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W. M. JARDINE, *Secretary of Agriculture.*

**12955. Misbranding of butter. U. S. v. 25 Cases of Butter. Judgment for the Government. Product ordered released to claimant to be repacked and correctly labeled.** (F. & D. No. 18417. I. S. No. 7321-v. S. No. C-4299.)

On February 25, 1924, the United States attorney for the Southern District of Alabama, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 25 cases of butter, at Mobile, Ala., alleging that the article had been shipped by the Hanford Produce Co., from Sioux City, Iowa, February 9, 1924, and transported from the State of Iowa into the State of Alabama, and charging misbranding in violation of the food and drugs act as amended.

Misbranding of the article was alleged in the libel for the reason that the following statement appearing on the cartons, "1 Lb. Net Weight Hanford's Fancy Creamery Butter \* \* \* Hanford Produce Co., Sioux City, Iowa," was false and misleading and deceived the purchaser, in that the net weight of the butter contained in the said cartons was less than 1 pound. Misbranding was alleged for the further reason that the article was food in package form and the net contents thereof was not plainly and conspicuously marked on the outside of the carton.

On March 11, 1924, the Hanford Produce Co., Sioux City, Iowa, having appeared as claimant for the property, judgment was entered for the Government, and it was ordered by the court that the claimant pay the costs of the proceedings and that the product be released to the said claimant to be repacked and correctly marked with the net contents thereof.

W. M. JARDINE, *Secretary of Agriculture.*

**12956. Adulteration of canned salmon. U. S. v. 109 Cases and 134 Cases of Salmon. Tried to the court and a jury. Verdict for the Government. Judgment of condemnation and forfeiture. Claimant granted permission to take product down under bond.** (F. & D. No. 17469. I. S. Nos. 6252-v, 6253-v. S. No. C-3966.)

On April 28, 1923, the United States attorney for the Eastern District of Texas, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 243 cases of salmon, remaining in the original unbroken packages at Paris, Tex., alleging that the article had been shipped by the Kelly-Clark Co., from Seattle, Wash., October 12, 1922, and transported from the State of Washington into the State of Texas, and charging adulteration in violation of the food and drugs act. The article was labeled in part: (Can) "Sambo Brand Chum Salmon" (or "Snowshoe Brand Salmon") "Packed In Alaska By Southern Alaska Canning Co., Main Office Seattle, Wash., U. S. A."

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

On January 5, 1925, the Southern Alaska Canning Co. having appeared as claimant for the property, the case came on for trial before the court and a jury. After the submission of evidence and arguments by counsel, the court delivered the following charge to the jury (Estes, D. J.):

"GENTLEMEN OF THE JURY:

"This case, a rather unusual proceeding, has been instituted under the provisions of a Federal statute generally known as the pure food and drugs act. The act prohibits the introduction into any State or Territory, from any other State or Territory, of any article of food which is adulterated. According to the provisions of the act, food is to be considered adulterated 'if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.' It contemplates that the Secretaries of the Treasury, of Agriculture, of Commerce, and of Labor shall make uniform rules and regulations for carrying out the provisions of it, but such rules, so far as I know, have not yet been made. So the enforcement of the law, under conditions like those obtaining here, involves more or less of an original undertaking.

"The evidence, as regards material matters, is uncontroverted. Both parties concede that certain of the cans among the samples taken out of the cases shipped from the State of Washington to Paris, in this State, contained putrid and tainted fish. The samples were gotten on four different occasions, three on behalf of the Government and one on behalf of the claimant, by taking 48 cans from the 109 cases of Sambo brand chum salmon and 48 cans from the 134 cases of Snowshoe brand salmon. The analyses or tests of these samples disclosed a percentage of putrid or tainted fish, varying as the opinions of the witnesses varied.

"Now, the question for you to determine from the production of these samples, taking into consideration the number of them and what the analyses of them disclosed—all the testimony, both for the Government and the claimant, on that point—is whether you find or feel capable of finding that the whole product is adulterated. To illustrate, an examination was made of a shipment of oysters in which some defective oysters were found in every can of the shipment. In that state of affairs, the jury might have no difficulty in determining that the entire shipment was in a state of decomposition or adulterated. On the other hand, if only two or three cans in a large shipment of oysters were found to contain oysters in a state of decay, there might be some doubt in your minds as to whether the entire shipment was thus affected.

"You are therefore to determine, from a preponderance of the evidence, whether this entire shipment of fish contained decomposed or putrid animal matter to the extent that it should be condemned. You should bear in mind, when determining that point, that the law requires nothing impossible of a shipper. The canning industry in this country is one of our largest and most outstanding enterprises. I think there was some testimony that it is impracticable to prevent a fish in a state of decomposition from now and then getting into the cannery and being put into the cans. The theory is that this can not be avoided. On the other hand, there is testimony that the canneries can be so managed, and the fish so handled and treated, as to prevent decaying fish from being put into the cans. The test to determine that is ordinary care.

"If you find and believe, from a preponderance of the evidence, that the parties who canned these fish exercised ordinary care in the handling of their products and found it impracticable to avoid a putrid fish from being canned now and then, and that the percentage of decayed fish found in this shipment represents no more than is inevitable in the canning process, then the claimant would not be responsible here and this shipment would not be condemned, even though the samples disclosed that some of the cans contained putrid or decomposed matter.

"So, in determining whether this shipment can properly be condemned, you should take the question of ordinary care into consideration. I, therefore, charge and instruct you that if you find and believe, from a preponderance of the testimony, that these cases of fish—that is, the 109 cases of Sambo brand chum salmon and 134 cases of Snowshoe brand salmon—consisted in whole or in part of decomposed or putrid animal substance, it will be your duty, unless you find for the claimant under the instruction I shall presently give you, to return a verdict in favor of the Government. If, from the samples procured, you do not find that the proof is sufficient to convince you that a percentage of adulteration existed throughout this shipment, or if you find that no more adulteration existed than was inevitable in canning fish when ordinary and proper care is exercised, your verdict should be for the claimant."

The jury then retired and after due deliberation returned a verdict for the Government.

On January 6, 1925, a judgment of condemnation and forfeiture was entered, and it was ordered by the court that the claimant pay the costs of the proceedings and that the said claimant be granted 90 days within which to make application for the withdrawal of the product under bond for the purpose of its reconditioning and reprocessing.

W. M. JARDINE, *Secretary of Agriculture.*

**12957. Misbranding of Foster's backache kidney pills. U. S. v. 38 Dozen Packages of Foster's Backache Kidney Pills. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 18118. I. S. No. 11701-v. S. No. W-1441.)**

On November 27, 1923, the United States attorney for the Northern District of California, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure