

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 544, FOOD AND DRUGS ACT.

ADULTERATION OF DESICCATED EGGS.

On or about the 15th day of January, 1910, the National Bakers' Egg Company, Sioux City, Iowa, shipped from the State of New York into the State of Pennsylvania one barrel containing about 180 pounds of desiccated egg product. Examination of samples of this product by the Bureau of Chemistry, United States Department of Agriculture, showed it to be adulterated within the meaning of the Food and Drugs Act of June 30, 1906. As it appeared from the findings of the analyst and report made that the shipment was liable to seizure under section 10 of the act, the Secretary of Agriculture reported the facts to the United States attorney for the Eastern District of Pennsylvania.

In due course a libel was filed against the said barrel of desiccated egg product, charging adulteration of the product within the meaning of the act, because it consisted in whole or in part of a filthy, decomposed, and putrid animal substance, indicated by the presence of an excessive number of bacterial organisms, including the streptococci, and praying seizure, condemnation, and forfeiture thereof.

On March 1, 1910, the said National Bakers' Egg Company filed an answer setting up claim to the said barrel of desiccated egg product, and denying that the product was adulterated as alleged in said libel. The case came on for hearing April 1, 1910, on the facts alleged in the libel and the claimant's answer thereto. The issues of fact raised were submitted to the jury upon the testimony, argument of counsel, and the following instructions of the court:

Hon. J. B. McPHERSON, *J.*

GENTLEMEN OF THE JURY: I dare say you all have some general idea, at all events, about the pure food act, although you may not have come into contact with it quite as closely as you have the last day. This proceeding is somewhat unusual. It is not

a suit against any particular person, although, in substance, in one of its aspects, it amounts to that; but it is directly a proceeding against a particular article of goods for the purpose of forfeiting it—for the purpose of condemning it. The United States declares that it is a kind of article which is forbidden to be transported in commerce between the states by the pure food act, and, therefore, it may be forfeited, condemned and destroyed; and the pure food act, in one of its sections, confers such power upon the courts of the United States; but, of course, before a remedy like that can be enforced,—a very drastic remedy,—you see it is taking a man's property from him, and destroying it, even although he has a trial to justify his right to it,—his right to retain it—I say, a remedy like that, of course, calls for clear and satisfactory proof on the part of the United States. This is not a criminal trial, strictly speaking, because there is nobody charged with crime, but it is a suit to enforce a penalty, and a severe penalty, as I just said, and, therefore, while the burden of proof is upon the United States, it is not the ordinary burden of proof such as exists in a civil suit between two individuals. In that case, as you no doubt know from your previous service upon juries, all that is necessary is that there shall be a fair balance of evidence in favor of one party or the other. It is not required that there should be, for example, as in a criminal case, proof beyond reasonable doubt, and that degree of proof is not required in this case, either—proof beyond a reasonable doubt; but a higher degree of proof than a mere preponderance,—a mere balance of evidence in favor of the Government is required. It is necessary, in a case like this, that the Government should establish, by clear and satisfactory evidence, that its case has been made out. These terms are necessarily somewhat indefinite, but I cannot do any better with them.

Now, has the Government laid before you evidence of that kind and quality? That is the question for your determination. The only part of the Act to which your attention need be directed is contained in this language: "If the article complained of"—in this case it is a barrel of egg product,—dried egg—"consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, then it may be condemned." Now, of course, this is an animal substance. It is made from eggs. It is composed wholly of that substance, as I understand. There is no evidence that there is any admixture; so that we may assume that it is wholly composed of animal substance. Now, is it, therefore, filthy, decomposed or putrid. Either one of these adjectives, if applied to this substance, and established by proof, would be sufficient to justify the jury in condemning it. Now, of course, there is a certain difficulty in dealing with language always; namely, the difficulty of getting at the exact meaning which it is intended to convey; and some words—indeed, a great many words, are incapable of precise definition. Words, as you know, very often mean what we choose to have them mean. They bear the meaning that we put into them, and that meaning varies from time to time, and varies under different circumstances, and that is true about a great many words. Without troubling you longer with general remarks, it is certainly true with regard to these particular words, filth, decomposed or putrid. Now, if any one attempts to make a scientific definition of these words, so as to give a precise and accurate meaning to each of them, I think he will find that he has undertaken a very difficult task. "Filthy," for example, might be said to be in the superlative degree of a word like soil. You speak of an article soiled. It conveys to our minds a sufficiently accurate meaning. Then if you say it is dirty, you go a step further, of course. It is pretty hard to say just what the limits are which shall describe an article as dirty, within which it may be properly described as dirty. Then when you say it is filthy, you are at once conscious that you have gone a step further; but just how far, I think it will be very difficult to say—I mean to know accurately and precisely, so that there should be no doubt at all about the limits you have.

And take the two words, that I will speak of together, decomposed and putrid; I think it is fair to say that they represent steps in the same direction. If we take the word rotten as expressing the general idea to which these two words may be referred, decomposed would probably represent a less advanced stage than putrid. I think there could not be any doubt about the word putrid, and yet there certainly would be some doubt as to where you would properly apply the word decomposed. It was said by one of the witnesses yesterday, and I thought very accurately said, that through our common experience there are certain kinds of cheeses, for example, which are eaten, and eaten extensively; but to which, certainly, the word decomposed, in some of its meanings, may properly be applied; and no doubt it is true with regard to certain other products, which I need not speak of, animal and vegetable. The process of fermentation is a process of decomposition. If fermentation goes on long enough, the article falls to pieces. Sugar, when it is fermented, begins to break up; and decomposition means, of course, to break up; to decompose, to resolve into its elements. So that when fermentation has proceeded far enough, it becomes decomposed, and to say just precisely where fermentation ceases and decomposition begins would be a very difficult task. I have been speaking to you in a very general way about the effort to assign a precise meaning to such words as these, but it is not necessary for you to trouble yourself, I think, about that matter. It is a general rule, with regard to all statutes passed by the Legislature, or by Congress, that the meaning which the words bear is the usual and ordinary and every day meaning which language is given in its common use among men. Laws are addressed to the community, and, therefore, they properly are construed in accordance with the sense which their language bears among the people that compose the community. Therefore I say, as I have just said, I think you will have very little trouble in assigning a sufficiently accurate meaning to these words. Filthy and decomposed and putrid, I think you will agree, convey a sufficiently definite meaning to the ordinary mind, and particularly,—and this is what concerns us now—in relation to the subject matter about which they are applied, namely, food. It is an act with regard to food. It is an act with regard to pure food, and that is the effort of the statute, to see that the people get pure food; and, therefore, when a substance which professes to be food is to be condemned because it is filthy, decomposed or putrid, necessarily those words are to be applied to the subject matter of the act, the substances that are offered for food; and, therefore, as I say, when you come to deal with that subject, as you are dealing with it, and attempt to apply these words to it, it requires the jury to say what is the condition of this substance, considered as food, offered for that purpose. Would it properly, in the ordinary use of these words, be condemned as filthy, or would it properly be condemned as decomposed or putrid? Now, I have no doubt,—or, at least, I trust—you get my meaning with regard to that. You are not required to assign scientific definitions to these words at all. You are simply required to give them their ordinary and usual meaning, and then apply that to the evidence in this case, and determine whether, in either respect, this substance can be said to offend against the statute. The Government's case, as I understand it, depends solely upon the presence of these minute vegetable existences in the product. I am right about that, am I not?

Mr. DOUGLAS. No, animal existences.

The COURT. They are not always animal. Some of them are and some of them are not. Most of them are vegetable.

Mr. SHERN. Organisms.

The COURT. They are organisms, but the vast majority of them are vegetable. There are a few that are animal, but only a few. But, at all events, it is the presence of these organisms on which the Government relies.

Mr. DOUGLAS. Yes, sir.

The COURT. Now, you have heard a good deal of testimony with regard to the presence of these bacteria or bacilli, I do not know exactly which word is the precise and proper word to apply, but, at all events, these very minute microscopic creatures, which, within a comparatively few years, have become of great importance. Now, you have a great deal of testimony about it from these gentlemen who have made the subject a study, and I commend their testimony to you for your careful consideration. We are, necessarily, in a subject like this, obliged to rely upon the testimony of expert witnesses, and their testimony is to be given a great deal of attention, and it is for the jury to say what its value is, and how far it may safely be relied upon. It may, perhaps, be difficult for the jury to come to a conclusion upon that matter, and yet there is not any other tribunal to whom that subject can be left, and especially is that the case where, as here, there is a difference of opinion among the experts with regard to the conclusion that ought to be drawn. That is not at all an uncommon situation, and it is not at all a situation,—or, at least, it is not a situation that need be dwelt upon with any degree of reprobation. It is comparatively common, I may say, to speak of expert testimony with a subdued sneer, at all events, and sometimes with an open sneer. I do not think it is justified in a great majority of the cases. These gentlemen are,—there is no possible reason to doubt,—I am not speaking especially about the witnesses in this case, but expert witnesses generally—they are almost always entirely honest, and desirous, to the last degree, to give the best evidence they can upon the subjects concerning which they are asked questions, but they are human, like other people. They have their own theories. They sometimes have their own biases and prejudices, which color their views, and in that subject, like the one that is before us, you can see there is a great deal of room for difference of opinion. The subject matter is one that is difficult to have accurate information on, although you may have approximate information that is substantially sufficient; and then besides, in an examination of these substances, if a sample were taken from one part of this large package, it might be of one quality, and then beside that there may be a sample that would be of a very different quality. So that one witness examining one sample and one examining another,—they might come to what seemed to be widely different conclusions, and are, if you regard the two samples as of the same quality; yet, if they are of different quality, of course the differences in their testimony is accounted for. I do not think it would be either necessary or desirable for me to comment upon their testimony. Counsel have already done that sufficiently, and besides their testimony was not difficult to understand, and I have no doubt you all understand it sufficiently for all purposes.

From their testimony, I repeat, the question for you is whether this substance was, at the time it was seized, either filthy, decomposed or putrid, with special reference to the fact that it was offered and intended as food, not whether it was going to be in the future, or whether it might be in the future, owing to the presence of these creatures,—these organisms in it, but whether it was at that time of that description; because it is to that time that the Government necessarily is confined.

Now, that is the case, and I do not believe I can assist you any further in the matter. I have endeavored to give you what I think is the proper method of the construction of this statute, and, as you will see, the question is a very narrow one, it is one for you to determine very largely, or in large part, by the aid of your common sense and common knowledge with regard to the meaning of these words. I cannot say to you definitely what they mean. It is for you to say what they mean, the kind of words I have given you. Of course, you have not any arbitrary right on that subject, but what their meaning is is what they mean to the ordinary citizen to whom they are addressed. They have not, as I conceive in this statute, a precise and scientific definition. Their meaning must be determined by a consideration of the subject matter about which they are dealing, namely, pure food,—as pure food as possible,

and in that light, the jury, with the instructions I have given them, must determine the question. Your verdict in the case would simply be in favor of the United States, if you find that this substance should be condemned, or in favor of the claimant, if you find that the Government has not made out its case, tested by the rule with regard to the burden of proof to which I have referred.

MR. SHERN. Will Your Honor allow me to make a suggestion? Of course, the jury know better, but the newspapers have been full of this case, and I would like the jury to govern themselves by what they have heard in Court, and not be actuated by any other comment.

THE COURT. Not all the newspapers were full of it, for I have not seen a word about it, but there may have been some, as there doubtless are, if Mr. Shern's information is accurate. Doubtless some may have had comments about it. I do not know whether the jury have seen them. However, if they have, I am sure they will dismiss it from their minds, and decide the case upon the evidence and the instructions of the Court.

The jury returned a verdict in favor of the United States and on April 20, 1910, the court rendered a decree of condemnation and forfeiture, adjudging the product to be adulterated because it consisted in whole or in part of a filthy, decomposed, and putrid animal substance, and ordered that the said goods be destroyed. On the same day, in accordance with this decree, the property was destroyed by the United States marshal for the said district.

This notice is given pursuant to section 4 of the Food and Drugs Act of June 30, 1906.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *August 5, 1910.*

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