

(h) which was produced in a plant which failed to provide for sanitary handling of livers, hearts, giblets and gizzards,

(i) which was produced in a plant permitting the use of filthy water in washing the birds in various phases of their preparation, and

(j) which was produced in a plant which permitted the use of improper equipment, unfit ice, careless handling of the food, or which allowed diseased employees with cuts on fingers, or other injuries, to work around the premises.

Following the entry of the temporary injunction, an inspection of the defendants' plant by the Food and Drug Administration disclosed that it was operating in compliance with the law and as a result thereof, an order for the dismissal of the action was entered on 6-25-56.

23988. Chicken food products. (F. D. C. No. 35114. S. Nos. 19-672 L, 19-674 L, 34-585/6 L, 54-375 L, 54-377 L.)

INFORMATION FILED: 7-10-53, against Badger Fruit & Extract Co., a corporation, Kenosha, Wis., and Lee R. Schwartz, president.

SHIPPED: Between 6-7-52 and 12-3-52, from Wisconsin to Minnesota, Illinois, and Indiana.

LABEL IN PART: (Can) "Cloverblossom Net Weight 3 Lbs. 4 Oz. Chicken Fricassee Without Giblets" "Net Weight 1 Lb. Cloverblossom Spaghetti & Chicken," "Net Weight 3 Lbs. 4 Ozs. Cloverblossom Chicken Fricassee In Butter Gravy," "Net Weight 3 Lbs. 4 Ozs. Cloverblossom Spaghetti & Chicken Livers," "Net Weight 3 Lbs. 4 Ozs. Cloverblossom Condensed - Clear Chicken Broth", and "Net Weight 1 Lb. Cloverblossom Rendered Chicken Fat."

CHARGE: 403 (e) (2)—when shipped, the articles failed to bear labels containing accurate statements of the quantity of contents, since the articles contained less than their declared weights.

DISPOSITION: On 9-25-53, the defendants filed a motion for dismissal of the information; and on 12-11-53, the court after considering the briefs and arguments of counsel handed down the following opinion:

TEHAN, *District Judge*: "Defendants have been charged in six counts of an information with violation of 21 U. S. C. A. Sections 331 and 333. Count I in substance charges defendants with having introduced into interstate commerce on or about December 3, 1952, a number of cases containing a number of cans containing 'Chicken Fricassee Without Giblets' which cans were misbranded within the meaning of 21 U. S. C. A. Section 343 (e) (2), in that the labels on the cans bore the statement 'Net Weight 3 lbs. 4 Oz.', which statement was inaccurate since said cans contained less than 3 pounds 4 ounces net weight of said food. The other five counts are similar and vary only as to the dates of the alleged violations, the types of food, and the quantity or weight indicated on the labels. Each count charges that a number of cases containing a number of cans containing a particular food, were introduced into interstate commerce on or about a certain date, and that the label on the cans was inaccurate in that the cans contained less than the weight indicated on the labels.

"Defendants have now moved to dismiss the action on the ground that 21 U. S. C. A. Section 343 (e) (2) is vague and indefinite and does not meet the requirements of the Sixth Amendment that a defendant be informed of the nature and cause of the accusation made against him. The provision complained of reads as follows:

Sec. 343. Misbranded food

A food shall be deemed to be misbranded—

* * * * *

(e) If in package form unless it bears a label containing * * * (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Administrator.

This provision of the Federal Food, Drug and Cosmetic Act of 1938 is almost the exact counterpart of Section 8 of the Food and Drugs Act of 1906 (21 U. S. C. 10). That provision read in pertinent part as follows:

Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count. Reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this title.

"The identical motion made by the defendants in this case in regard to 21 U. S. C. 343 (e) (2) was made in *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932), with respect to 21 U. S. C. 10. In that case the defendants contended that the proviso 'reasonable variations shall be permitted' made it necessary to read the entire section as substantively prohibiting unreasonable variations in the weight, measure or numerical count of the quantity and contents of any package from that marked on the outside of the package, and that the statute when read in that manner was invalid as being too indefinite and uncertain. In upholding the constitutionality of 21 U. S. C. A. Section 10 as against the contention that it did not sufficiently define an offense, the Supreme Court said: (Page 82)

We are of opinion that the construction thus sought to be put upon the act cannot be sustained; and, therefore, other considerations aside, the cases cited do not apply. The substantive requirement is that the quantity of the contents shall be plainly and conspicuously marked in terms of weight, etc. We construe the proviso simply as giving administrative authority to the Secretaries of the Treasury, Agriculture, Commerce and Labor to make rules and regulations permitting reasonable variations from the hard and fast rule of the act and establishing tolerances and exemptions as to small packages, in accordance with Section 3 thereof.

The court found that the substantive requirement of the statute that the quantity of the contents be plainly and conspicuously marked in terms of weight, etc. was sufficiently plain and definite.

"Although defendants' motion refers to the statute, it is evident to the court that the defendants here are not attacking the validity of the statute itself. Their position is rather that in view of the *Shreveport* decision it is imperative for the Administrator to create a standard by making rules and regulations permitting reasonable variations, and that the rules and regulations found at 21 C. F. R. 1.8 (e) et seq. do not disclose a standard permitting reasonable variations. The court cannot agree with this contention. The exemptions established at 21 C. F. R. 1.8, et seq. are similar and in some respects identical with those which were established under Section 8 of the Food and Drugs Act of 1906, published at 21 C. F. R. 1.58, et seq. (1939 Ed.) and which were in effect at the time the *Shreveport* case was decided. The court in that case, made mention of the regulations, and adverted to the strong presumption of their validity because of the acquiescence of Congress over the period of eighteen years during which they had been in effect. Over twenty more years have elapsed since the *Shreveport* decision, and substantially the same regulations are still in effect. Among the rules and regulations found at 21 C. F. R. 1.8 the following are most pertinent to the instant case:

(i) The statement shall express the minimum quantity, or the average quantity, of the contents of the packages. If the statement is not so qualified as to show definitely that the quantity expressed is the minimum quantity, the statement shall be considered to express the average quantity.

(j) Where the statement expresses the minimum quantity, no variation below the stated minimum shall be permitted except variations below the stated weight or measure caused by ordinary and customary exposure, after the food is introduced into interstate commerce, to conditions which normally occur in good distribution practice and which unavoidably result in decreased weight or measure. Variations above the stated minimum shall not be unreasonably large.

(k) Where the statement does not express the minimum quantity:

(1) Variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure, after the food is introduced into interstate commerce, to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure;

(2) Variations from the stated weight, measure, or numerical count shall be permitted when caused by unavoidable deviations in weighing, measuring, or counting individual packages which occur in good packing practice.

But under subparagraph (2) of this paragraph variations shall not be permitted to such extent that the average of the quantities in the packages comprising a shipment or other delivery of the food is below the quantity stated, and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment or delivery compensate for such shortage.

(1) The extent of variations from the stated quantity of the contents permissible under paragraphs (j) and (k) of this section in the case of each shipment or other delivery shall be determined by the facts in such case.

"The court said in the *Shreveport* case, (Page 86), that the effect of the proviso directing administrative officers to prescribe administrative rules and regulations was

. . . evident and legitimate, namely, to prevent the embarrassment and hardship which might result from a too literal and minute enforcement of the act, without at the same time offending against its purposes. The proviso does not delegate legislative power but confers administrative functions entirely valid within principles established by numerous decisions of this court, . . .

"The court believes that the regulations in question establish adequate standards permitting reasonable variations in fulfillment of the purposes and provisions of the act.

"Defendants have also made reference to 21 U. S. C. A. Section 336 which authorizes the Administrator to refrain from reporting violations of the Act when in his discretion the public interest will be adequately served by a suitable written notice or warning. This provision does not detract from the definiteness of the statutory definition of misbranding. Instead the Supreme Court in *United States v. Sullivan*, 332 U. S. 689 (1948), has found that this provision adds to the fairness of the Act by allowing the Administrator to refrain from reporting for prosecution minor technical violations. The court said in the *Sullivan* case, (Page 694):

The scope of the offense which Congress defined is not to be judicially narrowed as applied to drugs by envisioning extreme possible applications of its different misbranding provisions which relate to food, cosmetics, and the like. There will be opportunity enough to consider such contingencies, should they ever arise. It may now be noted, however, that the Administrator of the Act is given rather broad discretion—broad enough undoubtedly to enable him to perform his duties fairly without wasting his efforts on what may be no more than technical infractions of law. As an illustration of the Administrator's discretion, Section 306 permits him to excuse minor violations with a warning if he believes that the public interest will thereby be adequately served.

"Counsel for the Government will prepare an order in conformity with this opinion."

In accordance with the above opinion, an order was entered on 12-14-53 denying the defendants' motion for dismissal. On 2-8-54, the defendants were arraigned and entered pleas of not guilty. The case came on to trial before the court without a jury on 4-9-56, and at the conclusion of the trial on 4-10-56 the court rendered a verdict of guilty. On 6-25-56, the court imposed a fine of \$1,000 against the corporation and a jail sentence of 180 days against the individual defendant.

23989. Frozen poultry. (F. D. C. No. 40062. S. Nos. 44-146 M, 44-148 M.)

QUANTITY: 153 boxes, 3,455 lbs. total, at Memphis, Tenn.

SHIPPED: 6-22-56, from Hattiesburg, Miss., by C & S Poultry Co.

LIBELED: 3-21-57, W. Dist. Tenn.

CHARGE: 402 (a) (3)—when shipped, 99 boxes contained crop material and uncleaned gizzards, and 54 boxes, contained fecal material and decomposed birds.

DISPOSITION: 5-15-57. Default—delivered to a public institution for conversion into fertilizer.

SPICES, FLAVORS, AND SEASONING MATERIALS*

23990. Capsicum. (F. D. C. No. 39802. S. No. 27-608 M.)

QUANTITY: 87 85-lb. bags at New Orleans, La.

SHIPPED: 10-23-56, from New York, N. Y., by John Holt & Co.

LABEL IN PART: (Bag) "20 C Holts 12.1.55 Nigeria 53."

LIBELED: 12-4-56, E. Dist. La.

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

DISPOSITION: 1-8-57. Default—destruction.

23991. Mustard seed. (F. D. C. No. 39943. S. No. 53-326 M.)

QUANTITY: 62 100-lb. bags at New Orleans, La.

SHIPPED: 7-26-56, from Brooklyn, N. Y.

LIBELED: 2-7-57, E. Dist. La.

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

DISPOSITION: 3-29-57. Default—destruction.

23992. Nutmegs. (F. D. C. No. 39856. S. No. 45-766 M.)

QUANTITY: 26 180-lb. bags of cracked nutmegs and 252 lbs. of ground nutmeg at Baltimore, Md.

SHIPPED: 10-11-56, from New York, N. Y.

LIBELED: On or about 2-1-57, Dist. Md.

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

DISPOSITION: 2-28-57. Consent—claimed by Baltimore Spice Co., Baltimore, Md. Segregated; 887 lbs. destroyed.

23993. Paprika. (F. D. C. No. 40266. S. No. 14-561 M.)

QUANTITY: 29 110-lb. bags at St. Louis, Mo.

SHIPPED: 12-14-56, from Brooklyn, N. Y., by Morris J. Golombeck, Inc.

*See also No. 23972.