

"In December 1943, a trial was had and in February 1944 the trial judge handed down an opinion finding the facts and stating his conclusions of law holding for the plaintiff. Judgment was entered in accordance with this finding, from which judgment this appeal was brought.

"In February 1941 the defendant Fresh Grown Preserve Corporation shipped to the Quartermaster at Fort Jackson, South Carolina, 600 cases, six cans in each case, of an article, labeled in part 'Nature's Own Pure Strawberry Preserve [* * * also 'Blackberry, Peach and Cherry'].'

"On April 16, 1941, a libel was filed, in the District Court of the United States for the Eastern District of South Carolina, entitled '*United States of America, Libellant,* vs. *600 Cases, more or less,*' and the goods were seized. On May 14, 1941, no answer having been filed, an order was entered condemning said goods and directing their destruction by the Marshal. Before all of said goods had been destroyed, the defendant Fresh Grown Preserve Corporation

intervened in the libel proceeding as the owner and shipper of said goods and filed a claim and a stipulation admitting the allegations of the libel, consenting to a decree of condemnation, and asking to be allowed to reclaim such of the goods as had not been previously destroyed for the purpose of relabeling them before putting them into the channels of commerce again.

"On September 23, 1941, the court entered an order holding and decreeing that said goods were adulterated and were misbranded as alleged and ordering the forfeiture thereof; but providing that, in case the claimant should, within thirty days from the date of said decree, pay all the costs of said proceeding and execute and deliver to the libellant a good and sufficient bond in the sum of $1,000.00, conditioned as provided in said decree, the condemned goods should be released to the claimant.

"The conditions of said bond or undertaking as required by said decree were as follows:

"1. That claimant would, at its own cost and within thirty days, cause said libeled goods to be reshipped to the warehouse of the claimant in New Jersey and there relabeled under the supervision of the Food and Drug Administration so as to comply with the requirements of the Food, Drug and Cosmetic Act of June 25, 1938.

"2. That the claimant would retain the entire lot of condemned goods intact for examination or inspection by a representative of the United States Federal Security Agency, and at all times maintain necessary records or other proof to identify said goods to the satisfaction of said representative.

"3. That the claimant would notify the Federal Security Agency of its purpose to do so and then submit to the Agency's representative all of said goods at claimaint's warehouse for the purpose of examination and inspection.

"4. That the claimant would not, under any circumstances, ship or sell, or offer for shipment or sale, for human consumption, any part of said goods until a representative of said Federal Security Agency had been given free access to said goods for the purpose of inspection and he had released the same for sale.

"5. That the claimant would pay $14.00 per day as salary or wages and $5.00 per day as subsistence and expenses for each day a representative of the Federal Security Agency should be engaged in supervising or inspecting the relabeling of said goods.

"6. That the claimant would abide by the decision of the representative of said Agency as to the proper relabeling of said goods, which decision should be final.

"7. That the claimant would furnish evidence, by affidavit or otherwise, satisfactory to the Federal Security Agency, as to the relabeling of said goods, and file the same with the Clerk of this Court.

"The bond was duly executed by the defendant Fresh Grown Preserve Corporation and by the defendant indemnity company as surety on September 30, 1941, and filed in the court November 4, 1941. 217 cases of the condemned goods were shipped from Columbia, South Carolina, to the defendant Preserve Corporation on November 2, 1941, and they were in due course received by said defendant at its warehouse in Lyndhurst, New Jersey.

"There was no further action in the libel proceeding until August 14, 1942, when appellants filed with the court a signed written stipulation, as follows:

IT IS HEREBY STIPULATED AND CONSENTED that the decree heretofore entered on the above entitled cause on the 23rd day of September, 1941, be amended to further provide: That the time for the claimant herein to relabel the merchandise in conformity with the decree entered herein, be extended to the 1st day of October, 1942, and that this extension is conditioned upon the claimant furnishing to the Food and Drug Division of the Federal Security Agency satisfactory evidence as to the disposition of the relabeled goods by furnishing said Food and Drug Division a duplicate of the invoice of the sale of such merchandise which said invoice shall contain the amount and description of the merchandise and the name and address of the purchaser.

IT IS FURTHER STIPULATED that in the event that the said merchandise is not relabeled within the period of time as provided for in this stipulation, the claimant will not request a further extension.

"On the date of the filing of this stipulation the court below entered a supplemental order in the libel proceeding reciting that the merchandise in question had been condemned and forfeited but giving leave to the claimant to repossess certain of said merchandise; that the claimant had not carried out all of the conditions prescribed in the order of the court below that were made the condition of said bond and further ordering that 'the time for relabeling (said goods) in a manner satisfactory to the said Food and Drug Division and carrying out the other provisions relative to said relabeling and satisfying the

said Division, be extended to the 1st day of October 1942,' subject to the following proviso:

*** * * that the above extension is contingent upon the claimant paying all costs, disbursements and expenses due to or incurred by the Clerk of this court and by the Marshal of this court in connection with this cause * * * in full within ten days from the date hereof. Upon failure of such payment within such time then the extension hereinabove granted in this order shall become null and void and the District Attorney is directed to institute suit for the enforcement of the terms of the bond on file in this cause forthwith * * ***

"The costs required to be paid as a condition precedent to the extension of time asked for were not paid within the time specified in the last order of the court below. Thereafter, this action was brought.

"Two questions are involved in the appeal: (1) Were the conditions of the bond breached? (2) Was the bond a penal bond or an indemnity bond?

"That the conditions of the bond as originally given were breached is not open to dispute. The Preserve Corporation did not retain the entire lot of condemned goods intact for examination or inspection and did not notify the Federal Security Agency when they were ready to relabel the goods reclaimed. The Preserve Corporation also offered for shipment and sale part of said goods before a representative of the Federal Security Agency had been given free access to them for the purposes of inspection and did not furnish satisfactory evidence as to the relabeling of said goods.

"It is claimed on behalf of the Preserve Corporation that the conditions of the bond were substantially complied with, but the judge below found this not to be a fact and we are of the opinion that his finding is not only based upon substantial evidence but is overwhelmingly supported by the evidence.

"The Preserve Corporation claims to have relabeled the goods within thirty days after they were received but not under the supervision of the Food and Drug Administration, but that the Food and Drug Administration adopted the view that the relabeling had been properly done. As pointed out by the judge below in his able opinion it is not probable that if the relabeling had already been done the Preserve Corporation would have, months later, in August 1942, filed a stipulation asking for a further extension of time in which to do the relabeling. Upon this point and considering other evidence the judge below found against the Preserve Corporation defendant.

"It is also admitted that the costs, the payment of which within ten days from the date of the order of August 14, 1942, was required by said order, were not paid within the time specified and as again pointed out by the judge below this failure to comply with the conditions of the order as expressly stated in the order made null and void the privileges granted under the order to the Preserve Corporation. The record discloses that a few cases of the goods were destroyed or damaged.

"The Preserve Corporation contends that the order of August 14, 1942, was a waiver by the Government of any breach of the conditions of the bond that had occurred prior thereto but do not contend that they paid the costs within the time specified in the order to make the decree of August 14, 1942, effective.

"The whole history of what happened, as shown by the record, makes a picture of repeated efforts on the part of the Government, its attorneys and agents to aid the Preserve Corporation in reclaiming the goods and just as many negligent acts on the part of the Preserve Corporation to avoid complying with the conditions prescribed by the court. In fact very few of the conditions of the bond or the requirements made in the court orders were strictly complied with by the Preserve Corporation and there seems to be no room for excusing their course of conduct.

"The conditions of the bond were breached and the conditions of the court order excusing these breaches were not complied with.

"On the second question the court below held that the bond was a penal bond and not an indemnity one. In this holding the judge below was clearly right. We had occasion to discuss this question in *Eagle Indemnity Co.* v. *United States*, 22 F. 2d 388, where we distinguished the case of *United States* v. *Zerbey*, 271 U. S. 322, chiefly relied upon by the defendants. The condition as to the payment of certain money was, of course, an indemnifying one but the breach of that condition is not charged.

"The authorities are clear that where a bond is given to a public body as a condition of a privilege or condition on compliance with law, the full penalty of such bond may be recovered for a breach thereof, in the absence of statutory provision to the contrary.

"*Clarke* v. *Barnard*, 108 U. S. 436.

"*United States* v. *Dieckerhoff*, 202 U. S. 302.

"*Eagle Indemnity Co.* v. *United States*, *supra*.

"In *United States* v. *Dieckerhoff*, *supra*, the court said:

" 'But we think the purpose of the statute and the purpose of the requirement in the bond provided for therein, and the one given in this case, was to secure the performance of the duty imposed of returning the package or packages, where an importer availed himself of the privilege of withdrawing merchandise from the custody of the governmental officials before it has been examined and appraised. * * *, we think it was the intention of the law to provide specific damages to be recovered upon the nonperformance of the duty imposed, and to secure a prompt and faithful discharge of which the statute provides for the giving of a bond.

" 'We think such undertaking, for this manner of discharging this duty, or paying the value stipulated, was intended to and does relieve the government from the necessity of showing any actual damage or loss.'

"The Preserve Corporation was violating the law in shipping adulterated goods and showed no appreciation of the various efforts made to assist it in reclaiming and reconditioning the goods.

"The findings of the judge below that the conditions of the bond were breached and that the bond was a penal one were correct and the judgment of the court below is accordingly affirmed."

MISCELLANEOUS FRUIT PRODUCTS

6947. Adulteration and misbranding of currant juice. U. S. v. 9 Cans of Currant Juice. Default decree of condemnation and destruction. (F. D. C. No. 9181. Sample No. 22836–F.)

LIBEL FILED: January 13, 1943, Eastern District of Pennsylvania.

ALLEGED SHIPMENT: On or about August 21, 1942, by the Fresh Grown Preserve Corporation, from Lyndhurst, N. J.

PRODUCT: 9 cans, each containing 5 gallons, of currant juice at Philadelphia, Pa.

VIOLATIONS CHARGED: Adulteration, Section 402 (b) (2), a substance containing added sugar or sugars, added water, acid, and sodium benzoate, had been substituted in whole or in part for currant juice; and, Section 402 (b) (4), a substance containing added sugar or sugars, added water, acid, and sodium benzoate, had been added to the article, or mixed or packed with it, so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it was.

Misbranding, Section 403 (a), the name, "Currant Juice," was false and misleading; Section 403 (b), the product was offered for sale under the name of another food; Section 403 (c), it was an imitation of another food, currant juice, and its label did not bear, in type of uniform size and prominence, the word "Imitation," and, immediately thereafter, the name of the food imitated; Section 403 (f), the statement of the quantity of contents and the name and place of business of the manufacturer, packer, or distributor, required by law to appear on the label, were not placed thereon with sufficient prominence to render them likely to be read by the ordinary individual under customary conditions of purchase and use; Section 403 (i) (2), the product was fabricated from two or more ingredients, and its label failed to bear the common or usual name of each such ingredient; and, Section 403 (k), it contained a chemical preservative, sodium benzoate, and it did not bear labeling stating that fact.

DISPOSITION: January 29, 1943. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

6948. Misbranding of preserved fruits. U. S. v. 147 Jars of Preserved Dates, 299 Jars of Preserved Pears, and 107 Jars of Preserved Peaches. Consent decree of condemnation. Product ordered released under bond for relabeling. (F. D. C. No. 12076. Sample Nos. 76429–F to 76431–F, incl.)

LIBEL FILED: March 25, 1944, Southern District of New York.

ALLEGED SHIPMENT: From on or about December 3, 1943, to January 14, 1944, by Sunshine Products, Inc., from Miami, Fla.

PRODUCT: 147 jars of preserved dates, 299 jars of preserved pears, and 107 jars of preserved peaches at New York, N. Y.

LABEL, IN PART: "Annettes Preserved Dates [or "Bartlett Pears," or "Elberta Peaches"] * * * Net Wgt. One Pound."