

20149. George S. Knapp, et al. (Paterson, Boardman & Knapp) v. Joseph Callaway, Jr., et al. Suit to enjoin officials of the Department of Agriculture from using the so-called "acid test" in determining quality of dried egg yolk, in administering the Food and Drugs Act, and to enjoin Customs officials from detaining imported dried egg yolk because of alleged adulteration. Motion by Government to dismiss bill, overruled. Motion for preliminary injunction denied. Order discontinuing suit entered.

On April 17, 1931, George S. Knapp, George W. Knapp, and Charles Walden, copartners trading as Paterson, Boardman & Knapp, filed a bill of complaint against Arthur M. Hyde, Secretary of Agriculture, Andrew W. Mellon, Secretary of the Treasury; Walter G. Campbell, Directory of Regulatory Work of the Department of Agriculture; Joseph Callaway, Jr., Chief of the New York Station of the Food and Drug Administration of the Department of Agriculture; Guy C. Swan, acting chief of said station; and Philip Elting, Collector of Customs of the Port of New York. The bill recited that the plaintiffs were the owners of 56 cases of dried eggs imported from China and held in bonded warehouses in New York; that the defendant Elting refused to release and admit the said eggs on the grounds that they did not comply with the Food and Drugs act; that the Department of Agriculture had adopted and established a test known as the "acid test" for determining the quality of dried egg yolk; that as a result of applying the said test to the dried egg yolk in question the Department of Agriculture had pronounced the product to be adulterated. The bill alleged that the said test was not a fair and true test; that it was arbitrary and capricious; that the dried egg yolk complied with the law and was not adulterated or decomposed, but was of good quality; that because of the test adopted the plaintiffs would be irreparably injured in their business of importing dried egg yolk; and that plaintiffs had no adequate remedy in law.

The bill of complaint further prayed that the defendants be enjoined from using the said test in determining the quality of dried egg yolk, pending the determination of the suit and permanently enjoined from using said test as basing the standard of dried egg yolk on the acidity thereof; and that defendant Philip Elting be enjoined from further detaining the said dried egg yolk and be directed to release the product.

A motion on behalf of the Government to dismiss the bill came on for hearing on May 5, 1931. In advance of argument on the motion the plaintiffs consented to an order discontinuing the action against Arthur M. Hyde, Andrew W. Mellon, and Walter G. Campbell. On May 27, 1931, the court overruled the Government's motion to dismiss the bill in the following opinion, holding that Joseph Callaway, Jr., Guy C. Swan, and Philip Elting were properly made defendants and that the complaint stated a cause of action (Woolsey, J.):

"This motion is denied.

"1. The Secretary of the Treasury and the Secretary of Agriculture have not been served or appeared herein.

"The United States Attorney has appeared only for the defendants Callaway and Swan, of the Department of Agriculture, and for the defendant Elting Collector of Customs. They are properly made defendants herein because the defendant Callaway, as Chief of the New York station of the Department of Agriculture, and the defendant Swan, as acting chief thereof, instigated, by their tests and findings, the exclusion of the egg yolk, and the defendant Elting, as Collector of Customs, is holding it under the provisions of Section 11 of the Food and Drugs Act of June 30, 1906, as amended.

"II. In my opinion the bill of complaint states a cause of action.

"It is alleged in the complaint, paragraphs 16 and 17 thereof—and on this motion it necessarily must be deemed admitted—that the egg yolk in question here was when tested, and still is, of good quality, and in fact fit for food under the provisions of the Food and Drugs Act of June 30, 1906, section 7, subdivision 6.

"It is also alleged, paragraphs 11-15 and 18, that the condemnation of the egg yolk was due to the imposition by the Department of Agriculture of a test—a description of which is annexed to the complaint as Exhibit A—which is not a fair or true test of the condition of the egg yolk as food within the meaning of the Food and Drugs Act, section 7, subdivision 6, but on the contrary is an unreasonable test which results in establishing a standard for the admission of egg yolk which transcends the scope of the act under which only the Department of Agriculture has authority to act.

"Whether these statements be true or not, I do not know, but if they are established the case would come within the decision of the Supreme Court in

Waite v. Macy, 246 U.S. 606, 609, and the plaintiff would be entitled to the relief here sought.

"The question of the reasonableness of an executive act of this kind is a question of fact and not a question of law. *North German Lloyd v. Elting*—not yet reported—C.C.A. 2, April 6, 1931, reversing 43 F. (2d) 203.

"It follows that the complaint should not be dismissed but that the defendants must challenge these allegations of fact in the complaint by answer and contest them by evidence.

"Settle order on two days' notice."

On August 10, 1931, the application for a preliminary injunction was denied, the court handing down the following opinion:

In Equity. Suit by George S. Knapp and others, copartners doing business under the firm name and style of Paterson, Boardman & Knapp, against Joseph Callaway, Jr., as Chief of the New York Station of the Department of Agriculture, and others. On motion for preliminary injunction. Motion denied. (Bondy, D. J.):

"This is a suit to enjoin officers of the Department of Agriculture from detaining certain shipments of dried egg yolk belonging to the plaintiffs and from basing the standard of dried egg yolk, for purposes of admissibility into the United States, upon the Department's fatty acid test.

"Section 2 of the Food and Drugs Act (21 U.S.C.A., sec. 2) prohibits the importation of any article of food which is adulterated, and section 7 (21 U.S.C.A., sec. 8) provides that an article shall be deemed to be adulterated in the case of food if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.

"Section 3 (21 U.S.C.A., sec. 3) provides that the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce shall make uniform rules and regulations for carrying out these provisions.

"Pursuant to this authority a rule was adopted (Regulation 4b of the Regulations for the Enforcement of the Federal Food and Drugs Act) providing that all foods shall be analyzed by the methods prescribed by the Association of Official Agricultural Chemists, when applicable, provided, however, that any method of analysis or examination satisfactory to the Food and Drug Administration may be employed.

"It is contended by the plaintiffs that the new test which was recently put into effect in place of the organoleptic tests—appearance, taste, texture, solubility, viscosity, and odor—theretofore used by the Department of Agriculture and still used by the trade to determine the merchantable quality and fitness of dried egg yolk for human consumption, is unfair and enforces an unauthorized standard which is arbitrary and capricious, citing *Waite v. Macy*, 246 U.S. 606, 38 S.Ct. 395, 62 L.Ed. 892; *Lynch v. Tilden Produce Co.*, 265 U.S. 315, 44 S.Ct. 488, 68 L.Ed. 1034; *Ambruster v. Mellon*, 59 App.D.C. 341, 41 F. (2d) 430.

"The plaintiffs urge that the decomposition detected by the Department's test is chemical decomposition of the fat into its component parts and not the bacterial decomposition resulting in staleness or rottenness intended by the statute, citing *A. O. Anderson & Co. v. United States* (C.C.A.) 284 F. 542.

"The plaintiffs concede that the test is a fair and scientific test to determine the percentage of fatty acid contained in dried egg yolk.

"They assert that whether or not such yolk consists in whole or in part of a filthy, decomposed, or putrid animal substance, can be adequately determined, as it always has been, by the organoleptic test, and that the test of lipolytic decomposition adopted by the Government does not show whether such egg yolk consists of decomposed animal substance, and that decomposed dried egg yolk often shows a lower percentage of fatty acid than the standard fixed by the Department.

"The test required by the statute is not whether the food is unwholesome or injurious to health. See *United States v. Two Hundred Cases of Adulterated Tomato Catsup* (D.C.) 211 F. 780, 783; *A. O. Anderson & Co. v. United States* (C.C.A.): 284 F. 542.

"That such a test has never been used or heard of before is immaterial. See *United States v. One Hundred Barrels of Vinegar* (D.C.) 188 F. 471, 473, 474. The fact that the trade does not use it is immaterial. See *W. B. Wood Mfg. Co. v. United States* (C.C.A.), 292 F. 133, 134.

"It appears by the Government's affidavits that the fat or ether extract of fresh eggs passes practically unchanged from the liquid egg into the dried egg; that the acidity of a strictly fresh liquid egg has never been found to

be higher than 1.72 c.c. N/20 sodium ethylate per gram and never higher than 1.99 c.c. for any egg of edible commercial quality; that in no case were good shell eggs or frozen eggs ever found the acidity of the ether extract of which exceeded 2.5 c.c. per gram; that the acidity of this ether extract is always low when fresh sound eggs are used and high when decomposed or unsound eggs are used, and that the acidity of dried egg yolk prepared from sound fresh eggs was found to increase so slowly under ordinary conditions of storage that at the end of three years it does not equal 5. c.c., whereas egg products from decomposed eggs exhibit high acidity and a marked tendency for this acidity to increase rapidly; that, accordingly, sound eggs properly stored and shipped would show on arrival in the United States from China an acidity of from 2 to 3 c.c.; and that the acidity of the ether extract of dried egg yolk made from decomposed eggs often exceeds 5 c.c. at the time of drying, and, if not, it increases rapidly and soon exceeds that figure.

"From these scientific facts the Department concludes that when dried egg yolk shows an acidity of 5 c.c. or more on arrival in the United States that indicates that it was made from eggs which would have shown, if tested in the liquid state, the characteristics of such decomposition as amounts to staleness or rottenness clearly within the meaning of the word decomposition as used in the statute, but which cannot be detected by the organoleptic test after drying because the volatile products of decomposition are driven off by drying, or else that such a percentage of acidity shows that the egg yolk was improperly dried or stored and thus became decomposed after drying.

"The acid test seems to be a good test of whether the fatty part of the egg has been attacked by decomposition. Eggs may have a bad odor and show a low acidity, for it is conceded that the test does not detect protein decomposition, but eggs with a bad odor would be excluded as putrid. Thus, eggs may be filthy, decomposed, and putrid, and they may not have a high acidity, but, if they have a high acidity, that shows that the fatty part of the egg has been affected by decomposition. Many tests may be required to show that an egg is good in all respects, but any one of a number may suffice to show that it is bad in a certain respect. Though the affidavits of chemists, dealers, and dieticians used in support of the motion deny that the Government's acid test shows that dried egg yolk is decomposed, or that decomposed liquid eggs were used in making it, it cannot be said, in view of the statements set forth in defendants' affidavits, that the test adopted by the Government is arbitrary or capricious (see *United States v. Bartram Bros.* (C.C.A.) 131 F. 833; *Commercial Solvents Corp. v. Mellon* 51 App.D.C. 146, 277 F. 548), or that the complainant shows reasonable probability of ultimate success. Where the facts are disputed, a preliminary injunction will not issue. *Cumberland T. & T. Co. v. Stevens* (D.C. 274 F. 745; *Wisconsin-Minnesota L. & P. Co. v. Railroad Commission of Wisconsin* (D.C.) 267 F. 711.

"The motion for a preliminary injunction is denied. However, in view of the sharp conflict in the opinion of experts and the desirability of an early determination of the issue, the action will be given a preference, if desired."

On July 28, 1932, the case was discontinued.

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

20150. Adulteration of cherries. U.S. v. 135 Baskets of Cherries. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 28885. Sample No. 8469-A.)

This action involved a shipment of cherries which were found to bear arsenic in an amount which might have rendered the article injurious to health.

On August 11, 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 135 baskets of cherries, remaining in the original unbroken packages at Philadelphia, Pa., alleging that the article had been shipped in interstate commerce on or about August 9, 1932, by Albert Sutterlein, from Interlaken, 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 contained an added poisonous or deleterious ingredient, arsenic, which might have rendered it harmful to health.

On August 31, 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.*