

know, Mr. McKendrick, that very often in these indictments, or informations, animal or vegetable, from the standpoint of the law, is unimportant, but from the standpoint of this particular charge you have elected to treat it as an animal substance?

Mr. MCKENDRICK: Well, may it please the Court, I would like to suggest that the view of the administrator, through whom, of course, we have charge of the preparation of this information, is, and I think properly, that in stating in the information here that it consisted of a filthy animal substance, that means, to wit, the crab meat. They say the crab meat, which is an animal substance, was filthy, but that does not mean that the *B. coli* is or is not animal or vegetable.

The COURT: Well, the jury has heard the testimony on that. You have charged that it is a filthy animal substance. Now, the jury must find that, of course, if they find a verdict against the defendant.

Mr. FRAMPTON: Counsel in his opening statement limited it to fecal *B. coli*, and all the evidence shows that. May I present these prayers?

THE COURT. Yes, pass them up, if you will. I have granted you No. 1, No. 2, 3, with some modification, 4 with some modification; rejected 5 and 6. The point of the ruling has already been covered by the Charge, to wit: It is not necessary, in my view of the law, for the Government to prove that the matter found in the cans, if they find it was there, to wit, fecal *B. coli*, was, of itself *per se*, injurious to health. So your propositions which are based on that view are rejected with exceptions noted. It is, however, necessary for the Government to prove that the substance which they call fecal *B. coli* was a filthy substance. I have ruled on the prayers and the Clerk will give them to you.

Have you any more instructions to offer, Mr. McKendrick?

Mr. MCKENDRICK. No.

THE COURT. Very well, gentlemen, you want to argue it, I assume?

Mr. MCKENDRICK. Yes.

THE COURT. Do you want to state any length of time that you want to agree upon in argument? The rule of court allows an hour a side. I do not know that you will want that much in this case.

Mr. FRAMPTON. Your Honor, I think we can argue our side—I understand it is permissible for two to argue on a side?

THE COURT. Certainly.

Mr. FRAMPTON. I can cover my end in not more than ten or fifteen minutes.

Mr. SASSCER. That is all I want.

On December 11, 1937, the jury returned a verdict of guilty. On December 29, 1937, a motion for a new trial was argued and overruled without opinion and the defendant was sentenced to pay a fine of \$50 and costs.

W. R. GREGG, *Acting Secretary of Agriculture.*

28605. Misbranding of canned cherries. U. S. v. 18 Cases of Canned Cherries. Consent decree of condemnation. Product released under bond for relabeling. (F. & D. No. 41200. Sample No. 63294-C.)

This product fell below the standard established by this Department because of the presence of excessive pits and was not labeled to indicate that it was substandard.

On December 23, 1937, the United States attorney for the District of Oregon, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 18 cases of canned cherries at Portland, Oreg., alleging that the article had been shipped in interstate commerce on or about November 2, 1937, by Stokely Bros., Inc., from Bellingham, Wash., and charging misbranding in violation of the Food and Drugs Act as amended. The article was labeled in part: "Stokely's Finest Pitted Tart Red Cherries Stokely Bros. and Co., Inc. Indianapolis, Ind."

The article was alleged to be misbranded in that it was canned food and fell below the standard of quality and condition promulgated by the Secretary of Agriculture, in that there was present more than one cherry pit per 20 ounces of net contents, and its package or label did not bear a plain and conspicuous statement prescribed by regulation of this Department indicating that it fell below such standard.

On February 23, 1938, C. P. Dorr having appeared as claimant and having consented to the entry of a decree, judgment of condemnation was entered, and the product was ordered released under bond conditioned that it be relabeled.

W. R. GREGG, *Acting Secretary of Agriculture.*