TOMATOES AND TOMATO PRODUCTS

14739. Adulteration of tomato puree. U. S. v. 935 Cases * * *. Libel ordered quashed and goods returned to claimant; district court reversed on appeal to circuit court of appeals. Claimant's petition to Supreme Court for writ of certiorari denied. Libel amended. Case tried to district court; judgment for Government. Decree of condemnation and destruction. (F. D. C. No. 7159. Sample No. 80182–E.)

LIBEL FILED: April 9, 1942, Northern District of Ohio.

ALLEGED SHIPMENT: On or about March 12 and 16, 1942, from Lebanon, Ind., by the Ladoga Canning Co.

PRODUCT: 935 cases, each containing 6 No. 10 cans, of tomato puree at Cleveland, Ohio. Examination showed that the product contained decomposed material, as evidenced by mold.

LABEL, IN PART: "Bako Brand Tomato Puree * * * Contents 6 Lbs. 6 Oz. Type 3 The Weideman Co. Distributors Cleveland, Ohio."

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

DISPOSITION: The Ladoga Canning Co., owner of the goods, entered a special appearance on April 30, 1942, and filed a motion to quash the writ of attachment and moved for the return of the goods, which motion was granted. Upon an appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment of the district court was reversed, with the handing down of the following opinion:

MARTIN, *Circuit Judge:* "The United States Attorney for the Northern District of Ohio filed, in behalf of the United States, a libel *in rem* against a quantity of tomato puree shipped by appellee, Ladoga Canning Company, in interstate commerce from Lebanon, Indiana, to Cleveland, Ohio. The complaint charged that, under the Federal Food, Drug and Cosmetic Act, the food was subject to seizure and confiscation pursuant to U. S. C. A., Title 21, Section 334, as adulterated food within the meaning of U. S. C. A., Title 21, Section 342 (a) (3).

"The appellee, averring its sole ownership of the goods, appeared specially and moved to quash the writ of attachment and monition and the attachment and seizure of the goods; and, in the same motion, prayed for an order for the return of the goods to appellee upon the allegation that the issuance of the writ and the seizure of the goods violated the Fourth Amendment to the Constitution of the United States, 'in that the warrant for the seizure issued and in that the seizure was made without a showing of probable cause supported by oath or affirmation, particularly describing the place to be searched and the things to be seized.'

"The District Court entered an order sustaining the motion, directing that the goods be returned to the owner, and dismissing the complaint. On the following day, the United States Attorney filed notice of appeal to this court. Six days later, the District Court entered an order directing that, pending the perfection of the appeal, 'the operation and enforcement of the judgment entered be, and the same is ordered stayed, insofar as the return of the goods is concerned.' After another six-day interim, the appellee moved for a modification of the latter order by striking therefrom the provision concerning the stay of the return of its goods. The point was made that the order of the Court quashing the warrant and directing the return of the goods to the owner is 'a separate matter,' is an interlocutory order and, therefore, not appealable. (See *Wise* v. *Mills*, 220 U. S. 546.) The motion stated further that 'the continued holding of the goods is subject to the same objection as the original seizure; namely, that it is contrary to the constitutional provisions against unwarranted searches and seizures.' On March 30, 1943, the District Court entered an order denying the motion of appellee for modification of the Court's order 'staying proceedings.'

"On April 13, 1943, while the record in the cause was being printed, appellee filed in this court a motion, with an accompanying brief, for dissolution of the order of March 17, 1943, filed in the District Court, insofar as that order 'stays the enforcement of the part of the order of March 10, 1943, which directed that the goods theretofore seized by the Marshal in violation of the Fourth Amendment of the Constitution of the United States be released from seizure and delivered to appellee.'

"The printed record was subsequently filed on April 23, 1943, and hearing of the motion ensued on June 1, 1943. Upon this hearing, the attorneys for the parties argued the case upon the merits of the appeal, as well as upon the motion, and jointly besought this court not only to pass upon the motion to dissolve the District Court's stay order of March 17, 1943, but to decide the issue as to whether the District Court erred in dismissing the libel on information filed by the United States Attorney.

"The important issue for determination is whether a libel *in rem*, prosecuted in behalf of the United States pursuant to the Federal Food, Drug and Cosmetic Act of June 15, 1938, Ch. 675, must be verified. The Act provides, *inter alia:*

> Any article of food, drug, device or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not under the provisions of Section 344 or 355, be introduced into interstate commerce 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. . . . [U. S. C. A., Title 21, Section 334 (a).]
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> The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. [U. S. C. A., Title 21, Sec. 334 (b).]

"Recognition that proceedings under the provisions of Section 10 of the Pure Food Act of June 30, 1906, 34 Stat. 768, where this procedure was originally prescribed by Congress, shall be by libel *in rem* and shall conform as nearly as may be to proceedings in admiralty was given by the Supreme Court in *Four Hundred and Forty-Three Cans of Frozen Egg Product* v. *United States*, 226 U. S. 172, 178, 182, 183. It was commented there that the provision of the Act giving to either party the right to demand a jury trial of issues of fact was inserted with a view to removing any question as to the constitutionality of the Act, and that it was not intended to liken the proceedings to those in admiralty beyond *seizure of the property* by process *in rem*.

"Under the quoted paragraphs of the Act of Congress, the United States is authorized to seize adulterated or misbranded articles of food before proof of justification for seizure; but adequate provision is made for a hearing before condemnation of the goods seized. In admiralty, procedure by libel *in rem* is akin to the civil writ of attachment, and the procedure followed in the instant case conformed to admiralty practice. Admiralty Rule 21 controls the libel procedure under the Federal Food, Drug and Cosmetic Act. This rule does not specify that verification of the information or libel of information is required. Admiralty Rule 22, however, directs that all libels in *instance causes*, civil or maritime, shall be on oath or solemn affirmation. This difference in the two admiralty rules leads to the inference that the omission of the requirement of oath and affirmation to a libel filed under the Federal Food, Drug and Cosmetic Act was deliberate.

"The rules in admiralty effective in the United States District Court for the Northern District of Ohio expressly except the United States from the requirement of verification of pleadings. Admiralty Rule 1 of that district, which is the forum in the instant case, prescribes that 'pleadings and answers to interrogatories, except on behalf of the United States, shall be verified.' Similar local admiralty rules, excepting the United States from the requirement of verification placed on other libellants, have been adopted in the United States District Courts in many districts, among others the Western District of New York, the Eastern District of Pennsylvania, the Eastern District of South Carolina, the Southern District of Georgia, the Eastern District of Louisiana, the Western District of Kentucky, the Southern and the Northern Districts of California, the District Court of New Jersey, the District Court of Minnesota, the District Court of Hawaii, and the District Court of Puerto Rico. See

Benedict on Admiralty, 6th Ed., Vol. 5. This authoritative textbook asserts that 'all libels, except those brought on behalf of the Government, must be verified, even if also signed by the proctor.' *Benedict on Admiralty*, 6th Ed., Vol. 2, p. 71, Sec. 240. In a footnote, the author states that 'the practice was laid down in *Hutson* v. *Jordan* (1837), 1 Ware (385) 393, Fed. Cas. No. 6959 (D. Me.).'

"It is reasonable to assume that, in enacting the Federal Food, Drug and Cosmetic Act for the protection of the public against consumption of impure, adulterated or misbranded articles, by setting up procedure for immediate removal of suspected articles from the flow of interstate commerce, the Congress, presumably familiar with admiralty rules and practice, considered public policy best conserved by not requiring United States Attorneys to verify libels filed in their official capacities against articles to be seized. All official acts of a United States Attorney are under his oath of office. This fact differentiates his status from that of other libellants. Though the question presented is of first impression in the appellate courts of the United States, we have reached, without hesitation, the conclusion that, under existing law, the libel *in rem* filed by the United States Attorney in the case at bar needed no verification.

"But the appellee contended successfully in the District Court that, irrespective of admiralty rules and practice, the issuance of the writ of attachment and the seizure of the goods, without a showing of probable cause supported by oath or affirmation, were violative of the Fourth Amendment to the Constitution of the United States. The main dependence of appellee is *Boyd* v. *United States*, 116 U. S. 616, 622, in which the Government had seized goods charged to have been imported fraudulently in contravention of National revenue laws. The owners of the goods denied the fraud charged against them and the case was tried upon that issue. As part of its essential proof, the Government was compelled to show the value of the goods. In his effort to comply with this necessity, the United States Attorney, over objection of the owners, obtained a court order requiring them to produce the invoice covering the goods. Exception was taken by the owners to admission of the invoice in evidence. The jury returned a verdict for the United States condemning the goods seized; and a judgment of forfeiture followed. On appeal by the owners, the argument was made that the court order directing production of the invoice and the reception of the invoice in evidence was violative of the Fourth Amendment. The Supreme Court, in reversing the judgment below and awarding a new trial, said that 'a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.'

"The statute involved in the *Boyd* case provided that the offender, bringing goods into the United States in violation of its custom laws, might be punished by fine or by forfeiture of the imported goods. The basis of decision was that the case was criminal in character. The Supreme Court did not consider whether or not the initial seizure of the goods constituted a search and seizure within the purview of the Fourth Amendment, but directed its attention only to the court order requiring production of private papers. Nor did the Court decide that the order was equivalent to a search warrant which must be supported by oath. The ruling was merely that the order for the production of the invoice was, under the Fourth Amendment, unreasonable in the circumstances of the case. The issue of verification was not involved.

"No order for the production of private papers is involved in the instant case. Nor is this proceeding, in any aspect, a criminal case. An ordinary libel *in rem* brought by the United States is undoubtedly a civil action. *United States* v. *LaVengeance*, 3 Dallas 297, 301; *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 399.

"There is no element of search or invasion of the privacy of the citizen or of his home involved in the case at bar. The proceeding here is for the condemnation of adulterated goods under authority of an Act of Congress, by libel *in rem* to bring into court the thing charged as deleterious for determination of the issue of whether it is fit food, or not.

"Under the interstate commerce clause of the Constitution, Congress has been vested with full power to keep the channels of interstate commerce free from the transportation of illicit or harmful articles, and to make those deleterious to public health 'outlaws of such commerce.' So long as the means are appropriate to that end and do not violate any provision of the Constitution, Congress may be the judge of the means to be employed in exercising its powers. *McDermott* v. *Wisconsin*, 228 U. S. 115, 128. See, also, *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510, 514.

"No significance should be attached to the use by the Supreme Court of the words 'warrants of arrest' in the Admiralty Rules which it has promulgated. The usage bears no semblance to the use of the word 'warrant' in the Fourth Amendment. In admiralty, the term 'arrest' is the technical term long sanctioned to indicate an actual seizure of property. *Pelham* v. *Rose*, 9 Wallace 103, 107.

"The United States District Court for the Western District of Virginia has correctly held that a libel *in rem* under the Federal Food, Drug and Cosmetic Act is not a search and seizure within the meaning of the Fourth Amendment, and that the libel information need not be verified. *United States* v. *Eighteen Cases of Tuna Fish*, 5 F. (2d) 979. See, also, *United States* v. *Two Barrels of Dcsiccated Eggs*, 185 Fed. 302 (D. C. Minn.). The contrary has been held erroneously in *United States* v. *Eight Packages and Casks of Drugs*, 5 F. (2d) 971 (S. D. Ohio).

"As has been demonstrated, the libel of information filed by the United States Attorney on behalf of the United States in the instant proceeding required no verification; and the seizure of the alleged adulterated articles in interstate commerce, in the manner prescribed by the Federal Food, Drug and Cosmetic Act, U. S. C. A., Title 21, Sec. 334, was not an unreasonable search and seizure in contravention of the Fourth Amendment to the Constitution of the United States. The District Court erred in entering its order of March 10th, sustaining the motion to quash the writ of attachment, ordering the goods seized returned to appellee, and dismissing the complaint. That order is therefore reversed; the motion of the appellee filed in this court to dissolve the stay order entered by the District Court on March 17, 1943, is denied; and the cause is remanded to the District Court for further procedure in conformity with this opinion."

On September 22, 1943, a petition for a writ of certiorari was filed on behalf of the claimant in the United States Supreme Court, and on October 25, 1943, the petition was denied. On November 15, 1943, the claimant filed an answer in the district court, denying that the product was adulterated or subject to seizure.

On or about January 7, 1944, the Government moved to amend the libel, to charge that the product was adulterated under Section 402 (a) (3) in that it consisted in whole or in part of a decomposed substance by reason of the presence of decomposed material, as evidenced by mold, rot fragments, fly eggs, and fly maggots. On January 26, 1944, the court granted the motion upon condition that the Government make available the results of its examination and established tolerances.

The amended libel was filed on February 4, 1944; and thereafter, the claimant filed an answer denying the allegation of adulteration in the amended libel and filed interrogatories. Objections to the interrogatories were filed on behalf of the Government, and on March 22, 1944, the court sustained the objections on the ground that Rule 33 of the Civil Rules excepts admiralty proceedings of the character presented in the instant case and that Admiralty Rule 31 did not open the way for such wide and unlimited use of interrogatories.

The case came on for trial before the court without a jury on April 9, 1946, and following the conclusion of the trial, the court on April 16, 1946, handed down the following memorandum opinion:

JONES, *District Judge*: "The United States, by amended complaint, seeks to condemn 935 cases, more or less, of tomato puree shipped in interstate commerce by The Ladoga Canning Company, Lebanon, Ind., as consignor to the Weideman Company in Cleveland, as consignee.

"Several samples of the tomato puree were seized and examined by the Food and Drug Administrator in the warehouse or storeroom of the consignee.

"The consignor has answered and while admitting certain procedural allegations denies the charges respecting the adulterated character of the tomato puree; denies that it is subject to seizure and confiscation and denies that it was shipped contrary to the jurisdiction of the United States and this Court.

"In view of certain stipulations and the fact that findings and conclusions probably later will be presented for adoption it seems unnecessary to review or summarize the evidence, but only to set down the Court's consideration of and conclusions upon the issues presented.

"In general, two main questions require response. First, were the samples seized representative of the article or product shipped in interstate commerce, and second, does the evidence support the Government's charge that the tomato puree should be condemned as being adulterated within the meaning of Section 342 (a) (3) of Title 21, United States Code?

"It seems reasonable to construe the jurisdictional and procedural statute (Section 334) and the word 'article' used therein to include an entire shipment of the same product regardless of the fact that some cases or cans of the product in the shipment were so labeled or coded by the shipper as to indicate different dates of canning. I think the 'article,' as used in the statute, is the product shipped in the cases or cans and not the individual cases or cans. It would be impractical for the Government to examine samples from each case or can in the shipment on the theory that each case or can was an 'article' in the sense of the statute. If the samples are reasonably representative of the lot shipped—that is, taken at wide random from the entire shipment it is in my opinion sufficient to embrace the entire shipment in the condemnation.

"As to the question of the construction of the statute claimed for by the defendant during the trial—that the words 'if it is otherwise unfit for food' modify, limit or add any additional requirement of proof to the preceding words, I do not so interpret the language even though one may concede that the Congress, to the extent of its power, was by law intending to protect the public from food unfit for human consumption. On the contrary, while I think that it is not compelled or essential, there may be drawn a fair inference from the language that Congress considered that proof of the condition described made the particular article or product unfit for food.

"The evidence of the Government is that upon examination the samples taken show a substantial state of decomposition of the puree due to the presence of an excessive mold count, rot fragments, fly eggs and fly maggots and that this condition undoubtedly was due to the use of rotten tomatoes, since no one asserts that such condition likely could come into existence after sealing of the cans.

"The defendant offered testimony to show the care with which its tomato puree was prepared for canning and also evidence to support its claim that the product in question can not, under the most careful supervision, escape entirely having some substances such as the Government claims existed in the samples; that the Administrator of the Food and Drug Act recognized this situation and circulated certain information respecting tolerances which would be recognized in the determination of whether the particular product came within the requirements of the statute. However that may be, difficulty in producing a product which is not in whole or in part decomposed in the sense of the statute furnishes no exception to the legislative requirement or inhibition. The fact that a product can not be prepared and shipped in interstate commerce except in a decomposed or rotted state certainly can not justify permitting it so to be transported considering the plain language and purpose of the statute; nor are conditions of weather or methods of canning important

if the product is found to be decomposed and rotten upon examination following interstate shipment. These considerations, as they seem to me, are not entirely to be waved aside by the fact that certain tolerances or allowances may have been recognized by the Food and Drug Administrator in the administration of the statute. If the product was under the evidence in a state of substantial decomposition and rotten, as those terms are well understood, that ends their right to interstate shipment and condemnation is in order.

"The present statute supersedes any earlier regulation of the Food and Drug Administrator and while recognition of practices or tolerances adopted by the administrator is to be taken into account and given due weight in applying the statute, the fact remains that here the evidence, in my view, shows an excess of substantial parts above the tolerances adopted, and it must be borne in mind that Section 336 of the Act does not directly authorize exemptions but specifically gives the Administrator a discretion not to report or prosecute minor violations.

"That this is a conclusion rightly to be reached will be understood by reference to Section 345, wherein the Administrator is given power to promulgate regulations exempting certain requirements, and Section 346 authorizes regulations for tolerances in respect of poisonous ingredients. No such provision for regulation making exemptions, or for tolerating unavoidable ingredients is provided with respect to Section 342 (a) (3).

"Nor am I impressed with the testimony that the variable sense of smell and taste is more dependable in detecting rot than the microscopic procedure adopted by the Government. Certainly the question of adulteration would rest upon tenuous ground if reliance or conclusion as to the character of the product shipped were bottomed upon conflicting evidence as to the smell or taste of the article sought to be condemned.

"It is probably true that there will be a difference of opinion even under the microscopic procedure but for the want of a more reliable test it seems reasonable to accept such results depending, of course, upon the Court's conclusion as to the credibility of the witnesses testifying and giving their opinions upon that subject.

"The Act must be interpreted liberally in the interest of the congressional purpose to prohibit the transportation of adulterated foods in interstate commerce. In my judgment the Government has sustained the burden of proof and it follows from what has been said that condemnation of the entire shipment of tomato puree must be ordered.

"Proposed findings and conclusions may be submitted for approval and adoption accordingly.

"After entry of a decree carrying into effect the judgment of the Court the defendant, or condemnee, may have the benefit of the provisions of Section 334 (d)."

A motion for summary judgment subsequently was filed by counsel for the claimant, based on the decision in the case of Sligh v. Kirkwood, 237 U. S. 52. On October 9, 1946, the court (Jones, District Judge) denied the motion, ruling "I do not find in the opinion any ruling or conclusion to justify this Court in reversing its decision in respect of the interpretation of the statute in question."

On December 5, 1946, findings of facts and conclusions of law were filed; and on April 15, 1948, judgment of condemnation was entered and the product, with the consent of the claimant, was ordered destroyed.

14740. Adulteration of tomato puree. U. S. v. 253 Cases * * * (and 3 other seizure actions). (F. D. C. Nos. 24331, 24390, 24461, 24491. Sample Nos. 18522–K, 18526–K, 18675–K, 18679–K.)

LIBELS FILED: February 6 and March 2 and 17, 1948, Eastern District of Kentucky and Southern District of Ohio.

ALLEGED SHIPMENT: On or about November 1 and 15, 1947, by D. E. Foote & Co., Inc., from Baltimore, Md.