

12535. Adulteration of canned salmon. U. S. v. 2,995 Cases of Canned Salmon. Tried to the court and jury. Verdict for the Government. Decree of condemnation and forfeiture. Product released under bond to be sorted. (F. & D. No. 14945. I. S. No. 10642-t. S. No. W-950.)

On May 17, 1921, 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 2,995 cases of canned salmon remaining in the original unbroken packages at Seattle, Wash., alleging that the article had been shipped by the Alaska Herring and Sardine Co. from Port Walter, Alaska, to Anacortes, Wash., arriving between the dates of June 28 and November 7, 1919, and had been reshipped to Seattle, August 3, 1920, and transported from the Territory of Alaska into the State of Washington, and charging adulteration in violation of the food and drugs act. The article was labeled in part: "Hypatia Brand Pink Salmon."

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.

On March 13, 1924, A. O. Anderson & Co., Seattle, Wash., 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 (Cushman, D. J.):

"Gentlemen of the jury, you have heard the evidence in the case, and the arguments. It is the duty of the Court now to instruct you regarding the law. The task devolving upon the Court has been much lightened by the thorough and exhaustive manner in which the case has been tried and has been argued. You will take out the pleadings in the case with you, when you go to your jury room. These pleadings consist of the libel filed by the United States attorney, and the answer filed by the claimant. You understand this suit is against this particular parcel of salmon. The client of Mr. McCord and Mr. Shackelford interposes a claim to it, and, claiming to be the owner, is allowed to defend the salmon; but what you are trying in this case is this parcel of salmon.

"The libel filed by the United States attorney alleges that this salmon was shipped in interstate commerce from Alaska to the State of Washington; alleges that it is adulterated; alleges that it was adulterated at the time that it was shipped in interstate commerce; and prays its condemnation.

"The answer of the claimant admits that it was shipped from Alaska to the State of Washington; denies that it was adulterated.

"Your verdict in this case will not be 'guilty' unless a fair preponderance of the evidence has shown that it was adulterated within the meaning of this law.

"'Adulteration' or 'adulterated' is about the only word that occurs to me in this law that requires a definition at the hands of the Court. The other words used in the statute are words of ordinary meaning and are used in their ordinary sense, but this statute defines an adulterated article of food about as follows, that is, an article of food is adulterated when it consists, in whole or in part, of filthy, decomposed, or putrid animal substance, making it unfit for human food; and before your verdict can be 'guilty' in this case, or before it should be 'guilty' in this case, you will have to find that there was a fair preponderance of the evidence showing that it was either filthy, decomposed, or putrid to an extent that rendered it unfit for human food.

"It may be that decomposition begins as soon as life ends, but a food product, this canned fish product, is not decomposed within the meaning of this law at that early stage. 'Decomposed' in this law does not mean the beginning of decomposition; it means the state of decomposition that renders the article of food unfit for human food. 'Decomposed' within this law does not mean that it shall have reached such an advanced state of decomposition that it is resolved to its elements, that it has ceased really to be flesh. Regarding this expression 'unfit for food,' the Court does not undertake to enumerate all of the things that you might take into account in determining whether an article is fit or unfit for food.

"The evidence in this case has taken a wide range. You are not to understand from that fact that you are trying either the packers or the Bureau of Chemistry; you are trying this particular parcel of fish to determine whether

it is filthy, decomposed, or putrid to an extent rendering it unfit for food. This evidence regarding the manner in which the fish was packed, the conditions under which it was packed, and much of the other testimony in the case was to enable you to determine whether it was reasonably probable that it was a fit food product if it was put up in the manner described. In other parts of the testimony, witnesses have been examined and cross-examined about their experience and what they had done and what they had not done. Now, much of that testimony went into the case so that you might determine the value of their opinions from their experience and their interest, if any, in the case.

"Now, coming back again to the question of the fitness or unfitness of this fish for food: In order to be unfit for food, within the meaning of this law, it would not be sufficient if you found some one person with an appetite so pampered and cloyed with delicacies as to become so fastidious that he would turn up his nose at a can of salmon; that would not be sufficient to condemn it. Neither would it be sufficient to sanction and warrant its being carried in interstate commerce, if you found somebody so hungry that he would eat it. 'Unfit for food' here in this statute means reasonably unfit for food.

"The evidence in the case regarding the fact, if it be a fact, that salmon may be stale, tainted, or decomposed without being an injurious food, you will understand that the fact that it is not injurious does not make it fit for food, if it is so decomposed as to be unfit for food. The fact regarding whether it would injure the person eating it or not was admitted in the case, as you can understand that if an article of food in a certain condition was deadly, as you have heard of mushrooms—I do not undertake to say that they are deadly—but if an article of food was deadly and you could not determine, before eating it, whether it was deadly or not, you would understand that such an article of food would be unfit for human food on a certain percentage of the impurity or conditions that rendered it deadly, when another article of food that was perfectly harmless and could be easily detected would not be unfit for human food, measured by those standards alone. It is a matter of common knowledge that in determining whether an article is fit for food or appropriate for food, that you take into account whether it is harmful or not, you take into account whether it has food value, whether it satisfies your hunger, whether it builds up the wasted tissues that are exhausted because of a lack of food, and to a certain extent you take into account whether it pleases the taste. Now, what value you are going to place upon these different things that will be taken into account in measuring the fitness of this or any article of food, is for you to determine, not the Court.

"I believe I have instructed you that before you could find a verdict of 'guilty,' that you must be able to find, from a fair preponderance of the evidence, that this salmon was either filthy, decomposed, or putrid to an extent rendering it unfit for human food. Now, where a parcel of food has been tested, where the tests that have been made do not extend to the entire parcel, it is nevertheless necessary that the preponderance of the evidence should have shown that the adulteration extends to the whole product sought to be condemned before your verdict would be 'guilty.' It might be that a small percentage of adulteration in a small percentage of samples taken from such a product would not amount to a fair preponderance of the evidence, where an adulteration of a large percentage of the product would establish that fact.

"The thing that is charged is that this was an adulterated article of food when it was shipped in interstate commerce. That is necessary. But there has been no particular contention made here, either under the evidence or the arguments, that the fish is in any different condition now, or at the time it was examined here in Seattle, than it was when it was shipped.

"You are in this case, as in every case where questions of fact are tried to the jury, the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the witnesses. In weighing the evidence and measuring the credit of the witnesses who have appeared before you and testified, the law does not undertake to point out all of the things that you may take into question in measuring such credit of such witnesses. You are authorized to consider any and everything that as men of experience you have found to be of value in measuring where the truth lies, from human testimony and human transactions. The law does say that you should observe and weigh the appearance and conduct and demeanor of the witnesses who have come before you and testified; whether from their manner of giving their testimony it created a belief in your minds that they

were doing their utmost to tell you the exact truth as they understood it or saw it; whether some of them may have been reluctant and evasive and kept trying to get away from the question, creating the belief in your minds that they were trying to keep from telling you the straight of it, or whether other witnesses may have appeared to you to be willing, trying repeatedly to get something into the case that nobody had asked for—what the law calls a 'swift' witness; also take into account the situation in which the witness is placed, as enabling the witness to know the exact facts, as one witness, by reason of his experience and by reason of his situation in regard to the transactions about which he is testifying, might be in a much better position to tell the exact truth than another one who was just as much inclined to tell you the truth as the first; also take into account the reasonableness and probability of the testimony of each witness, in view of the circumstances, whether it appears to be reasonable and probable or whether it appears unreasonable and unlikely; take into account the interest that any witness may have been shown to have in the case, an interest either as shown by the manner in which the witness gave his testimony or as shown by the relation of the witness to the case and the matters therein involved.

"The Court has, in the course of the instructions, used the expression 'preponderance of the evidence.' Preponderance of the evidence is the greater weight of the evidence. That evidence preponderates which so appeals to your experience and reason and intelligence as to create and induce a belief in your minds, and, if there is a dispute in the evidence, that evidence preponderates which is so strong in these particulars as to create and induce a belief in your minds, in spite of what is opposed to it in the way of evidence or assaults that have been made upon it in the way of argument.

"There was something said, I believe, in argument, regarding the care taken in putting up this fish. For fear that you may not yet understand the rule of law on that matter: if this fish is decomposed to the extent that it is not reasonably fit for food and the fair preponderance of the evidence shows that fact, the verdict should be 'guilty,' no matter how it came about—its decomposition. If it came about in spite of the care taken in putting it up, or if some malicious person brought it about, that does not make any difference. You are trying this article of food. If it is so decomposed as not to be reasonably fit for food, the verdict should be 'guilty.' If a fair preponderance of the evidence has not shown that fact, your verdict should be 'not guilty.'

"Is there anything further, gentlemen?"

MR. McCORD: "We except to that portion of Your Honor's instructions as to the preponderance of the testimony. The burden of proof is on the Government to show, by a fair preponderance of the testimony, Your Honor stated, that the allegations of the libel were supported. This is an action in the nature of forfeiture of property, and I think the instruction should have been that the allegations of the libel must be established, not only by a fair preponderance of the evidence, but that the evidence should be clear and convincing."

THE COURT: "Exception allowed."

MR. McCORD: "I also except to Your Honor's failure and refusal to give the first instruction requested by the claimant."

THE COURT: "Exception allowed."

MR. McCORD: "The claimant also excepts to Your Honor's refusal to give the second instruction requested."

THE COURT: "Exception allowed."

MR. McCORD: "The claimant excepts to Your Honor's refusal to give the third instruction requested by the claimant."

THE COURT: "Exception allowed."

MR. McCORD: "The claimant excepts to Your Honor's refusal to give the fourth instruction requested by the claimant."

THE COURT: "Exception allowed."

MR. McCORD: "The claimant excepts to the action of the Court in refusing to give the fifth instruction requested by the claimant."

THE COURT: "Exception allowed."

MR. McCORD: "The claimant excepts to the refusal of the Court to give the sixth instruction requested by the claimant."

THE COURT: "Allowed."

MR. McCORD: "The claimant excepts to the action of the Court in refusing to give the seventh instruction requested by the claimant."

THE COURT: "Allowed."

MR. McCORD: "The claimant excepts to the refusal of the Court to give the eighth instruction requested by the claimant."

THE COURT: "Exception allowed."

MR. McCORD: "The claimant excepts to the refusal of the Court to give the ninth instruction requested by the claimant."

THE COURT: "Exception allowed."

MR. McCORD: "The claimant excepts to the action of the Court in refusing to give to the jury the tenth instruction requested by the claimant."

THE COURT: "Exception allowed."

MR. McCORD: "The claimant excepts to the action of the Court in refusing to give the eleventh instruction requested by the claimant."

THE COURT: "I will allow an exception. I think I covered that."

MR. McCORD: "The claimant excepts to the action of the Court in refusing to give the twelfth instruction requested."

THE COURT: "I think that has been covered. You are allowed an exception, however."

MR. McCORD: "The claimant excepts to the failure of the Court, in final instructions of the Court, to give the thirteenth instruction requested by the claimant."

THE COURT: "I will give that instruction, since something has been said about it in the course of the trial."

"In your deliberations, you will not consider the question as to whether or not the salmon involved in this controversy can or can not be reconditioned. The reconditioning of the salmon is not within the issues in this case."

"Are there any exceptions?"

MR. HILL: "If the Court please, the Government excepts to the Court's refusal to give the libelant's first requested instruction."

THE COURT: "Exception allowed."

MR. HILL: "The libelant excepts to the Court's refusal to give the second requested instruction."

THE COURT: "Exception allowed."

MR. HILL: "The libelant excepts to Your Honor's refusal to give the libelant's third requested instruction."

THE COURT: "Exception allowed."

MR. HILL: "The libelant excepts to Your Honor's refusal to give the libelant's fourth requested instruction."

THE COURT: "Exception allowed."

MR. HILL: "The libelant excepts to Your Honor's refusal to give the libelant's fifth requested instruction."

THE COURT: "Exception allowed."

MR. HILL: "And the libelant excepts to Your Honor's refusal to give the libelant's sixth requested instruction."

THE COURT: "Exception allowed."

MR. HILL: "The libelant further excepts to that portion of Your Honor's instructions in which it is stated that the issue is whether or not this salmon consists, in whole or in part, of filthy, decomposed, or putrid animal substance, and stating, in addition to that, 'unfit for food.'"

THE COURT: "'Making it.'"

MR. HILL: "Making it unfit for food."

THE COURT: "Exception allowed."

"Gentlemen, in the progress of the case, the Court, as evidence came in, instructed you regarding the purpose for which it was admitted. Many of those instructions I have not repeated to you in the charge I have just given you. It is your duty to bear in mind the instructions the Court gives you in the progress of the trial, as well as those that are given at the conclusion."

"The form of verdict as prepared reads: 'We, the jury in the above-entitled cause, find the respondent 2995 Cases Canned Salmon Labeled in Part "Hyphathia Brand Pink Salmon," ————— guilty as charged in the libel of information filed herein.' If you find this salmon guilty under the evidence and instructions you will write in the blank the word 'is.' If you find the salmon not guilty, you will write the word 'not' in there and have your foreman sign it."

"Is a sealed verdict agreed to if the jury agree after five o'clock?"

MR. McCORD: "Yes."

MR. HILL: "That is satisfactory, Your Honor."

THE COURT: "You understand, gentlemen, the method of returning a sealed verdict. If you agree before five o'clock, you will advise the bailiff of the fact"

that you have agreed and come into court with your verdict. If you agree after five o'clock, you will complete your verdict, seal it up, leave it with your foreman, and report here with your verdict at ten o'clock tomorrow morning. "You may now retire."

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

On July 7, 1924, a decree of condemnation and forfeiture was entered, and it was ordered by the court that the product be released to the 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 good portion be separated from the bad portion and the latter destroyed.

HOWARD M. GORE, *Secretary of Agriculture.*

12536. Adulteration and misbranding of apples. U. S. v. Roland R. Singer and Morris L. Gaskill (Singer & Gaskill). Pleas of guilty. Fine, \$75. (F. & D. No. 16841. I. S. Nos. 6044-t, 6045-t, 6046-t, 6047-t.)

On February 13, 1923, the United States attorney for the Western District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Roland R. Singer and Morris L. Gaskill, copartners, trading as Singer & Gaskill, Wilson, N. Y., alleging shipment by said defendants in violation of the food and drugs act as amended, on or about March 4, 1922, from the State of New York into the State of Pennsylvania, of quantities of apples which were adulterated and misbranded. The article was labeled in part: (Barrel) "New York Standard A Grade" and "Min. 2½ Inch," "Min. Size 2½," and "Min. Size 2½ In.," as the case might be. A portion of the barrels were further labeled, "Standard Barrel," and another portion bore no statement of the net contents of the said barrels.

Examination of the article by the Bureau of Chemistry of this department showed that the barrels contained many apples under the size declared on the labels and that a portion of the barrels contained apples infested with insects.

Adulteration of the article was alleged in the information for the reason that apples of a lower grade and quality than New York Standard A Grade and less than 2½ inches in diameter each had been substituted in part for New York Standard A Grade apples 2½ inches in diameter, which the article purported to be.

Misbranding was alleged for the reason that the statement, to wit, "New York Standard A Grade Min. Size 2½ In.," borne on the barrels containing the article, was false and misleading in that the said statement represented that the barrels contained only New York Standard A Grade apples at least 2½ inches in diameter each, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that the said barrels contained only New York Standard A Grade apples at least 2½ inches in diameter each, whereas, in truth and in fact, they did not, but contained in part apples of a lower grade and quality than New York Standard A Grade apples, and said barrels did contain in part apples less than 2½ inches in diameter each. Misbranding was alleged with respect to a portion of the article for the reason that it was food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package.

On March 13, 1923, the defendants entered pleas of guilty to the information, and the court imposed a fine of \$75.

HOWARD M. GORE, *Secretary of Agriculture.*

12537. Adulteration and misbranding of butter. U. S. v. 36 Tubs, et al., of Butter. Consent decrees of condemnation and forfeiture. Product released under bond to be reprocessed. (F. & D. Nos. 18880, 18881, 18882, 18883. I. S. Nos. 12864-v, 13187-v, 13258-v, 13259-v. S. Nos. E-4896, E-4897, E-4898, E-4899.)

On July 25, 1924, the United States attorney for the Southern District of New York, 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 129 tubs of butter remaining in the original unbroken packages at New York, N. Y., alleging that the article had been shipped by Harry H. Redfearn Co. from Chicago, Ill., July 10, 1924, and transported