

Misbranding was alleged for the reason that the label on the article, "Red Kidney Beans," was false and misleading and deceived and misled the purchaser when applied to a product consisting of long cranberry beans; and for the further reason that the article was an imitation of, and sold under the distinctive name of, another article, to wit, red kidney beans.

On July 8, 1921, the matter having come on to be heard on the pleadings and stipulation of the Marshall Canning Co., Marshalltown, Iowa. claimant, the court found the product to be adulterated and misbranded and ordered its condemnation as such. It was further ordered by the court that the product might be released to said claimant upon payment of the costs of the proceedings and the execution of bond amounting in the aggregate to \$200, in conformity with section 10 of the act, conditioned in part that the product be correctly relabeled.

C. W. PUGSLEY, *Acting Secretary of Agriculture.*

10512. Misbranding and alleged adulteration of salmon. U. S. * * * v. 80 Cases and 1,379 Cases Canned Salmon * * *. Tried to the court. Finding for claimant on charge of adulteration and for government on charge of misbranding. Product under charge of misbranding released to claimant under bond for relabeling; balance of product released unconditionally. (F. & D. Nos. 13822, 13854. I. S. Nos. 10138-t, 10132-t, 10136-t. S. Nos. W-784, W-788.)

On or about October 27 and November 10, 1920, the United States attorney for the Western District of Washington, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district libels for the seizure and condemnation of 80 cases of canned salmon, labeled in part "Medium Red Salmon * * * Lionax Brand Cohoe Sockeye Salmon," and 1,379 cases of canned salmon labeled in part "Northern Brand Pink Alaska Salmon Packed by Northern Packing Co., Juneau, Alaska," remaining in the original unbroken packages at Seattle, Wash., alleging that the article had been shipped by the Northern Packing Co., Juneau, Alaska, August 27, 1920, and transported from the Territory of Alaska into the State of Washington, and charging adulteration with respect to both consignments and misbranding with respect to the 80-case consignment of Lionax Brand salmon.

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

Misbranding of the Lionax Brand consignment was alleged for the reason that the word "sockeye," appearing only partly obliterated on a portion of the label of the article, was false and misleading and deceived and misled the purchaser by representing the article as sockeye salmon, when it was not.

On April 12, 1921, the cases which were consolidated for trial came on for hearing before the court, and after the submission of evidence and arguments by counsel, the 80-case consignment of Lionax Brand salmon was found to be misbranded, and it was found by the court that the Government's charges of adulteration with respect to all of the salmon had not been established, as will more fully appear from the following decision of the court (Cushman, *D. J.*):

I have too many matters under advisement now, and I am not going to take this matter under advisement.

So far as the misbranding is concerned, I hold with the government. I think, according to the decisions which you read, that it is not whether the brand is going to deceive the jobbers and wholesalers and retailers and people who trade in these things, but whether it is liable to deceive the consuming public. I am very much like Miss Kolnitz—I never heard of the word "Cohoe" until this case began, and if I saw it on a can of salmon I was about to buy, I would not know whether it referred to a canner or the fish or what it referred to. I have lived here almost thirty years and eaten canned salmon most of the time, so why I presume I am an average specimen of the public. I take it everyone in this country is familiar with the word "sockeye," and finding it on a can of salmon not completely obliterated, but with this fancy stamp on there, more or less ornamental, would tend to deceive. I think a purchaser going into a retail store to buy a can of salmon would reasonably conclude that that was intended to be a part of the label and might very easily be misled. The decree that is appropriate for forfeiture in that case will be prepared and submitted to the court.

As regards the other lot of salmon, and so far as the 80 cases are concerned also, the court is inclined to agree with Judge Sessions, that this act certainly

does require definition. Where the Government asks for forfeiture,—where the rule of strict construction obtains, the law should be brief and as clear as it is possible to make it.

Now, that word “article”—Judge Sessions found some trouble in construing “consists of” or “consists”—that word “article,” I find fully as much trouble with it as Judge Sessions did the other. Now, salmon is an article of food, but because some cans of salmon are found to be putrid, does not warrant the entire salmon output being condemned. A can of salmon is an article, but is the output of one cannery for a season an article, or is a shipload of salmon an article, or half of the output of a cannery an article? I can't agree with any such construction. It would be reasonable to conclude, in the light or the purview of this act,—possibly you could construe the output of a cannery to be an article if the evidence showed that all of the output of the cannery was subjected to those conditions that rendered the part that you found to be putrid or filthy, but it seems like instead of this being in part putrid or filthy that a part of it is [not] putrid or filthy. If a very small percentage of the contents of each can was filthy, even a very, very small portion of it, that would condemn the whole lot, but because part of the cans are found to be filthy and putrid, I am unable to conclude that the court would be warranted in condemning the entire lot of these cases of salmon. Now, if Congress does intend that the courts should give that construction to this law, a definition would clear the matter up.

Now, I find that instead of the entire output of this cannery having been subjected to conditions that caused this putrescence,—this filth in certain of the cans,—it is more reasonable to conclude that these old salmon that got into this pack were the salmon, as pointed out by the prosecutor, that they picked up locally when they were short of fish to complete the day's output or whatever reason there was, without knowing their age, and not those that Mr. Hanson went out to the fishing grounds and got from the purse seiners. That being true, why, the output of the cannery for those days on which they purchased these old fish would contain putrid fish. If you are going to construe “article” as limited to the condition that created the putrescence, why, then you are going to limit it to those days and the output on those days when they did buy such fish, and not the whole season's pack. If the department wants to make rules that these salmon canners shall can and keep their cans separate, and put one day's pack up separate from another, and not mix up the cans of the separate days' pack and thereby render,—put themselves in the position to test and sample cases canned on a particular day when they might bring in a scowload of old fish, why, the public would be protected, and the commercial end of it would not be jeopardized by incurring the destruction of a large amount of fish that might have been canned on days when they were getting perfectly fresh fish. I can see very easily how one scowload of fish, if it was canned and thrown into a shipload and brought in from Behring Sea and samples were taken from that one scowload all canned on one day, would show up a percentage high enough to condemn the whole shipload if we are going to adopt that rule and enforce it that the Government seems to ask in this case.

MISS KOLMITZ. Your Honor, may I interrupt?

THE COURT. No.

Now, this statute does not give the court any warrant or does not give the department, so far as I see, any warrant to fix a proper percentage of filth. It says “in part.” One decision you read said that meant substantial part, and if it was where human excrement entered into oysters that I take it must have been taken up from the mouth of a sewer some place, so small a percentage as could only be detected by a microscope, I believe, would be a very substantial portion. But I don't find any warrant under a forfeiture—how would anyone instruct a jury where your articles, like cans of salmon, are separate? They are separate articles; the cases are separate.

So far as health and comfort are concerned—that part of the law regarding misbranding is to prevent fraud being committed upon the consuming public—but the other part, keeping filth and putrescence out of it,—that was not to prevent a fraud; that was to protect the public in the matter of its comfort if not health; and the more rotten the salmon was, the less liable you would be or the more liable you would be to be disgusted by it as a food, because you would be warned in the kitchen before you ever got it to the table; but a very small bit, the smaller the portion of putrescence, the more likely you would be to get it on your table.

I would think that also in sampling there might have been something satisfactory worked out here, and possibly something could be worked out yet, if I am right in my conclusion that the putrid salmon found in fact was caused by these old fish that were bought occasionally. It is only reasonable to presume that in those cans there would be a greater percentage of putrid fish; that is, in handling them, it would only be natural that they would find their way into particular cases scattered through the entire pack. It would seem to me in careful sampling, not only the cans should be marked, but the cases in which they were taken, and where a putrid can was found, there should be some further test made of that case, if I am right in my assumption that the cans that are canned on a particular day are liable to find themselves,—liable to be put up in,—limited to the cases in which they appear and are not scattered through the entire pack.

The court finds not only on the law, but the facts as well, that there has not been sufficient evidence here to convince the court to that degree that is required in forfeiture cases to warrant a decree for the Government, both as to the 1,379 cases and the 80-case lot.

Mr. RYAN. What is that?

The COURT. I find against the Government in both cases on the law and the facts insofar as the charge is that these were adulterated.

Miss KOLMITZ. The Government desires to except to the court's instruction that the Government should make regulations that each batch be labeled. The law is now that the claimant may separate the good from the bad.

The COURT. What is that you are excepting to?

Miss KOLMITZ. That the Government make regulations that the batches be labeled,—each day's canning.

The COURT. That is only a suggestion. Of course, it would be a burden put on the salmon canners, but it would be one way to keep these things separate and not condemn a whole lot.

Miss KOLMITZ. The law now allows the claimant to separate the good from the bad. And the Government excepts to the court's definition of an article of food—

The COURT. Exception allowed.

Miss KOLMITZ. And the Government excepts to every ruling of the court upon the question of adulteration.

On March 23, 1922, the Government having lost its right to have the decision of the trial court reviewed in the Circuit Court of Appeals, no appeal having been taken from said decision within the time allowed by law for giving notice of appeal, and the time for such appeal having elapsed, it was ordered by the court that the 1,379 cases of canned salmon be delivered to the Northern Packing Co., claimant, unconditionally, and that the 80 cases might be released to said claimant upon the giving of bond by said claimant in conformity with section 10 of the act, in the sum of \$1,000, conditioned in part that the product be relabeled under the supervision of this department.

C. W. PUGSLEY, *Acting Secretary of Agriculture.*

**10513. Adulteration and misbranding of canned tomatoes. U. S. * * *
v. 54 Cases of Canned * * * Tomatoes. Default decree ordering
destruction of the product. (F. & D. No. 14438. I. S. No. 8461-t.
S. No. E-3118.)**

On February 11, 1921, the United States attorney for the Eastern District of Virginia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 54 cases of canned tomatoes, remaining in the original unbroken packages at Orange, Va., alleging that the article had been shipped by W. E. Robinson & Co., Baltimore, Md., on or about May 17, 1920, and transported from the State of Maryland into the State of Virginia, and charging adulteration and misbranding in violation of the Food and Drugs Act, as amended. The article was labeled in part: "Plum Point Brand Tomatoes * * * Plum Point Canning Co., Plum Point, Md."

Adulteration of the article was alleged in the libel for the reason that a certain substance, to wit, tomato pulp, had been mixed and packed therewith so as to reduce and lower and injuriously affect its quality and strength and had been substituted wholly or in part for the said article. Adulteration was alleged for the further reason that the article was mixed in a manner whereby damage and inferiority were concealed.