

19377. Adulteration of crabmeat. U. S. v. 1 Barrel * * *. (F. D. C. No. 33370. Sample No. 57211-L.)

LABEL FILED: June 19, 1952, Eastern District of Pennsylvania.

ALLEGED SHIPMENT: On or about June 18, 1952, by the Whorton Crab Factory, from Vandemere, N. C.

PRODUCT: 1 barrel containing 89 1-pound cans of crabmeat at Philadelphia, Pa. Analysis showed that the product was contaminated with *B. coli* of fecal origin.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a filthy animal substance.

DISPOSITION: August 27, 1952. Default decree of condemnation and destruction.

19378. Adulteration of crabmeat. U. S. v. 40 Cans, etc. (F. D. C. No. 33358. Sample Nos. 3640-L, 57316-L.)

LABEL FILED: July 21, 1952, Middle District of Pennsylvania.

ALLEGED SHIPMENT: On or about July 16, 1952, by Carol Dryden & Co., from Crisfield, Md.

PRODUCT: 52 1-pound cans of crabmeat at Harrisburg, Pa.

LABEL, IN PART: "Pride Of The Chesapeake."

NATURE OF CHARGE: Adulteration, Section 402 (a) (4), the product had been prepared under insanitary conditions whereby it may have become contaminated with *B. coli* of human origin.

DISPOSITION: September 26, 1952. Default decree of condemnation and destruction.

19379. Adulteration of crabmeat. U. S. v. 4 Cans, etc. (F. D. C. No. 33362. Sample Nos. 57415-L, 57416-L.)

LABEL FILED: July 21, 1952, Middle District of Pennsylvania.

ALLEGED SHIPMENT: On or about July 16, 1952, by Carol Dryden & Co., from Crisfield, Md.

PRODUCT: 27 1-pound cans of crabmeat at Harrisburg, Pa.

NATURE OF CHARGE: Adulteration, Section 402 (a) (4), the product had been prepared under insanitary conditions whereby it may have become contaminated with *B. coli* of human origin.

DISPOSITION: September 26, 1952. Default decree of condemnation and destruction.

FRUITS AND VEGETABLES

DRIED FRUIT

19380. Alleged refusal to permit factory inspection. U. S. v. Ira D. Cardiff. Motion to dismiss information denied. Plea of not guilty. Verdict of guilty. Fine of \$300, plus costs. Judgment reversed by court of appeals. Decision of appellate court affirmed by United States Supreme Court. (F. D. C. No. 29459. Sample No. 40827-K.)

INFORMATION FILED: October 23, 1950, Eastern District of Washington, against Ira D. Cardiff, president of the Washington Dehydrated Food Co., Yakima, Wash.

ALLEGED VIOLATION: On March 31, 1950, upon a request which was made by inspectors of the Food and Drug Administration at a reasonable time and in accordance with Section 704, the defendant, Ira D. Cardiff, refused entry and inspection of the factory of the Washington Dehydrated Food Co. where food was manufactured, processed, packed, and held for introduction into interstate commerce.

DISPOSITION: On October 27, 1950, the defendant filed a motion to dismiss the information on the ground that the information failed to allege any facts sufficient to constitute an offense against the laws of the United States. Argument was held by the court on November 17, 1950, after which the court took the matter under advisement. On December 29, 1950, the court handed down the following opinion:

DRIVER, District Judge: "Defendant's motion to dismiss the information in the above entitled case was taken under advisement some time ago. After careful consideration I have come to the conclusion that the motion should be denied. My reasons are stated briefly below.

"The Federal Food, Drug and Cosmetic Act rests upon the constitutional power resident on Congress to regulate interstate commerce. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious, adulterated and misbranded articles of the specified types. The protection of the 4th Amendment relative to unreasonable search and seizure is not violated by the Act. It is my opinion that the inspections must be made at reasonable times, but the right to inspect is necessary to carry out the purposes of the Act. Without it, there is no positive protection to the public.

"I perceive no merit in defendant's contention that refusal to permit entry and inspection is not punishable unless permission was first granted, or in other words, unless he granted permission and then changed his mind. The Congress had no such intention in enacting the law. What Congress did have in mind, I think, by providing for obtaining permission (Sec. 374) was an attempt to have the inspections made at reasonable times.

"I think the constitutional questions are adequately answered in the government's supplemental brief, by analogy to the cases dealing with production of corporate records, etc., as required by law. In those cases it is made plain that the records can be subpoenaed and required even though there is no reason for issuance of a search warrant. It is, I believe, a fundamental rule that constitutional immunities from search are waived to a limited extent by those who engage in a business regulated by law. And a corporation has not the same immunity from search as has a private individual.

"I have taken into consideration the fact that here the defendant is not a corporation, but a private individual. But an individual officer can not refuse to produce books and records of a corporation on grounds that they might incriminate him. See *Wilson v. U. S.*, 221 U. S. 361. By analogy, I feel that an individual officer can not refuse to permit entry for purposes of inspection under the Food, Drug and Cosmetic Act, if the inspection is sought to be made at a reasonable time.

"Order in accordance with the above views may be presented."

On March 30, 1951, following a plea of not guilty, the case came on for trial before the court without a jury. Based upon a stipulation as to the facts, the court found the defendant guilty, and on April 11, 1951, the court sentenced the defendant to pay a fine of \$300, plus costs. Thereafter, an appeal was taken by the defendant to the United States Court of Appeals for the Ninth Circuit, and on February 13, 1952, after consideration of the briefs and arguments of counsel, the following opinion was handed down by that court:

DENMAN, Chief Judge: "This is an appeal from a judgment convicting Cardiff of violating Section 331 (f) of 21 U. S. C. by his refusal to permit entry and inspection of the premises of the Washington Dehydrated Food Company of which Cardiff was manager.

"The stipulated facts are as follows:

That the Washington Dehydrated Food Company, a corporation, is a processor of food, manufactured, packed, and held for introduction into interstate commerce; that the appellant, Ira D. Cardiff, is the President of said corporation and was the operator and custodian of the factory of the Washington Dehydrated Food Company, and that as an individual he is responsible for the acts of the corporation; that on March 31, 1950, at Yakima, in the Southern Division of the Eastern District of Washington, Inspectors R. C. White and Horace A. Allen, agents of the Federal Security Agency, at a reasonable time did request permission to enter and inspect the factory, which request was refused by the appellant; that the Washington Dehydrated Food Company was at that time engaged in the preparation of food products for introduction and shipment into the channels of interstate commerce.

"Cardiff contends that the district court has misconstrued the two applicable sections of the Food and Drug Act, 21 U. S. C. 331 (f) and 374. Section 331, for the violation of which the punishment is provided in Section 333, states in subdivision (f):

The following acts and the causing thereof are hereby prohibited: . . .
(f) the refusal to permit entry or inspection as authorized by Section 374.

"The authorization in Section 374 is for entries at reasonable times (plural) and inspections also at such times. Such authorization is obtained only from a permission by the operator or custodian of the factory given pursuant to the request of the Food and Drug Administrator. Section 374 provides:

For the purposes of enforcement of this chapter, officers or employees duly designated by the Administrator, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. June 25, 1938, c. 675, Sec. 704, 52 Stat. 1057; Reorg. Plan No. IV, Sec. 12, eff. June 30, 1940, 5 Fed. Reg. 2422, 54 Stat. 1237.

"Section 331 (f) and Section 333 constitute penal legislation making the first offense a misdemeanor and a second offense a felony.¹ Obviously these statutes will not have one interpretation where the offense charged is a misdemeanor and another one where the charge is a felony. Here there are none of the gossamer-like refinements of interpretations referred to in *Pasadena Research Laboratories v. United States*, 169 F. 2d 375, 379 (Cir. 9). The statutes must be construed as creating a felony for their violation. Hence in construing this penal legislation, it is elemental that if it be subject to two rational interpretations, we must accept that favorable to the accused. We think that Cardiff in refusing to grant the permission for successive inspections did not violate the statute so construed.

"The permission which may be authorized by Section 374 is for repeated inspections at the 'reasonable times' for which the section provides. Obviously the inspector is not required to obtain permission for each inspection. It was agreed at the hearing that Cardiff's plant is engaged in processing apples into boxes for shipping in carload lots into interstate commerce and

¹ "§ 333. Penalties—Violations of section 331—(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine."

that the apples are the product of different orchards. Most orchardists use a spray on the growing apples to resist insect infestation or other deterioration. This spray contains chemicals remaining on the apples which from certain orchards is in sufficient quantity to be deleterious to the health of the consumer, while from other orchards there is no spraying or the remaining spray is not sufficient to be injurious. The apples with the excessive spray require a costly treatment to be made safely edible.

"Assume Cardiff, who has 'authorized [inspection] by section 374,' finds that the apples from so many orchards require this costly treatment that his season's operation will be at a loss and he therefore refused to permit any more of the inspections, which he had authorized under 374. So doing he would commit a misdemeanor for the first refusal and upon final conviction thereof, a second refusal is a felony.

"We do not agree with the government's construction of the two sections that while under 374 the inspector is to make entries and inspection *only* after requesting *and obtaining* permission of the owner, operator, or custodian, section 331 (f) makes it a crime if the inspector's request is refused. That is to say, Congress by section 374 (f) gives the operator the right to refuse inspection and section 331 (f) warns him that if he exercises the right so given him he is liable to imprisonment. It is true that 'the Lord giveth and the Lord taketh away' in a manner seemingly unjust to the mind of man, but here we are considering an act of Congress.

"Such a roundabout and unreasonable construction makes an absurdity of the requirement of the inspector of 'obtaining permission.' It would make nugatory instead of giving effect to the words, 'after first making request and obtaining permission,' etc. There is no merit to the contention of the government that these words do no more than provide for reasonable times for inspection, for section 374 would provide for this if the phrase were omitted. Congress if it desired to secure the inspections without obtaining permission would have done so in the manner of the preceding section 373 of the same Act.² There interstate carriers of foods and drugs 'shall, upon the [mere] request of . . . [the inspector],' permit 'access to . . . records showing the movement in interstate commerce' of their products.

"Even assuming that the government's interpretations of this legislation creating a felony were not absurd and unreasonable, the interpretation we have given is also a reasonable one, and being the one more favorable to the accused must control.

"The able district judge stated his doubt of the government's interpretation as follows:

Well, I had considerable difficulty in deciding the motion to dismiss the information. The statute on which the prosecution is based is not at all clear. I think it's very ambiguous and I reached my conclusion on what I thought the Congress should have intended rather than what they clearly said they intended in the statute. It's a very unsatisfactory statute, and I think it's one that should be clarified by a decision of the higher Court, and I think there is justification for Dr. Cardiff's position that he thought he was within his legal rights.

He had denied the defendant's motion to dismiss from which the government could have taken the appeal he thought needed. Instead of jailing Cardiff he imposed a small fine, thus enabling the case to be appealed here instead of granting an unappealable acquittal.

² "§ 373. Records of interstate shipment—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 government's brief gives an extended review of the food and drug legislation and makes a strong argument for the need for public protection of the power to inspect food plants without permission of the owner, and states that without that power, enforcement of the law will be hamstrung. The language of Mr. Justice Brandeis in *United States v. Weitzel*, 246 U. S. 533, is peculiarly applicable to this contention. There the court had for consideration the interpretation of a statute providing certain penalties against 'every president, director, cashier, teller, clerk or agent' of a national bank who committed certain offenses. The receiver of a national bank appointed by the controller of currency, was being prosecuted under that statute and it was necessary to interpret this statute and determine whether or not such a receiver fell within the meaning of the word 'agent.' In construing the statute as not covering the receiver, Justice Brandeis says at page 542:

It is urged by the Government that punishment of the defalcation by a receiver is clearly within the reason of the statute, and that unless the term "agent" be construed as including receivers, there was no Federal statute under which an embezzling receiver of a National bank could be prosecuted * * * *Statutes creating and defining crimes are not to be extended by intendment because the court and the legislature should have made them more comprehensive.* [Emphasis supplied.]

"The Food Administrator's remedy for the efficient enforcement of the law's protective provisions is the amendment of section 374 to correspond with the plain provision of 373. The judgment is reversed and the district court instructed to enter a judgment of acquittal of the defendant."

POPE, *Circuit Judge*, concurring: "The majority's able opinion makes an effort to read some meaning into this statute and states that in a certain hypothetical case, not like the one before us, a person might be guilty of an offense under this section. I am not prepared, and I do not think it wise, to express an opinion upon this supposititious case. I think that this statute, as written, is just plain nonsense, and because it is not the function of a court to rewrite such language, the judgment must be reversed."

A petition for a writ of certiorari was subsequently filed by the Government with the United States Supreme Court and was granted on May 5, 1952. On December 8, 1952, the following opinion was handed down by the United States Supreme Court, affirming the decision of the court of appeals:

DOUGLAS, *Associate Justice*: "Respondent was convicted of violating § 301 (f) of the Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. § 331 (f). That section prohibits 'The refusal to permit entry or inspection as authorized by section 704.'¹ Section 704 authorizes the federal officers or employees 'after first making request and obtaining permission of the owner, operator, or custodian' of the plant or factory 'to enter' and 'to inspect' the establishment, equipment, materials and the like 'at reasonable times.'²

"Respondent is president of a corporation which processes apples at Yakima, Washington, for shipment in interstate commerce. Authorized agents applied to respondent for permission to enter and inspect his factory at reasonable hours. He refused permission, and it was that refusal which was the basis of the information filed against him and under which he was convicted and fined. 95 F. Supp. 206. The Court of Appeals reversed, holding that § 301 (f),

¹ The violation is made a misdemeanor by 21 U. S. C. § 333.

² Section 704 reads as follows: "For purposes of enforcement of this Act, officers or employees duly designated by the Administrator, after first making request and obtaining permission of the owner, operator or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein."

when read with § 704, prohibits a refusal to permit entry and inspection only if such permission has previously been granted. 194 F. 2d 686. The case is here on certiorari.

"The Department of Justice urges us to read § 301 (f) as prohibiting a refusal to permit entry or inspection at any reasonable time. It argues that that construction is needed if the Act is to have real sanctions and if the benign purposes of the Act are to be realized. It points out that factory inspection has become the primary investigative device for enforcement of this law, that it is from factory inspections that about 80 percent of the violations are discovered, that the small force of inspectors makes factory inspection, rather than random sampling of finished goods, the only effective method of enforcing the Act.

"All that the Department says may be true. But it does not enable us to make sense out of the statute. Nowhere does the Act say that a factory manager must allow entry and inspection at a reasonable hour. Section 704 makes entry and inspection conditioned on 'making request and obtaining permission.' It is that entry and inspection which § 301 (f) backs with a sanction. It would seem therefore on the face of the statute that the Act prohibits the refusal to permit inspection only if permission has been previously granted. Under that view the Act makes illegal the revocation of permission once given, not the failure to give permission. But that view would breed a host of problems. Would revocation of permission once given carry the criminal penalty no matter how long ago it was granted and no matter if it had no relation to the inspection demanded? Or must the permission granted and revoked relate to the demand for inspection on which the prosecution is based? Those uncertainties make that construction pregnant with danger for the regulated business. The alternative construction pressed on us is equally treacherous because it gives conflicting commands. It makes inspection dependent on consent and makes refusal to allow inspection a crime. However we read § 301 (f) we think it is not fair warning (cf. *United States v. Weitzel*, 246 U. S. 533; *McBoyle v. United States*, 283 U. S. 25) to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States v. Cohen Grocery Co.*, 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. *Herndon v. Lowry*, 301 U. S. 242. *Affirmed.*

"MR. JUSTICE JACKSON concurs in the result.

"MR. JUSTICE BURTON dissents."

FRESH FRUIT

19381. Adulteration of blueberries. U. S. v. 31 Crates * * *. (F. D. C. No. 33364. Sample No. 54051-L.)

LIBEL FILED: August 1, 1952, Northern District of Illinois.

ALLEGED SHIPMENT: On or about July 30, 1952, by J. H. Welker, from Michigan City, Ind.

PRODUCT: 31 crates, each containing 12 pint baskets, of blueberries at Chicago, Ill.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance. The blueberries were infested with maggots.

DISPOSITION: October 14, 1952. Default decree of condemnation and destruction.