F. & D. No. 2742.
I. S. No. 10604–c.

Issued July 26, 1913.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 2456.

SUPPLEMENT TO NOTICE OF JUDGMENT NO. 1744.

(Given pursuant to section 4 of the Food and Drugs Act.)

U. S. v. Philadelphia Pickling Co. On appeal by defendant the U. S. Circuit Court of Appeals for the Third Circuit affirmed judgment of the lower court.

ADULTERATION OF TOMATO PASTE.

On November 19, 1912, the Philadelphia Pickling Co., defendant in the above-cited case, petitioned the District Court of the United States for the District of New Jersey for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Third Circuit. On the same date defendant filed its bill of exceptions and assignments of error at the trial of the case before said District Court, resulting, October 30, 1911, in a verdict of guilty and the imposition of a fine of $100.

At the trial of the case the jury was directed to find a verdict in favor of the Government, as will more fully appear on the following charge delivered to the jury by the court (Rellstab, *D. J.*):

The question now before the court is whether the defense that the defendant has been permitted to introduce, is an answer to this indictment, it having been admitted by the defendant, first that the nine barrels of tomato paste, which constitutes the shipment, contained adulterated food within the meaning of the Food and Drug Act; and second, that it shipped them from Belleplain, New Jersey, to itself at its place of business in Philadelphia, Pennsylvania.

As I say, the question is whether, in view of those admissions, the defense that has been permitted to be introduced can be treated as a defense in law. If it can, it presents a question for the jury. If not, there is no question for the jury to pass upon, and it devolves upon the Court to direct a verdict.

The view I have reached in the premises is that it does not constitute a defense, and I will briefly state my reasons, so that if the case should be taken up, the Appellate Court will know upon what grounds the defense was overruled.

The indictment contains but one count, and that charges the defendant, the Philadelphia Pickling Company, with wilfully and unlawfully shipping and delivering for shipment from Belleplain, New Jersey, to Philadelphia, Pennsylvania, by a certain railroad, nine barrels of tomato paste, which, the indictment alleges, was a food adulterated within the meaning of the Food and Drug Act. It then specifies in what way it was adulterated. This act, as indicated in its title, is an act to prevent not only the manufacture and sale, but the transportation of, adulterated or misbranded foods and drugs, etc. Transportation as well as sale or manufacture, is therefore, within the Congressional purpose in passing this enactment. Section 2 prohibits the introduction into any State from another State, of adulterated foods; or even the delivery for shipment from one State to another, and it declares the persons who shall so introduce and transport, to be guilty of a misdemeanor.

Section 10, to which reference has been made, authorizes a proceeding in rem, and contemplates only the confiscation of the offending goods. Section 2, upon which the indictment is founded, directs a proceeding in personum, and the constituents of the offense therein denounced are found therein, no reference to Section 10 being necessary.

It is said, however, that the shipment in question, though made with the view of sale, depended upon an inspection and test before a sale could take place, and therefore was not an offense within such section. In other words, that such a transaction was not commerce, and therefore not within the legislative purpose of the act. I cannot accede to this view. The defendant certainly contemplated making a sale of this paste. The examination and test were for that purpose; that the result thereof might prevent the consummation of the intended sale does not make this shipment any less a commercial transaction. The purpose of this act is very manifest, it is a beneficent purpose; it is to protect the public from the sale of impure food. The act itself furnishes the test of what is impure. Transportation with a view of putting into the hands of customers an adulterated article, is within the beneficent purpose, and within the terms of this enactment.

Now, it appears in this case that the defendant purchased in New Jersey, from a New Jersey manufacturer, a number of barrels of tomato paste, which it stored in its own place in New Jersey. The testimony on behalf of the defendant discloses not only that, but also that they knew at that time that it was adulterated within the meaning of this act, and that if such food should come into interstate commerce, it would fall within the denouncement of such act, subject the defendant to indictment, and the goods themselves to confiscation.

The proviso to Section 2, to which reference has been made, shows that Congress intended to except from the provisions of the act such articles, even though they were adulterated within the meaning of the act, where it was intended for export to a foreign country; but it expressly limits the proviso, and requires the persons so intending to use the adulterated food, to see that it is put in packages prepared and packed according to the specifications or directions of the foreign purchaser; that was not done in this case. The reason given why it was not done is that without an examination and test no such exportation was to take place, and that the prospective purchaser would not go to New Jersey to make the inspection, and that the goods were thereupon shipped to Philadelphia to have the examination and test made there. We find, therefore, that a shipment was made of adulterated goods from one State to another. It is said it was made, however, from the owner to himself, the shipper and the consignee being the same person, and that from that we are to conclude that it was not commerce. I do not think the cases cited by counsel will support that

insistence. Furthermore, it must not be overlooked that all those cases were dealing with Section 10, seizures in which the element of sale is expressly inserted. It may very well be that a person cannot sell to himself; yet, a shipment by one to himself may be in contemplation of sale and fall within the statute's inhibition. If Stevens, the original owner, had shipped these goods direct to the defendant at Philadelphia, there would be no question but that it would be a shipment in interstate commerce. Will the mere fact that the purchase was made in New Jersey and shipped by the purchaser to himself in another State, take the transaction out of the act? To put such construction upon this section seems to me to be violative of the ordinarily accepted principles of statutory construction. This section declares that introducing from one State to another, shipping from one State to another, delivering for the purpose of shipping from one State to another, an article of food which is adulterated, is a misdemeanor. As already stated, these nine barrels of adulterated tomato paste were intended to be sold, and that with a view of facilitating and consummating such sale, the shipment was made from New Jersey to Pennsylvania. It would have been consummated, according to their own statement, if the goods had upon inspection and examination by the intended purchaser proved to be satisfactory to him. To hold that a shipment of that kind is not commerce, in my judgment, would be in absolute disregard of the meaning of the word. The defendant, if it had intended to make a shipment of these barrels under this proviso which I have mentioned—the proviso tacked on to the second section—should have made its inspection and examination in New Jersey and should there have prepared and marked the containers in the manner directed by the statute. It did not do that; but on the contrary, it made the shipment in disregard of such requirement, and hence, in violation of the section.

My direction, therefore, to you gentlemen is that you find a verdict in favor of the Government.

On January 2, 1913, the case was argued in the Circuit Court of Appeals and on February 1, 1913, that court rendered its decision, affirming the judgment of the lower court, as will more fully appear from the following opinion delivered by the court (McPherson, *J.*):

The Philadelphia Pickling Company was convicted under Section 2 of the Food and Drugs Act of 1906, the indictment charging a shipment of adulterated tomato paste from the company's place of business in New Jersey to its place of business in Pennsylvania. Other facts will appear in a few moments; but it seems advisable to consider in advance the general question—Does the act apply where the owner has shipped to himself for some other business purpose than sale? The trial judge directed the verdict, but no complaint is made of this, if his construction of the act was correct.

The statute imposes penalties in three sections, but we are concerned only with sections 2 and 10. The latter section provides for condemnation, and permits an offending article to be seized, if it "is being transported from one state, territory, district, or insular possession to another for sale; or having been transported remains unloaded, unsold, or in the original unbroken packages; or if it be sold or offered for sale in the District of Columbia, or the territories, or insular possessions of the United States; or if it be imported from a foreign country for sale; or if it is intended for export to a foreign country." This section speaks repeatedly of sale, and the courts have had several occasions to consider what Congress meant by the language quoted. In United States vs. 65 Casks (D. C.), 170 Fed. 449, it appeared that the casks in ques-

tion (which were insufficiently marked) contained a liquid that had been manufactured and shipped by the owner's agent in Michigan to the owner himself in West Virginia for the primary purpose of being bottled and properly labeled there. It was not to be sold until this had been done, and the District Court held inter alia (pp. 445–6) that Congress

"did not * * * have power to restrict one from manufacturing in one state such product and removing it from that state to another for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured."

The Court of Appeals affirmed the judgment in a brief opinion (175 Fed. 1022) which is silent concerning the power of Congress and merely gives the following reason for affirmance:

"No attempt to avoid the law, either directly, indirectly or by subterfuge, has been shown; it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the same for the market. Under the circumstances disclosed in this case, having in mind the object of Congress in enacting the law involved, we do not think the liquid extract proceeded against should be forfeited. Reaching this conclusion we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court below."

In United States vs. 46 Packages (D. C.) 183 Fed. 642, it was held that a libel in rem under Section 10 was defective because it failed to aver that the articles seized were transported "for sale". The foregoing cases are referred to in Hipolite Egg Co. vs. United States, 220 U. S. 45, and although they are not definitely disapproved they are certainly not accepted as correct. At the best, they are noticed and laid aside with a word or two of comment, and of course they must yield if they clash with the decision or the opinion of the Supreme Court. One of the points decided in the Hipolite Egg case is, that section 10 permits the condemnation of adulterated food, although it has not been transported for sale directly but is intended solely for use as raw material in the manufacture of another product. This is clear, for the court on page 52 states the first contention of the Egg Company to be that

"Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product;"

and this contention is declared (p. 55) to be "Untenable."

But the reasoning that supports this declaration goes further, we think, than the precise point decided. We may perhaps venture to give an outline of the argument: Congress has taken away from adulterated food the right to be transported in interstate commerce, whatever the object of such transportation may be. The act has two clearly separate objects (p. 54); first, to keep adulterated articles completely out of the channels of interstate commerce; and second, if they do enter such channels to sanction their condemnation while being transported, or even after they have reached their destination, as long as they remain unloaded, unsold, or in original unbroken packages. These objects of the act are not changed or qualified by the purpose of the owner. He may, or may not, intend to sell; if he so intend, perhaps he may also intend that the articles shall first undergo a further process of manufacture; but even if the latter intention be present, he would still be transporting for sale. Therefore, even if the "condition" (Contention?) be accepted that section 10 does not allow condemnation unless such articles are transported for sale, nevertheless the facts of the case then being considered showed that a "sale" was intended. Not directly, it is true, but only one step removed; for the eggs were

intended to be used in making cakes for the market, and were, therefore, to be sold as a part of the cake. The court points out that all articles, compound or single, not intended for consumption by the producer, are designed for sale, and because they are so designed it is the concern of the law to have them pure.

One of the Egg Company's arguments—that a producer in one state is not interested in an article shipped from another state if such article be not intended for sale or consumption until it is manufactured into something else—is said to be "peculiar"; the court declares, that both the producer and the consumer are interested in having an article pure, no matter whence it may come, and that the law seeks to protect such interest both by the personal penalties of section 2 and by the seizure and condemnation under section 10.

This is in outline the Court's reply to the Egg Company's first position; but we think the attitude of that tribunal appears even more clearly in the discussion of the company's second position—which was, "that at the time of the seizure the eggs had passed into the general mass of property in the state, and out of the field covered by interstate commerce." The containers had been stored at the company's bakery among other supplies, but the original packages had not been broken. It was held that Congress might pursue the packages into the bakery and might seize them there; the offending articles had not escaped although they had reached their destination, and had already become part of a larger collection of supplies. The act had forbidden the transportation of adulterated food, and not only had made the shipper subject to penalties, but had made even the goods themselves so far culpable as to be liable to seizure in rem:

"It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce, and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the state. Certainly not, when they are yet in the condition in which they were transported to the state, or, to use the words of the statute, while they remain "in the original, unbroken packages". In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original packages, we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary."

And one characteristic of adulterated food is thus insisted upon, with the legal consequences that flow therefrom:

"We are dealing, it must be remembered, with illicit articles,—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of property of the state. In other words the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and state power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a state. The question in the case, therefore is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with

other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the states by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages."

We have examined this case at such length, because it seems to us that if our understanding of the court's reasoning be correct the decision of the present controversy is inevitably foreshadowed. It is true that this is a prosecution under section 2, and not a seizure under section 10; but the difference (if important) is in favor of section 2, for its meaning is not restricted by the words "for sale," and is therefore even broader than the language of section 10. One of the chief objects of the act is declared in section 2, namely, to forbid "*the introduction* into any state or territory, &c., &c., of any article of food . . . which is adulterated"; and while the section does not attempt to punish criminally every method of "introduction" it does punish the method here in question—"any person who shall *ship or deliver for shipment* from any state or territory, &c., &c., shall be guilty of a misdemeanor," &c., and the breadth of the prohibition justifies us at least in refusing to narrow the ordinary meaning of the words that define the crime. Of course the shipment must be in the way of "commerce"; such a limitation is constitutionally necessary; but if the limitation be assumed, no reason is perceived why "shipment" should be construed to mean "shipment for sale." Its ordinary meaning in this connection covers any shipment for any purpose in the course of commerce, and we accept this as the intended scope of the word. And the correctness of such construction seems more probable when we observe that the next penal clause of section 2 should apparently be construed in a similar manner. This clause applies to any person "who shall receive in any state or territory, &c., &c., and, having so received, shall deliver in original unbroken packages . . . or (shall) offer to deliver, to any person any such article so adulterated"—the delivery being punished, whether it be "for pay *or otherwise*." In other words to receive and deliver offending articles in the course of commerce is indictable whatever the business purpose may be.

The Court of Appeals of the Second Circuit, in United States vs. 300 Cans, 189 Fed. 352, has also ruled that, since the Hipolite decision at all events, a libel for condemnation need no longer aver that the articles were transported for sale—the food there in question having been shipped from Nebraska by the owner to himself in New York and remaining unsold in original unbroken packages.

The facts of the present dispute are these: The defendant has two places of business, one in New Jersey and one in Pennsylvania. The adulterated tomato paste in question was at the New Jersey house and was shipped to Philadelphia in order to be examined and tested in that city. The test was necessary because a customer in London had sent an order, and the paste, unless it could meet the English standard, would not fill the customer's requirements. It was not to be sold or used for food in Philadelphia, and it was not so sold or used; but, having failed to meet the English test, it was immediately destroyed without attempt to use or sell. The test was not made in New Jersey because facilities for making it there were lacking. The sale would have been completed in Philadelphia, and the shipment for export would have been made from that city, if

the paste had met the English test; and in that event the paste (although it might have been adulterated according to the United States standard) would not have been subject to seizure by this government, if it had been "prepared or packed according to the specifications or directions of the foreign purchaser, &c., &c." (See proviso to section 2.) That an ultimate sale was a possibility when the shipment was made in New Jersey, is not a decisive consideration; for the sale was never made, and of course the goods were never prepared or packed for export. But the English order does have this bearing; it explains why the interstate movement took place, and shows that the reason was a trade or business reason, and therefore that the movement was in the course of commerce.

In our opinion it was interstate commerce for the owner to ship the goods from New Jersey to Pennsylvania for a business purpose such as examination and test; and as the goods were adulterated such a shipment was unlawful.

The judgment is affirmed.

B. T. GALLOWAY,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *March 28, 1913.*

2456

O