

**20137. Adulteration of celery seed. U.S. v. 8 Bags of Celery Seed. Decree of condemnation and forfeiture. Product released under bond to be reconditioned.** (F. & D. No. 28500. Sample No. 8478-A.)

This action involved the interstate shipment of a quantity of celery seed, samples of which were found to contain rodent excreta.

On July 22, 1932, the United States attorney for the Eastern District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of eight packages of celery seed, remaining in the original unbroken packages at Philadelphia, Pa., alleging that the article had been shipped in interstate commerce on or about July 7, 1932, by Rene Moellhausen, from New York, N.Y., to Philadelphia, Pa., and charging adulteration in violation of the Food and Drugs Act.

It was alleged in the libel that the article was adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance.

On July 26, 1932, L. H. Parke & Co., Philadelphia, Pa., having appeared as claimant for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be released to the said claimant to be reconditioned under the supervision of this Department, upon payment of costs and the execution of a bond in the sum of \$500, conditioned in part that it should not be sold or disposed of contrary to the Federal Food and Drugs Act and all other laws.

R. G. TUGWELL, *Acting Secretary of Agriculture.*

**20138. Adulteration of butter. U.S. v. 26 Tubs of Butter. Consent decree of condemnation and forfeiture. Product released under bond.** (F. & D. No. 28699. Sample No. 12006-A.)

This case involved a shipment of butter, samples of which were found to contain less than 80 percent by weight of milk fat, the standard for butter prescribed by Congress.

On August 2, 1932, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of 26 tubs of butter, remaining in the original unbroken packages at New York, N.Y., alleging that the article had been shipped in interstate commerce by the Earl Creamery, Earl, Wis., through Northwest Dairy Forwarding Co. Duluth, Minn., on or about July 23, 1932, to New York, N.Y., and charging adulteration in violation of the Food and Drugs Act.

It was alleged in the libel that the article was adulterated in that a product containing less than 80 percent by weight of milk fat had been substituted for butter, a product which should contain not less than 80 percent of milk fat as provided by the act of March 4, 1923.

William G. Hollrock, New York, N.Y., interposed a claim admitting the allegations of the libel and consenting to the entry of a decree, and agreed that the product be reconditioned so that it contain at least 80 percent by weight of butterfat. On August 15, 1932, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be released to the said claimant upon payment of costs and the execution of a bond in the sum of \$700, conditioned in part that it be reworked so that it comply with the Federal Food and Drugs Act and all other laws.

R. G. TUGWELL, *Acting Secretary of Agriculture.*

**20139. Misbranding and alleged adulteration of butter. U.S. v. Centralia Dairy Co. Demurrer to information filed. Demurrer overruled. Plea of guilty to count 2 of information. Remaining counts nolle prossed. Fine, \$100 and costs.** (F. & D. No. 27473. I.S. Nos. 22159, 22160, 22161, 22162, 22193, 22194, 22252, 22253, 22254, 22277 to 22283, incl.)

This case was based on the shipment of 16 lots of butter in packages labeled as containing 1 pound net weight. Sample packages taken from each of the shipments were found to contain less than 1 pound. Samples from 10 of the shipments were also found to contain less than 80 percent by weight of milk fat, the standard for butter prescribed by Congress.

On March 22, 1932, the United States attorney for the Western District of Washington, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for the district aforesaid an information

against the Centralia Dairy Co., a corporation, Centralia, Wash., charging violation of the Food and Drugs Act as amended. It was alleged in the information that the defendant company had shipped, between the dates of May 7, 1931 and June 4, 1931, from the State of Washington into the Territory of Alaska, 16 separate consignments of butter; that the article was misbranded and that the product in 10 of the 16 shipments was also adulterated. Portions of the article were labeled in part: (Package) "Sunset Gold Creamery Butter \* \* \* One Pound Net \* \* \* Special Sales Agents Piggly Wiggly Stores." The remainder of the article was labeled in part: (Package) "One Pound Net Weight Medo-Maid Butter is made and guaranteed by Centralia Dairy Co., Centralia, Wash."; (wrapper) "Net Weight Four Ounces."

Misbranding of the consignment of Sunset Gold butter shipped May 7, 1931, was alleged in count 2 of the information for the reason that the statements, "Butter" and "One Pound Net", borne on the packages, were false and misleading, and for the further reason that the article was labeled so as to deceive and mislead the purchaser, since the statements represented that the article was butter, a product which should contain not less than 80 percent by weight of milk fat as prescribed by the act of March 4, 1923, and that each of the packages contained 1 pound net of the article; whereas it contained less than 80 percent by weight of milk fat and the packages contained less than 1 pound net.

The information charged in count 1 that the shipment of Sunset Gold butter on May 7, 1931, also was adulterated in that a product which contained less than 80 percent by weight of milk fat had been substituted for butter, which the article purported to be; and, in count 3, misbranding of the said lot in that it was food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package, since the statement made was incorrect. It also charged that all the remaining consignments were misbranded because of alleged shortages in weight, and that portions also were adulterated and misbranded because of alleged deficiency in milk fat.

On April 9, 1932, the defendant filed a demurrer to the information which came up for argument on June 13, 1932. Decision was handed down by the court on July 18, 1932, in the following memorandum opinion overruling defendant's demurrer (Cushman, *D. J.*):

"The information is for violation of the Food and Drugs Act, more particularly Sections 2, 6, 8, 9, and 10, Title 21, U.S.C.A.

"One set of counts in the information accuse the defendant of unlawfully shipping and delivering for shipment from the City of Centralia, in the State of Washington, to cities in the Territory of Alaska, an article of food, adulterated within the meaning of the act of Congress, in that a product which contained less than 80 per centum by weight of milk fat had been substituted for butter.

"Title 21, U.S.C.A., Sec. 8, provides: 'Sec. 8. Adulterated articles \* \* \* An article shall be deemed to be adulterated; \* \* \* In the case of food: \* \* \* If any substance has been substituted wholly or in part for the article.'

"Sec. 6 of the Food and Drugs Act, as amended by the act of March 4, 1923 (42 Stat. 1500—Title 21, U.S.C.A., Sec. 6) provides: 'Sec. 6. Same: "butter." For the purposes of sections 1 to 15, inclusive, of this title, "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter, and containing not less than 80 per centum by weight of milk fat, all tolerances having been allowed for.'

"The demurrer to this set of counts will be overruled.

"In another set of counts the defendant is accused of misbranding such shipments, it being alleged that the packages were misbranded in that the statements 'butter' and 'one pound net' were false and misleading in that they represented the article was butter, to wit, a product which should contain not less than 80 per centum by weight of milk fat and that each of said packages contained 1 pound net of the article whereas in truth and in fact said article did not contain 80 per centum by weight of milk fat but did contain a less amount and each of said packages did not contain 1 pound net of the article but did contain a less amount and that said article was further misbranded in that it was labeled as aforesaid so as to mislead and deceive the purchaser into the belief that it was butter, to wit, a product which should contain not less than 80 per centum by weight of milk fat and that each of said packages contained 1 pound net of the article. These counts are, in part

at least, under that part of paragraph 8 of the act of June 30, 1906 (34 Stat. 771 as amended by 37 Stat. 732) now appearing as Title 21, U.S.C.A., Sec. 9.

"This section, in part, provides: 'Sec. 9. Misbranded: meaning and application. The term "misbranded", as used in sections 1 to 15, inclusive, of this title, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substance contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country, in which it is manufactured or produced.'

"As these counts clearly allege that the statement that the packages contained 'butter', as the same is defined by section 6, was false and misleading in the particular therein pointed out, the demurrer to these counts will be overruled and it is not necessary to consider whether these counts are also under that part of section 8 of the original act as amended now appearing as Title 21, U.S.C.A., section 10, third paragraph.

"In a third set of counts shipments and deliveries for shipment such as described in the first considered counts are alleged. In these last mentioned counts the marking, in part, is alleged to have been 'one pound net' and that it was food in package form and that the quantity of the contents was not plainly and conspicuously marked on the outside of the package.

"These counts are under section 10, Title 21, U.S.C.A., and more particularly the third paragraph thereof. This section, in so far as applicable, provides: 'Misbranded articles. For the purposes of sections 1 to 15, inclusive, of this title, an article shall be deemed to be misbranded; \* \* \* Foods. In the case of food: \* \* \* Packages Not Marked With Weight: Variations and Exemptions Permitted.—Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count. Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this title. The word "package" as used in this paragraph shall include and shall be construed to include wrapped meats inclosed in papers or other materials as prepared by the manufacturers thereof for sale.'

"The question presented concerning these counts is as to the validity of the third paragraph of section 10, supra. In *United States vs. Shreveport Grain & Elevator Co.*, 46 Fed. (2d) 354, this part of the act was, under the 8th amendment, held unconstitutional, the court citing, in support of the ruling: *United States vs. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 293, 65 L.Ed. 516, 14 A.L.R. 1045; *Connally vs. General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; *Yu Cong Eng vs. Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059; *United States vs. Reese et al.*, 92 U.S. 214, 23 L.Ed. 563; *United States vs. Brewer*, 139 U.S. 278, 11 S.Ct. 538, 35 L.Ed. 190; *Todd vs. United States*, 158 U.S. 282, 15 S.Ct. 889, L.Ed. 982.

"In construing a statute the first duty of the court is to ascertain the legislative intent. *Ebert vs. Poston*, 266 U.S. 548.

"If an act of Congress cannot, upon a fair construction, be reconciled with the Constitution it is the duty of the court to give effect to the Constitution rather than to the statute. *Hepburn vs. Griswold*, 8 Wall. 603. Acts of Congress must, however, be regarded as constitutional unless clearly shown to be otherwise. *Hepburn vs. Griswold*, 8 Wall. A court should declare an act of Congress unconstitutional only where the repugnancy is clear and the conflict irreconcilable. *The Mayor vs. Cooper*, 6 Wall. 247. See also Trade Mark Cases, 100 U.S. 82, 95-96; *United States vs. Harris*, 106 U.S. 629, 635; *Close vs. Glenwood Cemetery*, 107 U.S. 466, 475. Acts of Congress should be construed so as to avoid grave doubts as to their constitutionality. *Llewellyn vs. Frick*, 268 U.S. 238-251; *Panama R.R. Co. vs. Johnson*, 264 U.S. 375-390; *United States vs. Jin Fuey Moy*, 241 U.S. 394-401; *United States vs. Delaware & Hudson Co.*, 213 U.S. 366, 408; *Baender vs. Barnett*, 255 U.S. 224.

"In *United States vs. Shreveport Grain & Elevator Co.*, supra, the court held the clause of paragraph 3 of section 10, quoted above, unconstitutional because of the following contained therein:

"Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this title."

"Section 3, to which reference is made, provides: 'Sec. 3. Regulations for carrying out food and drug laws. The Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce shall make uniform rules and regulations for carrying out the provisions of sections 1 to 15, inclusive, of this title, including the collection and examination of specimens of food and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended, for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.'

"This reference to section 3 shows that the sentence last quoted from paragraph 3 of section 10 is not part of the definition of the offense but is a direction as to the exercise of administrative power. The court is only concerned with whether the offense is described with such reasonable certainty as to be valid and is not, in a case such as the present, concerned with those parts of the law having to do with its administrative features.

"The demurrer to these counts will likewise be overruled.

"The clerk will notify the attorneys for the parties of the foregoing ruling."

On September 24, 1932, the defendant company entered a plea of guilty to count 2 of the information, and the court imposed a fine of \$100. Nolle prosequi was entered as to the remaining counts.

R. G. TUGWELL, *Acting Secretary of Agriculture.*

**20140. Adulteration of dried figs. U.S. v. 10 Boxes of Dried Figs. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 28541. Sample Nos. 645-A, 1450-A.)**

This action involved the shipment of a quantity of dried figs, samples of which were found to be insect-infested and filthy.

On July 28, 1932, the United States attorney for the District of Oregon, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of 10 boxes of dried figs, remaining in the original unbroken packages in possession of the transportation company at Portland, Ore. The article had been shipped by the Otzen Packing Co., from San Francisco, Calif., to Weiser, Idaho, and reshipped to the said firm by way of Portland, Ore. It was alleged in the libel that the article had been shipped in interstate commerce on or about July 19, 1932, from Weiser, Idaho, to Portland, Ore., and that it was adulterated in violation of the Food and Drugs Act. The article was labeled in part: (Boxes) "Otzen's Ex Choice Black Figs Packed by Otzen Packing Co., San Francisco, California."

It was alleged in the libel that the article was adulterated in that it consisted wholly or in part of a filthy, decomposed, or putrid vegetable substance.

On September 17, 1932, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

R. G. TUGWELL, *Acting Secretary of Agriculture.*

**20141. Adulteration of canned tomato puree. U.S. v. 87 Cases, et al., of Canned Tomato Puree. Default decrees of condemnation, forfeiture, and destruction. (F. & D. Nos. 28508, 28542, 28543, 28544. Sample Nos. 5987-A, 5993-A, 5994-A, 5995-A, 5996-A, 5997-A.)**

These actions involved the interstate shipment of quantities of canned tomato puree, samples of which were found to contain excessive mold.

On July 28, 1932, the United States attorney for the Southern District of Ohio, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for the district aforesaid libels praying seizure and condemnation of 962 cases of canned tomato puree at Cincinnati, Ohio, consigned by the Haxton Canning Co., Oakfield, N.Y., in part on or about March 10, 1932, from Oakfield, N.Y., and in part on or about June 4, 1932, from Wyoming, N.Y., alleging that the article had been shipped in interstate commerce from the State of New York into the State of Ohio, and charged with adulteration in violation of the Food and Drugs Act. The article was labeled