VIOLATION CHARGED: Misbranding Section 403 (a), the statement "Alfalfa Meal" on the label was false and misleading in that it represented and suggested that the article was alfalfa meal, a product obtained from alfalfa hay and defined by the American Feed Control Officials and accepted by established trade practice and understanding as containing not more than 33 percent of crude fiber, whereas it was stem meal, a product which by definition, trade practice, and understanding contains more than 33 percent of crude fiber; and the statement "Crude Fibre, not more than 33.0 Per Cent," borne on the label, was false and misleading since the article contained 37.78 percent of crude fiber.

DISPOSITION: June 21, 1944. A plea of guilty having been entered on behalf of the defendant, the court imposed a fine of $150.

7114. Adulteration of wheat. U. S. v. 90,400 Pounds of Wheat. Decree of condemnation. Product ordered released under bond. (F. D. C. No. 13512. Sample No. 40760–F.)

LIBEL FILED: September 7, 1944, District of Minnesota.

ALLEGED SHIPMENT: On about August 11, 1944, by Sully County Cooperative Association, from Onida, S. Dak.

PRODUCT: 90,400 pounds of wheat at Minneapolis, Minn.

VIOLATION CHARGED: Adulteration, Section 402 (a) (3), the product contained an added poisonous and deleterious substance, fluorine, which may have rendered it injurious to health.

DISPOSITION: September 21, 1944. Washburn Crosby Co., Minneapolis, Minn., claimant, having admitted the material allegations of the libel, judgment of condemnation was entered and the product was ordered released under bond to be scoured under the supervision of the Food and Drug Administration.

FISH AND SHELLFISH

7115. Adulteration of frozen whiting. U. S. v. 1,851 Cartons of Frozen Whiting. Tried to court; verdict for the defendant. District court judgment dismissing the libel reversed on appeal; final decree entered ordering the release of the fit portion and condemning the unfit portion, and ordering its release under bond to be sold for animal feed. (F. D. C. No. 11145. Sample No. 36478–F.)

U. S. v. 17,900 Pounds and 20 Boxes of Frozen Whiting. Default decrees of condemnation and destruction. (F. D. C. Nos. 12011, 12081. Sample Nos. 43280–F, 48194–F, 67123–F.)

LIBELS FILED: Between November 20, 1943, and March 29, 1944, District of Colorado, Western District of Kentucky and District of Nebraska.

ALLEGED SHIPMENT: Between the approximate dates of October 19, 1943, and February 26, 1944, by Pond Village Cold Storage Co., Provincetown and North Truro, Mass.

PRODUCT: 1,851 15-pound cartons of frozen whiting at Denver, Colo., 20 15-pound boxes at Omaha, Nebr., and 17,900 pounds at Louisville, Ky.

LABEL, IN PART: (Portion) "H & G Famous Booth Sea Foods Whiting * * * Booth Fisheries Corp Boston Mass."

VIOLATION CHARGED: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance.

DISPOSITION: April 22 to May 10, 1944. No claimant having appeared for the Louisville and Omaha lots, judgments of condemnation were entered and the product was ordered destroyed. On or about May 6, 1944, Booth Fisheries Corporation, Denver, Colo., claimant for the Denver lot, having denied that the product was adulterated, trial of the case was had before the court. After the Government had presented its case, the claimant moved for a directed verdict and dismissal of the libel on the ground that the Government's proof did not sustain its charge of adulteration. The proceedings in the district court are set forth in the following opinion of May 22, 1944, granting the claimant's motion for a directed verdict and dismissing the libel:

MEMORANDUM OPINION ON DEFENDANT-CLAIMANT'S MOTION TO DISMISS THE LIBEL

FOSTER, *District Judge:* "The defendant-claimant at the end of the Government's case moved to dismiss the libel on the ground that the Government's evidence does not sustain the charge.

"After considerable argument the court granted the motion, stating its reasons, upon the condition that the claimant give bond that in the selling

or disposition of any of this fish they give to the retailers written notice calling attention to the fact there had been found in the shipment an occasional bad fish, and the retailer before selling or delivering it to any customer should warn the purchaser to examine it himself. This was agreed to by both sides in open court, and a written notice was duly prepared and agreed to, consisting of a rubber stamp containing such a notice to be affixed to every carton or box as it left the possession of the claimant.

"Later the Government, for good and sufficient reasons I presume, withdrew its consent to this arrangement and has asked for a clear decision on the merits. The court therefore withdraws the above memorandum and substitutes the following in passing upon the motion.

"The charge is that contrary to Sec. 331, Title 21, USCA, the defendant introduced 1851 cartons, more or less, each containing 15 pounds of frozen whiting (fish), into interstate commerce by transporting it from Provincetown, Massachusetts to Denver, Colorado. That said article of food was adulterated within the meaning of Sec. 342 (a) (3), Title 21, USCA, in that it consisted 'in whole or in part of a decomposed substance'.

"Said Sec. 342, Title 21 USCA (a) (3), says 'a food shall be deemed to be adulterated' as the libel charges (3), 'If it consists in whole or in part of any filthy putrid, or decomposed substance, or if it is otherwise unfit for food'. The Government has left out of its charge the last part of the subsection as follows, to-wit, the words 'or if it is otherwise unfit for food'.

"On this motion we are required to consider the Government's evidence only giving it full value as uncontradicted.

"Our decision of this motion necessarily depends upon the testimony of the Government experts. The chief Government witness, Dr. Lewis Chernoff, is a graduate chemist employed for many years by the U. S. Food and Drug Administration in Denver. Dr. Chernoff has appeared in this court many times in similar cases and we entertain a very favorable opinion of his ability. He testified he has examined fish products for many years, and on November 9th and 10th, 1943, examined 26 boxes taken as samples from this shipment, seized by the Government while in a cold storage plant in Denver and taken to Dr. Chernoff's office. The fish when delivered to him were in hard, frozen blocks. He opened the cartons put the fish in trays permitting them to thaw out overnight. Next day he examined each fish separately by cutting or slitting it down the back and smelling. This is known as the organoleptic test.

"In many of the boxes he did not find any decomposed or bad fish at all. Out of a total of 1119 fish he found 55 or 4.9% decomposed. By decomposed he meant rotten, unfit for human consumption. His test—the only one he made—was his sense of smell, the odor being very offensive. The following questions and answers are informative:

"Q. 'If someone had eaten them what effect would it have had?'

"A. 'I don't know. If they were cooked they probably might be all right.'

"Q. 'What?'

"A. 'If they were cooked and eaten they might be all right. They might cause illness. I have no idea.'

"He said the balance of the fish outside of the 55 were all right.

"On cross-examination he testified that whiting was a salt water fish and when received were headless and gutted. That he made a personal examination of every one of the 1119 fish. That of those he examined the skin appeared to be normal and firm. That he made no notes on the physical condition of the fish. He did not make a bacteriological examination or chemical test, but simply organoleptic; that is a test by the senses of smell, sight, touch and taste. He did not make an indol test—indol being one of the by-products of decomposition of protein products and might determine decomposition. His test consisted simply of subjecting the 1119 fish to his sense of smell. Further, to sum up, of the 1119 fish so examined 55 smelled bad or putrid, and the balance were edible.

"On being recalled the witness testified he examined another 18 boxes of this same shipment on January 25th. Like the other examination they were frozen. He opened the boxes and placed the fish on pans allowing them to thaw overnight. He examined them the next morning. That out of the total of 768 fish 48 were unfit for food, or 6.2% by count. The only test he made was the organoleptic; that is he judged them solely by the smell.

"At the trial of the case—and at the request of counsel for both sides—additional samples of the whiting were brought in to a room adjoining the court and opened up and examined by Dr. Chernoff and the court. The results

of this examination are shown in Govt. Ex. A, signed by Mr. Williams defendant's expert Mr. Vincent, head of the Food and Drug Division office in Denver and Dr. Chernoff. Four hundred and eleven fish selected at random were examined in the presence of the court and the average per cent of bad fish found therein by Dr. Chernoff was 3.6%; that is to say 15 out of 411 fish, it was agreed, were unfit, showing signs of decomposition. The court found these upon personal examination to have a bad, disagreeable, putrid odor.

"While the sole question in the case, under the pleadings, is whether the fish consisted wholly or in part of a decomposed substance, the over-all question of course is whether they were fit for human consumption.

"It will be observed from Dr. Chernoff's testimony that the number of decomposed fish in the first exhibit unfit for human consumption was less than 5%, and of the second lot examined in January was a little over 6%. No witness qualified to or attempted to state what the effect of eating any of these decomposed fish would have upon the consumer. Dr. Chernoff did testify that the housewife would, in processing these fish before serving them, have ample opportunity to detect any bad odor. He said the cooking they would be subjected to might in most instances eliminate any danger of food poisoning. Furthermore, it would seem that the effect on the human system if consumed as food would depend largely upon a bacteriological test, which in this case was not made.

"U. S. v. Commercial Creamery Co., 43 Fed. Supp. 714, involved frozen eggs. The testimony of the Government was that of three witnesses who inspected the eggs sought to be condemned. They used the organoleptic test only, and while the case was a criminal one where the Government's allegations must be proven beyond a reasonable doubt, the court on such testimony dismissed the action, recognizing that the organoleptic test was justified only because it was quicker and, as the Government inspector testified, permitted more territorial coverage than could be obtained by the combined use of this method with any of the other three. The court noted that chemists had for years been seeking more efficient and rigid methods for determining decomposition in eggs, citing authorities, and observed that it was difficult for the court to believe that if the organoleptic test is as efficient as the Government witnesses said it was, that such complete and consistent efforts were being made by the chemists to acquire rapidity in their processes. And further stated that what is true of the chemists is also true of the bacteriologists, and stated it doubted whether the American Public Health Association would have interested itself to the extent that it has in bacteriological studies if the Government's contention as to the scientific efficiency of the organoleptic method were correct.

"In the case at bar the organoleptic test made by the Government's chemist in the presence of the court was that less than 4% of the fish in question were decomposed, and according to Dr. Chernoff this might be very greatly reduced by the processing that the fish would undergo in the house before being consumed.

"In U. S. v. Two Hundred Cases of Catsup, 211 Fed. 780, it says, p. 782.

> * * * there is no fixed standard by which it can be determined when a product has reached such a state of decomposition as to "consist in whole or in part of filthy, decomposed, or putrid vegetable substance" * * * I infer from the testimony of the experts that it would be difficult, if not impossible, to fix any arbitrary standard by which the question could be determined, as it depends upon so many contingencies. In any event, no such standard has been fixed, in the absence of which each case must be determined on its own facts.

"And in Andersen v. U. S., 284 Fed. 542, it is said, p. 545:

> It appeared from the cross-examination of the government witnesses that they have heretofore suffered canned salmon containing a small percentage of filthy, decomposed, or putrid matter to pass in interstate commerce unchallenged, but there is no room for controversy over percentages under the statute itself, for it excludes all. Of course, where the entire product is not inspected or tested, the proof must go far enough to satisfy the court or jury that the adulteration exends to the whole product sought to be condemned.

"I find no case that holds an entire shipment, such as the one at bar, can be condemned merely upon a finding that a percentage as small as the evidence here is decomposed, especially where there is no charge or evidence that the fish is unfit for food.

"In U. S. v. Two Hundred Cases, more or less, of Canned Salmon, 289 Fed. 157, Judge Hutcheson—then a District Judge—discussed this whole question and refused to follow the Andersen case, stating that while proof that the contents of 20% of cans in a shipment were adulterated with nothing more, might

authorize the inference the whole product was bad, and therefore support a condemnation of the lot where the same proof which establishes the adulteration of one-fifth establishes the lack of adulteration of the balance, the Government must fail, except as to the cans identified as adulterated. The court analyzed the testimony—which was about the same as in the case at bar—and stated the Government evidence proving part bad, and relied on for the inference that all was bad, proved just as conclusively that part of it was not bad within the meaning of the statute; that if the Government depended for its condemnation upon subdivision 6 of Sec. 7 of the Act, in accordance with the general rule of law that the burden is upon the Government to prove its case, the Government would have to be cast in this suit, or would have to take the alternative of examining and testing every can of the shipment. That view is applicable to our situation. The testimony of Dr. Chernoff proves that except for the number of bad fish found, the balance of the shipment which he examined was all right and fit for human consumption.

"C. J. S. Vol. 36, Sec. 16, p. 1076:

> Statutes and ordinances intended to prevent the manufacture or sale of food or food products that are unwholesome or unfit for human consumption will be enforced in accordance with their proper construction. * * * or by reason of their decay, [Commonwealth v. Prince, 89 N. E. 1047]. The statutes are not intended to regulate tastes or appetites, and the courts will not deem an article of food unwholesome merely because it is unpalatable to many, or even most, persons. [McNeill & Higgins Co. v. Martin, 107 So. 299]. Furthermore, an article of food is not unwholesome within such a statute, merely because it is unwholesome to a particular individual or to normal persons under abnormal conditions; it must have such qualities that normal persons generally, in a normal condition, would be adversely affected by its consumption. It has been said that the condition of a product in the hands of a consumer is the place and time to test its fitness for food; [U. S. v. Four Hundred and Fifty-three Cans of Frozen Egg Product, 193 Fed. 589].

"And according to Sec. 15, p. 1073:

> * * * an article of food shall be deemed adulterated * * * if it contains any poisonous or deleterious substance which may render it injurious to health, [U. S. v. 1232 Cases American Beauty Brand Oysters, 43 Fed. Supp. 749] or contains any added substance or ingredient which is poisonous or injurious to the health, * * * or consists in whole or in part of a filthy, decomposed, or putrid substance, [52 Fed. (2d) 476; 43 Fed. Supp. 714; 208 Fed. 419].

"C. J. S. Vol. 36, Note 61, p. 1074:

> The word "decomposed", as used in such a statute, [referring to the Federal statute], means more than the beginning of decomposition; it means a state of decomposition, [See also 26 C. J. p. 762, Note 76; and 284 Fed. 542 (infra).]

"In Andersen v. U. S. (supra), a food case, 408 cans of Salmon were selected at random from 408 of 1974 cases. One hundred forty-four cans of the second lot were first analyzed and found to contain eight putrid or tainted, and one stale can. The third lot of 192 cans contained 35 putrid or tainted, and 12 stale cans. That a putrid or tainted can was said to be one that contained rotten or decayed salmon with an offensive odor, while a stale can was disclosed as the beginning of decomposition, but not in so far advanced a state as the putrid or tainted cans. The net result was that one-fifth of the product analyzed was putrid or tainted and one-fourth either putrid and tainted or stale. It further appeared that decayed salmon was not injurious to health.

"The claimant offered no testimony and upon its motion the court directed a verdict in its favor, which was reversed by the Court of Appeals, which said that decomposition begins when life ends, but meat and fish are not decomposed at that early stage. Decomposed means more than the beginning of decomposition, it means a state of decomposition, and the statute must be given a reasonable interpretation to carry out the legislative policy or intent.

"In U. S. v. Commercial Creamery Co. (supra), it was held that the Federal Food, Drug and Cosmetic Act is designed to prevent injury to the public health and the introduction into interstate commerce of foods which consist in whole or in part of any filthy, putrid or decomposed substance, and the intent of Congress was to exclude from interstate commerce impure and adulterated food, and to prevent facilities of commerce from being used to enable such articles to be transported to people who consume them. And it is in the light of such power exerted by Congrss that the Act must be construed.

"In conclusion: The Government's testimony proves that a very small percentage of the entire shipment (less than 6%), was decomposed and the balance (95% plus), was all right. There is no evidence that even the bad fish was sufficiently decomposed to violate the object of the statute, to-wit, to prevent the introduction into interstate commerce of food unfit for human consumption. Further under the authorities (supra), the testimony, to say the least,

throws considerable suspicion on the efficiency of the organoleptic test alone as justifying the condemnation of the entire shipment.

"The motion for a directed verdict is granted and the libel dismissed."

On June 2, 1944, the district court entered an order staying the release of the product for a period of 30 days. On June 26, 1944, notice of appeal having been filed in the United States Circuit Court of Appeals for the 10th Circuit, that court handed down an order further staying release of the product to the claimant. Argument was had on August 2, 1944, and the court entered judgment reversing the district court judgment and ordering that the case be remanded for further trial in the district court. On August 11, 1944, the claimant having filed an amended answer admitting the allegations of the libel and the court having found that a part of the product was not adulterated, judgment was entered releasing the good portion to the claimant and condemning the remainder. The adulterated portion was released under bond to the claimant to be sold for use as animal food, under the supervision of the Food and Drug Administration.

On January 8, 1945, the Circuit Court of Appeals for the 10th Circuit issued the following memorandum opinion:

MURRAH, *Circuit Judge:* "In pursuance of Section 304 (a) of the Federal Food, Drug and Cosmetic Act of June 25, 1938 (52 Stat. 1040, 21 U. S. C. A. 301 et seq) the United States instituted a libel of information in the United States District Court of the District of Colorado, seeking condemnation of approximately 1,851 cartons of frozen fish, each containing 15 pounds, and allegedly consisting 'wholly or in part of a decomposed substance', which had been shipped in interstate commerce from the State of Massachusetts into the state of Colorado. The Booth Fisheries Corporation, as claimant, answered admitting the shipment in interstate commerce, but denying the allegation with respect to adulteration. Upon facts which are conclusive here the trial court found that approximately 6% of the entire shipment consisted of decomposed substance, but dismissed the libel on the grounds that it was not 'sufficiently decomposed' to be unfit for human consumption, and therefore was not 'adulterated' within the meaning and purposes of the Act. The Government has appealed.

"One of the declared purposes of the Federal Food, Drug and Cosmetic Act is to prohibit the movement in interstate commerce of adulterated and misbranded foods, drugs, devices and cosmetics. U. S. v. Dotterweich, 320 U. S. 277, 280; McDermott v. Wisconsin, 228 U. S. 115, 128; Hipolite Egg Co. v. United States, 220 U. S. 45, 54. To effectuate that purpose the Act prescribes injunctive remedies (Sec. 302 (a) (b)) and criminal penalties (Sec. 303 (a) (b) (c)) for violations, and in addition thereto (subject to enumerated exceptions and limitations) specifically authorizes the seizure and condemnation of any 'adulterated' food which is introduced or received in interstate commerce by a libel proceeding in any district court within the jurisdiction of which the adulterated food is found. (Sec. 304 (a))

"Section 402 of the Act pertinently provides that a food shall be deemed to be adulterated 'if it consists in whole or in part of any filthy, putrid or decomposed substance, or if it is otherwise unfit for food', and the sole question presented by this appeal is whether frozen fish in 15 pound cartons found to consist of approximately 6% decomposed substance is adulterated and therefore subject to condemnation under the Act.

"The trial court held in substance that although the product seized consisted wholly or in part of a decomposed substance it was nevertheless fit for human consumption and was therefore not adulterated within the meaning of the statutory definition and the same argument is made here in support of the trial court's judgment.

"We cannot agree with the trial court's interpretation of the statutory definition of 'adulterated' food. Before the amendment of June 25, 1938, sub-section 6 of section 7 of the original Act of June 30, 1906 (34 Stat. 768) provided that an article should be deemed to be adulterated '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 * *'. Giving effect to the objects and purposes of the legislation, the courts have uniformly held that when a food consisted 'in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance' its interstate shipment was prohibited whether otherwise considered as fit for human consumption or not. United States v. Two Hundred Cases of Adulterated Tomato Catsup, 211 F. 780, 782; Anderson & Co. v. United States, 284 F. 542; United States v. Krumm, 269 F. 848; United States v. Two Hundred

Cases of Canned Salmon, 289 F. 157; Knapp v. Callaway, 52 F. 2d 476; United States v. One Hundred Thirty Three Cases of Tomato Paste, 22 F. Supp. 515.

"Notwithstanding this strict construction of the language employed, of which Congress was undoubtedly aware, the amendment of 1938 (Sec. 402) not only impliedly approved this construction of its language but strengthened it by adding words which leave no doubt of its intention to free interstate commerce of any food if it consists 'in whole or in part of any filthy, putrid or decomposed substance'. The added clause 'or if it is otherwise unfit for food' is in the disjunctive and does not condition, qualify, or obscure the plain meaning of the whole sentence when considered in its context. United States v. 184 Barrels Dried Whole Eggs, 53 F. Supp. 625. This view is supported by the general purpose of the amendment to extend the range of control over impure and adulterated food and drugs moving in interstate commerce. United States v Dotterweich, 320 U. S. 277."

According to the conclusive findings of the trial court each carton of fish seized consisted in part of fish in a decomposed state and it was necessary to thaw the fish in each carton in order to separate the decomposed substance from the wholesome part. It is thus clear that the product in question comes within the interdiction of the Act and the judgment of the trial court is REVERSED."

7116. Adulteration of frozen shrimp. U. S. v. 218 Cartons of Shrimp. Consent decree of condemnation. Product ordered released under bond. (F. D. C. No. 12434. Sample Nos. 76406–F, 82003–F.)

LIBEL FILED: May 25, 1944, Southern District of New York.

ALLEGED SHIPMENT: On or about March 15, 1944, by J. H. Dulany & Son, Fruitland, Md.

PRODUCT: 218 cartons, each containing 6 5-pound packages, of frozen shrimp, at New York, N. Y.

LABEL, IN PART: (Packages) "Dulany Frosted Uncooked—Unpeeled Shrimp."

VIOLATION CHARGED: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance.

DISPOSITION: June 24, 1944. John H. Dulany & Son, claimant, having admitted the allegations of the libel, judgment of condemnation was entered and the product was ordered released under bond on condition that the unfit portion be segregated and destroyed under the supervision of the Food and Drug Administration.

7117. Adulteration of frozen shrimp. U. S. v. 14 Boxes of Frozen Shrimp. Consent decree of condemnation. Product ordered released under bond. (F. D. C. No. 13835. Sample No. 82015–F.)

LIBEL FILED: September 29, 1944, Southern District of New York.

ALLEGED SHIPMENT: On or about September 5, 1944, by Newark Sea Food Co., Newark, N. J.

PRODUCT: 14 boxes, containing about 1,900 pounds, of frozen shrimp at New York, N. Y.

VIOLATION CHARGED: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance.

DISPOSITION: November 9, 1944. Fred Julick, New York, N. Y., claimant, having admitted the allegations of the libel, judgment of condemnation was entered and the product was ordered released under bond for segregation and destruction of the unfit portion, under the supervision of the Food and Drug Administration.

FRUITS AND VEGETABLES

DRIED FRUIT

7118. Adulteration of evaporated apple chops. U. S. v. 250 Bags of Evaporated Apple Chops. Consent decree of condemnation. Product ordered released under bond. (F. D. C. No. 11837. Sample No. 945–F.)

LIBEL FILED: On or about February 28, 1944, Northern District of Illinois.

ALLEGED SHIPMENT: On or about November 17, 1943, by Valley Evaporating Co., from Yakima, Wash.

PRODUCT: 250 50-pound bags of evaporated apple chops at Chicago, Ill.

VIOLATION CHARGED: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of insects and dirty apple chops.