

CHARGE: 402(a) (3)—contained rodent urine; and 402(a) (4)—held under insanitary conditions when shipped.

DISPOSITION: 4-3-64. Consent—claimed by Trinidad Bean & Elevator Co., San Francisco, Calif. Segregated; 1,230 lbs. denatured for seed, 35 lbs. destroyed.

29682. Dried navy beans. (F.D.C. No. 48707. S. No. 29-192 V.)

QUANTITY: 350 100-lb. bags at Nebraska City, Nebr.

SHIPPED: 12-27-62, from Lowell, Mich.

LIBELED: 2-19-63, Dist. Nebr.

CHARGE: 402(a) (3)—contained rodent urine while held for sale.

DISPOSITION: 12-6-63. Consent—claimed by Morton House Kitchens, Inc., Nebraska City, Nebr., and reconditioned.

TOMATOES AND TOMATO PRODUCTS

29683. Tomato paste. (F.D.C. No. 46551. S. No. 46-070 T.)

QUANTITY: 1,148 cases of 6 cans each, at St. Louis, Mo.

SHIPPED: 9-21-61, from Patterson, Calif., by Patterson Canning Co.

LABEL IN PART: (Case) "Six #12 Patterson Tomato Paste * * * Patterson Canning Company, Patterson, California."

LIBELED: 11-22-61, E. Dist. Mo.

CHARGE: 402(a) (3)—contained *Drosophila* flies, *Drosophila* fly eggs, maggots and other insect parts; and 402(a) (4)—prepared and packed under insanitary conditions.

DISPOSITION: On or about 1-19-62, Patterson Canning Co., filed a claim to the article and an answer denying that the article was adulterated. On 4-16-62, the Government served written interrogatories on the claimant. Thereafter, the claimant objected to a number of the Government's interrogatories. On 5-11-62, the court heard oral argument on the claimant's objections. On 6-29-62, by agreement of the parties, the interrogatories were withdrawn in view of a stipulation to be filed on or before 7-13-62. Stipulations were filed and, on 12-3-62, the case was submitted for trial by the court. On 2-28-63, the court rendered the following findings of fact and conclusions of law:

MEREDITH, *District Judge*: "This case was submitted to the Court without a jury and the Court makes the following findings of fact:

FINDINGS OF FACT

"1. This case involves the seizure of 985½ cases of tomato paste, six cans to a case, which was seized by the United States Marshal for the Eastern District of Missouri under § 304 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 334.

"2. On November 22, 1961, the United States filed a Libel of Information in the United States District Court for this district alleging that the quantity of tomato paste named therein was adulterated when introduced into and while in interstate commerce within the meaning of 21 U.S.C. 342(a) (3) in that it consisted wholly or in part of a filthy substance by reason of the presence therein of *drosophila* flies, *drosophila* fly eggs, maggots, and other insect parts, and also within the meaning of 21 U.S.C. 342(a) (4) in that the tomato paste had been prepared and packed under insanitary conditions whereby it may have become contaminated with filth.

"3. Patterson Canning Company, a Nevada corporation, intervened as Claimant and filed answer to the Libel.

"4. The tomato paste under seizure traveled from Patterson, California, to St. Louis, Missouri, and was manufactured at the Claimant's plant in Patterson, California, on September 19 and 20, 1961.

"5. Tomato paste is an article of food. During an inspection at Claimant's plant at Patterson, California, on September 20, 1961, the machinery and equipment of the plant, as shown by photographs introduced in the Court and the testimony of the Food and Drug Inspector, had thousands of drosophila flies on various parts of the equipment used in processing of tomatoes, including conveyor belts, seed extractors, hood coverings, and other parts of the processing machinery.

"6. The photographs showing the flies revealed that they were in many instances only inches away from the tomatoes being processed. The evidence showed that on occasions while being processed the tomatoes would hit parts of the machinery which was covered by these flies.

"7. An analysis of the seized products from thirty 100-gram samples of the tomato paste taken from thirty separate cans, each sample representing about one thirty-sixth of the total contents of the can, showed drosophila maggots, drosophila eggs, insect eggs, fly leg parts and other filth and contamination in the samples. The samples analyzed include tomato paste manufactured both on the 19th and 20th days of September, 1961.

"8. Tests made on behalf of the Claimant also showed worm skins, fly skins and other filthy substances.

"9. The presence of drosophila flies in the large number shown by the evidence constitutes insanitary conditions at the manufacturing plant of the Claimant and the presence of maggots, skins, flies and other filthy substances in the paste is contamination of the tomato paste.

CONCLUSIONS OF LAW

"1. Tomato paste is a food within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321 (f).

"2. The Federal Food, Drug and Cosmetic Act provides that a food shall be deemed adulterated if it consists wholly or in part of a filthy substance, 21 U.S.C. 342(a) (3), or if it is prepared or packed under insanitary conditions whereby it may become contaminated with filth, 21 U.S.C. 342(a) (4). In this instance the premises were insanitary and the product consisted partially of filthy substance.

"3. The Claimant argues that the presence of a small amount of maggots, fly wings and other filthy substance is not sufficient to condemn and forfeit the tomatoes. The Court is not persuaded and finds that there is no tolerance for filth under the Federal Food, Drug and Cosmetic Act, and the Secretary of Health, Education and Welfare has no authority to establish any tolerance.

"4. 21 U.S.C. 334 requires that food seized pursuant to that statute and shown to be adulterated must be condemned and forfeited to the United States.

"5. The government is entitled to a decree of condemnation forfeiting the seized tomato paste to the United States and a judgment in accordance with the terms of this memorandum will be entered providing that the food shall not be used for human consumption and shall be destroyed.

"Costs will be assessed against the Claimant.

"Dated this 28th day of February, 1963."

On or about 5-10-63, the claimant moved to re-tax costs which totaled \$1,529.01 and included \$698.90 allocated as witness fees. On 5-24-63, the court issued an order reducing the fees for witnesses and disallowing any costs for a witness who was not called by the Government, but was called by the court. Total costs paid were \$910.11.

29684. Tomato paste. (F.D.C. No. 50336. S. No. 1-872 A.)

QUANTITY: 145 cases, each containing 6 6-lb. 15-oz. cans, at Quincy, Fla.

SHIPPED: 4-20-64, from San Francisco, Calif., by Kings Food Products.

LABEL IN PART: (Can) "King-Ko Tomato Paste * * * Distributed by Kings Food Products San Francisco, California."