

if the product is found to be decomposed and rotten upon examination following interstate shipment. These considerations, as they seem to me, are not entirely to be waved aside by the fact that certain tolerances or allowances may have been recognized by the Food and Drug Administrator in the administration of the statute. If the product was under the evidence in a state of substantial decomposition and rotten, as those terms are well understood, that ends their right to interstate shipment and condemnation is in order.

"The present statute supersedes any earlier regulation of the Food and Drug Administrator and while recognition of practices or tolerances adopted by the administrator is to be taken into account and given due weight in applying the statute, the fact remains that here the evidence, in my view, shows an excess of substantial parts above the tolerances adopted, and it must be borne in mind that Section 336 of the Act does not directly authorize exemptions but specifically gives the Administrator a discretion not to report or prosecute minor violations.

"That this is a conclusion rightly to be reached will be understood by reference to Section 345, wherein the Administrator is given power to promulgate regulations exempting certain requirements, and Section 346 authorizes regulations for tolerances in respect of poisonous ingredients. No such provision for regulation making exemptions, or for tolerating unavoidable ingredients is provided with respect to Section 342 (a) (3).

"Nor am I impressed with the testimony that the variable sense of smell and taste is more dependable in detecting rot than the microscopic procedure adopted by the Government. Certainly the question of adulteration would rest upon tenuous ground if reliance or conclusion as to the character of the product shipped were bottomed upon conflicting evidence as to the smell or taste of the article sought to be condemned.

"It is probably true that there will be a difference of opinion even under the microscopic procedure but for the want of a more reliable test it seems reasonable to accept such results depending, of course, upon the Court's conclusion as to the credibility of the witnesses testifying and giving their opinions upon that subject.

"The Act must be interpreted liberally in the interest of the congressional purpose to prohibit the transportation of adulterated foods in interstate commerce. In my judgment the Government has sustained the burden of proof and it follows from what has been said that condemnation of the entire shipment of tomato puree must be ordered.

"Proposed findings and conclusions may be submitted for approval and adoption accordingly.

"After entry of a decree carrying into effect the judgment of the Court the defendant, or condemnee, may have the benefit of the provisions of Section 334 (d)."

A motion for summary judgment subsequently was filed by counsel for the claimant, based on the decision in the case of *Sligh v. Kirkwood*, 237 U. S. 52. On October 9, 1946, the court (Jones, District Judge) denied the motion, ruling "I do not find in the opinion any ruling or conclusion to justify this Court in reversing its decision in respect of the interpretation of the statute in question."

On December 5, 1946, findings of facts and conclusions of law were filed; and on April 15, 1948, judgment of condemnation was entered and the product, with the consent of the claimant, was ordered destroyed.

14740. Adulteration of tomato puree. U. S. v. 253 Cases * * * (and 3 other seizure actions). (F. D. C. Nos. 24331, 24390, 24461, 24491. Sample Nos. 18522-K, 18526-K, 18675-K, 18679-K.)

LIBELS FILED: February 6 and March 2 and 17, 1948, Eastern District of Kentucky and Southern District of Ohio.

ALLEGED SHIPMENT: On or about November 1 and 15, 1947, by D. E. Foote & Co., Inc., from Baltimore, Md.

PRODUCT: 529 cases at Covington, Ky., and 1,082 cases at Cincinnati, Ohio, each case containing 48 10½-ounce cans of tomato puree.

LABEL, IN PART: (Can) "Family Brand Tomato Puree."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance by reason of the presence of decomposed tomato material.

DISPOSITION: April 14 and 26, 1948. D. E. Foote & Co., Inc., claimant, having consented to the entry of decrees, judgments of condemnation were entered and the product was ordered released under bond to be brought into compliance with the law, under the supervision of the Federal Security Agency. A total of 1,195½ cases were seized under the four lots. Of these, 275 cases and 19 cans were segregated as satisfactory, and the remainder was destroyed.

14741. Adulteration of tomato puree. U. S. v. 321 Cases * * *. (F. D. C. No. 26251. Sample Nos. 44324-K, 44327-K.)

LIBEL FILED: January 4, 1949, Southern District of Ohio.

ALLEGED SHIPMENT: On or about July 1, 6, and 22, 1948, by the Mays Packing Co., Mays, Ind.

PRODUCT: 321 cases, each containing 6 No. 10 cans, of tomato puree at Columbus, Ohio.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance by reason of the presence of decomposed tomato material.

DISPOSITION: February 11, 1949. Default decree of destruction.

14742. Adulteration of tomato puree. U. S. v. 126 Cases * * *. (F. D. C. No. 24436. Sample No. 22635-K.)

LIBEL FILED: February 9, 1948, Western District of Louisiana.

ALLEGED SHIPMENT: On or about October 15, 1947, by the Uddo & Taormina Co., from Crystal Springs, Miss.

PRODUCT: 126 cases, each containing 100 4¾-ounce cans, of tomato puree at West Monroe, La.

LABEL, IN PART: "Baby Brand Tomato Puree."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of fly eggs and maggots.

DISPOSITION: October 7, 1948. Default decree of condemnation and destruction.

14743. Adulteration and misbranding of tomato puree. U. S. v. 95 Cases * * *. (F. D. C. No. 26286. Sample No. 23331-K.)

LIBEL FILED: January 14, 1949, Eastern District of Louisiana.

ALLEGED SHIPMENT: On or about October 5, 1948, by the Taormina Co., from Donna, Tex.

PRODUCT: 95 cases, each containing 6 No. 10 cans, of tomato puree at Baton Rouge, La.

LABEL, IN PART: "Red Bird Tomato Puree."