

On January 14, 1924, no claimant having appeared for the property, judgments of condemnation and forfeiture were entered, and it was ordered by the court that the product be sold for fertilizer.

HOWARD M. GORE, *Acting Secretary of Agriculture.*

12055. Adulteration of mineral water. U. S. v. 264 Cases, et al., of Mineral Water. Default decrees of condemnation, forfeiture, and destruction. (F. & D. Nos. 17856, 17887, 17961. I. S. Nos. 7129-v, 7145-v, 7146-v, 7147-v. S. Nos. C-4130, C-4139, C-4158.)

On or about October 11, October 29, and November 6, 1923, respectively, the United States attorney for the Eastern District of Louisiana, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district libels praying the seizure and condemnation of 326 cases of mineral water, at New Orleans, La., alleging that the article had been shipped by the Crazy Well Water Co., from Mineral Wells, Tex., on or about September 18, 1923, and transported from the State of Texas into the State of Louisiana, and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: (Bottle) "No. 1" (or "No. 2" or "No. 3" or "No. 4") "Crazy * * * This is a Natural, Saline, Alkaline Mineral Water * * * The Crazy Well Water Company. Mineral Wells, Texas. One-Half Gallon."

Adulteration of the article was alleged in the libels for the reason that it consisted in part of a filthy, decomposed, and putrid animal and vegetable substance, in that a portion of the said article contained bacillus coli and the remainder thereof showed pollution.

On December 3, 1923, the Crazy Well Water Co., Mineral Wells, Tex., claimant, having stipulated that decrees of forfeiture might be entered, judgments of condemnation were entered, and it was ordered by the court that the product be destroyed by dumping the water and that the bottles and cases be returned to the claimant upon payment of the costs of the proceedings.

HOWARD M. GORE, *Acting Secretary of Agriculture.*

12056. Adulteration of canned salmon. U. S. v. 496 Cases, et al., of Salmon. Tried to the court and a jury. Verdict for the Government. Decree of condemnation and forfeiture entered, with proviso that product might be released under bond to be reconditioned. (F. & D. Nos. 17383, 17385, 17385-a, 17385-b. I. S. Nos. 6651-v, 6655-v. S. Nos. C-3951, C-3953.)

On March 17, 20, and 25, 1923, respectively, the United States attorney for the Eastern District of Missouri, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district libels praying the seizure and condemnation of 1,195 cases of salmon, remaining in the original unbroken packages in various lots at St. Louis, Poplar Bluff, Sikestown, and Cape Girardeau, Mo., respectively, alleging that the article had been shipped by the Griffith-Durney Co., Seattle, Wash., in part on or about October 24 and in part on or about October 27, 1922, and transported from the State of Washington into the State of Missouri, and charging adulteration in violation of the Food and Drugs Act. A portion of the article was labeled in part: (Can) "Aviation Brand * * * Chum Salmon Fresh Alaska * * * Chum Salmon North Pacific Trading and Packing Company San Francisco, Cal." The remainder of the article was labeled in part: (Can) "Klawack Brand * * * Salmon * * * Packed At Klawack Alaska, U. S. A. By The North Pacific Trading And Packing Company San Francisco Calif."

Adulteration of the article was alleged in the libels for the reason that it consisted wholly or in part of filthy, decomposed, and adulterated animal substance.

On January 16, 1924, the North Pacific Trading & Packing Co., San Francisco, Calif., having appeared as claimant for the property, and the four libels having been consolidated into one action, the case came on for trial before the court and a jury. After the submission of evidence and arguments by counsel the court delivered the following charge to the jury (Faris, J.):

"GENTLEMEN OF THE JURY: I shall now endeavor, as best I can, to give you what I deem to be the law of this case. This proceeding is a civil action. It is what is called a libel, that is, the Government, under a statute commonly called, I believe, the Food and Drugs Act, has provided for the seizure of articles of food, and drugs as well, though none of those are in issue here, whenever such articles of food fail to comply with the provisions of the statute that I have mentioned.

"The Government has also made it a criminal offense, a misdemeanor punishable by fine or imprisonment, or both fine and imprisonment, for the transportation across a State line, that is, from one State to another, of articles of food which do not comply with the act that I have mentioned; that, however, is not in this case. There are, as forecast, two methods: One is by prosecuting the shipper and fining him or sending him to jail; the other is by seizing the article which he ships, in a case such as this, called, I repeat, a libel, and of trying out the issues, and should it be determined that the article of food in question by its condition contravenes the law then the Government has the right, by a decree of court, to have that article either condemned or destroyed, or to have it, if I may so express it, rehabilitated under a bond which the claimant in the case is required to give, conditioned that the article be by such rehabilitation put in a condition to conform to the statute.

"Now, that is all this case is about. The case may be tried either before the court or by a jury. If it be tried by a jury certain issues are presented to that jury, or a certain issue of fact is presented to that jury. The decree, then, upon the finding of the jury is entered by the court in accordance with the law.

"Your duty in this case is simply to pass upon the single question of whether the salmon seized, two different brands, I believe in effect, the Klawack and the Aviation brands, do or do not comply with the provisions of this pure food act in the behalves that I shall presently mention to you.

"Questions of the nature of the shipment—that it was shipped by the claimant in the case, that it was shipped in interstate commerce and therefore is brought within the law—are all conceded fairly, honestly, and candidly by the claimant.

"The suit, of course, is brought by the United States against the salmon itself. The practice, you will observe, is somewhat peculiar, but the owner of that salmon may come in and become a claimant, that is, a sort of defendant in the case, and ask that it be not condemned, but that it be returned to him, denying any allegations of its unfitness, as alleged by the Government in the libel.

"The claimant in this case is the Northern Pacific Trading & Packing Co., a corporation under the laws of California, engaged in business in Prince of Wales Island, in southeastern Alaska.

"So, you have the issue here—you have the Government upon the one hand alleging certain things, and the claimant, standing in the shoes of a defendant, having taken the place of the cases of salmon, and becoming, in effect, a defendant.

"The statute provides against adulteration, that is, it forbids adulteration of a food; and an article shall be deemed to be adulterated, in the case of food, for a number of reasons, but the pertinent reason here in this case is numbered 6:

"That for the purposes of this act an article shall be deemed to be adulterated * * *. Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

"Now, that is the statute that is in issue in this case. That statute raises the question that you are called upon to decide, and that question, in its simplest analysis, is whether the salmon in controversy here consists in whole or in part of filthy, decomposed or putrid animal substance.

"You may cut out, of course, the question of filth, except in so far as that word 'filthy' throws light upon 'decomposed.' Bearing in mind that the word 'filthy' may modify, or throw light upon the word 'decomposed,' the question is: What is the meaning of the word 'decomposed'? It uses the word 'decomposed' as well as the word 'putrid.' We all know what putrid means. Putrid means absolutely rotten and decayed, but the statute uses also 'decomposed.' We have to go to the dictionary, which is the ordinary source of definition of words used in the English language, in order to find out what 'decomposed' means. It is the past participle, I believe, of the verb 'decompose.' The verb 'decompose' means to rot or decay. The past participle, that is, 'decomposed,' therefore, means in a state of decomposition. Decomposition, of course, is a noun and means the condition of being decayed, putrid, or rotten. Substantially, that is what it means.

"So, if you shall find that the article—and I shall return presently to the word 'article' and try, as best I may, to define it for you—was in a filthy, decomposed or putrid condition, that is, that it was decomposed, that it was in

a state of decomposition, you are warranted in finding the issues for the Government and against the claimant.

"The great difficulty, gentlemen, as a matter of law, as well as a matter of fact in this case—and this is a difficulty which presents itself to the court as well as to you, gentlemen, as the triers of fact—arises from the situation here presented. In a seizure of four different lots of salmon contained in hundreds of cases, and amounting in all, I believe the evidence shows, to about 72,000 one-pound cans, a part of those cases, mayhap, or a part of the contents of those cases, certainly, is shown by the evidence to be good and a part is shown to be bad, if you find that is the fact. Commenting upon the evidence, there seems to be but little dispute about it, that that was the condition here, since there is but a negligible difference between the experts for the Government upon the one hand and the experts for the claimant upon the other.

"You will note that the statute which I read to you contains the word 'article' and in that word, and in a correct definition of that word, the trouble in this case, both of law and of fact, lies. I think the meaning of the word 'article,' that is, as to whether it means a single one-pound can, or whether it means one of these lots of 496 cases or not, must necessarily be found from a construction of the entire statute. I am constrained to conclude, as a matter of law, that the word 'article' as used in this statute does have reference to the case or cases seized, and that it does not have reference to a single, individual can. If it had reference to a single, individual can then a man who shipped in interstate commerce 72,000 cans, or a corporation which so shipped them, could, upon conviction, be imprisoned in jail or fined the full amount of the penalties mentioned by the statute, for each single, individual can. There would be great objection, of course, to that. If but 5 per cent of 72,000, if 16 per cent of 72,000 of those cases were bad, you would have the peculiar result in the case of having the amount of the penalty multiplied by the number of cans. If you conclude that 'article' means 'cans' you would have no trouble in the case as to the cans that were actually bad. There is not any doubt that those ought to be thrown out, provided you find that they were decomposed, within the purview of the definition which I have given you.

"So, I think, for the purpose of this proceeding, the word 'article,' as used in the statute, means the lot seized under each of the single counts of this libel. You will recall that there were four separate cases, but these cases have been combined into a single consolidated case, of which the former four separate cases now constitute counts 1, 2, 3, and 4, respectively.

"Now, gentlemen, something has been said in the case about there being an issue here as to whether tainted salmon, that is, salmon which was spoiled, or tainted, or decomposed before it was canned, after it has been canned and processed and subjected to heat at 240 degrees Fahrenheit, is hurtful to health. I charge you, as a matter of law, that it does not make any difference in this case. The statute forbids the sale, through interstate commerce, or the transportation in interstate commerce, of an article of food which is decomposed, but it does not say anything about whether that article be hurtful or non-hurtful to health. So, I charge you as a matter of law, that that cuts no figure, even though you should find that it might be perfectly healthful. That is clear, and I went further in reading that statute than is necessary for the point involved here, in order to point that moral, because you will note that that statute forbids the transportation in interstate commerce, for the use of food, of the carcass of an animal that has died otherwise than by slaughter. No one would contend that the death of an animal from a natural cause would make that, when used as food, unhealthful food or food dangerous to health. Going, for the moment, into the realm of literature, we are told by Sir Walter Scott, in a number of his novels, that our Scotch friends, in early times, at least, were addicted to the use of mutton of that sort which they called 'braxy' mutton.

"So I charge you, as a matter of law, that it makes no difference what your finding shall be as to whether it was healthful or unhealthful. The object of the law, as shown by the words used, was to keep away from the consumer things that were filthy, according to our common understanding. Of course, 'filthy' and 'filth' are relative terms. What might be filth to you might be attar of roses to a Siwash Indian. So the term as used is merely a relative one.

"Something has been said here about decomposition. Decomposition begins, of course, in a sense, where life ends, but that is not the sort of decomposition meant in this statute. To a degree, the moment a thing begins to live, in a sense it begins to die, and the moment that life is out, decomposition, to a degree, begins and increases faster and faster to rottenness, decomposition, or

decay. It is necessary, therefore, to give a reasonable construction to that word, in order to carry out the intent of this statute.

"Now, gentlemen, something has been said in the case about the matter of tolerance. The statute itself provides for no tolerance, and, while the statute provides for the making by the Secretary of Agriculture of certain rules and regulations, these rules and regulations, the witnesses tell us, have never yet been made by the Secretary of Agriculture. There may be difficulties of a practical nature in the making of them. It might be a matter of unwisdom to make them, because the making of them might invite violation to the full extent of the per cent of tolerance permitted, but that is neither here nor there. The statute provides for no tolerance, and none has been provided for by any rule or regulation, which the statute seems to give power to the Secretary of Agriculture to make. I think, however, something must be said on that question of tolerance, and I think it is a matter which, when absent statute and when absent regulation—and I have told you that there seems to be none—must be addressed to your sound common sense and idea of justice, in the light of your experience as business men.

"I use the word 'tolerance,' of course, in the sense that it is the usual and ordinary per cent of decomposed salmon which would get into a case of salmon, or into a lot of many cases, in the face of the use of ordinary care by those engaged in the business of canning salmon, when such canners are using that degree of care which an ordinarily careful and prudent person would exercise under similar circumstances. I think you ought to be permitted to determine, under the evidence, whether such tolerance, or any tolerance, in this business, ought to be allowed. You ought to do that from the evidence.

"The witnesses have gone very broadly here, very minutely here, and at great length here, in many instances, into the matters of catching these fish, bringing them to the canneries, of canning them, and of processing them, and have told you candidly, on both sides, how they are gotten, where they are gotten, how far away they are gotten, and what is the condition of them after 48 hours, after 72 hours, and after 96 hours. So I think it is reasonable to say that occasionally, necessarily a bad salmon, decomposed salmon, salmon forbidden by this law that I have called your attention to here, creeps into these cases and into these shipments, in spite of the canners. I know of no other way by which that per cent or degree of tolerance can be figured out except by the use of your sound common sense and ideas of right and justice, in the light of your experience as men and as business men. But one of the witnesses touched upon that question, I say, by way of comment upon the evidence. He said that in his opinion it ought to be about one-half of one per cent, as I recall it. Certainly, in my opinion, it would strike a man of ordinary business judgment, common sense and ideas of justice, that it might be impossible to prevent some bad or decomposed salmon, or forbidden salmon, to get into a lot of many cases. Whether the amount here in these four cases, or four counts of this single case, or in either of those four counts, be greater or less than the per cent of tolerance that I have undertaken to define to you, is a question for you, gentlemen. The season, of course, as the evidence shows in the case, is short. It runs from June to September. That, I take it, is due to the fact that the run of salmon is short.

"Now, gentlemen, I have undertaken to give you my view of the statute, and I again repeat to you that it is a very difficult statute, because it is a statute that has not up to now been construed very often, and the courts which have seen fit to construe it, unfortunately, have not agreed with each other, and perhaps, in a case or two, have not agreed with themselves. I have endeavored to give you my views of the law, however, as it strikes me. The duty of doing this is upon me and you are not concerned about it, whether I have given it correctly or not; so long as you follow what I say about it, that ends your duty.

"When you come to the evidence, however, you, and not the court, are the sole judges of the credibility of the witnesses and of the weight and value to be given to the testimony of the witnesses. You are warranted in taking into consideration their manner and appearance upon the stand, their manner of testifying, the probability or improbability of the testimony which they gave, and their opportunity to see and observe and profit by, and their ability accurately to relate what they saw, heard, or attempted to relate. You may take into consideration their interest in the case for plaintiff, or for the claimant. Having done this, it is your province to give to their testimony that credibility which you deem it entitled to.

"I have commented, in a few places, upon the evidence. You are to accept that comment in the light of the rule that I have given you, that is to say, that you, and not the court, are the sole judges of matters of evidence and of the credibility of witnesses. If you do not agree with what I have said, it is not only your privilege but your duty to follow your own views and cast out of your minds what the court has said, and the opinions given by the court as well, about this evidence.

"I have had prepared for you a single form of verdict, because, as I say, there is but one issue to be found by you. Upon that finding by you I am permitted, by the law that I read to you, by the decree I make, either to order the salmon to be condemned or destroyed, or order it to be rehabilitated, if you shall find for the plaintiff. If you find for the claimant upon this single issue then, of course, the salmon seized is to be returned to the claimant. You may, therefore, use this single form of verdict. I have used the words 'libelant' and 'claimant,' so you may strike out either 'libelant' or 'claimant' and the verdict will be proper.

"If your verdict shall be for the plaintiff on the first count (formerly case 6327) you may render this verdict: 'We, the jury in the above entitled consolidated cause, find the issues herein joined under count 1 (formerly case 6327) in favor of the libelant.' On the other hand, if your finding should be in favor of claimant, draw your pen through the word 'libelant' and it will then be all right. So, also, with the other three counts. There must be a finding upon each of the counts. I have had prepared a verdict accordingly.

"Your verdict must be unanimous, gentlemen; each of your number, twelve in all, must concur in any verdict which you shall render.

"Now, gentlemen, that is all that occurs to me. If there are any suggestions or objections to the charge I shall be glad to hear them."

"Mr. ELVINS. I have no suggestions to offer, because I think the court has covered it entirely, but I do, for the purpose of the record, desire to offer an exception to that part of your honor's charge which dealt with tolerance and allowed the jury to determine, from the rule which your honor gave them, whether or not that should enter into the case, because the Government is of the opinion that under the statute it would not be a jury question. That is the only exception."

"Mr. MCPHEETERS. If the court please, there are just two objections that I would like to make. The first one is to the court's interpretation and ruling on the meaning of the word 'article,' which the claimant contends means the individual can rather than the case, or the entire lot, and we therefore object to the instruction for that reason. Second: We object to the court's ruling on the question of the fact as to whether or not the salmon was or was not injurious to health. We object on the ground that that question necessarily enters into and is connected with the matter of the reasonableness, or the amount of tolerance. In other words, that things that would be injurious to health should not be tolerated, or the percentage should be very minute, but as to things that are not injurious there might be a wider range of tolerance.

"I also think, your honor, and I suggest that possibly there may be a little confusion on this question. It occurred to me when the court was dictating the instructions. I got the impression that the jury was authorized to find a seizure of all the salmon if they found that a part, no matter how small, of the salmon was decomposed. I think that was probably cured by the latter part of the charge, but there was some uncertainty in my mind about it."

"The COURT. Well, if those are objections and exceptions to the charge you may have them. If they are requests for additional and further charges, they are denied."

The jury then retired and after due deliberation returned on January 18, 1924, a verdict for the Government.

On March 13, 1924, a decree of condemnation and forfeiture was entered, and it was ordered by the court that the product might be released to the claimant upon payment of the costs of the proceedings and the execution of a bond in the sum of \$3,000, in conformity with section 10 of the act, conditioned in part that it be reconditioned by actual recanning, under the supervision of this department, the bad portion to be destroyed and the good portion to be released to the said claimant. On April 5, 1924, the claimant having failed to file a bond, a writ ordering the destruction of the product was entered.

HOWARD M. GORE, *Acting Secretary of Agriculture.*