3372. Adulteration of tomato catsup. U. S. v. 200 Cases of Adulterated Tomato Catsup. Tried to the court. Finding in favor of the Government. Decree of condemnation, forfeiture, and destruction. (F. & D. No. 5494. S. No. 2058.)

On or about December 19, 1913, the United States attorney for the District of Oregon, 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 200 cases of adulterated tomato catsup, remaining unsold in the original unbroken packages at Portland, Oreg., alleging that the product had been shipped on or about November 1, 1913, and transported from the State of California into the State of Oregon, and charging adulteration in violation of the Food and Drugs Act. The cases were labeled: "ST 1 doz. #10 tins Luxury Brand California Tomato Catsup Packed by Sunlit Fruit Co., Berkeley, Cal. Preserved with 1/10 of 1% benzoate soda—from trimmings— Hudson & Gram Co., Portland." The cans in the cases were labeled: "Luxury Brand Tomato Catsup Not Artificially Colored. Made from Tomato Trimmings, Pure Spices, Granulated Sugar, Onions and Vinegar, Contains one tenth of one per cent Benzoate of Soda Net Weight 7 lbs. Packed by Sunlit Fruit Co., Berkeley, Cal. Guaranteed by the Sunlit Fruit Co. under the Food and Drugs Act, June 30, 1906, Serial No. 8988."

Adulteration of the product was alleged in the libel for the reason that said catsup consisted in whole or in part of filthy, decomposed and [or] putrid vegetable substance.

On February 20, 1914, the case came on to be heard before the court without the intervention of a jury, and after the submission of evidence and argument by counsel was submitted to the court. On March 9, 1914, a finding was made favorable to the contentions of the Government, as will more fully appear from the following opinion by the court (Bean, *D. J.*):

The United States, proceeding under the Pure Food and Drugs Act (34 Stat. L., 770), filed a libel in this court for the condemnation of 200 cases of tomato catsup, alleging that it was adulterated within the meaning of the act, which declares that a food product is deemed to be adulterated "if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance." After the seizure the product was claimed by the company which manufactured it and the proceedings defended. The claimant admits the interstate shipment and other jurisdictional facts, but denies that the catsup was decomposed or adulterated within the meaning of the law.

By stipulation of the parties the case was tried before the court without a jury. It turns upon two questions: First, whether the product was in fact decomposed, and if so, whether it was adulterated as defined by the pure-food law. It was manufactured from pulp screened from peelings, cores, and by-products of tomatoes, obtained in the course of their preparation for canning. The decay or decomposition of tomatoes or tomato products is commonly the result of the attack upon the fruit in the field or in process of manufacture of various forms of plant life, such as yeast, bacteria, and mold. They feed upon certain compounds in the fruit, reducing the food value of the product and producing a by-product of a more or less offensive character, and are evidences of decay and decomposition. The condiments used in the manufacture of tomato catsup have the effect of concealing decomposition or putrefaction from the senses, and its existence can most readily be determined by a bacteriological analysis of the manufactured product to ascertain whether the organisms referred to are present in sufficient quantities to indicate a decomposed state.

Various samples of the product in question have been carefully analyzed under the microscope, separately, by Dr. Schneider, of the University of California and the Government laboratory in San Francisco, and Prof. Beckwith, of the Oregon Agricultural College, both of whom are expert bacteriologists, and they agree that it contains bacteria, yeast, and mold in very large and unusual quantities, as high as from 350 million to 1 billion bacteria and 15 million

yeast spores per cubic centimeter (about one-quarter of a teaspoonful), and mold hyphæ in abundance, thus indicating, in the opinion of these experts, a largely decomposed conditon—Dr. Schneider says from 10 to 15 per cent—and, according to their testimony, it is unfit for human food. This testimony is not contradicted in any way, although the claimant was permitted to and did take samples of the goods for analysis after their seizure. Nor is there any conflict among the experts as to the scientific deductions to be made therefrom. It would seem conclusive, therefore, of the fact that the product is decomposed in part or in whole. The examination of the bacteriologists is confirmed by a chemical analysis made by the chemist at the Government laboratory, and, in my judgment, finds support in the method of manufacture. The evidence shows that the fruit from which the product in question was manufactured was brought to the factory in carload lots in boxes containing about 50 pounds each. Without being sorted or examined in any way, except the merest visual examination of the outer layer of fruit, the contents of the boxes were emptied for washing into a vat containing about 150 gallons of water, which was only changed once a day, except as it might be affected by a 1-inch stream running into the vat and an overflow pipe at the top. While in the water the tomatoes were stirred by a mechanical screw-like agitator, which subsequently carried them to the steaming table, where they were scalded with hot water to loosen the skin, and washed under a spray of cold water. From there they were taken in buckets to the peeling table, where the skins were removed and the tomatoes graded for canning. Then the skins, with such pulp as adhered to them, the stem ends. and like by-products were placed in buckets by the operatives and subsequently taken to another department of the factory, where they were used in the manufacture of the catsup in question.

The washing of a large quantity of fruit which necessarily is more or less infected with bacteria, mold, and decay in the manner described would naturally have a tendency to foul the water and infect the entire lot, and especially the skins and by-products from which the catsup in question was manufactured. Again, the claimant depended on the peelers or sorters to sort out and reject the decayed portions from the trimmings before they were sent to the catsup department. The peelers were paid by the piece for the peeled tomatoes only, and it is but natural that they would become careless or indifferent about the removal of the decayed material from that portion of the output for the handling of which they received no direct compensation. It therefore seems to me that the method of manufacture adopted by the claimant was calculated to produce just such a product as the bacteriologists found the one in question to be. Better methods of handling the fruit are in vogue, for it is in evidence that in other factories, the output of which was shown to be unobjectionable, the tomatoes were sorted and the decayed or infected ones removed before being washed, and were washed in perforated metal cylinders by sprays of clean water.

If the testimony in this case is to be considered, and it is uncontradicted, there is, in my judgment, but one conclusion which can be reached, and that is, the product in question was decomposed and adulterated within the meaning of the Food and Drugs Act.

It is argued for the claimant that since the presence of bacteria, mold, and yeast in any quantity is evidence of decomposition or the process of decomposition, and there is no fixed standard by which it can be determined when a product has reached such a stage of decomposition as to "consist in whole or in part of filthy, decomposed, or putrid vegetable substance," the Government can not prevail. I infer from the testimony of the experts that it would be difficult if not impossible to fix any arbitrary standard by which the question could be determined, as it depends upon so many contingencies. In any event, no such standard has been fixed, in the absence of which each case must be determined on its own facts, and when it appears, as in this case, that the product is so far decomposed as to be unfit for food, it comes within the letter and spirit of the law. It was also urged that since there is no proof that the product in question would be injurious to health, a verdict should be ordered in favor of the claimant, but I do not understand that such proof is necessary or required under the provisions of the Food and Drugs Act, on which this proceeding is based. The object of the law is to prevent the manufacture or interstate shipment of adulterated food, and when food is adulterated so as to "consist in whole or in part of filthy. decomposed, or putrid animal or vegetable substance," its interstate shipment is prohibited, whether its use would be injurious to health or not.

The recent decision of the Supreme Court, while not at hand, involved, as I understand from the press report, the construction of the fifth subdivision of section 7, and not the one involved in this controversy.

I conclude, therefore, that the motions for nonsuit and directed verdict should be overruled, and that a decree should be entered in favor of the Government, as prayed for in the libel.

On March 10, 1914, a formal decree of condemnation and forfeiture was entered and it was ordered by the court that the product should be dealt with or destroyed in conformity with the instructions of the Secretary of Agriculture of the United States and usual in such cases.

D. F. HOUSTON, *Secretary of Agriculture.*

WASHINGTON, D. C., *September 24, 1914.*

3373. Adulteration of tomato catsup. U. S. v. 10 Cases * * * Adulterated Tomato Catsup. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 5495. I. S. No. 3034-h. S. No. 2059.)

On December 18, 1913, the United States attorney for the District of Oregon, 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 10 cases, each containing six 1-gallon bottles of adulterated tomato catsup, remaining unsold in the original unbroken packages at Portland, Oreg., alleging that the product had been shipped on or about November 15 [5], 1913, and transported from the State of California into the State of Oregon, and charging adulteration in violation of the Food and Drugs Act. The shipping containers were branded: "6 only—1 gal. C. Z. E. Pkrs. Flint Red Rose Brand Catsup" (Top of case) "Glass With Care M. M. C. Co. Portland, Or." Each of the bottles in said cases was branded: "Red rose (Picture of rose) Catsup Put up by Lewis Packing Co., San Francisco, Cal. Prepared from Fresh Ripe Tomatoes without Fermentation. Not Artificially Colored. Made from Whole Ripe Tomatoes. Flavored and Preserved with Sugar, Glucose, Salt, Vinegar, Pure spices and One-fifth of one per cent Benzoate of Soda."

Adulteration of the product was alleged in the libel for the reason that said catsup consisted in whole or in part of filthy, decomposed, and [or] putrid vegetable substance.

On February 26, 1914, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product should be dealt with or destroyed in conformity with instructions of the Secretary of the Department of Agriculture and usual in such cases.

D. F. HOUSTON, *Secretary of Agriculture.*

WASHINGTON, D. C., *September 24, 1914.*

3374. Adulteration and misbranding of malt extract. U. S. v. P. Ballantine & Sons. Plea of non vult. Fine, $50. (F. & D. No. 5502. I. S. No. 2516-e.)

On March 27, 1914, the United States attorney for the District of New Jersey, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against P. Ballantine & Sons, a corporation, Newark, N. J., alleging shipment by said company in violation of the Food and Drugs Act, on or about May 29, 1912, from the State of New Jersey into the State of Pennsylvania, of a quantity of Ballantine's Ideal Malt Extract, which was adulterated and misbranded. The product was labeled: "Average quantity Alcohol contained 3 7/10 per cent by volume. Ballantine's Ideal Malt Extract P. Ballantine & Sons, 134 Cedar St., New York. Foot Fulton St., Newark, N. J. A fully matured preparation of