

24207. Flour. (F. D. C. No. 40368. S. No. 41-237 M.)

QUANTITY: 16 50-lb. bags at Bristol, S. Dak.

SHIPPED: 1-14-57, from New Prague, Minn.

LIBELED: 7-5-57, Dist. S. Dak.

CHARGE: 402 (a) (3)—contained insects while held for sale.

DISPOSITION: 8-5-57. Consent—destruction.

24208. Flour and sauerkraut. (F. D. C. No. 40377. S. Nos. 81-756/8 M, 81-763 M.)

QUANTITY: 53 25-lb. bags and 24 50-lb. bags of flour, and 38 cases, 24 No. 2½ tins each, of sauerkraut at Tupelo, Miss., in possession of J. J. Rogers & Sons.

SHIPPED: Between 12-6-52 and 6-12-57, from Hays, Kans., and Indianapolis, Ind.

LIBELED: 7-17-57, N. Dist. Miss.

CHARGE: 402 (a) (3)—the flour contained rodent urine and excreta, and the sauerkraut contained a decomposed substance while held for sale; and 402 (a) (4)—the flour had been held under insanitary conditions.

DISPOSITION: 8-7-57. Default—destruction.

24209. Flour and corn sirup solids. (F. D. C. No. 40382. S. Nos. 44-345/7 M.)

QUANTITY: 13 100-lb. bags and 11 25-lb. bags of flour, and 78 100-lb. bags of corn sirup solids at Little Rock, Ark., in possession of Terminal Warehouse Co.

SHIPPED: Between 3-1-56 and 12-5-56, from Chester, Ill., and Memphis, Tenn.

LIBELED: 7-19-57, E. Dist. Ark.

CHARGE: 402 (a) (3)—contained urine; and 402 (a) (4)—held under insanitary conditions.

DISPOSITION: 8-30-57. Consent—the flour was claimed by the H. C. Cole Milling Co., Chester, Ill., and the corn sirup solids were claimed by the Hubinger Co., Keokuk, Iowa. Segregated; all of the flour, and 19 bags of the corn sirup solids were denatured for use as animal feed.

24210. Flour. (F. D. C. No. 40567. S. No. 57-638 M.)

QUANTITY: 69 25-lb. bags at Tampa, Fla.

SHIPPED: 2-15-57, from Enid, Okla.

LIBELED: 8-13-57, S. Dist. Fla.

CHARGE: 402 (a) (3)—contained insects while held for sale.

DISPOSITION: 9-6-57. Default—destruction.

MACARONI AND NOODLE PRODUCTS

24211. Macaroni products. (F. D. C. No. 35775. S. Nos. 70-390 L, 70-392/3 L.)

INFORMATION FILED: 2-9-54, E. Dist. Mich., against Sam Palazzolo, Carl V. Viviano, and John A. Viviano, t/a Vivison Macaroni Co., and as Viviano Bros. Macaroni Co., Detroit, Mich.

SHIPPED: 5-27-53, from Michigan to Ohio.

LABEL IN PART: (Pkg.) "Clarion Spaghetti Made from Pure Semolina Flour Net Weight 16 Ounces." (Ctn.) "One Pound Net Viviano Detroit Brand Macaroni Products Made from No. 1 Pure Semolina Mfd. by Vivison Maca-

roni Company, Detroit, Michigan Shells" and "One Pound Net Viviano Detroit Brand Macaroni Products Made from No. 1 Pure Semolina Mfd. by Viviano Bros. Macaroni Co. Detroit, Michigan Elbow Macaroni."

CHARGE: 402 (a) (4)—prepared and packed under insanitary conditions.

PLEA: Not guilty.

DISPOSITION: On 3-3-54, the defendants filed a motion to dismiss the information and to suppress the evidence secured by the Government, on the grounds that the evidence was secured illegally; that the entry for inspection of the defendants' premises was an illegal entry and not in accord with Section 704; and that the entry of the Government agent and the subsequent search was in violation of the defendants' constitutional rights under the fourth and fifth amendments. The motion came on for hearing on 3-22-54, and was subsequently denied by the court on 4-27-54, since it appeared that there had been no invasion of the defendants' constitutional rights and that the inspection complained of was in accordance with law.

The case came on for trial before the court without a jury on 8-30-55. At the conclusion of the trial on 9-12-55, the court entered the following findings of fact and conclusions of law:

THORNTON, *District Judge*: "Under the law, sitting here as a court and jury on a waiver of jury in a criminal matter, I am only required to make a finding of guilt or innocence as to the defendants here on trial. Because there has been some departure on the part of the Government as to their opening argument, and as to the defense in their argument to the jury, a departure from the testimony in this case, and probably an unintentional wandering over into the field of conjecture, and because the case does have certain technical aspects that the ordinary criminal case might not have, I feel that I should make special Findings of Fact and certain Conclusions of Law, and I intend doing that, and will.

"And, I do find as a fact that the Inspector of the Food and Drug Administration inspected the premises of the Vivison Macaroni Company on May 28, 1953, and during the course of his inspection he was accompanied at times by Sam Palazzolo and on other occasions during the period of his inspection by Carl V. Viviano, both of whom are partners in the business of Vivison Macaroni Company.

"That the Food and Drug Inspector was at this plant about six hours in conjunction with this investigation.

"That in the course of conducting this investigation, the Food and Drug Inspector took samples of insect fragments and insect larvae that he found in and about the machinery and the premises of the Vivison Macaroni Company on May 28, 1953.

"That he forwarded these samples to the Food and Drug Administration for analysis, and that the analysis conducted by the different chemists of the Food and Drug Administration revealed the presence of filth in the form of insect fragments and insect larvae in the samples that had been withdrawn from the plant of the Vivison Macaroni Company operated by the defendants.

"That the Inspector took as samples two pints of unused semolina, the product of General Mills which the defendants were using in their production of macaroni, which was also forwarded to the Food and Drug Administration for analysis, and the analysis made of the semolina disclosed no insect infestation of any kind.

"That samples of the macaroni manufactured by the defendants were collected from each of three interstate shipments of macaroni products, and these samples were forwarded to the Food and Drug Administration for analysis, and the analysis disclosed insect infestation of the same type and kind as they observed in the defendants' factory, as indicated by the samples collected at the factory by the Food and Drug Inspector.

"That the parties to this lawsuit have stipulated that the samples were drawn from the interstate shipments which were shipped by the defendants in interstate commerce on the dates, and from and to the places designated in each of the three counts in the information, so that no finding of fact is necessary.

in relation to these shipments as they pertain to a shipment in interstate commerce.

"That semolina is a product or a by-product of durum wheat.

"When a plant is infested with filth, the result of this filth would be manifested in the finished product manufactured in the plant, providing the manufactured products would be, as in this case, food.

"That insects and insect fragments can be kept out of a plant by good housekeeping alone.

"The 1952 crop of durum wheat was not contaminated by insect infestation.

"That there was an effort on the part of both Sam Palazzolo and Carl Viviano, in their testimony, to minimize the part played by the co-defendant, John Viviano, in the operation of the business of the Vivison Macaroni Company, and to exonerate him from any culpability in relation to the offenses charged in the information.

"That the defendant, John Viviano, took an active part in the operation of the Vivison Macaroni Company, including the time of the alleged offenses in the information.

"That the defendant, Sam Palazzolo, was evasive in his answers to questions put to him on cross-examination. However, neither Sam Palazzolo nor Carl Viviano rebutted the testimony of the Food and Drug Inspector in relation to the samples that he, the Food and Drug Inspector, testified he took from the plant of the Vivison Macaroni Company on May 28, 1953.

"The testimony of James J. Winston, produced by the defendants as an expert, is of questionable value to this court, sitting as a jury, since it was developed on cross-examination that his analysis was not confined exclusively to the product semolina, made from durum wheat, and if his testimony in this regard, on his direct examination, had been permitted to stand it would have been a misrepresentation of true facts.

"The defendants produced the testimony of two inspectors from the Bureau of Foods and Standards for the State of Michigan who inspected the Vivison Macaroni plant on October 1, 1953, for insect infestation. These witnesses further testified that they inspected the stock on hand, as well as the condition of the equipment, and that their inspection consumed a period of time of from one-half hour to one hour, which testimony negatives the testimony of Carl Viviano and Sam Palazzolo that they always kept a fairly substantial stock of their finished product on hand in their plant, since it would be, in the opinion of this court sitting as a jury, a physical impossibility for these two State Inspectors to examine six, eight or ten thousand cases of macaroni in a period of time of from one-half hour to an hour, and their testimony is that they did examine the stock on hand.

"That the defense witness, Harry F. Fisher, in his inspection of the Vivison Macaroni Company, concentrated on keeping the premises free from roaches, rats and mice, as called for under the service contract that brought him into the plant, and that the inspection of the premises that he made on May 6, 1953, was not as thorough as that made by the Government inspector on May 28, 1953.

"The defendants produced an inspector of the Board of Health of the City of Detroit, who testified that on March 17, 1953, he inspected the plant of the Vivison Macaroni Company and on that occasion examined the bags of flour on these premises and found this flour not infested, which corroborates the testimony of the Government expert, Mr. Nicholson.

"I find that on or about May 27, 1953, the defendants' unlawfully caused to be introduced and delivered for introduction into interstate commerce, as heretofore stipulated to by the parties, certain food which at that time was adulterated in that it had been prepared and packed under insanitary conditions, whereby it had become contaminated with filth, and that this finding relates to all three counts in the information.

"I conclude, as a matter of law, that the United States District Court for the Eastern District of Michigan, Southern Division, has jurisdiction of the subject matter set out in the information, and of the parties named in the information.

"I conclude that the testimony adduced at the hearing of this cause in relation to each of the three counts constitutes a violation of Title 21, U. S. C. Section 342 (a) (4) in that the food mentioned in the information was adulterated within the meaning of this section in that it had been prepared and packed under insanitary conditions whereby it may have become contaminated with filth.

"The term 'food' means: 'Articles used for food or drugs for man or other animals * * *'

"Introduction, or delivery for introduction, into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded, is prohibited under the laws of the United States.

"Food shall be deemed to be adulterated if it has been prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth.

"The term 'sanitary conditions' should be construed to have the usual and ordinary meaning.

"And, accordingly, and in keeping with the Findings of Fact and the Conclusions of Law as just stated by the court, I find Sam Palazzolo, Carl V. Viviano, and John A. Viviano guilty as charged in each of the three counts."

The defendants were each fined \$3,000 and placed on probation for two years.

Defendants then appealed to the United States Court of Appeals for the Sixth Circuit, and on 10-31-57, the appellate court affirmed the judgment of the district court.

24212. Egg noodles and flour. (F. D. C. No. 40634. S. Nos. 43-484 M, 43-490 M, 44-603 M.)

QUANTITY: 7 ctns., 24 5-oz. bags each, of egg noodles and 53 25-lb. bags and 10 50-lb. bags of flour at Jacksonville, Ill., in possession of Jenkinson Wholesale Grocer Co.

SHIPPED: Between 3-22-57 and 8-16-57, from St. Louis, Mo., and Arkansas City, Kans.

LIBELED: 9-11-57, S. Dist. Ill.

CHARGE: 402 (a) (3)—contained insects; and 402 (a) (4)—held under insanitary conditions.

DISPOSITION: 10-10-57. Default—delivered to a public institution for use as animal feed.

MISCELLANEOUS CEREALS

24213. Wheat. (F. D. C. No. 40029. S. No. 53-986 M.)

QUANTITY: 121,800 lbs. at Spokane, Wash.

SHIPPED: 12-19-56, from Inverness, Mont., by McCabe Co.

LIBELED: 2-26-57, E. Dist. Wash.

CHARGE: 402 (a) (1)—contained, when shipped, an added poisonous substance, lead, which may render the article injurious to health.

DISPOSITION: 4-11-57. Consent—claimed by the Great Northern Railway Co., Spokane, Wash. Segregated; 8,250 lbs. destroyed.

24214. Wheat. (F. D. C. No. 40235. S. Nos. 56-456 M, 71-469 M.)

QUANTITY: 60,490 lbs. at Hastings, Minn.

SHIPPED: 4-18-57, from Hecla, S. Dak., by Estee Elevator Co.

LIBELED: 5-1-57, Dist. Minn.

CHARGE: 402 (a) (3)—contained rodent pellets when shipped.

DISPOSITION: 5-14-57. Consent—claimed by Estee Elevator Co., and denatured for use as animal feed.

24215. Wheat. (F. D. C. No. 40245. S. No. 20-875 M.)

QUANTITY: 43,590 lbs. at Parkville, Mo.

SHIPPED: 4-10-57, from Erie Kans., by Erie Grain Co.

LIBELED: 5-10-57, W. Dist. Mo.