

PRODUCT: 23 boxes, each containing 20 pounds, of frozen shrimp at Baltimore, Md.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a decomposed substance.

DISPOSITION: July 7, 1942. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

8919. Misbranding of crab meat. U. S. v. 78 Cans of Crab Meat. Default decree of condemnation and destruction. (F. D. C. No. 15725. Sample No. 5813-H.)

LIBEL FILED: March 20, 1945, Southern District of New York.

ALLEGED SHIPMENT: On or about February 27, 1945, by J. H. Fleming & Co., Portsmouth, Va.

PRODUCT: 78 1-pound cans of crab meat at New York, N. Y.

LABEL, IN PART: (Cans) "DeLuxe Crab Meat"; (portion also labeled) "Packed For Lucien Prince & Co. Fulton Mkt. N. Y. C., N. Y."

NATURE OF CHARGE: Misbranding, Section 403 (e) (2), the product was food in package form, and it failed to bear a label containing an accurate statement of the quantity of the contents since the cans contained less than "1 Lb. Net," the declared volume.

DISPOSITION: April 6, 1945. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

FRUITS AND VEGETABLES *

DRIED FRUIT

8920. Adulteration of apple chops. U. S. v. 1,240 Sacks of Apple Chops. Tried to the court and jury. Verdict for claimant. Judgment ordering dismissal of libel reversed on appeal, and case remanded by appellate court for entry of decree of destruction. (F. D. C. No. 11744. Sample No. 39651-F.)

LIBEL FILED: February 3, 1944, Southern District of California.

ALLEGED SHIPMENT: On or about December 9, 1943, by Jack Gomperts and Co., from Cashmere, Wash.

PRODUCT: 1,240 50-pound sacks of apple chops at Los Angeles, Calif. Analysis showed that the product contained an average of 0.327 grain of arsenic (as As_2O_3) per pound and an average of 0.560 grain of lead per pound.

NATURE OF CHARGE: Adulteration, Section 402 (a) (1), the article contained added poisonous and deleterious substances, arsenic and lead, which may have rendered it injurious to health.

DISPOSITION: The Washington Dehydrated Food Co., Yakima, Wash., claimant, having denied that the product was adulterated, the case came on for trial before a jury on May 11, 1944, at the conclusion of which the court gave the following instructions to the jury:

BEAUMONT, *District Judge*: "Gentlemen of the Jury: It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as the Court gives it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

"If the Judge has said or done anything which has suggested to you that he is inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion.

"I have not expressed, nor intended to express, nor have I intimated nor intended to intimate any opinion as to what witnesses are, or are not, worthy of credence; what facts are, or are not, established; or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

"You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the government, or the claimant, the manner in which he might be affected by the verdict and the extent to which he might be affected by the verdict and the extent to which he is contradicted or corroborated by

*See also Nos. 8803-8808, 8988.

other evidence, if at all, and every matter which tends reasonably to shed light upon his credibility.

"A witness false in one part of his testimony may be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favors his testimony in other particulars.

"You shall consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

"You must not consider for any purpose any evidence offered or rejected, or which has been stricken out by the Court; such evidence is to be treated as though you never had heard it.

"You are to decide this case solely upon the evidence that has been admitted by the Court herein, considered in the light of the instructions of the Court. The instructions are to be considered as a whole.

"You are the sole judges of the credibility and the weight to be given to the witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or his motives, or by contradictory evidence.

"In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men.

"You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force.

"A fact in issue may be proved either by direct evidence or by proof of other facts or circumstances from which the fact in issue may be inferred.

"You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action.

"You are instructed that this proceeding is brought under the Federal Food, Drug, and Cosmetic Act, which provides in part that adulterated foods which have been introduced in interstate commerce may be seized and condemned.

"The government, libellant herein, claims that the 1240 bags of apple chops, which have been seized in this action, were introduced in interstate commerce, and while in interstate commerce were adulterated because they contained added poisonous and deleterious substances, that is, arsenic and lead, which may render them injurious to health when employed as a component part of the apple butter.

"The intent of the claimant is not an issue in this case and has no bearing on the facts you are to decide. The only question for you to determine is whether or not the apple chops fall under the ban of the statute.

"You are instructed that one of the matters to be decided in this case is whether the apple chops are a food within the meaning of the law. The Federal Food, Drug and Cosmetic Act defines what constitutes a food. It says that the term 'food' means articles used for food or drink for man or other animals, and articles used for components of any such article. If you find from the evidence that the apple chops are used for food by man, or are manufactured into another food or used as an ingredient or component of another food, for instance apple butter, then the apple chops are a food within the meaning of the law.

"You are instructed that the Federal Food, Drug and Cosmetic Act also defines under what conditions a food shall be deemed to be adulterated. It says that a food is adulterated if it bears or contains any poisonous or deleterious substances which may render it injurious to health. A substance is poisonous if it has properties or effects of poison. A substance is deleterious if it is hurtful or destructive or detrimental.

"The Court instructs you that the opinions of experts have been introduced in this action for your assistance, but their opinions are not to be substituted for common sense and judgment of the jury. You are to exercise your own independent judgment, giving to such expert opinions such weight only as you deem they are entitled to. The introduction of expert testimony does not preclude you from exercising your own judgment upon the subject. The purpose of the intro-

duction of such expert testimony is to supplement the general knowledge and experience of the jury in relation to the matters before them, and thereby to aid them in the exercise of their own judgment.

"The Court instructs you that it is your exclusive province to determine the credibility of witnesses, including those giving expert testimony, and determine the weight to be given to their testimony.

"The Court instructs you that you are not in any manner to infer or conclude that the apple chops in this case are adulterated because the government has seen fit to institute this proceeding.

"The Court instructs you that the evidence is undisputed that apple chops as such are not used as food but are used in the making of apple butter, jelly and cider, the particular apple chops here involved being intended for use in the making of apple butter.

"The Court instructs you that the question of whether the apple chops contain any poisonous or deleterious substance which may render them injurious to health depends on whether or not the quantity of such poisonous or deleterious substance found in the product into which such apple chops would be manufactured may render such manufactured product injurious to health. If you find that the apple butter into which the apple chops in this case would be manufactured would not have an arsenic or lead content which might render the apple butter injurious to health, then your verdict should be that the apple chops are not adulterated by reason of the presence of lead or arsenic and they should be released to the claimant.

"The Court instructs you that this proceeding has been brought to condemn and destroy 1240 sacks of apple chops of 50 pounds each, for the alleged reason that they contain lead and arsenic in quantities which may render them injurious to health. In a case of this character brought to condemn and destroy property it is necessary that the government establish its case by clear and satisfactory evidence. In other words, if the evidence has not clearly and to your satisfaction established that the apple chops do contain lead and arsenic in quantities that may be injurious to health, your verdict should be for the release of the apple chops to the claimant.

"The Court instructs you that it is proper for you to apply to the facts proved your general knowledge as intelligent men, and take into consideration matters of common knowledge and observation.

"To render a verdict requires the unanimous agreement of the jury. Whatever your verdict is, it must be signed by your foreman.

"For your convenience, the Court has had prepared some forms of verdict which you may take with you when you retire to deliberate."

After consideration of the evidence and arguments of counsel, the jury returned a verdict for the claimant on May 18, 1944, and on May 24, 1944, the libel was ordered dismissed.

Subsequently, an appeal was taken on behalf of the Government to the Circuit Court of Appeals for the Ninth Circuit. On August 1, 1945, the matter came on for hearing before that court, and it having appeared that the claimant had consented to the destruction of the product on the ground that it had become rotten and valueless while in the possession of the court, thereby rendering moot the question upon which the appeal was based, a decree was entered reversing the judgment of the district court and remanding the case for the entry of a decree of destruction.

On September 18, 1945, judgment was entered by the district court ordering that the product be destroyed.

8921. Adulteration of evaporated apples. U. S. v. Rosenberg Brothers & Co.
Plea of nolo contendere. Fine, \$50. (F. D. C. No. 10633. Sample No. 17121-F.)

LIBEL FILED: January 17, 1944, Northern District of California, against Rosenberg Brothers & Co., a corporation.

ALLEGED SHIPMENT: On or about October 9, 1942, from Oakland, Calif., to Syracuse, N. Y.

LABEL, IN PART: "For Manufacturing Purposes Only. California Evaporated Apples."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a filthy substance by reason of the presence of insect excreta pellets or insect larvae excreta pellets, mold, and worm-tunneled fruit.

DISPOSITION: June 20, 1944. A plea of nolo contendere having been entered, the court imposed a fine of \$50.