F. & D. No. 2103.
S. No. 756.

Issued August 30, 1911.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1027.

(Given pursuant to section 4 of the Food and Drugs Act.)

ALLEGED ADULTERATION OF FROZEN EGG PRODUCT.

On November 23, 1910, the United States Attorney for the District of New Jersey, acting upon the report of the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying condemnation and forfeiture of 443 cans of frozen egg product in the possession of the Merchants Refrigerating Co., Jersey City, N. J.

Examination by the Bureau of Chemistry, United States Department of Agriculture, of samples of said product showed it to contain added sugar and 6,000,000 organisms per gram, 100,000 of said organisms being of the gas-producing type. The libel alleged that the frozen egg product after transportation from the State of Kansas into the State of New Jersey remained in the original unbroken packages and was adulterated in violation of the Food and Drugs Act of June 30, 1906, because sugar had been added thereto and had been substituted in part therefor, and because it consisted in whole or in part of a filthy, decomposed, and putrid animal substance, and was, therefore, liable to seizure for confiscation.

On January 4, 1911, the H. J. Keith Co. filed answer to said libel, a jury was waived, and the case was heard by the court which rendered its opinion in form and substance as follows:

UNITED STATES CIRCUIT COURT, DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA
vs.
443 CANS OF FROZEN EGG PRODUCT.

The COURT (Cross, District Judge, orally): This is a suit brought by the Government against 443 cans of frozen egg product, to condemn this egg substance, under the Pure Food Law; the Government claiming that, under that

law, the article must be deemed to be adulterated in two respects; under the second subdivision of section 7, if any substance has been substituted wholly or in part for the article, and, under the sixth subdivision of the same section, if it consists in whole or in part, of a filthy, decomposed or putrid animal substance.

The charge under the sixth subdivision of section 7 has been limited so that only the word "decomposed" is now relied upon. A bill of particulars was furnished whereby the words "filthy" and "putrid" were eliminated. So, as just stated there remains but two points for consideration—first, whether any substance has been wholly or in part substituted for the article, and, second, whether the food product under examination has been shown to be decomposed.

It has been admitted in the case that this egg mixture is a food product and that it was transported in interstate commerce. I understand that no question is raised about that.

The Government is the moving party herein, and the burden of proof, therefore, rests on the Government to establish, by the weight of the evidence, the allegations of its petition of forfeiture. The Government must not only establish its case by the weight of the evidence, but, this being a case involving the forfeiture of property, the evidence must be of a clear and convincing character.

Under the second clause of the seventh section, I shall dismiss the Government's charge at once. I do not think, under the evidence in the case, that that clause has been violated; that is, I do not think that the egg product in question is adulterated within the meaning of the second subdivision of section seven. It is the very article that it was intended to be—the very article that was intended to be made and sugar was a part of that article. This is not a case of misbranding. The article is made under a patent, or at least a similar article is patented—and I do not think that the introduction of sugar under the circumstances disclosed, adulterates the article within the meaning of the act. It is made just as it was ordered and as it was directed to be made; that being so it is not clear why sugar adulterates the article any more than the putting of salt and pepper into canned soup would adulterate that article, assuming that the soup was to be seasoned.

The only question remaining, therefore, is whether this egg product was decomposed in whole or in part, and, in determining whether or not it was so decomposed, that word must be given its ordinary signification. It is not used in any technical sense here, and should not have any such meaning given it.

The question is whether in the ordinary sense of the word the article was in whole or in part decomposed. I do not think it was under the evidence.

There has been a great deal of technical testimony given by experts upon both sides of that question, which testimony, as I look at it is in direct conflict. Under the Government's expert testimony, the substance was apparently decomposed, while if you look at the other expert testimony, that in behalf of the claimant, it certainly could not be so considered.

I think the Government has not sustained the burden of proof which rested upon it to show, under the expert testimony, that this egg product was decomposed, either in whole or in part, and if we look at what might be called the lay testimony—the testimony as to tasting, smelling and baking or the practical uses of the substance—it has likewise failed. I think the claimant has really borne the burden of proving that this egg product was not decomposed. The Government has not, therefore, sustained, the burden of proof which rested upon it, but, on the contrary, the clear weight of all of the testimony given is with the claimant and not with the Government, and accordingly my finding is in favor of the claimant.

On April 10, 1911, the court issued its decree in accordance with the above opinion dismissing the libel and ordering the release of the product to the claimants. Within the prescribed period the United States appealed from the above decree to the United States Circuit Court of Appeals for the Third Circuit where the case is now pending on the following grounds, to wit:

ASSIGNMENT OF ERRORS.

First. The said Court erred in dismissing the libel filed by the United States of America in this cause.

Second. The said Court erred in making, entering and rendering a decree in said cause in favor of the said claimant H. J. Keith Company, and in adjudging that the frozen egg product seized in this cause should be released by the Marshal of this District.

Third. That the said Court erred in making and entering a decree in said cause that the frozen egg product seized in said cause was not adulterated within the meaning of the act of Congress entitled "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors and for regulating traffic therein and for other purposes" approved June 30, 1906.

Fourth. That the said Court erred in making and entering a decree in said cause that the frozen egg product seized in said cause did not at the time of said seizure consist in whole or in part of a decomposed animal substance within the meaning of the act of Congress known as "The Food and Drugs Act June 30, 1906."

Fifth. That the said Court erred in admitting in evidence, and in considering as an element in the case, the contract marked "Exhibit D 1", being a contract between the Waldorf Pound Cake Company and the H. J. Keith Company.

Sixth. That the said Court erred in admitting in evidence, and in considering as an element in the case, United States Letters Patent Number 955,835 for preserving eggs, issued April 19, 1910, to H. J. Keith Company.

Seventh. That the Court erred in not finding that the frozen egg product in question was adulterated within the meaning of the act of Congress known as "The Food and Drugs Act June 30, 1906."

Eighth. That the Court erred in not finding that the frozen egg product in question consisted in whole or in part of a decomposed animal substance.

Ninth. The said order and decree is contrary to the law and the evidence.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *July 20, 1911.*

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