BEVERAGES AND BEVERAGE MATERIALS*

18851. Misbranding and alleged adulteration of Quenchies. U. S. v. 70 Gross Bottles * * *. Tried to the court. Verdict for claimant with respect to adulteration charge and verdict for Government with respect to misbranding charge. Decree of condemnation and destruction. (F. D. C. No. 26389. Sample No. 44321-K.)

LIBEL FILED: January 11, 1949, Southern District of Ohio; amended libel filed May 6, 1952.

ALLEGED SHIPMENT: On or about November 26, 1948, by the Wafer-Fizz Corp., from New York, N. Y.

PRODUCT: 70 gross bottles of Quenchies at Columbus, Ohio. Examination showed that the product was a tablet intended to produce soft drinks in the home when mixed with water. The sweetening of the tablet was due to the presence of saccharin. The product was offered for general sale to the public.

LABEL, IN PART: (Bottle) "Contents 12 Wafers of Quenchies * * * Sparkling Flavored Sodas."

NATURE OF CHARGE: Original libel. Adulteration, Section 402 (b) (1), sugar, one expected constituent of a soft drink, or soft drink base, had been omitted; and, Section 402 (b) (2), a flavored mixture containing saccharin, a nonnutritive substance, had been substituted for one, the sweetening ingredient of which is sugar.

Amended libel. Adulteration, Section 402 (b) (1), the article purported to be and was represented as a complete base, to which only water need be added, to make a carbonated soda beverage, whereas sugar, an essential ingredient of such a base, had been omitted; and, Section 402 (b) (2), saccharin, a nonnutritive substance, had been substituted for sugar, an essential ingredient in a complete base for making a carbonated soda beverage. Misbranding, Section 403 (a), the labeling of the article contained statements and designs which represented and suggested that the article would, with the addition of water alone, make a carbonated soda beverage, which statements and designs were false and misleading since the article would not, with the addition of water alone, make a carbonated soda beverage; Section 403 (f), the information required by the Act to appear on the label, namely, the common or usual name of each ingredient contained in the article, was not prominently placed on the label with such conspicuousness (as compared with other words, statements, or designs on the label) and in such terms, with respect to the statement "Terpeneless Oil of Fruit" appearing on the cherry and strawberry flavor labels, as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use; and, Section 403 (k), the article contained artificial (cherry and strawberry) flavor and failed to bear labeling stating that fact.

DISPOSITION: On May 16, 1949, the Wafer-Fizz Corp., claimant, filed an answer denying the interstate shipment and the adulteration of the article, as alleged in the libel. Thereafter, the Government filed 16 interrogatories to be answered by the claimant, to which the claimant filed objections. On April 18, 1951, with respect to the claimant's objections to 4 of the interrogatories on the ground that the matters to which such interrogatories related were not matters of fact within the claimant's knowledge and would require research and

*See also No. 18888.

investigations, the court ruled that such objections were well taken and need not be answered. However, as to the objections to the remaining interrogatories, the court found that such objections were not well taken and ordered that the claimant answer these interrogatories.

The case subsequently came on for trial before the court on May 6, 1952, at which time a request to amend the libel was made on behalf of the Government. After discussion of the matter with counsel, the court allowed an amendment to be made with respect to the adulteration charges, but denied at that time an amendment with respect to adding the misbranding charges (such amendment was added subsequent to the trial).

Following the trial of the case, permission was granted by the court for the filing of briefs by counsel, and after consideration of these briefs and the evidence submitted at the trial, the court, on July 3, 1952, handed down the following opinion:

STATEMENT OF FACTS

PICARD, *District Judge:* "Government libel action urging that the defendant articles seized herein, 70 gross bottles each containing 12 wafers of Quenchies sparkling flavored soda, be condemned as violating 21 USC 301 et seq., the Food, Drug and Cosmetic Act of 1938, on the specific charge that the substitution of non-nutritive saccharin for nutritive sugar in any food product (except special dietary food products) constitutes an adulteration within the meaning of the Act. The beverage base is in tablet or wafer form for use in preparing carbonated soft drinks. Each flavor has a different color; when dropped into a glass of water this tablet or wafer colors, flavors, sweetens and gives it the appearance of being carbonated. Properly dissolved per directions, the final product is one part saccharin to 10,000 parts water.

"The label stipulates in small type:

> Ingredients: Citric Acid, Tartaric Acid, Sodium Bicarbonate, Artificial Flavoring, Certified Food Color, Saccharin, Vitamin B_1 added.
> Non-fattening—Each wafer contains 0.33 grain saccharin. Saccharin has no food value.

"Plaintiff government admits that the Federal Security Administrator has not promulgated a formal standard for a soft drink base and, therefore, that trade and consumer understanding must prevail. Accordingly, the government advances the argument that sugar is an expected ingredient in a complete carbonated soda beverage base and that saccharin, having no food value, cannot be substituted therefor. Its use, the government contends, amounts to adulteration.

"Before proceeding to the actual determination of the issues, leave is hereby granted plaintiff to amend the libel to conform to the proof that the article is misbranded by reason of false and misleading label statements and the inconspicuous nature of said required statements, in accord with Rule 15 (b) which provides for the amendment of pleadings to conform with the evidence.

ISSUES

"Presently before the court are the questions whether the seized articles are adulterated by reason of the saccharin substituted for sugar in the base and/or whether the articles are misbranded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

"Food, in the federal law, includes drink and adulteration thereof, if established, cannot be corrected by labeling; the sole exception is 403 (j) designating special dietary uses, not applicable herein. The particular section of the Federal Food, Drug, and Cosmetic Act involved is section 402 (b) which sets forth that a food shall be deemed adulterated

> (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor; * * *

"This court in no way seeks to relax regulations of the Federal Food, Drug, and Cosmetic Act or narrow their scope. Their very purpose is protective and conducive to the welfare of the general public in the most important field of food. To accomplish this and we grant for the purpose of this opinion that the general purpose of the law was stated correctly in United States v. 88 Cases more or less, containing Bireley's Orange Beverage, 187 F. 2d 967—

> The correct standard was the reaction of the ordinary consumer under such circumstances as attended retail distribution of this product. When a statute leaves such a matter as this without specification, the normal inference is that the legislature contemplated the reaction of the ordinary person who is neither savant nor dolt, who lacks special competency with reference to the matter at hand but has and exercises a normal measure of the layman's common sense and judgment.

See also Bruce's Juices, Inc., v. United States, 194 F. 2d 935: United States v. Allbrook Freezing & Cold Storage, 194 F. 2d 937, and Bowles v. Sneider, 62 Fed. Supp. 916, where the court held that if you are going to let the consumer decide, then you ought to take a poll of the sentiment throughout the United States and not limit it to one locality.

"But some thirteen years ago the Secretary of Agriculture indicated (Federal Register February 17, 1939) that he would promulgate a standard for a soft drink base or at least a soft drink. He has not done so and we do not believe that it is the duty of this court to substitute its own standard of such a formula on an issue as important as the substitution of saccharin for sugar. If the Administrator couldn't find it advisable to set such a regulation after this length of time, how can the court be certain that with his limited knowledge of the facts any finding of his will not be unfair to one group or the other. It appears to us that this is more a matter for the states to regulate if the federal government fails to act. In fact 39 states have already adopted laws governing the use of saccharin for sugar in some foods and drinks. But it must be remembered that it is agreed here that saccharin is non-poisonous and non-deleterious. This was not true in United States v. 36 Drums of Pop'n Oil, 164 F. 2d 250.

"Saccharin is also allegedly non-nutritious. Unlike sugar it does not build calories. It merely sweetens. But this very characteristic is a quality that is much desired and sought by many who fear that their waistline may unduly expand with the use of sugar. As a matter of fact on the market now are any number of soft drinks or bases for soft drinks that have no sugar and sugar is added to suit the taste of the consumer. Some examples are 'Kool-Aid,' 'Miracleaid,' and Collins 'Penny Drink,' and many prepared foods contain chemicals and artificial food coloring that are non-nutritious. Some people prefer to omit sugar because it does build calories.

"While evidence may be available that would substantiate the government's position, here the testimony indicating that there was an expected standard for soft drinks based only on sugar was not convincing.

"In the first place the disputed product is in fact not a 'soft drink' or 'soda water' as commonly known but is marketed solely as a base for a drink. But accepting as a fact that this is a distinction without a difference, we believe that some of the witnesses here were influenced because of their own vocation or business and the housewife who testified, was talking about a syrup—not a tablet. She said she gave her children sweetened carbonated drinks instead of milk 'to give them a lift' and had never heard of Quenchies, club soda, or any carbonated drink that wasn't sweetened. She added that when she said 'sweetened' she expected sugar. We wouldn't want to condemn an entire industry on that type of testimony. In addition what is recognized in one city in Ohio might not be that of the industry in general.

"However, there is an objection to the continued sale of the product sought to be condemned. This relates to the labeling which in our opinion, is not sufficient. Sec. 403 of the act states:

> A food shall be deemed to be misbranded—
>
> (k) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact: * * *

"As held we do not believe on the record in this case that it has been proved that the addition of saccharin as sugar makes it adulterated or satisfies the decisions of some courts which hold that the government may prove any such standardization by the opinion of what the consumer expects. But the label amounts to a misbranding. If saccharin is to be used it should be so stated in sufficient sized type so that it may be read as easily as other parts of the label. Here the printed word 'saccharin' is so small that one is unable to read it without the aid of a magnifying glass. Section 403 (f) of the Act requires labeling

> in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

"Thus the generally recognized rule that no illegal substitution occurs where a replacement is made, in whole or in part, with another substance not injurious or deleterious to health, provided the name of the substance substituted appears on the label, governs in these proceedings. And we are not confusing adulteration with misbranding, United States v. 36 Drums of Pop'n Oil, supra.

"It is ordered therefore that the product seized be and the same is hereby condemned for misbranding."

DISPOSITION: In accordance with the above opinion, the court, on October 2, 1952, found that the food was not adulterated but was misbranded within the meaning of Sections 403 (a), (f), and (k), and entered a decree providing for condemnation and destruction of the product.

18852. Adulteration of coffee concentrate. U. S. v. 25 Cases * * *. (F. D. C. No. 32685. Sample No. 35509–L.)

LIBEL FILED: February 20, 1952, Western District of Wisconsin.

ALLEGED SHIPMENT: On or about October 22, 1951, from Dubuque, Iowa.

PRODUCT: 25 cases, each containing 24 6-ounce bottles, of coffee concentrate at Holmen, Wis.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance. Examination disclosed that the product was undergoing progressive decomposition. The product was adulterated while held for sale after shipment in interstate commerce.

DISPOSITION: August 8, 1952. Default decree of forfeiture and destruction.

18853. Misbranding of tea. U. S. v. 32 Cases * * *. (F. D. C. No. 32865. Sample No. 22226–L.)

LIBEL FILED: March 10, 1952, Northern District of Alabama.

ALLEGED SHIPMENT: On or about March 27, 1951, by American Tea & Coffee Co., Inc., from Nashville, Tenn.

PRODUCT: 32 cases, each containing 48 4-ounce packages, of tea at Florence, Ala.

LABEL, IN PART: "Net Weight 4 Ozs. American Ace Brand."

NATURE OF CHARGE: Misbranding, Section 403 (e) (2), the product failed to bear a label containing an accurate statement of the quantity of the contents since the packages contained less than the labeled 4 ounces.

DISPOSITION: April 24, 1952. American Tea & Coffee Co., Inc., having appeared as claimant, judgment of condemnation was entered and the court ordered that the product be released under bond to be repackaged to correct weight, under the supervision of the Food and Drug Administration.