

"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

and condemnation of 38 dozen packages of Foster's backache kidney pills, remaining in the original unbroken packages at San Francisco, Calif., alleging that the article had been shipped by the Foster-McClennan [McClellan] Co., from Buffalo, N. Y., on or about August 31, 1923, and transported from the State of New York into the State of California, and charging misbranding in violation of the food and drugs act.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that the pills consisted of potassium nitrate, rosin, fenugreek, uva ursi, and an essential oil such as juniper or turpentine oil, coated with talc and sugar.

Misbranding of the article was alleged in the libel for the reason that the following statements, appearing in the labeling, (box and wrapper, English) "Backache Kidney Pills * * * For Kidney Complaints and diseases arising from disorders of the Kidneys & Bladder Such As Backache, Stiff, Lame or Weak Back, Cold in the Back or Kidneys, Congestion of the Kidneys, Inflammation of the Bladder, Gravel, Scalding Urine, and Urinary Troubles," (circular, English and Spanish) "Backache Kidney Pills" (Spanish "Pills for the Kidneys") "For Kidney Complaints and diseases arising from disorders of the Kidneys & Bladder * * * if relief is not noticed, increase the dose * * * When relief is noticed the dose may be reduced * * * a good medicine," (pasteboard container for one dozen, English and Spanish) "Backache Kidney Pills For the Kidneys and Bladder, Backache, etc.," together with the design or device showing a cut of a figure about waist length, rear view, slightly stooped, head turned to the right, hands pressing on flanks, and inscription on arms, shoulders, and back, "Foster's Backache Kidney Pills," regarding the curative and therapeutic effects of the said article, were false and fraudulent, since the article contained no ingredient or combination of ingredients capable of producing the effects claimed.

On January 16, 1925, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

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

12958. Adulteration of minced clams. U. S. v. 79 and 390 Cases of Minced Clams. Consent decree of condemnation and forfeiture. Product released under bond. (F. & D. Nos. 18855, 18856. I. S. Nos. 20073-v, 20074-v, 20075-v, 20253-v. S. Nos. W-1530, W-1531.)

On July 24, 1924, the United States attorney for the Western District of Washington, 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 469 cases of minced clams, remaining in the original unbroken packages at Seattle, Wash., alleging that the article had been shipped by the Pioneer Packing Co., from Cordova, Alaska, June 24, 1924, and transported from the Territory of Alaska into the State of Washington, and charging adulteration in violation of the food and drugs act.

Adulteration of the article was alleged in the libel for the reason that excessive water or brine had been mixed and packed with and substituted wholly or in part for the said article.

On December 23, 1924, the Pioneer Packing Co., Cordova, Alaska, claimant, having admitted the allegations of the libel and having consented to the entry of a decree, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be released to the said claimant upon payment of the costs of the proceedings and the execution of a bond in the sum of \$3,000, in conformity with section 10 of the act, conditioned in part that the adulterated portion be separated from the unadulterated portion under the supervision of this department, and the adulterated portion destroyed or relabeled.

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

12959. Adulteration and misbranding of butter. U. S. v. 245 Cases, et al., of Butter. Product released under bond to be reconditioned. (F. & D. Nos. 19089, 19090. I. S. Nos. 7395-v, 7394-v. S. Nos. C-4504, C-4503.)

On or about October 2 and 4, 1924, respectively, the United States attorney for the Eastern District of Louisiana, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district libels praying the seizure and condemnation of 345 cases and 630 pounds of butter, at New Orleans, La., alleging that the article had been shipped by