

**4329. Alleged adulteration and misbranding of "Fancy Mixed Nuts." U. S. v. 25 Bags of Nuts. Tried to the court and jury. Verdict in favor of the claimant by direction of the court. (F. & D. No. 5462. I. S. No. 1083-h. S. No. 2034.)**

On December 5, 1913, the United States attorney for the Northern District of West Virginia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel, and on October 21, 1914, an amended libel, for the seizure and condemnation of 25 bags of nuts, remaining unsold in the original unbroken packages at Wheeling, W. Va., alleging that the article had been shipped by Hills Bros. Co., New York, N. Y., during October, 1913, and transported from the State of New York into the State of West Virginia, and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled "Fancy Mixed Nuts."

Adulteration of the article was alleged in the libel and amended libel for the reason that said nuts were wormy, some of them empty and moldy and unfit for food, portions thereof being filthy and decayed.

Misbranding was alleged in the amended libel for the reason that the term "Fancy Mixed Nuts" appearing on the label was false and misleading, because the nuts were not fancy mixed nuts but were of a grade inferior thereto.

On May 7, 1915, Hills Bros. Co., New York, N. Y., filed their claim, and on October 19, 1915, their answer to the libels.

On October 23, 1915, the case having come on for hearing before the court and jury, after the submission of evidence the court directed a verdict in favor of the said claimant, and thereupon the jury returned a verdict declaring the nuts not to be adulterated or misbranded.

During the progress of the trial the following rulings upon the admissibility of evidence tending to show that the nuts were not fancy mixed nuts, were made by the court (Dayton, J.):

Court: "Well, under this law as I understand it, persons—property might be confiscated and the owners held subject to fine—I think there is a criminal offense connected with the violation of the branding feature of the law. Now I don't believe the trade can establish what shall constitute a criminal offense nor that the opinion of men engaged in any special line of business can establish a standard which may hold another man engaged in that business, guilty of a criminal offense and lay him liable to fine and confiscation of his property."

"Well, gentlemen, I don't think I will permit you to go and introduce evidence tending to establish a standard set up by the opinion of the 'trade' so called. How can any set of individuals be empowered to speak for the 'trade' anyway? It doesn't seem to me that it would be fair or reasonable to allow the opinion of men who deal in nuts or any other commodity to establish what may be an offense by some one (of) their brother tradesmen. It seems to me it would make it very easy for one set of men to injure and destroy competitors in a similar line. It seems to me that until the department establishes a set standard of quality for nuts to be branded as 'fancy,' or 'choice,' or what not, that it would be altogether unsafe to attempt to set up a standard by common consent of the trade, and to use that standard to harrass and annoy dealers who may be in good faith trying to live up to the law, and to make them amenable to such a vague and indefinite standard as I understand the Government seeks to establish by the testimony of men engaged in the business of handling these nuts. The department under the Pure Food and Drugs Act, as I understand, has the power to establish certain standards—they can establish a standard as to what shall constitute fancy mixed nuts and what shall not, and until they do so, I don't see how it will be possible to proceed under this law. As I understand there have been standards established for different commodities, and it can be done in the case of nuts, and unless you can establish such a set standard, open and understood by those who come under its rulings, it doesn't seem to me that the Government can hope to establish its case."

"I certainly will not permit you to bring in anybody who deals in nuts and have them say that in their opinion these nuts did not come up to the grade of fancy mixed, until you show that there is a Government standard, because this law establishes what is in effect an offense punishable at least by confiscation of property, and I believe under certain circumstances by fine, and this would simply mean allowing the trade to fix what will become a criminal offense, instead of fixing it by regulation of the department, as the act provides it shall be done. Under the view taken by the Government it seems to me a half a dozen or a dozen dealers, if they wanted to break up a prosperous firm, could get together and swear that they were selling a lower grade of commodity under a brand of a higher grade and were thus guilty of misbranding, and the opinion of these men might prevail in a court of law and thus work great hardship upon a firm or individual."

"As I understand, the grade of fancy mixed nuts is not established by any regulation of the department, but is a mere trade term, which is likely to be different in different localities, and may mean one thing here and something very different at another point, and inasmuch as that standard involves a criminal offense I think it should be established by the department itself and not by private individuals, who might conceivably have an interest in establishing a grade suitable to themselves and be swayed by self-interest, in their testimony."

"The Government has it within its power to fix regulations by which these nuts can be gauged as to quality, whether up to standard called for by the brand or not, and the Government ought to do it and not seek to set a standard by the mere opinion of private individuals."

"Well, gentlemen, you can't get me, as a matter of conscience, to believe that any person under an act authorizing the Department of Agriculture to issue regulations as to what shall constitute misbranding, and if that regulation be violated—(because the act gives the department the right to establish such regulations)—and if that act is violated, the party can be made criminally responsible. Now you can't get me to believe in conscience that the Department of Agriculture can, without making any regulation known to the public whereby dealers can be governed and guided, bring in a man or even seize his property, and upon the opinion of the so-called 'trade' hold him guilty of a criminal offense, or at least liable to seizure of his property. There is no use of arguing that any further."

"The trouble is, it seems to me, that the trade practice in New York might be entirely different from the practice here. Fancy mixed nuts in one place might be an entirely different and distinct grade from that classification in another place. If your idea were proper, we might establish one grade for instance in New York, another in Wheeling, another in Philippi and so on. Gentlemen, I have stated my ruling before. The Department of Agriculture has the power to fix a standard but fails to do it. Now it brings in a case at Wheeling, where the standard is one thing, and puts it up to the trade in general—brings in perhaps a witness from Baltimore, where the customs may be entirely different as to classification and grading. I don't think it is fair or equitable, and I am not willing it shall be done."

"There is no trouble about the name. The trouble lies in the utter failure of the department to establish what percentage of bad nuts shall constitute the standard of 'fancy mixed nuts.' The percentage of bad nuts or of small nuts or of the various sort of nuts contained in the mixture. They have failed to do that, and they can't put that responsibility on the trade. I don't think that meaning was ever intended to be given to the Food and Drugs Act."

"You are not in position to establish this case until you can establish a standard set up and published by the department. A standard which would be known to the trade, so that any dealer who desired to comply with the law as to branding would have access to it and would have absolute knowledge of its requirements and not be dependent altogether on the mere opinion of trade experts who, as I say, might differ materially in their views according to the locations where their business or experience had been attained."

"Well, my ruling is that you can't prove by the trade, by a number of witnesses, the trade understanding as to what constitutes fancy mixed nuts, that no such standard can be used as a basis for this action, but that it must be a Government standard fixed and published by the Department of Agriculture."

"Let the record show that the defendant claimant objected and excepted to the tender of testimony on this question, and the court sustains such objection, for the reason that these nuts were seized in 1913 and their outside appearance at this time would be manifestly misleading, but more particularly for the reason that the Department of Agriculture under the Pure Food and Drugs Act has full authority by regulation to determine what percentage of these nuts shall constitute a fancy mixed nut or first grade and what percentage second-grade or choice nut and to enforce such regulation when published, by the criminal provisions of this act, and that it can not, in the judgment of this court, fail to establish such regulation and then leave it to the opinion of dealers in various sections of the country to establish whether 17 per cent of badness will constitute a violation of the statute and condemn them, and 10 per cent of badness would prevent a person from being so prosecuted."

It is probable that this case will be taken by the Government by writ of error to the Circuit Court of Appeals for the Fourth Circuit.

CARL VROOMAN, *Acting Secretary of Agriculture.*