

sale under the name of another food; and, Section 403 (i) (1), its label failed to bear the common or usual name of the article, i. e., "Bonita."

DISPOSITION: August 10, 1942. A plea of guilty having been entered by the defendant, the court imposed a fine of \$25.

8917. Alleged adulteration of canned herring roe. U. S. v. 667 Cases of Canned Herring Roe. Tried to the court. Verdict for claimant. Product ordered released. (F. D. C. No. 7637. Sample No. 1085-E.)

LIBEL FILED: June 11, 1942, District of Maryland.

ALLEGED SHIPMENT: On or about May 7, 1942, by the Reedville Oil and Guano Co., from Reedville, Va.

PRODUCT: 667 cases, each containing 48 8-ounce cans, of herring roe at Baltimore, Md.

LABEL, IN PART: "Premier Herring Roe * * * Francis H. Leggett & Co. Distributors New York, N. Y."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance.

DISPOSITION: November 2, 1942. The Reedville Oil and Guano Co., claimant, having filed an answer denying that the product was adulterated, trial was had before the court. After hearing the testimony and arguments of counsel and considering the evidence, the court delivered the following oral opinion:

CHESNUT, *District Judge*: "Gentlemen, I would have very much preferred to have submitted this case to a jury because they represent a cross-section of the public in determination of the facts. And I think a decision is much more satisfactory if made by a jury in such cases than if made by a single judge. However, when neither side wants a jury trial, the Judge has to solve the problem of determining the facts. Now, it is also my duty under Rule 52 of the Federal Rules of Civil Procedure to make a finding of facts and conclusion of law in these non-jury cases.

"I understand this is not a criminal prosecution but a condemnation proceeding by libel of alleged improper food products and the precise issue is whether the food product which is involved in an interstate shipment was adulterated because it contained filthy matter, which is specified in the bill of particulars to have been in cans of herring roe, some part of the viscera and stomach and intestines and other digested matter in some of the herring, under U. S. Code, Title 21, Section 342.

"I think to get the full force of the meaning of the Act of Congress, you must bear in mind, of course, that it is part of the Food, Drug and Cosmetics Act of 1938, and we should look at the context in which the particular sentence or phrase is included. The heading of Section 342 is 'Adulterated food'. The provision is: 'A food shall be deemed to be adulterated—'. Then there is a heading 'Poisonous, insanitary, etc., ingredients', and the Section continues:

(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 346; or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance; or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; or (5) if it is, in whole or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter; or (6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

"Now, it is perfectly obvious to the reader of that section that the whole gist of the matter looks to the health of the consuming public and, therefore, while the word 'filthy' is rather a vague term to the extent of its whole meaning, yet in the context in which we find it, it seems to me that it was intended to be used in the sense of its effect on human beings as a food or with relation to food. I do not feel that I could limit it absolutely and sharply by saying that nothing would be filthy in the sense of this statute unless it is definitely unhealthy, but where you have a situation in which it is admitted that the alleged filthy substance is in no way harmful to health but merely such that when contained in a food product, the latter is made unattractive in appearance to the consumer, I doubt very much whether the meaning of 'filthy' as contained in this section is gratified by that latter condition.

"The word 'filthy' is, perhaps, literally broad enough to cover the contentions here made by the Government as to just what it does mean. I read from Webster's International Dictionary: 'Filthy means defiled with filth, whether material or moral; nasty; disgustingly dirty; polluting; foul; impure; obscene. Secondary meaning: disgraceful; disgusting; low', and then I turn to Corpus Juris as a handy definition from a legal viewpoint of 'filthy' and find it is defined as 'Containing or involved in filth; contemptible; defiled by sinful practices; foul; dirty; low; mean; morally foul; nasty; noisome; polluted; scurvy; that which is nasty, dirty, vulgar, indecent, offensive to the moral sense; morally depraving and debasing.'

"Now, our problem in this case is to determine whether the inclusion in some of these cans of herring roe, which were seized for condemnation, or part of the viscera, stomach, intestines and partially digested matter therein corresponding to it are included within the meaning of the word 'filthy' as contained in this context.

"Now, with regard to the facts of the case, I find that the facts are so almost exactly parallel to those stated by Judge Pollard in this case that is reviewed in the Federal Security Agency Bulletin of December, 1940, that I think it unnecessary to review the facts of this case at any great detail. The case referred to is United States vs. 896 and other numbered cases of herring roe, tried in the United States District Court for the Eastern District of Virginia at Richmond in 1940. That was a case which was in all respects materially parallel to this case except that here the interstate shipment which was seized was seized in Baltimore while in transit from Reedville, Virginia, to New York, and what was seized was 667 cases of herring roe which represented more than a majority of the 1,015 cases constituting the total pack of the Reedville Company during 1942. The amount seized at market values apparently was over \$3,000 while the total market pack for the year would only have been about \$5,000, as I recall the figures. That, of course, is a very heavy seizure for a condemnation, and it seems to me that it at least justifies the requirement that the Government should quite clearly prove its case where the consequences are very material like that to the claimant of the goods.

"Now, after all, it is necessarily a jury question here as to what I find from the testimony of the Government as opposed by the testimony of the defendant. With the burden of proof being on the Government in this case to prove its case by a preponderance of the testimony, the question is whether I find from a preponderance of the testimony that the shipment contained filthy matter as particularized in the Bill of Particulars.

"Now, without going into further elaboration and detail, my conclusion in this case is that the Government has not sufficiently established by a preponderance of the evidence that the so-called extraneous matter was filthy in the proper application of that term in the context in which it is included in the law. I will say, however, in this case, as I have said in many of these Food and Drug Act cases, that I think the Act should be considered a very great improvement on the former Act and that the general administration of the Act by the Food and Drug Administration is very materially important and desirable and advantageous for the consumers of food and drug products. We have tried quite a number of these cases in this Court and very generally the result has been, I think, a justified finding in favor of the Government.

"In this particular case, I do not feel that that should be the result. As I say, I think it is not properly found in this case that what we find here, undesirable as it may be from the standpoint of efficiency in merchandising, I do not think it goes to the extent of justifying a condemnation of this shipment that was seized.

"The important thing, of course, is that it is admitted by the Government that the unattractive contents of the cans, which certainly did not average more than about two per cent at most, was in no way injurious to health. The most you can say about it is that it rendered the product unattractive and in that sense only is it said to be filthy.

"It is true that some of the representatives of the Food and Drug Administration say that that means to them that the article was filthy by virtue of the extraneous matter, but I think that is a too expanded definition of the word 'filthy' as it is used in the Food and Drug Act.

"Now, as I say, I think the general administration of the Act is very helpful to the public and very often helpful to the factories and food producers, and the impression was made on my mind that a greater care in the segregation

of the viscera of the fish from the roe could well be striven for by the manufacturer in this case. At the same time, I am not prepared to say that the failure to make a complete separation condemns the article as a filthy thing.

"I would also point out in that connection this important thing in the administration of the Food and Drug Act. The health of the public is the main thing, of course, we are looking at. That is of most importance with reference to foods. Now, 'filthy' is a term of uncertain application. When food is manufactured under conditions where something that is foreign to the food product that is being worked upon is injected into the food product to be sold to the consumer, that, I think, is very definitely wrong. For instance, some months ago we had one or two of these cases where candy manufacturers had their goods seized on the ground that they allowed the candy to be exposed in their factories at night to the presence of rats or mice and the rats or mice would leave their excreta upon the candy. That, obviously, falls within the meaning of 'filthy'. It is the kind of thing that not only is repellent to a person who is told that such a thing existed with regard to the candy manufacturer, but nobody would be likely to say from a bacteriological standpoint that it might not be very definitely injurious to health. So in the case of prosecution some two or three years ago of crab meat packers down on the Eastern Shore. The testimony was that the employees who picked with their hands the meat from the shell of the crab were not clean in their habits and were not required to wash their hands after going to the lavatory, in consequence of which it was alleged by the bacteriologists in a particular case that there were portions of human excreta in the canned product. Now, that case was tried before a jury and the jury found a verdict in favor of the Government, and I could not say that it was an improper verdict, although I think there was a motion for a new trial in the case, so whether the foreign substance which is alleged to be filthy is a really foreign substance and not a part of the whole operation of packing parts of the fish and getting along with the roe some parts of the viscera attached to the roe simply by virtue of lack of adequate care in making the separation, it seems to me there is a vast difference between the two kinds of foreign matter. In the case we have here, the matter that is included and alleged to be filthy is not foreign to the fish. It is at most a part of the fish which is not completely separated from the roe, while in the other case the foreign substance is something which is brought in quite unnecessarily and should undoubtedly be eliminated and could have been eliminated with care.

"Here I am impressed with the testimony of the defendant to the effect that no matter how much care is used, it is nearly always likely that some hidden parts of the viscera of the fish may be included. Take, for instance, a deviled crab. It is very disagreeable to some people in eating a deviled crab to get particles of the shell of the hard crab which have not been eliminated by the cook in preparing it, but no one could say that it is filthy or makes the deviled crab filthy. It makes it unattractive and unpleasant for some people in eating but it can hardly be said to be filthy, so when you have the delicate surgical operation of separating the small roe of a small herring, weighing six to eight ounces, from the surrounding membranes or tissues of the stomach or viscera, it is a delicate operation which often leads to inadequate separation but that is not an injection of extraneous and foreign matter into the product. It is simply a lack of care in separating the roe from the rest of the fish.

"Now, we have nothing here to the effect that the substance is decomposed or is injurious to health, but simply that it is unattractive. I think the witness, Mr. Hines, from Virginia, says it very definitely affects the grading for the purpose of commercial sale or the proper grading of the product for public sale, but it does not affect the health of the public.

"Now, that is the view I have of this particular case. Therefore, the verdict is for the claimant. If you want any judgment entered, well and good. If you want a more detailed finding of fact, I will be very glad to make it if you think it necessary."

In accordance with the court's opinion, the libel was dismissed and the product released to the claimant.

8918. Adulteration of frozen shrimp. U. S. v. 23 Boxes of Frozen Shrimp. Default decree of condemnation and destruction. (F. D. C. No. 7329. Sample No. 87555-E.)

LIBEL FILED: April 11, 1942, District of Maryland.

ALLEGED SHIPMENT: On or about October 8, 1941, by W. M. Wells and Sons, from Southport, N. C.