

12832. Adulteration of beverage sirups and sundaes topping. U. S. v. 10 Cases, etc. (F. D. C. No. 22746. Sample Nos. 54700-H, 55301-H, 55303-H, 55304-H.)

LIBEL FILED: April 2, 1947, Southern District of Georgia.

ALLEGED SHIPMENT: On or about September 11, 1946, by the Howard's Syrups Co., from Miami, Fla.

PRODUCT: 28 cases, each containing 24 1-pint bottles, of beverage sirups and 3 cases, each containing 6 ½-gallon jars, of sundaes topping at Brunswick, Ga.

LABEL, IN PART: "Howard's Beverage Syrup Thirst Quenchers Flavored Syrup Wild Cherry [or "Strawberry," or "Pineapple"] * * *"; (In small type on side panel) "Prepared with cane sugar, filtered water, citric acid, certified food coloring and imitation fruit flavoring ¼ of 1% Benzoate," and "Chop Suey Topping."

NATURE OF CHARGE: Adulteration (Chop Suey Topping), Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of larvae, and of a decomposed substance by reason of being fermented.

Misbranding (beverage sirups), Section 403 (a), the label designations, "Flavored Syrup Wild Cherry," "Flavored Syrup Strawberry," and "Flavored Syrup Pineapple," were false and misleading, since the products were acidulated, artificially flavored and colored sugar solutions; Section 403 (c), the products 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 name of the food imitated; and, Section 403 (e) (2), they failed to bear a label containing an accurate statement of the quantity of the contents.

DISPOSITION: May 10, 1947. Default decree of condemnation. The Chop Suey Topping was ordered destroyed, and the beverage bases were ordered delivered to a charitable organization or destroyed.

12833. Misbranding of Esterex. U. S. v. 12 Bottles of Esterex. Tried to the court. Decree of condemnation and destruction. (F. D. C. No. 18010. Sample No. 22198-H.)

LIBEL FILED: October 22, 1945, Eastern District of Missouri.

ALLEGED SHIPMENT: On or about July 31, 1945, by the C. O. & W. D. Sethness Co., from Chicago, Ill.

PRODUCT: 12 bottles of Esterex at St. Louis, Mo. Analysis showed that the article was an aqueous solution containing about 15 grams of monochloroacetic acid per 100 cc.

LABEL, IN PART: "Cosco Esterex * * * a buffered aqueous solution of monochloroacetic acid and its selected esters, salt, and glycerine. Directions—For stabilizing purposes use ½ ounce to each gallon of bottling syrup, or to 6 gallons of finished drink."

NATURE OF CHARGE: Misbranding, Section 403 (a), the labeling of the article was misleading, since the trade mark "Esterex" coupled with the directions for use, represented to purchasers that the article was wholesome and suitable for use as a component of beverages for man, whereas the article contained about 15 grams of monochloroacetic acid per 100 cc., which acid is a poisonous and deleterious substance, and the labeling failed to reveal the material fact, in the light of the representations in the labeling, that the article contained a poisonous and deleterious substance.

DISPOSITION: The C. O. & W. D. Sethness Co., claimant, having filed a motion for the removal of the case to a district within reasonable proximity to the claimant's principal place of business, an order was entered on December 11, 1945, overruling such motion. Subsequently, a motion for rehearing was filed by the claimant, and on January 15, 1946, the motion was overruled with the consent of the claimant. On January 21, 1946, an answer was filed by the claimant, denying that the product was misbranded. Thereafter, the case came on for trial before the court, and at its conclusion and after consideration of the evidence and briefs of the parties, the court on May 2, 1946, handed down the following findings of fact and conclusions of law:

DUNCAN, *District Judge*:

FINDINGS OF FACT

"1. The United States Marshal on October 23, 1945, seized twelve bottles labeled in part 'Cosco Esterex' in the possession of Moore Brothers Bottling Company, 1711 North Spring Avenue, St. Louis, Missouri, within the Eastern Division, Eastern Judicial District of Missouri.

"2. The C. O. and W. D. Sethness Company, a Corporation organized and existing under the laws of the State of Illinois, Claimant herein, is the owner of the article seized herein.

"3. The C. O. and W. D. Sethness Company, Claimant herein, shipped said article seized herein in interstate commerce from Chicago, Illinois to St. Louis, Missouri, via Hayes Freight Lines on or about July 31, 1945.

"4. When the said article was shipped in interstate commerce, each bottle was labeled: 'Cosco Esterex—Trade Mark—Manufactured Exclusively by C. O. and W. D. Sethness Company—1926 Sunnyside Avenue, Chicago 40, Illinois—Esterex is a buffered aqueous solution of monochloroacetic acid and its selected esters, salt, and glycerine—Directions—For stabilizing purposes use ½ ounce to each gallon of bottling syrup, or to 6 gallons of finished drink—Follow Directions Carefully—Caution—Esterex is not a finished food and should not be taken internally in its present concentration. In common with many acid solutions of low p. h., care should be taken to avoid spillage or breakage. If Esterex in its undiluted form comes in contact with skin or clothing, wash immediately with warm water and then with a solution of baking soda or other mild alkali.'

"5. The said article seized herein contains 15 grams of monochloroacetic acid per 100 cubic centimeters.

"6. Monochloroacetic Acid is a poisonous, toxic and caustic substance.

"7. The said article seized herein is intended by its producer, claimant herein, to be used as a stabilizer or preservative of liquids for human consumption, that the producer sells 'Cosco Esterex' only to manufacturers for use as a stabilizer for liquids for human consumption and does not sell to wholesalers or retailers for resale or to the consuming public.

"8. The label contained on each bottle of said article represents to purchasers that the said article is to be used as a stabilizer of liquids for human consumption.

"9. There is no indication on the label that the said article is poisonous or deleterious to public health.

"10. There is nothing on the label to indicate that monochloroacetic acid is poisonous, and the label does not sufficiently caution the careless, the unthinking or the ignorant of the fact that the said article contains a poisonous, toxic and caustic substance.

"11. On the label under the Caption 'Caution' appears 'ESTEREX is not a finished food and should not be taken internally in its present concentration. In common with many acid solutions of low p. h., care should be taken to avoid spillage or breakage.' And in smaller type: 'If Esterex in its undiluted form comes in contact with skin or clothing, wash immediately with warm water and then with a solution of baking soda or other mild alkali.' However, there is no indication on the label as to what the effect of spilling this solution on clothing or skin may be, or what the object of washing may be or that the said article may be poisonous or deleterious to public health.

"12. Although the said article is sold only to manufacturers of soft drinks to be used as a stabilizer all manufacturers of soft drinks are not informed as to the properties of monochloroacetic acid and the label would not inform them that the said article contained a poisonous substance.

"13. Although there is no statement on the label which is untrue, the label is misleading in that it fails to reveal that the said article contains a poisonous, toxic and caustic substance and such fact is material in the light of the representation that said article is to be used as a component of liquids for human consumption.

CONCLUSIONS OF LAW

"1. The label appearing on each bottle of said article is labeling within the meaning of the Food, Drug and Cosmetic Act of 1938, as amended. (21 U. S. C. A. 321 (m))

"2. The said article is a component of food and is therefore a food. (21 U. S. C. A. 321 (f))

"3. In determining whether labeling is misleading there shall be taken into account whether the labeling fails to reveal any fact material in the light of representations made on the labeling or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual. (21 U. S. C. A. 321 (n))

"4. As said in *United States v. 62 Packages * * * Marmola Tablets*, 48 Fed. Supp. 878, l. c. 887:

The Federal Food Drug and Cosmetic Act was not made for experts nor is it intended to prevent self-medication. The purpose of the law is to protect the public, the vast multitude which includes the ignorant, the unthinking and the credulous, who, when making a purchase, do not stop to analyze.

"5. The labeling on said article is misleading in that it fails to reveal that the said article contains a poisonous, toxic and caustic substance and said fact is material in the light of the representation that said article is to be used as a component of liquids for human consumption.

"6. The labeling in the cause herein is misleading and should contain the definite information that monochloroacetic acid is poisonous.

"7. The said article seized herein was misbranded while in interstate commerce.

"8. The said article was seized in the Eastern District of Missouri, Eastern Division.

"9. On the facts heretofore found, Libelant is entitled to condemnation and forfeiture of said article and for costs to be assessed against the claimant."

On May 2, 1946, judgment of condemnation was entered and the product was ordered destroyed. A motion for a new trial and a motion to amend the findings of fact and conclusions of law was subsequently filed on behalf of the claimant, but were overruled by the court on June 14, 1946.

12834. Misbranding of Esterex. U. S. v. 4 Jugs * * * (and 1 other seizure action). (F. D. C. Nos. 20615, 20634. Sample Nos. 45206-H, 49056-H.)

LIBELS FILED: August 8 and 20, 1946, Northern District of Texas and Southern District of California.

ALLEGED SHIPMENT: On or about July 19, September 21, and October 12, 1945, by the C. O. & W. D. Sethness Co., from Chicago, Ill.

PRODUCT: Esterex. 4 1-gallon jugs at Abilene, Tex., and 64 1-gallon bottles at Fowler, Calif.

LABEL, IN PART: "Cosco Esterex * * * Aqueous Solution of Monochloroacetic Acid."

NATURE OF CHARGE: Misbranding, Section 403 (a), the labeling of the article was misleading, since the trade mark "Esterex" coupled with the directions for use, represented to purchasers that the article was wholesome and suitable for use as a component of beverages, whereas the article contained in one shipment about 19 percent and in the other shipment about 25 percent, of monochloroacetic acid, a poisonous and deleterious substance; and the labeling failed to reveal the material fact that the article contained a poisonous and deleterious substance.

DISPOSITION: November 26 and December 18, 1946. No claimant having appeared, judgments of condemnation were entered and the product was ordered destroyed.

12835. Misbranding of sugar extender. U. S. v. 1 Pail * * * (and 1 other seizure action). (F. D. C. Nos. 22571, 23638. Sample Nos. 54297-H, 81831-H.)

LIBELS FILED: February 27 and August 26, 1947, District of Idaho and Southern District of Florida.

ALLEGED SHIPMENT: On or about November 15, 1946, and January 10, 1947, by the Vitaplex Co., from Chicago, Ill.

PRODUCT: Sugar extender. 1 3-gallon pail at St. Maries, Idaho, and 1 3-gallon pail at Belle Glade, Fla.

LABEL, IN PART: "Vitaplex Brand Single Strength Sugar Extender. Not a Saccharin Product 1 Gal. Vitaplex replaces 230 lbs. of sugar. Usable in all