CEREALS AND CEREAL PRODUCTS

BAKERY PRODUCTS

15801. Action to enjoin and restrain the introduction into interstate commerce and the manufacture in the District of Columbia of adulterated bakery products. U. S. v. Samuel Rubenstein (New York K. & R. Bakery). Temporary injunction granted; affirmed on appeal to United States Court of Appeals. Injunction subsequently dissolved on consent of parties. (Inj. No. 67.)

COMPLAINT FILED: On or about September 15, 1944, District of Columbia, against Samuel Rubenstein, trading as the New York K. & R. Bakery, Washington, D. C. The complaint charged that the defendant had been and was at the time of filing the complaint, introducing or delivering into interstate commerce and within the District of Columbia, bakery products that were adulterated, and was also manufacturing, in the District of Columbia, bakery products that were adulterated.

NATURE OF CHARGE: The complaint alleged further that on April 19, May 15, and July 12, 1944, inspections of the premises disclosed that the flour stored therein was infested with adult weevils and showed evidence of rodent depredation; that the raw materials used in the manufacture of the bakery products were weevil-infested; that the manufacturing equipment was contaminated with flies feeding on liquid eggs and uncooked dough; that examination of materials used in the manufacture of the bakery products disclosed external contamination by grain beetles, silverfish, moths, and roaches; that rodent excreta, pellets, and gnawed pieces of bread were accumulated with other miscellaneous debris on the premises; and that numerous other objectionable conditions existed in the plant.

Samples of bakery products purchased from the defendant's establishment were found to contain rodent hair fragments, larvae head capsules, storage insect fragments, and mites.

PRAYER OF COMPLAINT. That the defendant and his employees be enjoined from introducing or delivering for introduction into interstate commerce and from manufacturing within the District of Columbia any food that is adulterated.

DISPOSITION: On November 29, 1944, the defendant having filed a motion to dismiss the injunction, a hearing was held on that motion and on the Government's motion for a preliminary injunction. Subsequently the court overruled the defendant's motion and granted the Government's motion for a preliminary injunction. On January 31, 1945, the defendant filed a notice of appeal to the United States Court of Appeals for the District of Columbia.

On June 11, 1945, a motion having been filed by the Government to hold the defendant in contempt for violation of the preliminary injunction, and the defendant having filed a motion to suspend the restraining order pending termination of appeal, the court denied the defendant's motion and found the defendant in contempt. On August 1, 1945, however, on consent of the parties, the matter was reopened and the motion to hold the defendant in contempt was denied.

On January 14, 1946, the United States Court of Appeals for the District of Columbia affirmed the decree of injunction, handing down the following opinion:

EDGERTON, *Associate Justice:* "This appeal is from a decree which restrains appellant, a Washington baker, from manufacturing or introducing into com-

merce in the District of Columbia 'any food that consists in whole or in part of filthy or putrid substances or has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth.' The court found that appellant had been doing these things. Appellant does not question the findings. His contention is that because his business is a local one, carried on entirely within the District of Columbia, the Federal Food, Drug, and Cosmetic Act [1] under which action was brought by the United States does not apply.

"Section 331 of the Federal Act prohibits '(a) the introduction . . . into interstate commerce of any food . . . that is adulterated . . . (g) The manufacture within any Territory of any food . . . that is adulterated . . .' Section 321 defines 'Territory' as 'including the District of Columbia' and defines 'interstate commerce' as '(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 . . .' Section 342 provides that food shall be deemed 'adulterated . . . (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.' With exceptions not material here, section 332 gives the district courts jurisdiction to restrain violations of section 331.

"On their face the quoted provisions of the Federal Act support the decree appealed from. Appellant's attack upon the decree rests on the premise that these provisions of the Federal Act 'parallel in substantially every respect the local laws and regulations upon this subject of adulterated foods.' From this premise appellant derives the conclusion that the Federal Act, despite its plain language, is not applicable to local business in the District of Columbia.

"We find that both appellant's premise and his conclusion are incorrect.

"Chapter 1 of Title 33 of the District of Columbia Code forbids sale or delivery, or possession for sale, of 'any article of food or drug which is adulterated within the meaning of this chapter.' [2] It does not expressly cover manufacture. It covers only specified kinds of food. These include bread, but do not appear to include the other bakery products to which the Federal Act, the evidence against appellant, and the injunction relate. This local act defines bread as 'adulterated . . . if there is any addition of alum, sulphate of copper, borax, or sulphate of zinc, or other poisonous or harmful ingredient, and if it contains more than thirty-one per centum of moisture, more than two per centum of ash, and less than six and twenty-five one-hundredths per centum of albuminoids.' [3] This language appears to be aimed at deliberate adulteration rather than carelessness and filth. This is made clearer by a proviso that no offense is committed if the purchaser's 'order calls for an article . . . inferior to such standard, or where such difference is made known by being plainly written or printed on the package.' No one contends that appellant deliberately inserted in his goods the filth and rodents which they were proved to contain. Moreover the ingredients named in the local act are vastly different from the filthy and putrid substances named in the Federal Act.

"The local act of December 16, 1941, 'To prevent the sale of unwholesome food in the District of Columbia',[4] forbids sale of any food which is 'unwholesome or unfit for use.' It does not, as the Federal Act and the injunction do, cover manufacture as well as sale. It does not, as they do, cover food which is 'adulterated' without being 'unwholesome or unfit for use.'

"It is not clear that these local acts prohibit, as the Federal Act does, all of the misconduct which appellant has committed and which the injunction forbids. Moreover these local acts do not specifically provide, as the Federal Act does, for restraint of such misconduct by injunction. The remedies provided by the local acts are condemnation of unwholesome food, criminal prosecution, and revocation of licenses.[5] Revocation of a license is a drastic remedy which

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[1] June 25, 1938; 52 Stat. 1040, U. S. C. title 21 §§ 301–392.
[2] D. C. Code, 1940, § 33–101; 30 Stat. 246.
[3] § 33–103 (b) ninth.
[4] D. C. Code, 1940, Supp. IV §§ 22–3416 to 22–3422; 55 Stat. 807.
[5] Bakeries are licensed under the General License Law of the District of Columbia. D. C. Code, 1940, §§ 47–2301, 47–2327; 47 Stat. 550, 554. This law authorizes the Commissioners to revoke licenses in the interest of health, and provides for criminal prosecutions. Code, §§ 47–2345, 47–2346; 47 Stat. 563.

prevents proper operations as effectually as improper ones. Criminal convictions for commercial carelessness are rare, and the maximum penalty on conviction under the local acts is a fine of $300 or imprisonment for 90 days.[6] An injunction is a relatively simple matter and carries with it a prospect of contempt proceedings if the forbidden acts are continued.

"We conclude that the provisions of the Federal Act which are involved in this case are not closely paralleled by local law. But even if they were, it would not follow that the local law would supersede the federal instead of supplementing it.[7] When a subject is covered both by a general law which does not mention the District of Columbia and by a local law which provides expressly for the District, a question may arise as to whether Congress did or did not have the District in mind in enacting the general law.[8] But when a general law expressly mentions the District, as the Federal Food, Drug, and Cosmetic Act does, it can hardly be contended that Congress did not have the District in mind when it passed the law.[9] Congress has 'followed its usual policy of extending legislation based on the commerce power to the same substantive acts taking place wholly within the District.'[10] And in order to preclude any possibility that the local act of 1941, 'To prevent the sale of unwholesome food in the District of Columbia,' might be interpreted as exclusive, Congress expressly provided that the local Act 'shall in no respect be considered as a repeal of any of the provisions of the Federal Food, Drug, and Cosmetic act, but shall be construed as supplemental thereto.'[11] Congress could hardly have expressed more clearly its continuing intention that all provisions of the Federal Act should be enforced, in accordance with their terms, in the District of Columbia. The Commissioners of the District, as *amici curiae* in the present proceeding, express the opinion that the public will be best protected by the combined efforts of the federal and the District food inspection services. Congress appears to have taken the same view."

"Affirmed."

Subsequent inspections having indicated that the defendant was operating in compliance with the law, a precipe signed by the parties was filed on November 19, 1947, agreeing to the dissolution of the injunction.

15802. Misbranding of pretzels. U. S. v. 50 Boxes * * *. (F. D. C. No. 23158. Sample No. 66541–H.)

LIBEL FILED: On or about June 4, 1947, District of New Jersey.

ALLEGED SHIPMENT: On or about April 23, 1947, by Bachman Bakeries, Inc., from Reading, Pa.

PRODUCT: 50 boxes, each containing 12 12-ounce cartons, of pretzels at Margate City, N. J. Each carton contained 1 wax paper bag of the product.

LABEL, IN PART: (Carton) "Bachman Oven Fresh Extra Thin Pretzels Net Weight 12 Ounces."

NATURE OF CHARGE: Misbranding, Section 403 (d), the container was so filled as to be misleading since the bag of pretzels in the carton occupied only about 65 percent of the volume of the carton.

DISPOSITION: January 27, 1950. The shipper having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be destroyed.

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[6] D. C. Code, §§ 22–3421, 47–2347.

[7] *Nuckols* v. *United States*, 69 App. D. C. 120, 99 F. 2d 353. Cf. *Page* v. *Burnstine*, 102 U. S. 664.

[8] *Johnson* v. *United States*, 225 U. S. 405, 413, 32 S. Ct. 748, 56 L. Ed. 1142; *Kleindienst* v. *United States*, 48 App. D. C. 190, 202; *O'Brien* v. *United States*, 69 App. D. C. 135, 99 F. 2d 368.

[9] *United States* v. *Beach*, 324 U. S. 193.

[10] *Ibid.*, p. 195. The Pure Food and Drugs Act of 1906, 34 Stat. 768, was repeatedly held to be applicable, according to its terms, to local activity in the District. *Galt* v. *United States*, 39 App. D. C. 470; *Dade* v. *United States*, 40 App. D. C. 94. It was also held to supersede certain provisions of an earlier local law. *District of Columbia* v. *Coburn*, 35 App. D. C. 324.

[11] D. C. Code, § 22–3422.