1 ½-oz. cans each, of ripe olives in brine, 27 cases, 12 1-qt. btls. each, of apple juice, 21 cases, 24 1-lb. jars each, of canned beets, and 35 cases, 48 15-oz. cans each, of canned herring at Philadelphia, Pa.

SHIPPED: During 1954 and 1955, and on 1–27–56, from Baltimore and Tilghman, Md., New York, N. Y., and Masonville, N. J.

LIBELED: 9–10–56, E. Dist. Pa.

CHARGE: 402 (a) (3)—contained a decomposed substance while held for sale.

DISPOSITION: 11–15–56. Default—destruction.

23978. Peeled Italian tomatoes. (F. D. C. No. 40127. S. No. 61–123 M.)

QUANTITY: 64 cases, 24 2-lb. 3-oz. cans each, at New Bedford, Mass.

SHIPPED: 1–19–57, from Naples, Italy.

LIBELED: 4–5–57, Dist. Mass.

CHARGE: 402 (a) (3)—contained decomposed tomatoes while held for sale.

DISPOSITION: 5–13–57. Default—destruction.

23979. Tomato catsup. (F. D. C. No. 38501. S. No. 27–935 M.)

QUANTITY: 936 cases, 24 btls. each, at Atlanta, Ga.

SHIPPED: 9–3–55, from Elwood, Ind., by Frazier-Schafer Farms, Inc.

LABEL IN PART: (Btl.) "Frazier's Superfine Contents 14 Oz. Avd. Tomato Catsup."

LIBELED: 10–12–55, N. Dist. Ga.

CHARGE: 402 (a) (3)—contained decomposed tomato material when shipped.

DISPOSITION: Frazier-Schafer Farms, a partnership, Elwood, Ind., having appeared as claimant, filed an answer on 11–23–55 denying that the article was adulterated. Thereafter, the Government served written interrogatories upon the claimant and in response thereto, the claimant filed its answers to all interrogatories except for those numbered 4 (d), 5, 12 and 15 to which objections were made. A hearing on the objections was held, and on 4–12–56 the court handed down the following ruling thereon:

"Interrogatories were filed February 6, 1956 and objections thereto are attached to the answers which were filed March 19, 1956.

"*Interrogatory 4 (d)* directs the defendant to 'furnish copies of reports of inspection.' *Interrogatory #5* directs respondent to attach to its answers 'the results of analyses,' and a statement as to when each sample was collected. *Interrogatory #12* in part directs respondent to attach to its answer 'the results of all analyses reported by you,' etc.

"It will be observed that each of the foregoing interrogatories contemplate that the respondent shall attach certain documents to answers. Plaintiff should have employed Rule 34 which contemplates the production of documents in connection with which it is necessary that good cause shall be shown. There are a few cases which uphold the procedure followed by the Government in this case, but the great weight of authority is to the contrary. See *Castro vs. A. H. Bull & Co. (S. D. N. Y.) 9 F. R. D. 84; Jones vs. Penn. R. R. Co. (N. D. Ill.), 7 F. R. D. 662; Roth, et al vs. Paramount Film Distributing Corp. et al (W. D. Penn.) 4 F. R. D. 302.* It is ruled therefore, that insofar as the foregoing Interrogatories seek the production of documents the objections are sustained, but respondent should answer as to *Interrogatory #5*, 'the results of analyses of all samples taken,' and as to *Interrogatory #12* should state 'the results of all analyses.'

"*Interrogatory #15* desires the names 'of all persons that claimant intends to call as witnesses.' The Interrogatory, as written, if it desires the names of parties having knowledge of the facts, is proper, but if it is designed to commit the respondent to the calling of certain persons as witnesses so as

to cause embarrassment to the respondent should the respondent change its mind, it is improper. This question has been frequently discussed by the courts, and efforts have been made to amend the Rules of Civil Procedure so as to require a party to give the names of their witnesses, but these efforts have failed. One reason the rules were not amended is the fact that many district judges have adopted the practice of requiring the parties at a pre-trial to give the names of their witnesses, and this practice has been taken to be adequate.

"There are several objections which might be urged to require a party to give the names of parties intended to be called as witnesses. Should some of these parties not be called, opposing counsel could argue that fact that if the witness, if produced would have been adverse. In that regard *Georgia Code Section 38-119* reads as follows:

> where a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, having more certain and satisfactory evidence in his power, relies on that which is of a weaker and inferior nature, a presumption arises that the the charge or claim is well founded; but this presumption may be rebutted.

"Federal Courts have laid down a similar rule but one not as far reaching as the Georgia statute, a collection of these cases being found in *Federal Digest, Volume 30*, under the subject of Evidence, Key #76. Most of these cases are to the effect that where a party has it in his power to call certain witnesses but does not call them, there is a presumption that their testimony, if called, would not be favorable to his case. Whether a party has it within his power to produce a certain witness it is often vague and uncertain, but it would seem that when one party has the name of a person who has knowledge of the case, and gives the name and address of that possible witness to the other party to the case, each party has equal opportunity to subpoena the witness and therefore, it cannot be said that the party having first knowledge of the witness has the witness under his power any more than the other party.

"The Court, therefore, is interpreting *Interrogatory #15* as asking for the names and addresses of all persons who within the knowledge of the respondent have knowledge of the facts involved in the litigation. Whereupon, such parties may be interviewed by the Government if it sees fit to do so."

On 8-8-56, the claimant filed a petition for an order to permit the claimant, under the supervision of the Food and Drug Administration, to segregate the bottles of the article seized into separate groups of 100 cases each, and further to permit the claimant and the Food and Drug Administration to take post-seizure samples of each such group. In addition, the claimant filed a petition on 9-7-56 for removal of the libel action to the United States District Court for the Northern District of Indiana, Lafayette Division. On 9-12-56, the court entered an order denying the petition for segregation since the petition was not supported by a brief as required by the local rule of court. On 10-19-56, pursuant to the claimant's petition for removal, the court ordered the libel action removed to the United States District Court for the Northern District of Indiana, Lafayette Division. Thereafter, the Government filed with the United States District Court for the Northern District of Indiana, Hammond Division, a motion to remand the case to the court of original jurisdiction. On 12-4-56 the United States District Court for the Northern District of Indiana, Hammond, Indiana, granted the motion to remand on the ground that the above mentioned removal order of 10-19-56 was void, since there was no such court as the United States District Court for the Northern District of Indiana, Lafayette Division, to which the order had directed the libel action to be removed. Following the remanding of the case to the United States District Court for the Northern District of Georgia, the claimant withdrew its claim and answer, and on 3-29-57 an order was entered for the condemnation and destruction of the article.