

8640. Adulteration of walnut halves and pieces. U. S. v. The L. Demartini Co. Plea of guilty. Fine, \$100. (F. D. C. No. 16578. Sample No. 29152-H.)

INFORMATION FILED: September 14, 1945, Northern District of California, against the L. Demartini Company, a corporation, San Francisco, Calif.

ALLEGED SHIPMENT: On or about February 12, 1945, from the State of California into the State of Colorado.

LABEL, IN PART: "West Owl Brand Shelled Walnut Halves & Pieces."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy and decomposed substance by reason of the presence of larvae, insect excreta and webbing, and moldy or decomposed nut meats.

DISPOSITION: October 4, 1945. A plea of guilty having been entered on behalf of the defendant, a fine of \$100 was imposed.

8641. Adulteration of shelled walnuts. U. S. v. 49 Cartons of Shelled Walnuts. Consent decree of condemnation. Product ordered released under bond. (F. D. C. No. 16772. Sample No. 27658-H.)

LIBEL FILED: July 3, 1945, Western District of Washington.

ALLEGED SHIPMENT: On or about May 4, 1945, by the Consolidated Nut Co., from Los Angeles, Calif.

PRODUCT: 49 cartons, each containing 25 pounds, of shelled walnuts at Seattle, Wash.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a filthy substance by reason of the presence of rodent hairs and insect-infested walnut meats; and, Section 402 (a) (4), it had been prepared under insanitary conditions whereby it might have become contaminated with filth.

DISPOSITION: September 12, 1945. The Consolidated Nut Co., claimant, having admitted the allegations of the libel, judgment of condemnation was entered and the product was ordered released under bond to be brought into compliance with the law by sorting and segregation under the supervision of the Food and Drug Administration.

8642. Adulteration of shelled walnuts and almonds. U. S. v. 8 Cartons of Shelled Walnuts and 13 Bags of Shelled Almonds. Decrees of condemnation. Walnuts ordered destroyed; almonds ordered released under bond. (F. D. C. Nos. 15988, 17211. Sample Nos. 17151-H, 25423-H.)

LIBELS FILED: May 1 and September 11, 1945, District of Idaho and Northern District of Illinois.

ALLEGED SHIPMENT: On or about February 14 and May 29, 1945, by the Davis Nut Shelling Co., from Los Angeles, Calif.

PRODUCT: 8 25-pound cartons of shelled walnuts and 13 160-pound bags of shelled almonds at Idaho Falls, Idaho, and Chicago, Ill., respectively.

LABEL, IN PART: "Davis-Pakt Shelled Walnuts Standard Amber Halves and Pieces," or "Shelled Almonds Nonpareil."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the walnuts consisted in whole or in part of filthy and decomposed substances by reason of the presence of worm-damaged and moldy walnuts, and the almonds consisted in whole or in part of a filthy substance by reason of the presence of larvae and insect-damaged almonds.

DISPOSITION: September 28 and October 12, 1945. The National Candy Co., Inc., having appeared as claimant for the almonds, and having admitted the facts set forth in the libel, and no claimant having appeared for the walnuts, judgments of condemnation were entered. The almonds were ordered released under bond to be brought into compliance with the law, under the supervision of the Food and Drug Administration, and the walnuts were ordered destroyed.

SPICES, FLAVORS, AND SEASONING MATERIALS

8643. Adulteration of sesame seed. U. S. v. Richard J. Spitz. Tried to a jury. Verdict of guilty. Fine, \$1,000. (F. D. C. No. 15491. Sample Nos. 50653-F, 50654-F.)

INFORMATION FILED: May 17, 1945, Southern District of New York, against Richard J. Spitz, a partnership, New York, N. Y.

ALLEGED SHIPMENT: On or about January 10 and 28, 1944, from the State of New York into the State of Pennsylvania.

LABEL, IN PART: "Chinese Hulled Sesame Seed."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of larvae, adult insects, head capsules, insect fragments, worm webbing and excreta, and insect and rodent pellets.

DISPOSITION: October 9, 1945. A plea of not guilty having been entered by the defendant, the case was tried before a jury. At the conclusion of the testimony and arguments of counsel, the court delivered the following charge to the jury:

LEAMY, District Judge: "Mr. Foreman and Ladies and Gentlemen of the Jury: This is an action brought by the United States of America against Richard J. Spitz, a partnership, on an information filed against the partnership in this court. The partnership may be hereinafter referred to either as 'the defendant' or as 'he' or as 'it'.

"The fact that the defendant is here under information and on trial is not to be taken against it. The information which has been filed and on which the partnership is being prosecuted is no evidence whatsoever of the guilt of the defendant. The information is simply an accusation which charges the defendant with an offense, and no member of the jury should be influenced in the least degree by the fact that the information has been filed.

"The information, as you know, is in two counts. It charges, in substance, in the first count, that on or about the 10th day of January, 1944, that Richard J. Spitz, a partnership, of the City of New York, did introduce and deliver for introduction into interstate commerce for delivery to Philadelphia, Pennsylvania, a number of bags containing a food within the meaning of the Federal Food, Drug and Cosmetic Act; that the said food, when it was introduced in interstate commerce was contaminated and adulterated in that it consisted in whole or in part of a filthy substance, to-wit, larvae, adult insects, head capsules, insect fragments, worm webbing and excreta.

"The second count of the information charges, in substance, that on or about the 28th day of January, 1944, that the said Richard J. Spitz, a partnership, did ship in interstate commerce from New York to Philadelphia a number of bags containing food within the meaning of the Federal Food, Drug, and Cosmetic Act; in that the said food when shipped in interstate commerce was then and there adulterated, in that it consisted in whole or in part of a filthy substance, to-wit, larvae, adult insects, insect fragments, insect pellets, and other matters.

"In brief, the information is in two counts and charges the interstate shipment of a number of bags of food, namely, sesame seed, which seed was adulterated in that it contained various filthy substances.

[Here the Court gave the usual instructions to the jury that the burden of proof rests upon the Government and that the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt.]

"The statutes involved and which the Government claims have been violated are Section 331 (a) of Title 21, which prohibits the introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and Section 342 (a) of Title 21 which provides that food shall be deemed to be adulterated if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food.

"The statute also provides that the term 'interstate commerce' means commerce between any State or territory; the term 'person' includes an individual, a partnership, or an association, and that the term 'food' means articles used for food or drink, or articles used for components of any such article.

"It is the contention of the Government that on January 10, 1944, the Spitz firm shipped from its New York place of business to Frank Burns Inc., in Philadelphia, 20 200-pound bags of sesame seed; and that on January 28, 1944, there was another shipment of 7 bags of sesame seed to Philadelphia, and that both shipments were adulterated in that the seed contained various filthy substances.

"It is the contention of the defendant that the filthy substances which were found in the seed on the 17th of February, 1944, were not in the seed at the time the seed was shipped, and that the infestation occurred after the shipment of the seed.

"You are instructed that sesame seed is food within the meaning of the Food and Drug Act. You are further instructed that this shipment was in interstate commerce.

"There does not seem to be any dispute over the fact that filth was found in the seed on the 17th of February at the Burns plant in Philadelphia. So that the only question for you to determine is, was the filthy substance in the seed at the time that it was shipped?

"The contention of the Government is that it was in the seed. Although I ordinarily do not refer to facts in the case in a charge to the jury, I call your attention to some of the testimony in the case for the purpose of directing your attention to the question at issue.

"Evidence has been introduced by the Government through the testimony of one or more experts that the filthy substance, the larvae which you and I probably would call worms and insects, both dead and alive, if they were there, could not have reached the growth that they did during the period of shipment and the date of discovery. In other words, that the filth could not have reached the development to which it had developed between the 10th day of January, 1944, which was the date of the first shipment, and the date of the discovery, February 17th; and could not have reached the development to which it had developed between January 28, 1944, which was the date of the second shipment, and February 17th, the date of the discovery.

"On the other hand, the defendant has introduced testimony that the defendant's machine, the testing and cleaning machine, was of the highest standard, and also testimony as to the defendant's fumigation process all as evidence of the fact that the filth could not have existed in the seed at the time of the shipment.

"So that the question for you to determine under count one, in plain, simple language, is this: Were those foreign substances in the seed at the time the seed was shipped on January 10th? If it was, the defendant is guilty as to count one. If it was not in the seed on January 10th, the defendant is not guilty as to count one.

"If the filth was in the seed that was shipped on January 28th at the time of the shipment, then the defendant is guilty as to the second count. If the filth was not in the seed on January 28th, the defendant is not guilty as to count two.

"The question of intent or knowledge is not an element in this case. Any shipper of food in interstate commerce ships at his peril, so far as the Food and Drug Act is concerned, and if there is filth in the food, whether the defendant knew it or not, or whether he intended it to be there or not, is not an element in this case.

"The only question for your determination is, was the filth in the food at the time that it was shipped. Intent is not part of the crime with which the partnership is charged. If the defendant introduced the sesame seed into interstate commerce, and it contained a filthy substance when so introduced, or when shipped, then the defendant is guilty, regardless of intent or lack of knowledge that the seed contained filthy substances.

"In other words, in order to find the defendant guilty it is not necessary for you to find that he had the guilty knowledge or wrongful intent at the time he shipped the sesame seed. Regardless of the defendant's lack of knowledge, if the seed contained filthy substances, if you find that when the merchandise was shipped in interstate commerce it did contain filthy substances, then you must find the defendant guilty.

"If you find that the facts as alleged by the Government have not been proved beyond a reasonable doubt, then your verdict will be that the defendant is not guilty. If, however, you find that the facts as alleged by the Government have been proved beyond a reasonable doubt, then your verdict will be that the defendant is guilty.

"It is, of course, your duty to reconcile conflicting testimony, if you can, on the theory that all of the witnesses have sworn to the truth, but if you cannot do that, then you are to determine from all the evidence before you, which of the witnesses is entitled to the greater credit.

"It is proper that I should add that your verdict in this case should not be controlled by contradictions on minor points, provided the evidence taken as a whole, after making all due allowances for any such contradiction, leads you to a fixed conclusion of the guilt of the defendant. If the evidence so taken does not satisfy you beyond a reasonable doubt, as already defined, that the defendant is guilty, he should be acquitted. If, however, the evidence does so satisfy you beyond a reasonable doubt, your verdict should be that he is guilty.

"In this action I charge you that as to the complaint of the defendant as to the absence of the witness Miller, you are instructed that the Government is not obliged to furnish witnesses for the defendant. The defendant had just as much right to call the witness Miller as did the Government, and the processes of this court to obtain Miller's presence was as open to the defendant as it was to the Government.

"Once again, briefly the question for you to decide on count one is, was the filth in the bags or in any of the bags when they were shipped on January 10th?

"As to count two, was the filth in the bags or any of them at the time they were shipped on January 28th? That is the only question for you to determine.

"As I have already said, you are the sole judges of the credibility of the witnesses, the weight to be given to their testimony, and the weight and effect that evidence, whether oral or documentary.

"While it is the exclusive function of the Court to present to you the principles of law applicable to the case, it is your exclusive function to pass upon the facts and the evidence and reach a conclusion subject to the principles of law as presented to you by the Court. The case is for you to decide upon the evidence and the evidence alone.

"You must not be influenced by assumption, conjecture, sympathy or by inferences not warranted by facts proved to your satisfaction.

"Your oath sums up your duty, and that is without fear or favor of any man that you will well and truly try and true deliverance make between the defendant and the United States of America, according to the evidence given to you in court and the law of the United States.

"Take the case and consider it in view of its importance and the gravity of the charges made in the information. It is important to the public. It is also important to the defendant.

"You will not concern yourselves about the sentence for this offense, if there is one, because that is a matter solely for the Court and not for your consideration.

"Your verdict will be oral and will be either guilty or not guilty on each of the counts. It will be announced by your foreman when called upon to report for you.

"There have been a great many exhibits introduced in the case. You are entitled to have any of these exhibits or all of them in the juryroom during your deliberations, if you will make your wants known to the officer in charge.

"Are there exceptions, Mr. Rosoff?"

MR. ROSOFF: "I have no exceptions, if the Court please, but I respectfully request your Honor to charge that that side which calls a witness vouches for his credibility, and I ask your Honor to so charge with reference to the witness Miller."

THE COURT: "I do charge that whichever side calls a witness vouches for his credibility, but the Government did not call the witness Miller as a witness."

MR. ROSOFF: "I respectfully except to the charge as given. I respectfully ask your Honor to charge that the uncontradicted evidence is that the witness Miller was in the court on Monday and Tuesday."

THE COURT: "No, I will charge no such thing."

MR. ROSOFF: "I respectfully except."

THE COURT: "You may have an exception."

MR. ROSOFF: "I respectfully ask your Honor to charge that if the evidence may be construed equally, consistent with the guilt or innocence of the defendant, it must be construed to find the defendant innocent."

THE COURT: "That is true. That is the law. I so charge."

MRS. SHIENTAG: "I would respectfully request the Court to charge that it is not necessary for the jury to find that the adulteration and that the filth would have constituted a danger to health, contained in Government's request number three."

THE COURT: "Yes, I will so charge. The jury are instructed that if an article be unlawfully adulterated in violation of the Food and Drug Act, it is not necessary that it must be dangerous to health. Your concern should be simply to find as to the question of whether the seed was adulterated; I so charge you, and that the elements found in the seed on the 17th of February was an adulteration within the meaning of the Act."

MR. ROSOFF: "I did omit to request one more charge, and that is that there is eliminated from this case on the defendant's motion that portion of each count which purports to allege that the food was adulterated by reason of

insanitary conditions existing in the premises. I mean to give it in the words of the information, if the Court please, the second part of each count."

THE COURT: "Yes. The jury is instructed that the last part of each count in the information has been dismissed."

MR. ROSOFF: "May I respectfully request your Honor to read, or perhaps I should read, that part which is to be excluded in the deliberations of the jury."

THE COURT: "Yes, I will read it. It is the last part of the first count and it is this: 'That said food, when introduced and delivered for introduction into interstate commerce, was further adulterated in that it had been held under insanitary conditions whereby it may have become contaminated with filth, against the peace and dignity of the United States.' That has been dismissed."

"The last part of the second count reads as follows: 'That said food, when introduced and delivered for introduction into interstate commerce as aforesaid, was further adulterated in that it had been held under insanitary conditions whereby it may have become contaminated with filth; against the peace of the United States and their dignity.' That also has been dismissed."

MR. ROSOFF: "Thank you, sir."

MRS. SHIENTAG: "May I make one further request with reference to count two of the information? That count charges that the adulteration consisted of the matters set forth in the Court's charge, and in addition another item, rodent pellets."

THE COURT: "Yes, I read that to the jury when I gave them the substance of the counts."

"You may take the case, ladies and gentlemen. You will be in charge of the officer."

The jury then retired and, after due deliberation, returned a verdict of guilty. The court imposed a fine of \$500 on each of the 2 counts, a total fine of \$1,000.

8644. Adulteration of Oregon (spice) and adulteration and misbranding of imitation white pepper. U. S. v. Hugh C. Donnell (Golden Light Coffee Co.) Plea of guilty. Fine, \$600. (F. D. C. No. 16502. Sample Nos. 26039-H, 26044-H.)

INFORMATION FILED: September 7, 1945, Northern District of Texas, against Hugh C. Donnell, trading as the Golden Light Coffee Co., at Amarillo, Tex.

ALLEGED SHIPMENT: On or about February 21 and 26, 1945, from the State of Texas into the State of New Mexico.

LABEL, IN PART: "Golden Light Spices * * * Oregon," or "Imit. White Pepper Golden Light Spices."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the products consisted in whole or in part of filthy substances by reason of the presence of insect fragments, rodent hairs, and a feather barbule in the Oregon, and a mouse pellet with rodent hairs attached in the imitation white pepper; and, Section 402 (a) (4), the products had been prepared, packed, and held under insanitary conditions whereby they might have become contaminated with filth.

Misbranding, Section 403 (i) (2), the imitation white pepper was fabricated from two or more ingredients and its label failed to bear the common or usual name of each such ingredient.

DISPOSITION: October 15, 1945. A plea of guilty having been entered, the defendant was fined \$600.

8645. Adulteration and misbranding of fenugreek. U. S. v. 115 Bags of Fenugreek. Consent decree of condemnation. Product ordered released under bond. (F. D. C. No. 12206. Sample No. 64861-F.)

LABEL FILED: April 27, 1944, Western District of Washington.

ALLEGED SHIPMENT: On or about June 29, 1943, by the J. B. Gruman Co., Inc., from Newark, N. J.

PRODUCT: 115 200-pound bags of fenugreek at Seattle, Wash.

LABEL, IN PART: "200 Net Condition Powder J. B. Gruman Co. Inc. Newark, N. J."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of rodent hairs and insect fragments.

Misbranding, Section 403 (i) (1), the label failed to bear the common or usual name of the product.