PRODUCT: 10 100-pound bags and 58 50-pound bags of flour at Whittier, Calif.

LABEL, IN PART: "Diamond D Flour," or "Best Out West Enriched Flour."

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 hair fragments.

DISPOSITION: May 4, 1948. Default decree of condemnation and destruction.

13035. Adulteration and misbranding of enriched flour. U. S. v. Russell-Miller Milling Co. Plea of nolo contendere. Fine, $500. (F. D. C. No. 24059. Sample Nos. 76359–H, 76450–H.)

INFORMATION FILED: February 25, 1948, Northern District of Texas, against the Russell-Miller Milling Co., a corporation, Dallas, Tex.

ALLEGED SHIPMENT: On or about February 13 and March 22, 1947, from the State of Texas into the States of Louisiana and Florida.

LABEL, IN PART: "Enriched Stanard's Reliable Flour," or "American Beauty Self-Rising Enriched Flour."

NATURE OF CHARGE: Adulteration, Section 402 (b) (1), valuable constituents of the article had been in part omitted and abstracted.

Misbranding, Section 403 (g) (1), the product failed to conform to the definition and standard of identity for enriched flour, since one shipment contained per pound less than 2 milligrams of thiamine and less than 16 milligrams of niacin and the other shipment contained per pound less than 2 milligrams of thiamine and less than 1.2 milligrams of riboflavin. (The standard requires a minimum of 2 milligrams of thiamine (vitamin B_1), 16 milligrams of niacin or niacin amide, and 1.2 milligrams of riboflavin per pound.) Further misbranding, Section 403 (a), the statements, "8 Ozs. Enriched flour contain not less than the following proportions of the minimum daily requirements of: Thiamine 100% * * * and 8 Mg. of Niacin" and "8 Oz. enriched self-rising flour contain not less than the following proportions of the minimum daily requirements of: Thiamine 100%, Riboflavin 30%," borne on the labels of the respective lots, were false and misleading, since the former contained less thiamine and niacin and the latter contained less thiamine and riboflavin than indicated.

DISPOSITION: February 27, 1948. A plea of nolo contendere having been entered, a fine of $500 was imposed.

MACARONI AND NOODLE PRODUCTS*

13036. Alleged adulteration of sphaghetti and macaroni. U. S. v. 150 Cartons, etc. Tried to the court. Verdict for claimant. Verdict sustained on Government's appeal to circuit court of appeals. Government's request for certiorari to United States Supreme Court denied. (F. D. C. No. 14857. Sample Nos. 73785–F to 73787–F, incl.)

LIBEL FILED: February 27, 1944; amended September 28, 1945, District of Arizona.

ALLEGED SHIPMENT: On or about February 13, 1943, from Denver, Colo.

PRODUCT: 150 10-pound cartons of spaghetti and 25 10-pound cartons of macaroni at Douglas, Ariz., in possession of the Phelps Dodge Mercantitle Co.

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 insect fragments, rodent hairs, and rodent excreta; and, Section 402 (a) (4), it had been held under insanitary conditions whereby it may have become contaminated with filth.

DISPOSITION: October 22, 1945. The Phelps Dodge Mercantile Co. having filed exceptions to the libel, the district court allowed the exceptions and ordered the libel dismissed and the product returned to the claimant. The Government having appealed to the circuit court of appeals, the circuit court of appeals, on September 25, 1946, handed down the following decision sustaining the lower court:

MATHEWS, *Circuit Judge:* "On an amended libel of information filed on September 28, 1945, appellant, the United States, proceeded against 175 cartons

*See also No. 13176.

of food (150 cartons of spaghetti and 25 cartons of macaroni) in possession of appellee, Phelps Dodge Mercantile Company, in the District of Arizona. The amended libel, hereafter called the libel, prayed that the food be seized and condemned. The food was seized. Appellee excepted to the sufficiency of the libel. The exception was sustained, and a decree was entered dismissing the libel and directing that the food be released to appellee. From that decree this appeal is prosecuted. The question is whether the libel stated facts sufficient to warrant condemnation of the food.

"Condemnation was sought under § 304 (a) of the Federal Food, Drug, and Cosmetic Act,[1] 21 U. S. C. A. § 334 (a), which provides: 'Any article of food * * * that is adulterated[2] * * * when introduced into or while in interstate commerce[3] * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found * * *'

"The libel stated that the food was shipped in interstate commerce from Denver, Colorado, to Douglas, Arizona, in 1943—75 cartons on February 13, 1943, and 100 cartons on June 18, 1943. The libel further stated: 'That said food * * * is [on September 28, 1945] adulterated within the meaning of 21 U. S. C. A. as follows:

342 (a) (3) in that it consists wholly or in part of a filthy substance[4] by reason of the presence therein of insect fragments, rodent hairs, and rodent excreta;

342 (a) (4) in that it has been held under insanitary conditions whereby it has been contaminated with filth,[5] while held in the original packages by [appellee] at [appellee's] warehouse in Douglas, Arizona.

"Thus the libel stated, in substance and effect, that on September 28, 1945—more than two years after it was shipped in interstate commerce—the food was adulterated. The libel did not state that the food was adulterated when introduced into or while in interstate commerce.[6] Instead, the libel stated, in substance and effect, that the food was adulterated while held in original packages by appellee at its warehouse in Douglas, Arizona. Thus it appeared that the adulteration of the food occurred after it ended its interstate journey and came to rest at appellee's warehouse.[7]

"Appellant contends that the fact that the food was adulterated while held in original packages was sufficient to warrant its condemnation. We do not agree. As shown above, § 304 (a) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 334 (a), under which this proceeding was brought, provides for the condemnation of 'Any article of food * * * that is adulterated * * * when introduced into or while in interstate commerce.' It says nothing about original packages. The terms 'interstate commerce' and 'original packages' are not synonymous. Articles may be in interstate commerce without being in original packages. They may be in original packages without being in interstate commerce. They may be in both interstate commerce and original packages and, if in both, may cease to be in interstate commerce and yet remain in original packages.[8] Hence the fact that the food was

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[1] Act of June 25, 1938, c. 675, 52 Stat. 1040, as amended.

[2] Section 402 of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 342, provides: "A food shall be deemed to be adulterated

"(a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance * * * or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth * * *"

[3] Section 201 (b) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A., § 321 (b), provides: "The term 'interstate commerce' means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body."

[4] See § 402 (a) (3) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A., § 342 (a) (3).

[5] See § 402 (a) (4) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A., § 342 (a) (4).

[6] See § 304 (a) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A., § 334 (a).

[7] Cf. *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Bacon* v. *Illinois*, 227 U. S. 504; *Texas Co.* v. *Brown*, 258 U. S. 466; *Sonneborn* v. *Cureton*, 262 U. S. 506; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472; *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249; *Louis K. Liggett Co.* v. *Lee*, 288 U. S. 517; *Edelman* v. *Boeing Air Transport*, 289 U. S. 249; *Southern Pac. Co.* v. *Gallagher*, 306 U. S. 167; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572.

[8] Cf. *Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, 8 Wall. 148; *American Steel & Wire Co.* v. *Speed, supra; Baccus* v. *Louisiana*, 232 U. S. 334; *Wagner* v. *Covington*, 251 U. S. 95; *Sonneborn* v. *Cureton, supra; Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169; *Whitfield* v. *Ohio*, 297 U. S. 431.

adulterated while held in original packages did not show that it was adulterated when introduced into or while in interstate commerce.

"Appellant cites, in support of its contention, § 10 of the Food and Drug Act of 1906,[9] 21 U. S. C. A. § 14, which provided that 'any article of food * * * that is adulterated * * * and is being transported from one State * * * to another for sale, or, having been transported, remains * * * in original unbroken packages * * * shall be liable to be proceeded against * * * and seized for confiscation by a process of libel for condemnation.' This proceeding was not brought, and could not have been brought, under § 10 of the Food and Drug Act of 1906, 21 U. S. C. A. § 14, for that section was repealed[10] long before this proceeding was brought. As stated above, this proceeding was brought under § 304 (a) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 334 (a). The quoted provision of § 10 of the Food and Drug Act of 1906, 21 U. S. C. § 14, is not in § 304 (a) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 334 (a), and should not be read into it by construction.

"Whether Congress could have provided in § 304 (a) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 334 (a), for the condemnation of any article of food that is adulterated while held in original packages after being transported in interstate commerce need not be considered, since Congress did not, in fact so provide.

"Appellant says that administrative officers charged with the duty of enforcing § 304 (a) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 334 (a), have interpreted it as providing for the condemnation of any article of food that is adulterated while held in original packages after being transported in interstate commerce. Being clearly erroneous, that interpretation need not and should not be followed by the courts.[11]

"Appellant has cited no court decision supporting its contention, and we have found none. We conclude, as did the court below, that the libel did not state facts sufficient to warrant condemnation of the food.

"Decree affirmed."

On February 10, 1947, the Government's petition for the writ of certiorari to the United States Supreme Court was denied.

13037. Adulteration and misbranding of spaghetti and macaroni. U. S. v. California Vulcan Macaroni Co. and Augustin Bacigalupi. Pleas of nolo contendere. Total fines $2,250. (F. D. C. No. 24509. Sample Nos. 75335–H, 75729–H, 32006–K.)

INFORMATION FILED: March 18, 1948, Northern District of California, against the California Vulcan Macaroni Co., a corporation, San Francisco, Calif., and Augustin Bacigalupi, president.

ALLEGED VIOLATIONS: The defendants were charged with giving to various firms false guaranties, as follows: On or about February 2, 1944, the defendants gave to Theo H. Davies & Co., San Francisco, Calif., a guaranty to the effect that any food, drug, or cosmetic sold or delivered by the defendants to the holder of the guaranty would comply with the Federal Food, Drug, and Cosmetic Act. On or about May 6 and July 15, 1947, respectively, the defendants gave similar guaranties to Juillard Fancy Foods and Alexander & Baldwin, Ltd., of San Francisco, Calif. On or about April 10, and May 6, 1947, respectively, the defendants sold and delivered to Theo H. Davies & Co., and Juillard Fancy Foods, quantities of spaghetti which was adulterated; and on or about September 19, 1947, the defendants sold and delivered to Alexander & Baldwin, Ltd., a quantity of macaroni which was misbranded.

The products so sold, delivered, and guarantied by the defendants were shipped by the holders of the respective guaranties from the State of California to the Territory of Hawaii on or about April 17, May 13, and October 23, 1947.

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[9] Act of June 30, 1906, c. 3915, 34 Stat. 768, as amended.

[10] See § 902 (a) of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1059, and notes appended to 21 U. S. C. A., §§ 14 and 392.

[11] Cf. *United States* v. *Tanner*, 147 U. S. 661; *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269; *Texas & Pac. R. Co.* v. *United States*, 289 U. S. 627; *Koshland* v. *Helvering*, 298 U. S. 441; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39; *Neuberger* v. *Commissioner*, 311 U. S. 83; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U. S. 161.