

claimant cannot now be heard to say that it is selling only cigarettes and not drugs.

"On this point legislative intent is clear. 'The use to which a product is to be put will determine the category into which it will fall. If it is to be used only as a food it will come within the definition of food and no other. If it contains nutritive ingredients but is sold for drug use only, as clearly shown by the labeling and advertising, it will come within the definition of drug, but not that of food. If it is sold to be used both as a food and for the prevention or treatment of disease it would satisfy both definitions and be subject to the substantive requirements for both. The manufacturer of the article, through his representations in connection with its sale, can determine the use to which the article is to be put. For example, the manufacturer of a laxative which is a medicated candy or chewing gum can bring his product within the definition of drug and escape that of food by representing the article fairly and unequivocally as a drug product.' (Senate Report No. 361, 74th Congress, 1st Session from the Committee on Commerce Report to accompany S. 5).

"How, then, has the manufacturer in the case at bar represented his product to the public? What is the nature and import of the labeling as shown by the leaflet?

"Claimant, understandably, does not believe it is selling drugs. It admits that the product has none of the curative or preventive powers implied in the leaflet. But throughout the leaflet claimant has tried to capture a share of the cigarette market by a subtle appeal to a natural and powerful desire on the part of us all to avoid the infectious diseases or ailments therein mentioned. Should the buying public or some portion of it turn to Fairfax cigarettes, it would most likely do so because of the means claimant has used to bring the cigarettes to public attention. It is not likely that the buying public would ordinarily carefully study or weigh each word in the leaflet. 'The ultimate impression upon the mind of the reader arises from the sum total of not only what it said but also of all that is reasonably implied.' *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 167 (C. C. A. 7, 1942). The clear import of the leaflet is at least that the smoking of the cigarettes will make it less likely that the smoker will contract colds or other virus infections. This is enough to bring the product within the statutory meaning of 'drug.' If claimant wishes to reap the reward of such claims, let it bear the responsibility as Congress has seen fit to impose it. *United States v. Dotterweich*, *supra*: cf. *Barnes v. United States*, 142 F. 2d 648 (D. C. A. 9, 1944)."

Pursuant to the above opinion, the court, on June 29, 1953, entered a decree of condemnation and ordered that the product be destroyed. On September 9, 1953, with the consent of the parties, an amended decree was entered providing for the release of the product under bond for relabeling under the supervision of the Department of Health, Education, and Welfare.

4095. Misbranding of Yo-Zyme yogurt tablets. U. S. v. 63 Bottles, etc. (F. D. C. No. 33313. Sample Nos. 1162-L, 1163-L.)

LIBEL FILED: July 7, 1952, Southern District of Florida.

ALLEGED SHIPMENT: On or about March 17, 1952, by MacDonald Laboratories, Inc., from St. Paul, Minn.

PRODUCT: 63 150-tablet bottles and 86 500-tablet bottles of *Yo-Zyme yogurt tablets* at Orlando, Fla., together with a number of mailing cards entitled "Yo-Zyme" and a number of leaflets entitled "The Story of Yo-Zyme" and "Yo-Zyme For Health and Vitality."

Examination showed that the product contained a small number of viable streptococci and lactobacilli organisms.

LABEL, IN PART: (Bottle) "Yo-Zyme Yogurt Cpd. Tablets" or "Yo-Zyme Yogurt Cpd. Healthfood Tablets."

NATURE OF CHARGE: Misbranding, Section 502 (a), certain statements in the labeling of the article, namely, the bottle labels and the above-mentioned

mailing cards and leaflets accompanying the article, were false and misleading. The statements represented and suggested that the article was effective to increase vitality, to prevent "flu," colds, and other infections, to lessen fatigue, to increase resistance to disease, to relieve nervousness, to improve complexion, to build blood, and to implant and maintain a lactic acid bacterial culture in the intestines. The article was not effective for such purposes.

DISPOSITION: MacDonald Laboratories, Inc., claimant, having filed a motion for the removal of the case to the District of North Dakota, the court entered an order, on November 24, 1952, directing such removal. Thereafter, since the claimant failed to make any further appearance in the case and since it appeared that default judgment could not be entered in the District of North Dakota, an order was entered by the United States District Court for the District of North Dakota, transferring the case back to the Southern District of Florida. Following such transfer, the United States District Court for the Southern District of Florida entered a default decree of condemnation and destruction on September 4, 1953.

4096. Misbranding of Matte (maté). U. S. v. 53 Cylinders * * *. (F. D. C. No. 34162. Sample No. 44418-L.)

LIBEL FILED: November 20, 1952, District of Massachusetts.

ALLEGED SHIPMENT: On or about July 22, 1952, by David Komisar & Son, Inc., from New York, N. Y.

PRODUCT: 53 cylinders of *Matte* (maté) at Boston, Mass. Examination showed that the product was maté.

LABEL, IN PART: (Cylinder) "Gold Brande Matte The Energizing Brazilian Tea Nature's Golden Drink delicious stimulating * * * Net Weight ½ Pound."

NATURE OF CHARGE: Misbranding, Section 502 (a), the label statements, namely, "The Energizing Brazilian Tea * * * is prepared identically as is common tea * * * energizing * * * supplies vitamins and minerals * * * tonic effects * * * its natural dietetic properties aid the body to throw off excess uric acid * * * supplies quick energy and helps to resist unusual mental and physical strain," were false and misleading since the article was not tea, did not provide nutritionally significant amounts of vitamins and minerals, and was not effective in the treatment of the conditions stated and implied.

The article was alleged also to be misbranded under the provisions of the law applicable to foods, as reported in notices of judgment on foods.

DISPOSITION: David Komisar & Son, Inc., appeared as claimant and filed an answer denying that the product was misbranded. Thereafter, upon agreement of the parties, the case was removed for trial to the United States District Court for the Eastern District of New York. Interrogatories subsequently were filed by the Government on April 15, 1953. Upon failure of the claimant to answer the interrogatories, a motion was filed by the Government to strike the claimant's answer to the libel and for a default decree of condemnation. No opposition to such motion having been interposed, the court, on September 4, 1953, granted the motion and entered a default decree of condemnation and destruction.

4097. Misbranding of Azalias Medicine. U. S. v. 100 Bottles * * *. (F. D. C. No. 34668. Sample No. 19903-L.)

LIBEL FILED: February 18, 1953, District of Minnesota.