

CHARGE: 402(a)(3)—contained maggot and other insect fragments; and 402(a)(4)—prepared and packed under insanitary conditions.

DISPOSITION: 7-25-62. Default—destruction.

TOMATOES AND TOMATO PRODUCTS

28262. Canned tomatoes. (F.D.C. No. 46850. S. No. 9-976 T.)

QUANTITY: 498 cases, 24 1-lb. 12-oz. cans each, at Albany, N.Y.

SHIPPED: 9-26-61, from Hurlock, Md., by Albert W. Sisk & Sons.

LABEL IN PART: (Can) "Brand De Cecco Selected Italian Style Peeled Tomatoes Net Weight 1 Lb. 12 Oz. Packed by John N. Wright Jr. Hurlock, Md."

LIBELED: 12-14-61, N. Dist. N.Y.

CHARGE: 402(a)(3)—contained *Drosophila* fly eggs and maggots when shipped.

DISPOSITION: 6-12-62. Consent—claimed by John N. Wright, Jr., Inc., Hurlock, Md. Segregated; 50 cases destroyed.

28263. Canned tomatoes. (F.D.C. No. 47139. S. Nos. 7-242/3 T.)

QUANTITY: 595 cases, 24 1-lb. cans each, and 148 cases, 24 1-lb. 12-oz. cans each, at Raynham, Mass.

SHIPPED: 12-7-61, from Hickman, Md., by H. H. & B. H. Nuttle Canning Co.

LABEL IN PART: (Can) "Clover Red Ripe Tomatoes * * * Net Weight 1 Lb. [or "1 Lb. 12 Oz."] Packed For R. F. Owens Co. Raynham, Mass."

LIBELED: 2-14-62, Dist. Mass.

CHARGE: 402(a)(3)—contained *Drosophila* fly eggs and maggots when shipped.

DISPOSITION: 4-2-62. Consent—claimed by H. H. & B. H. Nuttle Canning Co. Segregated; 284 cases and 10 cans destroyed.

28264. Tomato catsup. (F.D.C. No. 45885. S. No. 69-925 R.)

QUANTITY: 599 cases, containing 24 14-oz. btl., at Philadelphia, Pa.

SHIPPED: 3-30-61, from Bridgeton, N.J., by P. J. Ritter Co.

LABEL IN PART: (Btl.) "Ritter Tomato Catsup Net Contents 14 Oz. Avoir. Sold and Guaranteed by The P. J. Ritter Co., Bridgeton, N.J., U.S.A."

LIBELED: 5-10-61, E. Dist. Pa.

CHARGE: 402(a)(3)—contained decomposed tomato material when shipped.

DISPOSITION: On or about 6-27-61, P. J. Ritter Co., claimant, filed an answer to the libel and thereafter the Government filed a motion to strike certain portions of the claimant's answer. On 4-19-62, the court handed down the following opinion and order:

GRIM, Sr. J.: "This is a proceeding for the seizure of catsup under the Federal Food, Drug, and Cosmetic Act, enacted in 1938, 21 U.S.C. § 301 et seq. The libel avers that the catsup is adulterated within the meaning of section 402(a)(3) of the Act, 21 U.S.C. § 342(a)(3), 'in that it consists wholly or in part of a decomposed substance by reason of the presence therein of decomposed tomato material.' The answer of P. J. Ritter Company avers that it is the owner, manufacturer, and claimant of the catsup, denies that the catsup is adulterated within the meaning of section 402(a)(3), or that it is 'unfit for food, or harmful to health,' and avers that the decomposed tomato material is known as rot, 'which is present in varying degrees in all processed tomato products' and 'represents a breakdown of tomato tissue caused by mold.' The answer then sets up the government's technique for estimating the amount of mold or rot, its tolerances for determining how much rot or mold can be present without rendering the material unfit for food or injurious

to health, and the fact that the government is in the process of developing new tolerances to meet the situation resulting from new manufacturing processes known as comminution and homogenization.

"The government has moved under F.R. Civ. P. 12(f) to strike, as immaterial that part of the answer which denies that the catsup is unfit for food or harmful to health and which deals with standards of and tolerances for, rot or mold. The government contends that these two grounds are not defenses under § 402(a) (3), which condemns food as adulterated:

'(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food.'

"The meaning of this provision, the government contends, is that food is adulterated if it consists partly or entirely of a filthy substance, of a putrid substance, or of a decomposed substance, without regard to whether or not the presence of such unlovely substance renders it unfit for food. Defendant contends that the provision means that food is adulterated only if the food is rendered unfit for food, i.e., injurious to health by the presence of a filthy, a putrid, or a decomposed substance, or is rendered unfit for food in some other way.

"The government indeed has respectable authority for its contention: *United States v. 499 Cases Tomato Paste*, 212 F. 2d 567 (2d Cir. 1954) (dissent by Judge Frank); *Bruce's Juices, Inc. v. United States*, 194 F. 2d 935 (5th Cir. 1952); *Anderson and Co. v. United States*, 284 Fed. 935 (9th Cir. 1922); *Salamonie Packing Co. v. United States*, 165 F. 2d 205 (8th Cir. 1948); *United States v. 1851 Cartons, etc., Frosted Fish*, 146 F. 2d 760 (10th Cir. 1945); see also Maris, J., in *United States v. 133 Cases of Tomato Paste*, 22 F. Supp. 515 (E.D. Pa. 1938).

"The most recent case in a Court of Appeals, however, *United States v. 1500 Cases Tomato Paste*, 236 F. 2d 208 (7th Cir. 1956), refused to follow the earlier cases, the court there saying, 236 F. 2d at p. 210:

'We find it impossible to agree with the accepted interpretation of Section 342(a) (3), 21 U.S.C.A., without ignoring completely the word "otherwise" therein.'

"Since this court, speaking by the authoritative voice of Judge Maris, has construed the provision as condemning food as adulterated without regard to whether or not it is unfit for food, *United States v. 133 Cases of Tomato Paste*, *supra*, the ruling of Judge Maris in that case will be followed here.

ORDER

"AND NOW, April 19, 1962, the government's motion to strike portions of the answer is granted."

On 5-9-62, the claimant having consented to the entry of a decree, judgment was entered providing for condemnation of the article and its release under bond for segregation and destruction of certain codes of the article.

NUTS AND NUT PRODUCTS

28265. Shelled peanuts. (F.D.C. No. 46655. S. No. 80-448 R.)

INFORMATION FILED: 1-9-62, M. Dist. Ga., against Houston Peanut Co., Sylvester, Ga.

SHIPPED: 6-9-61, from Georgia to Massachusetts.

CHARGE: 402(a) (4)—held under insanitary conditions.

PLEA: Guilty.

DISPOSITION: 6-25-62. \$250 fine.

28266. Shelled peanuts. (F.D.C. No. 47505. S. No. 32-596 T.)

QUANTITY: 18 100-lb. bags at Los Angeles, Calif.

SHIPPED: Between 12-4-61 and 4-5-62, from Norfolk, Franklin, and Suffolk, Va.