

"Even if a greater percentage of shells and shell fragments were found in claimant's product than in that of other processors, yet this fact, under the theory of the Government, would not add to the deleterious nature of claimant's product. It should be stated, however, that there was no evidence that there was an excess of shell fragments in claimant's product over that of other processors. On the contrary, a preponderance of the evidence showed that the claimant's processing methods were superior.

"2. It does not seem necessary to discuss other portions of said section 342 invoked by the Government. It is charged in the libel complaint that other provisions of the statute were violated by substituting shell fragments for oysters, and that shell fragments had been mixed or packed with the oyster product so as to reduce its quality. There was no testimony to support these averments and so as to make applicable those provisions of the law directed against such acts.

"3. Counsel for both the Government and the claimant, at the trial and in their briefs, discussed the question of the right to a tolerance regulation as provided by section 346, title 21, U. S. C. A. This provision is for tolerance of both poisonous and deleterious substances where the presence of such substance cannot be avoided. However, that section says:

(a) Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practices of the application of clause (2) of section 342 (a).

Adverting to clause 2 of said section 342 (a), it reads as follows:

* * * or (2) if it [food] bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 346.

"It will be seen at once that this provision does not apply where the deleterious substance inheres in the product and is not added. Further quoting from section 346, however, note this language:

* * * but when such substance is so required or cannot be so avoided, the Administrator shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health.

"Upon the concession made by the Government in this case, even if the tolerance section could be construed to apply, it is not the quantity of the substance but its character 'that controls its ability to injure.'

"4. Upon the evidence in the case it must be found that the presence of shell fragments in the article sought to be condemned does not ordinarily render it injurious to health.

"Under the statute and upon the evidence the Government is not authorized to condemn the article seized for the reason that the processed article does not offend against the food and drug law. The claimant, therefore, should have restored to it the articles seized and the libel should be dismissed. It will be so ordered."

On March 6, 1942, judgment was entered dismissing the case and ordering the goods restored to the claimant.

3722. Adulteration of canned oysters. U. S. v. 1,792 Cases of Canned Oysters. Consent decree of condemnation. Product ordered released under bond for segregating and salvaging the good portion. (F. D. C. No. 4941. Sample Nos. 17281-E, 17282-E, 49207-E.)

On June 17, 1941, the United States attorney for the Middle District of Tennessee filed a libel against 1,792 cases, each containing 24 cans, of oysters at Nashville, Tenn., alleging that the article had been shipped on or about May 16, 1941, by the Mavar Shrimp & Oyster Co., Ltd., from Biloxi, Miss.; and charging that it was adulterated in that it consisted in whole or in part of a decomposed substance. The article was labeled in part: "Bullhead Brand Contents 10 Oz. Avoir. Oysters Gibbs & Co., Inc. Distributors."

On August 15, 1941, the Mavar Shrimp & Oyster Co., Ltd., claimant, having admitted the allegations of the libel, judgment of condemnation was entered and the product was ordered released under bond conditioned that it be brought into compliance with the law under the supervision of the Food and Drug Administration. The fit portion was separated from the unfit and the latter was destroyed.