

**PRAYER OF COMPLAINT:** That the defendants be perpetually enjoined from commission of the acts complained of, and that a preliminary injunction be granted during the pendency of the action.

**DISPOSITION:** June 15, 1948. The defendant having filed an answer denying the manufacture and interstate shipment of adulterated butter but having consented to the entry of a decree without contest and before any testimony had been taken, the court issued an order perpetually enjoining the defendant and its officers, agents, and employees from shipping in interstate commerce any adulterated food products, specifically butter, which they had manufactured or prepared for shipment or would manufacture and prepare for shipment.

**13254. Adulteration of butter. U. S. v. 24 Cans \* \* \* (and 4 other seizure actions).** (F. D. C. Nos. 2394, 3014, 3255, 3256, 3406. Sample Nos. 9003-E, 9019-E, 35357-E to 35359-E, incl.)

**LIBELS FILED:** On or about July 2 and 22 and October 9, 10, and 24, 1940, Northern District of Alabama.

**ALLEGED SHIPMENT:** On or about June 20, July 18, and October 2, 3, and 9, 1940, from the States of Georgia and Tennessee, by the Cloverleaf Butter Co., Inc.

**PRODUCT:** 24 cans containing a total of 1,833 pounds of ladled butter; 1 370-pound drum, 2 drums containing a total of 205 pounds, 4 cans containing a total of 50 pounds, 1 209-pound barrel, 7 tubs containing a total of 308 pounds, 5 drums containing a total of 1,781 pounds, and 16 tubs containing a total of 655 pounds, of packing stock butter at Birmingham, Ala. Analyses disclosed that the butter contained maggots, rodent hairs, flies, insects, insect fragments, insect eggs, mold, human hairs, and feather fragments.

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

**DISPOSITION:** The Cloverleaf Butter Co., Inc., Birmingham, Ala., having appeared as claimant and the seizure actions against the butter having been consolidated, the court, on February 17, 1942, over objections of the Government, ordered that the butter be delivered to the claimant for renovation; that a representative of the Food and Drug Administration be allowed to take a sample of the butter before and after renovation and to be present during the period of renovation; and that claimant's possession of the butter for purpose of renovation was to be as an agent of the court.

On March 31, 1942, a motion was filed on behalf of the Government to have the order of February 17, 1942, vacated and set aside, and on April 18, 1942, a further motion was filed to stay and suspend the effectiveness of such order pending determination of the motion to vacate. On October 4, 1943, after a number of continuances, the court overruled the Government's motions and entered a decree that the provisions of the order of February 17, 1942, should be carried out, on the basis that the shortage of butter due to wartime conditions warranted the renovation of the butter as provided for by such order. A motion to set aside the decree of October 4, 1943, was filed on October 14, and on October 19, 1943, was denied. Thereafter, a petition for a writ of mandamus was filed in the United States Circuit Court of Appeals for the Fifth Circuit, and on December 16, 1943, the following decision was handed down by that court:

*SIBLEY, Circuit Judge:* "The United States in 1940 brought five libels under the Federal Food and Drug and Cosmetic Act of 1938, to condemn five lots of 'ladle butter' and 'packing stock butter' transported in interstate commerce to Cloverleaf Butter Co., because adulterated in that it 'consists in part of a filthy animal substance.' On seizure, Cloverleaf Butter Co. claimed the material, denied the adulteration, prayed for a more definite statement or bill of particulars as to what sort of matter was intended to be relied on as constituting the adulteration; and as to whether all the containers seized were claimed to be so adulterated; and if not, which ones. In February, 1942, the cases were consolidated for trial, but instead of passing on the motions for a more definite statement or otherwise trying the case, an order was made to allow the claimant to take possession of the butter and renovate it. The United States filed a motion to vacate this order and stop its execution. This motion was pending, a stay being granted, till Oct. 4, 1943, when it was overruled and a new order made that the Marshal deliver the butter to the claimant at its renovating plant in Birmingham, for renovation, the identity

of the several lots to be preserved, and the custody of the court being maintained, and full provision being made for the taking of samples by both sides before and after renovation, all at the expense of claimant. Jurisdiction was retained to dispose of the butter afterwards as if this order had not been granted. The United States petitioned this court for a writ of mandamus to compel the judge to vacate this order as being without authority of law, and to set a date certain for the trial of the case, an appeal not yet being available. We ordered that the judge show cause why the case should not be at once tried.

"The judge in his response admits the proceedings as above, and gives as his reason why he should not be required to proceed to a final trial of the libels, without waiting for a renovation of the butter therein described, facts which he states he understands are true; in brief that claimant has conducted for twenty-five years a regularly licensed plant in Birmingham for processing and renovating butter, its product being taxed under 26 U. S. C. A. § 2321, and regulated by 26 U. S. C. A. § 2325; that the seized material is not transported nor about to be offered to the public as food, but is to be renovated and processed in the plant and then packed and branded and disposed of under the just cited law; that there is public need for butter, and if the material can as a finished product be so used it ought to be, rather than condemned; so that it is prudent and right to see what can be done with it before trying the libels for condemnation.

"We cannot by mandamus review or set aside the interlocutory order. Our only function at present is to decide whether the reason given for not presently trying the case is a good one. We do not think it is. The libels are filed expressly under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 301, and following. For its purposes 'food' is defined as 'Articles used for food or drink for man or other animals' and 'Articles used for components of any such articles,' § 321 (f). The introduction into interstate commerce of any food that is adulterated is forbidden by Section 331 (a). Food is declared by Section 342 (a) (3) to be adulterated if it 'consists in whole or in part of any filthy matter.' An adulterated article of food when introduced into interstate commerce may be seized for condemnation by libel, Section 334 (a). By Section 334 (d) any food condemned shall be disposed of as the court may direct, and if sold the proceeds go to the United States; 'Provided, that after entry of the decree and upon payment of the costs of such proceeding and the execution of a good and sufficient bond . . . the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Chapter, etc.' The Act thus provides for the saving from destruction of articles which ought to be saved, much as the judge has ordered here. It also provides in Section 334 (c) for sampling to ascertain the truth before trial. But the plan of the Act is to determine first whether what is seized is really food under the Act, and is really adulterated as alleged. If either is not true, the libel will be dismissed. If both are true, and decree is entered accordingly, then upon the conditions named in the Act the measures above quoted may be taken. We think the statutory proceedings ought to be precisely followed, and that no good reason is shown for further delaying to rule on the motions for a more definite statement and to bring the matter to a final trial.

"Let a copy of this opinion be certified to the judge for his guidance. A formal mandamus may hereafter be issued if necessary."

WALLER, *Circuit Judge*, dissenting: "I do not take issue with what has been said in the majority opinion in this case, but do take issue with the action of the Court in saying anything at all except to say 'Petition denied.' The opinion of this Court seems to correctly interpret the applicable part of Federal Food and Drug and Cosmetic Act, but the majority, in my view, has indulged in the vacuous pastime of writing an advisory opinion 'for the guidance' of the Court below.

"We were petitioned for a writ of mandamus—not for advice—and the petitioner has not shown itself to be entitled to such a writ. It is the universal rule that a relator in mandamus must positively show not only that a clear duty devolves upon the respondent to perform a duty but that relator has a clear right to the performance of that duty. The petitioner has wholly failed to show a clear right to performance of the alleged duty.

"The United States Attorney filed the libels in July, 1940, alleging that the food products were 'adulterated \* \* \* in that it consists in whole or in part of a filthy animal substance.' It is not alleged that all of the cans of butter are adulterated, and nowhere were any facts alleged as to what the 'filthy animal substance' was. Claimant promptly filed a motion for a more definite statement or for a bill of particulars. It was clearly entitled to have a bill of particulars showing whether all cans were adulterated and also what filthy matter was claimed to be in the product sought to be condemned. The motion was filed July 16, 1940. The petitioner did not supply the bill of particulars, nor does the record show that it ever set the motion down for a hearing. It is difficult to see how claimant could prepare its defense in the absence of fuller information. The claimant has never answered. The case is not at issue, yet the United States Attorney is now shouting for a trial, and petitioning for a writ to require a trial when the case is not at issue and, for all the record shows, the delay is chargeable as much to him as to the claimant. Surely the Judge is not chargeable with the defect of petitioner's pleading in lack of specificity. The United States Attorney evidently was possessed of the information as to the alleged filthy animal substance because he now goes entirely out of the record and repeatedly asserts in his brief—which he surely knows is no substitute for pleading—that the butter contains maggots, dirt, hair, feather and maggot fat and other filthy matters.

"The United States Attorney has not placed himself in position to insist that he has a clear right to have the respondent proceed to an immediate trial. Furthermore, he is seeking by mandamus to have this Court review an interlocutory order of the Court below. In this he succeeded. Mandamus is not a substitute for appeal. The action of the Court below may have been irregular, but no one is injured except perhaps the claimant. All costs of renovation are placed on it. Jurisdiction is retained. The court can order renovated butter condemned as well as it can unrenovated butter. It is not being eaten while in custody of the Court.

"Petitioner is not hurt but he hollered nevertheless.

"I respectfully dissent."

Upon the return of the case to the district court, a motion to dismiss was filed on behalf of the claimant on January 27, 1944, and on March 24, 1944, the court granted the claimant's motion and ordered that the butter be delivered to the claimant. A notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit was filed on behalf of the Government on March 28, 1944, and on March 27, 1945, the following opinion was handed down by that court:

HUTCHESON, *Circuit Judge*: "Cloverleaf Butter Company is an operator in Birmingham, Alabama, under federal license, of a renovated butter factory.<sup>1</sup> Claiming that packing stock butter consigned to Cloverleaf was adulterated in that it consisted in whole or in part of a filthy or decomposed animal substance, the United States brought libels of condemnation under the Federal Food, Drug and Cosmetic Act of 1938.<sup>2</sup> Urging successfully below against condemnation under the Federal Food and Drug Act what it had urged successfully in its injunction suit against the state authorities, that the handling and use of packing stock butter was governed exclusively by the Renovated Butter Act and the regulations promulgated by the Secretary of Agriculture thereunder, and that the materials which it used in its factory were not subject to seizure, claimant obtained an order dismissing the libels. Appealing from the order, the United States, in support of its position that the Food and Drug Act does apply and the seized products may be libelled under it, points to the admitted fact that the seized stock is used as a component of renovated butter, to the language of the Act which authorizes the seizure of any food which is adulterated, and to Section 321 (f), Title 21, which defines food to mean 'articles used for food or drink for man or other animals \* \* \* and (3) articles used for components of any such articles.' It points, too, to the opinion

<sup>1</sup> See *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 786, 62 S. Ct. 491, 86 L. Ed. 754, an injunction suit against condemnation by state authorities of packing stock butter, in which claimant's activities are fully set out and it was held by a divided court that the Renovated Butter Act of 1902, as amended 26 U. S. C. Int. Rev. Code § 2320 to 2327 excluded state action.

<sup>2</sup> Sec. 402 (a) (3), 21 U. S. C. A. § 342 (a) (3).

of this court in *Re United States*, 140 F. 2d 19, 20, directing the district court to proceed under the libels to determine whether the seized product 'is really food under the Act; and is really adulterated as alleged' and to enter its decree accordingly. Finally, it points to the holding of the majority in *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 786, 62 S. Ct., 491, 86 L. Ed. 754:

"Further, we agree with respondent's contention that there is no authority to confiscate or destroy materials under the renovated butter act. It should be noted that packing stock adulterated under the definitions of § 402 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1046, 21 U. S. C. A. § 342, when introduced into or while in interstate commerce may be confiscated under § 304, 21 U. S. C. A. § 344 while in the interstate commerce or at any time thereafter. Cf. *United States v. Nine Barrels of Butter*, D. C., 241 F. 499.' 315 U. S. at page 163, 62 S. Ct. at page 500, 86 L. Ed. 754.

"\* \* \* Confiscation by the state of material in production nullifies federal discretion over ingredients.' 315 U. S. at page 168, 62 S. Ct. at page 502, 86 L. Ed. 754.

"\* \* \* To uphold the power of the State of Alabama to condemn the material in the factory while it was under federal observation and while federal enforcement deemed it wholesome would not only hamper the administration of the federal act but would be inconsistent with its requirements. Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject.' 315 U. S. at page 169, 62 S. Ct. at page 503, 86 L. Ed. 754.

"Cloverleaf, on its part, points to the provision of the Renovated Butter Act, to the history of the renovated butter industry, and to the holding of the Supreme Court in the Cloverleaf case, that the act assumes, and, in view of the character of the industry must assume, that all packing stock from which renovated butter is made is more or less adulterated, and, therefore, the scheme of the act is to subject the finished product, rather than its ingredients, to the inspection and scrutiny of the Department of Agriculture. So pointing, it insists that if the Food and Drug Act is held to apply, renovated butter cannot be made, and that there is, therefore, such an inconsistency between the two statutes as that as to ingredients of renovated butter, the Renovated Butter Act supersedes and excludes the Food and Drug Act and its administrators. Relying heavily on the opinion of the majority of the Supreme Court in the Cloverleaf case, that Congress had, in the Renovated Butter Act, assumed for the Department of Agriculture such complete control over the field as to oust state inspection and state supervision of ingredients, Cloverleaf insists that the same reasoning which supported the decision in its favor there compels one in its favor here, leaving it as to the components of its finished product completely immune from their seizure and condemnation.

"[1-4] We cannot at all agree. We accept, as we must until it is reversed, the view of the majority, that as between state and federal power, an act which does not give the Department of Agriculture the right to inspect and condemn filthy ingredients of renovated butter, has yet pre-empted the field as against state inspection and condemnation of such filthy substances. Nothing, however, in the opinion lends support to the view which the exigencies of its situation require Cloverleaf now to advance, that the Renovated Butter Act has pre-empted the field for the Department of Agriculture not only as against state action but as against federal action as well. The authoritative statement of the majority opinion that though the Renovated Butter Act made no provision for the seizure by the Department of Agriculture of butter stock, inspection and seizure of filthy and otherwise adulterated stock could be had under the Food and Drug Act, and, therefore, it could not be successfully claimed that filthy packing stock was immune from seizure, completely destroys appellee's position that the one federal act is exclusive of the other. Indeed, unless the statement in one of the dissenting opinions in that case that 'The result of this decision is to deny Alabama the power to protect the health of its citizens without replacing such protection by that of the federal government' is to be accepted, despite the disclaimer of the majority, it must be held that it was certainly not intended by Congress to leave packing stock butter manu-

facturers completely free to use in making their completed product any kind of filthy and putrid material they chose to use in the faith, the substance of things hoped for, the evidence of things not seen, that, in homely phrase, it will all come out in the wash. When the Food and Drug Act is considered in the light of its purpose to protect the public from adulterated and unfit materials, it would take the strongest kind of showing that its protective provisions had been limited not directly but by implication, and Cloverleaf, in maintaining that position here has a heavier burden than it can bear. It does, indeed, show that the renovating process is well adapted to remove all impurities, that renovated butter is good butter, that all packing stock has to be renovated, that all of it comes into the plant more or less adulterated with extraneous and deleterious substances in it, or otherwise unfit in its then condition for human food, and that if all packing stock were to be condemned because not fit for human food, no matter how slight the adulteration, the renovated butter industry could not survive. But these considerations are for Congress, and if Congress had intended to take packing stock butter out of the Food and Drug Act, it could very easily have done so either by amending the statutory definition of food to exclude materials that go into the finished product or by expressly excluding from the Act ingredients of renovated butter. Implied repeal or limitation of one act by another is never favored. It is not for the courts, unless the conflict between two acts is inescapable and compelling, to exclude from the coverage of an act matters which its terms expressly include, on the theory that another act, whose general purpose seems inconsistent has impliedly repealed or limited the act under review. Only where it is found that it is not possible for both acts to co-exist can an act be held to repeal or limit another, and then only in respect to the precise point of conflict. It certainly cannot be said that there is any fatal inconsistency between the two acts here. If Congress wanted to encourage the making of packing stock butter out of any materials that the manufacturers can get hold of in reliance on their claims that no matter how filthy the ingredients, the finished products will be pure, or the impurity can be, or will be, detected, it could, of course, take packing stock butter out of the Food and Drug Act. We find no support in the acts for a finding of a repealer by implication, indeed, we think it plain that there is no necessary inconsistency between them. What was intended by the Renovated Butter Act, and all that was intended, was that renovated butter could be made out of stock which, while not in its then state fit for human consumption, was yet not so unfit as to require its condemnation. It was not intended that renovated butter be made out of any kind of stock, no matter how filthy or putrid, in the pious hope that its filthiness and putrescence would, in the process of renovating, be purged away. Thus Congress, while authorizing the making of renovated butter, left to proper administration the supervision of the ingredients, authorizing their seizure and condemnation whenever they were of such character as to be deemed deleterious or otherwise unfit for use. The libels were wrongfully dismissed. The judgments dismissing them are reversed and the causes are remanded with directions to proceed with the libels, in accordance with our former opinion in 140 F. 2d 19, and herewith."

Following the remanding of the case to the district court, motion was made by the claimant for a bill of particulars to show what filthy animal substance was alleged to be in each of the containers of the butter. The claimant also filed a motion to be allowed to take samples from each of the containers of the butter. On January 21, 1946, the court entered orders granting the motions. Thereafter, a motion was filed on behalf of the Government to set aside the order for a bill of particulars on the ground that the rules of civil procedure did not apply but that the proceedings of libel cases under the Federal Food, Drug, and Cosmetic Act should conform, as nearly as may be, to proceedings in admiralty. On February 1, 1946, the court having considered the arguments and brief of counsel, rendered an opinion that the claimant's motion for a bill of particulars was in substance within Rule 27 of the Admiralty Rules which provide for exceptions to pleadings. The Government's motion was accordingly denied. A bill of particulars was thereupon filed by the Government's attorney, setting forth the information requested.

On February 11, 1946, the case came on for trial before the court without a jury. At the conclusion of the trial the court took the case under advise-

ment. On March 18, after consideration of the testimony and briefs and arguments of counsel, the court made findings of fact that the product consisted in part of a filthy substance by reason of the presence of filth, and that the renovation processes employed in renovating butter factories, and specifically by the claimant, would not purge the product of those filth elements such as maggot and other insect fats and fat extractives. The court also found as conclusions of law that the product was adulterated; that the law prohibited interstate shipment of food which consisted in part of any filthy substance; and that it should not be released for renovation into human food, but that the claimant might obtain release of the product for its conversion for some use other than human consumption.

In accordance with the above findings, judgment of condemnation was entered and the product was ordered released under bond for conversion into soap, glycerin, or other substance for use other than human consumption, under the supervision of the Federal Security Agency. Notice of appeal was filed by the claimant on April 16, 1946. However, the claimant failed to perfect its appeal, and accordingly an order dismissing the appeal was entered by the United States Circuit Court of Appeals for the Fifth Circuit on January 4, 1947.

**13255. Adulteration of butter. U. S. v. 99 Cases \* \* \* (and 4 other seizure actions).** (F. D. C. Nos. 24147, 24154, 24160, 24161, 24205. Sample Nos. 714-K, 19007-K, 19008-K, 19029-K, 22651-K, 22652-K, 22664-K, 22665-K.)

**LIBELS FILED:** Between September 18 and November 13, 1947, Eastern District of Louisiana, Southern District of Florida, and Southern District of West Virginia.

**ALLEGED SHIPMENT:** Between September 10 and November 1, 1947, by the Sugar Creek Creamery Co., from Louisville, Ky., and Russellville, Ark.

**PRODUCT:** Butter. 248 boxes at New Orleans, La., 50 cases at Charleston and 43 cases at Huntington, W. Va., and 83 cases at Miami, Fla. Each box in the New Orleans lot contained 12 pounds, and each of the other containers held 32 pounds.

**LABEL, IN PART:** "Valley Farm Brand Creamery Butter [or "Cudahys Sunlight Creamery Butter"] \* \* \* The Cudahy Packing Co., Distributors \* \* \* Chicago, Ill.," "Clear Brook Creamery Butter [or "Clear Brook \* \* \* Ol Fashund Roll"] Distributors Wilson & Co. General Offices Chicago, Ill.," "Sugar Creek Butter Distributed by Sugar Creek Creamery Company Danville, Illinois," or "Land O' Sunshine Butter \* \* \* packed for the Winn & Lovett Grocery Company Jacksonville, Florida."

**NATURE OF CHARGE:** Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed animal substance. (Examination showed that the product contained mold.)

**DISPOSITION:** Between October 20 and December 10, 1947. The Sugar Creek Creamery Co., claimant, having consented to the entry of decrees, judgments of condemnation were entered and the product was ordered released under bond for conversion into butter oil or other disposition in compliance with the law, under the supervision of the Food and Drug Administration. A total of 93 cases were denatured and sold to a tankage firm for rendering, and the remainder was converted into butter oil.

**13256. Adulteration of butter. U. S. v. 20 Cases, etc.** (F. D. C. No. 24696. Sample No. 22456-K.)

**LIBEL FILED:** February 16, 1948, District of Alabama.

**ALLEGED SHIPMENT:** On or about February 4, 1948, by the Cudahy Packing Co., from Nashville, Tenn.

**PRODUCT:** Butter. 20 cases, each containing 32 1-pound prints, and 1 case, containing 12 1-pound prints, at Birmingham, Ala.

**LABEL, IN PART:** "Cudahy's Sunlight Creamery Butter."

**NATURE OF CHARGE:** Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed animal substance. (Examination showed the presence of mold.)

**DISPOSITION:** March 30, 1948. Default decree of condemnation. The product was ordered sold to be used in manufacturing grease, glycerin, or soap.