

"Motion to strike the counterclaim is granted, without prejudice to the claimant's rights to challenge the libel by appropriate exceptions."

On February 2, 1944, the claimant filed exceptions to the libel, and thereafter made a motion for an order sustaining the exceptions and dismissing the libel. At the conclusion of the hearing on the matter, and after due deliberation, the court, on May 2, 1944, handed down the following memorandum opinion:

MOSCOWITZ, *District Judge*: "Exceptions have been filed to the libel based upon two grounds: One, that the libel is insufficient, and the other, that Section 343 (d) of the U. S. Code is unconstitutional.

"Section 343 (d) reads as follows: 'A food shall be deemed to be misbranded \* \* \* (d) If its container is so made, formed or filled as to be misleading.'

"As I understand claimant's position, it is claimed that this is not sufficiently descriptive and would not afford an opportunity to a seller, packer or shipper to determine what is a proper container. The criticism is that this subdivision (d) also involves a conclusion rather than specifying the grounds sufficiently and for that reason is unconstitutional and that the claimant is thereby deprived of his property without due process of law.

"It seems to me that this provision is specific and does not violate any constitutional rights of the claimant.

"As to the first ground, that the libel is insufficient, there has been produced to the Court for visual demonstration, Libelant's Exhibit 1, which is one of the packages in question, which is substantially similar to the other packages shipped by claimant. I think the libel upon its face is complete and sets forth a prima facie cause of action; an examination of the Exhibit 1 indicates that a purchaser might be misled. It might very well be that upon the trial some other demonstration can be made; that it may very well be, as claimed by the claimant, that it was necessary to ship it in that way. However, I am not passing upon that question; that is to be passed upon by the trial court.

"I will overrule exceptions to the libel."

On May 19, 1944, an order was issued denying the claimant's motion and overruling the claimant's exceptions to the libel. Thereafter the claimant withdrew its claim and answer, and on August 8, 1944, judgment of condemnation was entered and the product was ordered destroyed.

**7193. Adulteration of gift packages. U. S. v. 20 Boxes and 31 Boxes of Gift Packages. Default decree of condemnation and destruction. (F. D. C. Nos. 12006, 12007. Sample Nos. 30373-F, 60520-F.)**

**LIBEL FILED:** March 14, 1944, Northern District of California.

**ALLEGED SHIPMENT:** On or about November 30, 1943, by Golden Brand Nut Products, Inc., from New York, N. Y.

**PRODUCT:** 51 3-pound gift packages at San Francisco, Calif.

The product was a confection-type pack consisting of assorted cookies, candies, and fruit pastes.

**LABEL, IN PART:** (Sticker on bottom of box) "Victory Snack-Pack No. 9253."

**VIOLATION CHARGED:** Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence in the fruit pastes of worm and insect fragments and rodent hairs.

**DISPOSITION:** June 9, 1944. No claimant having appeared, judgment of condemnation was entered and the article was ordered destroyed.

## MISCELLANEOUS FOODS

### VITAMIN PREPARATIONS AND FOODS FOR SPECIAL DIETARY USES

**7194. Adulteration and misbranding of candy. U. S. v. 59 Packages of Candy. Default decree of condemnation. Product ordered delivered to a local hospital. (F. D. C. No. 12911. Sample No. 60938-F.)**

**LIBEL FILED:** July 12, 1944, Eastern District of Louisiana.

**ALLEGED SHIPMENT:** On or about June 12, 1944, by Joe Franklin Myers, from Dallas, Tex.

**PRODUCT:** 59 8-ounce packages of candy at New Orleans, La.

Examination showed that the product contained less than 50 U. S. P. units of vitamin A per pound.