

November 24, 1937, by Rockwood & Co. from Brooklyn, N. Y.; and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Rockwood & Co., Brooklyn, N. Y."

It was alleged to be adulterated in that it consisted wholly or in part of a filthy vegetable substance.

On September 6 and 8, 1938, no claimant having appeared, judgments of condemnation were entered and the product was ordered destroyed.

HARRY L. BROWN, *Acting Secretary of Agriculture.*

29392. Alleged adulteration and misbranding of potatoes. U. S. v. 420 Sacks of Potatoes. Tried to the court. Judgment for claimant. Libel dismissed and product ordered released. (F. & D. No. 42921. Sample No. 33644-D.)

On June 13, 1938, the United States attorney for the District of Maryland, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 420 sacks of potatoes at Baltimore, Md.; alleging that the article had been shipped in interstate commerce on or about June 4, 1938, by W. H. Martin from Bangor, Maine; and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled in part: "Maine Selected Potatoes Martin's W. H. M. Brand U. S. Commercial Graded * * * W. H. Martin * * * Bangor, Maine."

The article was alleged to be adulterated in that it consisted in whole or in part of a decomposed vegetable substance.

It was alleged to be misbranded in that the statement "U. S. Commercial" was false and misleading and tended to deceive and mislead the purchaser when applied to potatoes below U. S. Commercial grade.

On June 28, 1938, W. H. Martin having appeared as claimant, the case came on for trial before the court. After hearing the evidence and arguments of counsel, the court entered judgment for the claimant, with the following opinion delivered orally from the bench:

COLEMAN, *District Judge*: "I am inclined to believe that the owners of the goods in this shipment are entitled to a verdict in their favor, in view of the conflict in the evidence in this case.

"Of course, it is difficult for the court to put itself in the position of the inspectors and attempt to say what yardstick ought to be adopted by the Government under this ruling. The fact remains, however, that the regulation with respect to the 6 percent tolerance is couched in very broad language and obviously permits of a great variation, depending upon how the examination is conducted.

"I do feel that there is considerable weight to the argument of the claimant that where 70 bags have been examined, as against 28, the former examination ought to control if there is nothing otherwise to upset it—in other words, if it appears to have been fairly and reasonably made. Of course, the person making it, the witness Schley, may be said to have an interest in the investigation because, presumably, he would have an interest in the sale. But, also, the Government witnesses who made the inspection had an interest in upholding the technical requirements of the law.

"Since the average of serious damage exceeds the allowable amount by relatively little—only three and a quarter percent, as I understand it, in regard to the 20 bags inspected for the claimant, and only one-quarter of a percent with reference to the inspection of 50 bags inspected for the claimant—I am inclined to take the position that this conflict, or wide variance between these figures and what the Government found—namely, an average of 15 percent with respect to the eight sacks seriously damaged, and an average of 13 percent with respect to the 20—I am inclined to the view that because of this difference between the two groups of inspections, it is very reasonable to say that a more minute inspection might have shown that the whole lot did not violate the regulations.

"I will, therefore, give the claimant the benefit of the doubt.

"Having come to that conclusion, it is equally reasonable to say that the goods should be allowed to go entirely free, because it necessarily follows that it cannot be said that they have been misbranded any more than it can be said that they are decomposed, contrary to law.

"I will sign a decree to this effect."

On June 29, 1938, a decree was entered dismissing the libel and ordering that the product be released to the claimant.

HARRY L. BROWN, *Acting Secretary of Agriculture.*