

DISPOSITION: September 11, 1953. Default decree of condemnation and destruction.

20604. Adulteration of flour. U. S. v. 200 Bags * * *. (F. D. C. No. 35455. Sample No. 62597-L.)

LIBEL FILED: August 13, 1953, Eastern District of Arkansas.

ALLEGED SHIPMENT: On or about July 21, 1953, by the Commander Larabee Milling Co., from Hutchinson, Kans.

PRODUCT: 200 25-pound bags of flour at Pine Bluff, Ark.

LABEL, IN PART: "Larabee's Airy Fairy Flour Enriched * * * Bleached Phosphated Commander Larabee Milling Company Kansas City, Missouri."

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

DISPOSITION: September 22, 1953. Default decree of condemnation. The court ordered that the product be delivered to a State institution, for use as animal feed.

MACARONI AND NOODLE PRODUCTS

20605. Adulteration of egg noodles, macaroni, and spaghetti. U. S. v. Golden Grain Macaroni Co., Inc., and Paskey Dedomenico. Pleas of not guilty. Tried to the court. Verdict of not guilty on count 1 of information and verdict of guilty on remaining counts. Fine of \$5,000 against each defendant. Individual defendant also placed on probation for 3 years. Judgment affirmed upon appeal. (F. D. C. No. 32775. Sample Nos. 29477-L, 29478-L, 29871-L, 29872-L, 30182-L, 30340-L.)

INDICTMENT RETURNED: June 19, 1952, Western District of Washington, against Golden Grain Macaroni Co., Inc., Seattle, Wash., and Paskey Dedomenico, president of the corporation.

ALLEGED SHIPMENT: On or about June 25 and July 16 and 26, 1951, from the State of Washington into the States of Idaho, Montana, and Oregon, and the Territory of Alaska.

LABEL, IN PART: (Package) "Golden Grain Enriched Egg Noodles [or "Cut Macaroni" or "Elbow Macaroni"]," "Elbow Macaroni," "Spaghetti," and "Golden Grain Thin Spaghetti."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the articles consisted in part of filthy substances by reason of the presence of insect larvae and insect fragments; and, Section 402 (a) (4), the articles had been prepared, packed, and held under insanitary conditions whereby they may have become contaminated with filth.

DISPOSITION: The defendants having entered pleas of not guilty, the case came on for trial before the court without a jury on December 5, 1952. The trial was concluded on the same day, with the return by the court of a verdict of not guilty as to count 1 of the information, a verdict of guilty as to the other 5 counts of the information, and the imposition of a fine of \$5,000 against the corporation and \$5,000 against the individual. The court also placed the individual on probation for 3 years.

The defendants filed a motion for a new trial, which was denied by the court on January 13, 1953. A notice of appeal was filed by the defendants on January 14, 1953, and on December 28, 1953, the United States Court of Appeals for the Ninth Circuit handed down the following opinion:

HEALY, *Circuit Judge*: "Appellant Golden Grain Company is a California corporation doing business at Seattle, and appellant Dedomenico is its president and the general manager of its Seattle plant. The corporation manufactures and sells various types of macaroni, spaghetti, and other similar food products. In a six-count indictment the appellants were jointly charged with violations of the Federal Food, Drug and Cosmetic Act by causing adulterated foods to be introduced into interstate commerce. The indictment specifically alleged that the foods in question consisted in part of filthy substances such as insect larvae or fragments of insects, and had been prepared, packed, and held under insanitary conditions whereby they may have been contaminated with filth. The charges were laid under 21 USCA § 342 [402] (a) (3) and (4).¹ On a trial to the court without a jury each defendant was convicted on counts two to six, acquitted on count one, and sentenced to pay a fine of \$5,000.

"Appellants argue or suggest a variety of grounds for reversal, only a few of which are worthy of notice. One is that the evidence on behalf of the government was obtained illegally in that the officers designated by the Administrator to enter and inspect the plant did not first request and obtain permission to do so. The statutory provision invoked in section 704 of the Act, 21 USCA § 374, which grants authority to enter and inspect for enforcement purposes 'after first making request and obtaining permission of the owner, operator or custodian' of the factory, warehouse, or establishment involved. The showing on this subject is as follows:

"On July 18, 1951, Inspectors Shallit and Allen came to the plant, appellant Dedomenico being then absent in California. The two identified themselves to the lady receptionist, asked for Dedomenico, and were informed of his absence. Shallit requested permission to make an inspection and was told by the receptionist that Mr. McDiarmid was in charge of the plant but that he was not in at the moment but was expected down shortly. McDiarmid, it appears, was the Company's sales manager. Shallit then inquired who might grant permission, and the receptionist replied that she would inquire of Mr. Mulvaney, who appears to have been in charge of production. She left and shortly returned, informing the inspectors that Mulvaney 'didn't feel that he had authority to grant permission to make the inspection.' The officers waited for McDiarmid, who on arrival granted the permission requested. The inspection was made July 18 and 19. It appears that Dedomenico had departed for California on June 28, 1951, and that he returned July 25 following. A few days after his return the same officers appeared for the purpose of a second inspection for which Dedomenico readily gave his permission. On cross examination at the trial Dedomenico said that had he been present at the time of the first inspection he would have given permission to make it.

"The trial court ruled that on July 18 and 19 McDiarmid was custodian of the plant in the sense of the statute and that there had been no disregard of the statutory directive. The ruling was obviously not error. McDiarmid was held out to the officers as the person in charge, and he acted as such. The authority of the Administrator to make investigations of this nature is broadly granted. See 21 USCA § 372 (a), and consult *Research Laboratories v. United States*, 9 Cir., 167 F. 2d 410, 414. Compare also 21 USCA §§ 373 and 331 (e), and the language of the Fourth Circuit in *United States v. 75 Cases Peanut Butter*, 146 F. 2d 124, at pages 127 and 128. At best the point is in the last degree technical.

"It is claimed that the government's evidence to show adulteration, in that the food had been prepared, packed and held under insanitary conditions, is insufficient to sustain the convictions. The claim is without substance, as a brief summary of the testimony will indicate. Three interstate shipments of allegedly adulterated products are involved. Samples from each were obtained and analyzed by representatives of the Food and Drug Administration, and insects or larvae fragments and other foreign matter were found in each sample. The sanitary conditions prevailing in the Seattle plant during June and July of 1951—the period during which the food in question was manufactured—were described not only by the inspectors of the Food and Drug Administration but

¹ "§ 342 [402], Adulterated Food:

"A food shall be deemed to be adulterated—

"(a) . . . (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; . . ."

by former and present employees of the corporation. Inspectors Shallit and Allen described the inside appearance of the plant building, including the flour storage bin, the conveying system, and the manufacturing and drying equipment, and they testified to finding everywhere live or dead moths, live larvae, insect webbing, and pupae.

"It is urged that Dedomenico can not be held responsible for the shipments inasmuch as he was admittedly absent from the plant during the period June 28 to July 25. We do not agree. It is notable that the food product involved in one of the counts was manufactured and packed before he left for San Francisco, and that samples from this pack were shown to be more seriously contaminated than the majority of the other samples taken. Also it appears that one of the three shipments was made on July 26, the day after he returned. The unsanitary conditions found in the establishment had certainly prevailed for a considerable length of time prior to his departure. The record discloses also that he and the corporation had suffered a previous conviction for like violations of the Act. It is unnecessary to rest decision in this respect on the settled rule appealed to by government counsel that the criminal responsibility of a corporate officer having broad authority such as that possessed by this defendant does not depend upon his physical presence. See in support of the rule: *United States v. Dotterweich*, 320 U. S. 277, 281-285; *United States v. Kaadt*, 7 Cir., 171 F. 2d 600, 604; *United States v. Parfait Powder Puff Co.*, 7 Cir., 163 F. 2d 1008, 1009-1010, cert. den. 322 U. S. 851; *State v. Burnam* (Wash.), 128 Pac. 218; *People v. Schwartz* (Wash.), 70 P. 2d 1017.

"Another contention is that § 342 [402] (a) (4), on which the convictions in part rest, is so indefinite, uncertain and obscure as to render it violative of the Fifth and Sixth Amendments. The provision has been quoted in footnote 1 above, but for convenience we repeat its language. It declares that a food shall be deemed adulterated 'if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.'

"No decision directly in point is cited in support of the contention. The Eighth Circuit, in *Berger v. United States*, 200 F. 2d 818, held that the section conveys a sufficiently definite warning as to what conduct would constitute a crime to save the provision from invalidity for vagueness. We are in agreement with this holding. Compare *Boyce Motor Lines v. United States*, 342 U. S. 337, dealing with the alleged vagueness of a regulation promulgated by the Interstate Commerce Commission under statutory authority. In rejecting the claim of vagueness, the Court there said (p. 340) that 'but few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.' See also *United States v. Petrillo*, 332 U. S. 1, where the words 'unneeded employees' were held sufficiently clear to escape condemnation.

"Other points raised are too lacking in substance to warrant discussion.

"The judgment is affirmed."

20606. Adulteration and misbranding of egg noodles. U. S. v. American Beauty Macaroni Co. Plea of nolo contendere. Fine of \$150, plus costs. (F. D. C. No. 34866. Sample No. 22608-L.)

INFORMATION FILED: June 25, 1953, Western District of Missouri, against the American Beauty Macaroni Co., a corporation, Kansas City, Mo.

ALLEGED SHIPMENT: On or about May 5, 1952, from the State of Missouri into the State of Texas.

LABEL, IN PART: "American Beauty Egg Noodles Contain 5½% Egg Solids."

NATURE OF CHARGE: Adulteration, Section 402 (b) (1), a valuable constituent, egg, had been in part omitted from the article; and, Section 402 (b) (2), a product, the total solids of which contained less than 5.5 percent by weight of the solids of egg or egg yolk, had been substituted for egg noodles.