

**DISPOSITION:** August 19, 1945. The Fisher Nut and Chocolate Co., St. Paul, Minn., claimant, having consented to the entry of a decree, judgment was entered condemning the product, with the exception of any fit portion that might be segregated from the bad under the supervision of the Food and Drug Administration. The decree provided further that the product be released under bond, conditioned that it should not be disposed of in violation of the law.

**8269. Misbranding of salted peanuts. U. S. v. 8 Cases of Salted Peanuts. Default decree of condemnation and destruction.** (F. D. C. No. 16866. Sample No. 27276-H.)

**LIBEL FILED:** July 26, 1945, District of Oregon.

**ALLEGED SHIPMENT:** On or about June 21, 1945, by Idaho Food Products, Inc., from Boise, Idaho.

**PRODUCT:** 8 cases, each containing 48 11-ounce bags, of salted peanuts at Baker, Oreg.

**LABEL, IN PART:** "Carolyn Brand Thrifty Pack Quality Foods."

**VIOLATIONS CHARGED:** Misbranding, Section 403 (e) (2), the article failed to bear a label containing an accurate statement of the quantity of contents; Section 403 (i) (1), its label failed to bear the common or usual name of the article; and, Section 403 (i) (2), its label failed to bear the common or usual name of each of its ingredients.

**DISPOSITION:** September 12, 1945. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

**8270. Adulteration of peanut butter and chocolate-covered peanuts. U. S. v. 75 Cases of Peanut Butter (and 4 other seizure actions against peanut products). Tried to the court. Judgment dismissing libels. Judgment reversed by the circuit court of appeals. Petition by claimant for writ of certiorari denied. Decree of condemnation and destruction.** (F. D. C. Nos. 11023, 11076, 11127, 11143, 11193. Sample Nos. 53226-F, 53227-F, 53511-F, 53515-F, 58514-F.)

**LIBELS FILED:** Between October 27 and December 7, 1943, District of Maryland and Eastern District of North Carolina. Two of the Maryland libels were amended on January 20, 1944.

**ALLEGED SHIPMENT:** Between the approximate dates of October 6 and 15, 1943, by the Old Dominion Peanut Corporation, from Norfolk, Va.

**PRODUCT:** 162 cases of peanut butter at Baltimore, Md., and 23 cases of peanut butter at Tarboro, N. C., each case containing 24 jars, and 200 boxes of chocolate-coated peanuts at Wilson, N. C.

**LABEL, IN PART:** (Jars) "Top Notch Brand [or "Virginia Maid Brand"] Peanut Butter," "LaGrande Brand Peanut Butter \* \* \* Packed For Foote Bros. and Co., Distributors, Norfolk, Va.," and (boxes) "Betteryet Chocolate Coated Peanuts."

**VIOLATIONS CHARGED:** Adulteration, Section 402 (a) (3), the products consisted in whole or in part of filthy substances by reason of the presence of insects, insect fragments, rodent excreta fragments, rodent hair fragments, and dirt; and, Section 402 (a) (4), they were prepared under insanitary conditions whereby they may have become contaminated with filth.

**DISPOSITION:** On December 29, 1943, upon application of the Old Dominion Peanut Corporation, claimant, the district court for the District of Maryland ordered that the three cases filed in that district and the two cases pending in the Eastern District of North Carolina be consolidated for hearing of preliminary proceedings and trial. The claimant thereafter filed a motion to impound the evidence and documents upon which all of the cases were based, alleging that they had been illegally obtained, and further prayed the court to return the seized merchandise and to quash and dismiss the consolidated cases. On February 2, 1944, this motion having come on for hearing, the testimony of witnesses of the respective parties having been heard in open court, and the proceedings and argument of counsel having been duly considered, the court handed down the following opinion:

**COLEMAN, District Judge:** "This suit involves four [five] consolidated libel proceedings under the Federal Food, Drug and Cosmetic Act (21 U. S. C. A. Secs. 301-392) on the ground of alleged adulteration of certain shipments of peanut-butter.

"The motion of claimant to impound certain evidence and documents, to return the seized merchandise, and to quash and dismiss the libels, to which the Government has filed exceptions, must be granted for the following reasons.

"There are two questions in the case presented by the motion: first, whether the Government inspector acted within his authority and according to the requirements of the Act, as respects the inspection of claimant's plant on the dates in question; and, second, whether this same inspector likewise acted in accordance with the law in obtaining access to, and copying data from interstate shipping records of the claimant which form the basis for these proceedings.

"On the first question, I must rule in favor of the Government. Section 374 provides for very broad inspection of the factory itself, 'and all pertinent equipment, finished and unfinished materials, containers and labeling therein,' after first requesting and obtaining permission of the owner, operator or custodian of the factory to make such inspection. I find from the weight of the credible evidence that permission to do this was fully and freely given by claimant in the present case; that it is reasonable to assume that the results of such inspection might, without more, have led the Government to insist upon improvement within the plant, and that claimant might have inferred that such was a probable purpose implied in the inspection. Also, equally full permission was given to the inspector to take photographs in the plant, etc., so, in doing so, the inspector did not go counter to the requirements of the law.

"On the second point, however, I feel that, while the case may be said to be a borderline one, the somewhat peculiar facts require the Court to rule in favor of the claimant.

"Section 373 of the Act sets out, meticulously, the method by which records of interstate shipments shall be obtained for the purpose of enforcing the Act's provisions, which is that such records may be obtained *from the carrier* upon the request of an officer or employee duly designated by the Administrator under the Act. That provision does not mean that the records may never be obtained in some other manner, i. e., direct from the shipper if he freely consents to disclose them, but I think it does mean that if the Government sees fit to bypass the specified method, then it must be very careful to make *full* disclosure to the factory owner as to the purpose for asking for the records. Clearly, the use of the words 'all pertinent equipment' in Section 374 was not intended to include, for example, a firm's books of account or financial statements. A fortiori, it was not intended to include data of a firm's shipments, especially since the Section of the Act just preceding (Section 373) specifically provides how such data shall be obtained by the Government.

"In the present case, I find from the weight of the credible evidence that there was no such full and complete disclosure as the Government was required to make. It is true the president of the company testified—and I think his testimony is characterized by complete frankness, as also is that of the Government inspector—that he gave permission to the inspector to look at the records, but there is no evidence of any conversation on any occasion, or any discussion between the inspector and the president of the company or any one else connected with the company, as to the precise use to which disclosure of the records would be put. Yet the information so obtained was made the basis of these proceedings, and is the *only* basis for them. That smacks of surprise, if not of actual misrepresentation, and I do not think that is a permissible way for the Government to proceed. It should follow the strict provisions of the law. It should not so combine a factory inspection with an examination of the records as might—and as, I find in the present case, did, in fact—mislead the factory owner or operator as to just what use the Government might make of the shipping data gleaned from these records. Possible damage to claimant's business reputation was likely to be involved in stoppage and seizure of its shipments in interstate movement—far more damage than would normally be contemplated by imposing added sanitary requirements for manufacture of the product so shipped.

"To summarize: I do not base the granting of the motion in this case upon a violation of the Fourth Amendment. The Government is correct in saying that the Amendment is not basis for relief in a civil suit of this kind. See U. S. vs. 935 Cases more or less, 136 Fed. (2) 523, and cases therein cited. I rest my decision upon what I believe to be the proper interpretation of the Act as applied to the particular facts as I find them from the weight of the credible evidence.

"For aught that appears, this proceeding might have been avoided, and the public interest equally and no doubt much more speedily served, if there had been a more complete, frank disclosure at the time to the president of the company as to just what would follow as a result of the examination of the records. It is true the inspector who examined the records was acting under direction

of his superior, and it is not to be assumed that he had any ill-will or intention to misrepresent the situation. Yet, for aught that appears, there is reasonable ground to believe that the Government's position was misrepresented; and, in any event, where the Act says that investigators, before starting libel proceedings based upon interstate shipments shall obtain records in a certain way, they should either proceed accordingly, or should make complete disclosure to the factory owner or operator and be sure that his consent to examination of his records is not due in any respect to a failure to understand the full use to which the records might be put.

"For the reasons given, I will sign an order granting the motion to impound and to return the evidence taken from the records of the claimant, which means a dismissal of the present proceeding, because it is based on information which I rule was improperly obtained. However, the shipments will be ordered to remain in the Marshal's custody for a period of fifteen days, pursuant to the Government's request, pending a determination by it as to whether or not to take an appeal.

"I should add that my conclusion should not in any way hamper the Government or give any solace to the claimant if it be a fact that claimant has violated the law, because the Government still has a right to obtain from the carriers the records of interstate shipments; to bring new libel proceedings, or, in lieu of that, on the basis of what evidence they may already have from *other* sources, to bring, if they see fit to do so, an equity proceeding for the purpose of having further shipment in interstate commerce by the claimant restrained."

In accordance with the above opinion, the court, on February 11, 1944, ordered that the claimant's motion be granted and that the case be dismissed. The government subsequently perfected an appeal to the Circuit Court of Appeals for the Fourth Circuit, and on December 27, 1944, after consideration of the briefs and arguments of counsel, the following opinion was rendered by that court:

DOBIE, *Circuit Judge*: "This is an appeal from an order and judgment of the District Court impounding certain evidence and documents, and dismissing five libels for condemnation, consolidated for trial, brought pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act, June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. A. § 301 et seq. (hereinafter called the Act). The evidence and documents were impounded, and the Government prohibited from using them and any information obtained therefrom, on the assumption that the evidence, documents and information were obtained by a government representative wrongfully and in violation of certain provisions of the Act. The opinion of the District Court is reported in 54 F. Supp. 641.

"The Old Dominion Peanut Corporation (hereinafter referred to as claimant) is a corporation with its place of business in Norfolk, Virginia, engaged in manufacturing peanut butter and peanut candies. On or about October 15, 1943, one Rankin, an inspector for the Food and Drug Administration, went to claimant's plant for the purpose of making an inspection of the factory, under authority of Section 374 of the Act. He saw Stubbs, claimant's president, and revealed the purpose of his visit. Stubbs made no objection. An inspection of the factory was made and Rankin found rodent pellets and refuse in and around the food products. Chapman, claimant's plant superintendent, secured containers for Rankin and samples of the food products were taken.

"After the completion of the factory inspection, Rankin asked to see the company invoices for the purpose of ascertaining where shipments of these food products were being made. Mizzell, the claimant's sales manager, produced the invoices for Rankin's inspection. No objection whatever was made by either Stubbs or Mizzell.

"Subsequently, on November 1, 1943, Rankin returned to claimant's plant for another inspection. Stubbs gave Rankin permission to make the inspection and take photographs of insanitary conditions. The inspection again showed the presence of rodent pellets and refuse. Rankin photographed and took as evidence a dead mouse found in the candy manufacturing room. Rankin testified that he informed Worsham, claimant's secretary-treasurer, of the insanitary conditions and advised him that legal proceedings might result. Rankin again asked for permission to inspect claimant's invoices and this permission was once more granted, without objection. He made notations of claimant's interstate shipments. Later certain shipments of these food products were seized and, on analysis showing the presence of filth in the food products, the instant libels for condemnation were brought.

"The District Court found, and we agree with this finding, that permission to inspect the factory was fully and freely given. Further findings were made to the effect that permission was given to Rankin to inspect the claimant's invoices; but the District Court held that this permission was secured by a method that 'smacks of surprise, if not of actual misrepresentation.' This finding was predicated on the Court's interpretation of the requirements of Section 373 of the Act, and was, we think, clearly erroneous. F. R. C. P., Rule 52(a), 28 U. S. C. A. following § 723c.

"Section 373 of the Act provides as follows:

For the purpose of enforcing the provisions of this chapter, carriers engaged in interstate commerce, and persons receiving food, drugs, devices, or cosmetics in interstate commerce or holding such articles so received, shall, upon the request of an officer or employee duly designated by the Administrator, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any food, drug, device, or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any such record so requested when such request is accompanied by a statement in writing specifying the nature or kind of food, drug, device, or cosmetic to which such request relates.

"The Court below has taken the position, that since Section 373 'meticulously' sets out the method by which information as to interstate shipments is to be obtained, should the Government choose to avail itself of any other method, it must make a full and complete disclosure to the claimant and make sure that claimant's consent is not due in any respect to a failure to understand the fullest use to which the records might be put by the Government.

"While we agree that in no case should the Government be permitted to use fraudulent methods in obtaining evidence, we think that the District Court has here placed an unduly narrow construction on this statute. No such interpretation is warranted, either by the words of the Act, by its purpose, or by its legislative history.

"Section 373 was enacted to provide a compulsory method by which information of interstate shipments, necessary to the enforcement of the Act, might be obtained from carriers. The need for such a method is obvious since interstate transportation is, in large part, done by common carriers. The lack of such a provision had proved a definite handicap to the enforcement of the Act. H. R. Report No. 2139—75th Cong. 3rd Session. But this section does not require that investigation must be limited to the records of the classes of persons therein enumerated. Nothing in the legislative history of the Act indicates any such intent on the part of Congress.

"Claimant contends here, as it did below, that since the Act provides that the records of carriers and receivers may be examined, this excludes the examination of the claimant's records. We agree with the District Court that the prescribing of certain compulsory methods of investigation does not exclude permissive investigation. The affidavit filed by Stubbs clearly shows the unfortunate result which would follow from a contrary view. The affiant there states that one of the interstate shipments involved was moved by the purchaser in his own truck. Such an instance reveals the difficulties confronted by those administering the Act, should permissive examination of the shipper's records be denied. In such cases there would be no common carrier's records to be examined. Such a view would clearly not be in conformity with the purposes of the Act.

"We need not consider the question of claimant's rights had it refused to allow Rankin's inspection of its invoices. The District Court found that such permission was given. We think that claimant has no grounds for contending, nor the District Court for finding, that claimant was really misled. Claimant's officers well knew, or must have known, that, should the plant inspection justify the sampling of products shipped in interstate commerce, this would be done. Further, Stubbs admitted that he was 'generally' familiar with the Act, and in the light of his experience he must have been aware, at least such knowledge is legally imputable to him, that should the sampling disclose filth, the products would certainly be subject to condemnation. This is the obvious and only practical inference to be drawn from these facts.

"In connection with Section 373 of the Act, there is no ground for the application of the maxim *expressio unius est exclusio alterius*. We interpret this section, rather as affording a cumulative procedure to the Government, without restricting other avenues of information. Nor are we impressed by the statement of claimant's president (who, without any remonstrance or protest, gave

Rankin free access to the invoices) that he would not have granted this access if he had not thought Rankin had a legal right to such access or if he had known that the information thereby gleaned might be used in subsequent libel proceedings. Permission to inspect the invoices was still voluntary and the Government was free to use this information in the proceedings for libel. See *Joong Sui Noon v. United States*, 76 F. (2d) 249, 251.

"We are not here dealing with a criminal proceeding within the 4th Amendment to the Constitution. *United States v. 935 Cases, etc.*, 136 F. (2d) 523 (C. C. A. 6, 1943), cert. denied, 320 U. S. 778. These libels for condemnation are proceedings *in rem*, and we agree with the Court below that there has been no violation of the 'search and seizure' clause of the 4th Amendment. *United States v. 935 Cases, etc., supra*. Public interest demands such a construction as will further the purposes of the Act. *United States v. Research Laboratories*, 126 F. (2d) 42, cert. denied, 63 S. Ct. 54.

"Claimant relies on *Boyd v. United States*, 116 U. S. 616, in support of its contentions. Several factors impel the view that the *Boyd case* has no application here. That case involved an unconstitutional demand for the production of records in a criminal proceeding. If the records were not produced (in the *Boyd case*) the allegations were to stand as admitted. No such question arises here. By a specific proviso in Section 373 of the Act such information received may not be used in a criminal prosecution of the person giving the information. Nor was the plate glass involved in the *Boyd case* an outlaw of interstate commerce. It was subject to forfeit only because of the illegal acts of its owner. Under the Act, condemned goods are subject to seizure and destruction irrespective of the intent of the manufacturer. *United States v. Buffalo Pharmacal Co.*, 131 F. (2d) 50 (C. C. A. 2, 1942).

"Claimant further contends that it was improper for the inspector to combine a factory inspection and an examination of the claimant's invoices. It can hardly be assumed that the activities of the Food and Drug Administration are of a pigeon-hole nature which demand canalized separation. The Administration operates as a unit in furtherance of its primary purpose—the protection of the public. It is not unreasonable to assume that packaged food in which filth is found, will be sold by the producer. Further, not only is it commensurate with the purpose of the Act to ascertain the interstate destination of the food in order to sample it for filth, should the factory inspection justify such action; but any other procedure would tend to frustrate the entire purpose of the Act. There was nothing wrongful in either the method of obtaining the information, or in the use of the information voluntarily granted. *Joong Sui Noon v. United States, supra*.

"There is no legal merit in the contention that the Administration must use other and more expensive and time consuming methods of investigation instead of using information voluntarily given. Nor do we find approval for claimant's position that had Rankin not received the information from its invoices, there would have been no means of tracing the adulterated food shipped in the purchaser's truck. The Administration is not indulging in a game of 'hide and seek.' Its efforts are expended in the protection of the public.

"Finally, claimant contends that the taking of samples by Rankin was illegal. This, we think, is also without merit. Section 372 (b) of the Act clearly contemplates the taking of samples.

"The judgment of the District Court is reversed and the cause is remanded to that Court for further proceedings consistent with this opinion."

On May 7, 1945, the Supreme Court of the United States denied claimant's petition for a writ of certiorari, and on May 11, 1945, judgment of condemnation was entered and the product was ordered destroyed.

**8271. Adulteration of peanut butter. U. S. v. 75 Cases of Peanut Butter. Default decree of condemnation and destruction. (F. D. C. No. 16116. Sample No. 819-H.)**

**LIBEL FILED:** May 8, 1945, Northern District of Georgia.

**ALLEGED SHIPMENT:** On or about March 23, 1945, by the Globe Grocery Co., from South Boston, Mass.

**PRODUCT:** 75 cases, each containing 12 2-pound jars, of peanut butter at Atlanta, Ga.

**LABEL, IN PART:** "Lynnhaven Brand Peanut Butter \* \* \* Manufactured By Southgate Foods Norfolk, Va."