N. J., F. D. 26176–26300 Issued March 1937

United States Department of Agriculture

FOOD AND DRUG ADMINISTRATION

NOTICES OF JUDGMENT UNDER THE FOOD AND DRUGS ACT

[Given pursuant to section 4 of the Food and Drugs Act]

26176–26300

[Approved by the Acting Secretary of Agriculture, Washington, D. C., January 16, 1937]

26176. Adulteration of canned mackerel. U. S. v. Southern California Fish Corporation. Plea of guilty. Fine, $100. (F. & D. no. 34085. Sample nos. 11461–B, 17577–B.)

This case involved canned mackerel that was in part decomposed.

On August 12, 1935, the United States attorney for the Southern District of California, acting upon a report by the Secretary of Agriculture, filed in the district court an information against the Southern California Fish Corporation, Terminal Island, Los Angeles, Calif., alleging shipment by said company on or about August 29, 1934, from the State of California into the States of Alabama and New Jersey of quantities of canned mackerel which was adulterated in violation of the Food and Drugs Act. The article was labeled in part: "Sunset Brand California Mackerel * * * Packed by Southern California Fish Corporation, Los Angeles Harbor, Calif."

The article was alleged to be adulterated in that it consisted in whole or in part of a decomposed animal substance.

On September 21, 1936, a plea of guilty was entered on behalf of the defendant company and the court imposed a fine of $100.

HARRY L. BROWN, *Acting Secretary of Agriculture.*

26177. Adulteration of butter. U. S. v. Ray Hartman (Potomac Valley Creamery). Plea of guilty. Fine, $10. (F. & D. no. 34088. Sample no. 27506–B.)

This case involved butter that was deficient in milk fat.

On July 24, 1935, the United States attorney for the Northern District of West Virginia, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Ray Hartman, trading as Potomac Valley Creamery, Franklin, W. Va., alleging that on or about December 11, 1934, the defendant shipped from the State of West Virginia, into the State of Maryland, a quantity of butter which was adulterated in violation of the Food and Drugs Act.

The article was alleged to be adulterated in that a product deficient in milk fat because it contained less than 80 percent by weight of milk fat, had been substituted for butter, a product which must contain not less than 80 percent by weight of milk fat, which the article purported to be.

On July 10, 1936, a plea of guilty was entered on behalf of the defendant and the court imposed a fine of $10.

HARRY L. BROWN, *Acting Secretary of Agriculture.*

26178. Adulteration and misbranding of honey. U. S. v. 19⅔ Cases of Honey. Tried to a jury. Verdict for the Government. Decree of condemnation. Product turned over to a charitable institution. (F. & D. no. 35461. Sample no. 24200–B.)

This case involved honey that contained commercial invert sugar.

On May 4, 1935, the United States attorney for the Eastern District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 19⅔ cases of honey at Philadelphia, Pa., alleging that the article had been shipped in interstate commerce on or about March 25, 1935, by the Silver Label Products Co., from

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Brooklyn, N. Y., and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled in part: "Relco Brand Pure Honey Quality Pack."

The article was alleged to be adulterated in that honey containing commercial invert sugar had been substituted for pure honey, which the article purported to be.

The article was alleged to be misbranded in that the statement on the label, "Pure Honey Quality Pack", was false and misleading and tended to deceive and mislead the purchaser when applied to honey containing commercial invert sugar; and in that it was offered for sale under the distinctive name of another article, namely, "pure honey."

On June 5, 1935, the Silver Label Products Co., claimant, filed an answer to the libel denying that the article was adulterated or misbranded. On November 7, 1935, the case came on for trial before a jury. On November 8 the trial was concluded and the court submitted the case to the jury with the following instructions:

KIRKPATRICK, *Judge:* Members of the jury: This suit is what is known as a libel for the forfeiture of certain property under the Food and Drugs Act.

That act says—I am going to omit all the parts that have not anything to do with this case—but that act says any article of food that is adulterated or misbranded shall be liable to be seized for confiscation, and proceeding under that Act the Government seized nineteen and two-thirds cases of this food product which was labeled "Pure Honey."

There is only one question for you to decide in this case, it is very simple, keep everything else out of your minds. That question is: Was this article, which has been seized and is before you now, adulterated or misbranded?

The act defines what is meant by adulterated. It says, in the case of food, if any substance has been mixed with the food product so as to reduce its quality or strength, or if any substance has been substituted wholly or in part with the food product or if any valuable constituent of the article has been wholly or in part abstracted. In other words, you can see what counsel have agreed upon as the fact, namely, that it is not a question of whether the thing has been made harmful or poisonous or deleterious. It is simply a question of whether it is what it purports to be. A man could with perfect freedom sell a product that was composed of a compound of one-fifth honey and four-fifths of sugar syrup, if he so stated it on his label. The act goes on to say that any article shall be deemed to be misbranded if the package containing it shall be false in any particular. The Government says that this article is adulterated, because it contains approximately four-fifths of sugar syrup, or what is known as commercial invert sugar, and that it is misbranded because it is branded "Pure Honey", when as a matter of fact it is not pure honey.

That is all you have to determine. You do not need to bother about how it got there or why it is there, what the effect of this case would be on anybody's business or its effect would be on the Government or the community. Just confine yourselves to one simple question of fact. Ask yourselves, are you satisfied from the evidence you have heard here that the articles which have been seized and produced here in court do not contain an appreciable quantity of commercial invert sugar, because that is the only thing the Government says is there. That is what the Government alleges is there, except a small quantity of tartaric acid, which would have to be used, according to the evidence, in making commercial invert sugar, but that is not a question for you to determine.

The burden is on the Government to satisfy you by the weight of evidence that it is correct. If you are so satisfied, you will find, counsel having agreed as to the form of the verdict, a general verdict in favor of the libellant, which is the same as the plaintiff, but the Government is the libellant here, because it has filed a libel. If you are not so satisfied, then you will find a verdict in favor of the defendant.

Now, we must all recognize that this is a matter which must depend upon scientific testimony, and we have to get experts to tell us how to test the honey and see whether or not it is pure honey. We have not conducted tests here in court, because we do not know how it ought to be done and we do not know how to do it, and if those tests were conducted here in our presence, they would not tell us very much because we haven't the scientific knowledge to interpret them. The Government took samples of the product and they subjected them to certain tests, and we have the testimony of Dr. Lothrop and Dr. Osborn who testified with all the degree of certainty which a witness in

such a situation can have that in their opinion there is present in large quantities in these samples that substance known as commercial invert sugar. The defendant produced a witness who testified that in his opinion, as a result of certain tests that he made on what are admitted to be samples, the same as the Government samples—that in his opinion it does not contain the commercial invert sugar, and the defendants have appeared personally and testified as to the process of manufacture and have denied that they put anything into the composition other than pure honey, which they obtained from various sources. Now, you have got to weigh that testimony and ask yourselves which side has convinced you. In other words, you have to ask yourselves whether the Government has convinced you by the weight of the evidence that that foreign substance is present.

We get a rather peculiar situation here. If the Government chemists—let us put it this way: If there is nothing in that sample other than pure honey, then these two gentlemen from the Department of Agriculture must be either deliberately lying to you or else they must be utterly incompetent and know nothing about their business, because no competent man could come here and testify as they have testified and be mistaken. You would have to come to one of those two conclusions. Now, do you think it is likely? These gentlemen so far as the evidence has disclosed here have no interest in the case. Do you think it is likely that they would either be deliberately falsifying or that they know so little about their business that they would undertake to come here and testify as they have testified without any real knowledge or without any real demonstration along scientific lines? Of course, you have to ask yourselves virtually the same thing about the defendant's witnesses. You must compare the experience of these men, you must compare the technic which they used to make their investigations and you must consider what is the weight of the evidence, and then if the Government has convinced you by the weight of the evidence that the substance in question is present, you will find a verdict in favor of the libellant.

Let us examine for just a moment the question of these tests. We can't very well say, "Oh, well, they are all scientific matters, we don't understand a thing about them and we will have to guess at them", because the Government's witnesses and the defendant's witnesses both have fully explained to you what was done.

The Government used four tests in the case of this substance and they started in—we will say started in, because I don't know which one they started with, but let us take the ash test. They burnt this alleged honey—you will see it there on the chart—and they found, after they burnt it, the residue that was left was very much less than in an average American honey, that having been established by their chemistry, apparently. In other words, there were 25 parts left over in ash as compared with 180 of the same units, of what they would ordinarily expect if it was pure honey, according to the evidence. They say that indicates from its contents a large quantity of something which is not honey, because pure honey is not as combustible as some other things, and if you burn honey up you will get 180 units left in ash which won't burn or will burn—I don't know which way that works out, and then you have so much left. So, if you start out with this test, there would be a large quantity of something which is not honey, and then you ask yourselves, "What's this?" Then they started with the color tests, and they got a red color in both of the tests. It may be that those tests are not conclusive. Their own manual says if honey has been heated to over 160°, it is possible that you will get that red color without the presence of commercial invert sugar. You will remember that the defendant's testimony is that they did heat this honey and heated it to a very high degree; in fact, they referred to it as boiling it, whatever that may mean, and in that way they account for the possibility that the Government may have gotten a red color, because they said they boiled it. You will remember and give full weight to the testimony of Mr. Tuber, who testified to exactly what their process was; how they took two-thirds of the native honey and one-third of the foreign honey and subjected it to 180° F. and kept it there for a time, and then poured it hot into the bottles and then cooled it. You will remember what the Government witnesses say about that. In the first place, they say that if that might be done you might get a red color, but that if you did that, if you did what the defendants say they did, the stuff wouldn't look like honey, it wouldn't taste like honey, it could not be sold and it would not be fit for consumption in all probability. Dr. Osborn, you will remember, actually did try to raise that honey to a very high degree of heat,

and he kept some of it at 158° for 18 hours and he didn't get any red color. Some of it he heated to 212° for 2 hours and he didn't get any red color, and in order to get a red color, he had to heat the honey to 212° and keep it at that heat for 18 hours, and then he said he did get a red color, but it wasn't honey and it would not be fit for sale.

It is a question of fact, and you must decide it between the two. You will remember that in all other questions the burden is upon the Government.

Now, that test was made and they found the presence of some foreign substance that indicated, in their opinion, that it was commercial invert sugar, and then they put it through two more tests, and one of them was by polarization, and that is a very technical matter. The rays of light when they are sent into the product will get a twist in one direction or you will get a twist in another direction. It is something that cannot easily be demonstrated, and they say that these twists of light indicate the presence of commercial invert sugar.

The last test was to find out whether there was anything else in there, and through an elaborate chemical process, they found the presence of a certain. definite quantity of tartaric acid, and they say that fits in with the whole theory, because tartaric acid is used to make commercial invert sugar. Now, I asked one of the witnesses why commercial invert sugar was used instead of ordinary cane sugar, and the answer was because it is a much more satisfactory adulterant to use, because it is harder to detect. These tests, at least it seemed to me, were not extremely simple tests, but they took quite some time and quite some scientific knowledge and skill, but that is no reason why they should be rejected. The only thing is whether you believe those substances were there, whether they have convinced you by the weight of the evidence that commercial invert sugar is present in real large quantities. If you so find, you will find in favor of the libellant. If you do not so find, you will find in favor of the defendant. That is all there is to the case. You can put everything else connected with it out of your minds.

Mr. KEOUGH: May I ask for an exception to that part of your honor's charge where you said that were the jury to find that either of these men were deliberately lying or were incompetent—

THE COURT: The Government's?

Mr. KEOUGH: Yes. It does seem to me that there is a wider latitude than that.

THE COURT: What else could they find?

Mr. KEOUGH: Well, as to how far their conclusions may be based upon convincing scientific evidence—

THE COURT: Members of the jury, you must use your judgment about that. If you can find for the defendant and still find that these Government witnesses are truthful, competent, and skillful, maybe you can do it—I couldn't do it.

(Exception noted for defendant by direction of the court.)

Mr. KEOUGH: Also the test described by Dr. Osborn, as I remember, in his test he did not include any Puerto Rican honey.

THE COURT: That is right. I have not attempted to give you every fact. It is your recollection of these facts that governs the case. If I have stated anything different from what you remember, you will take your own recollection.

The jury returned a verdict for the Government. On July 9, 1935, the court having denied a motion for a new trial, judgment of condemnation was entered and it was ordered that the wrappers and labels be removed from the article and that it be turned over to some charitable institution.

HARRY L. BROWN, *Acting Secretary of Agriculture.*

26179. Adulteration and misbranding of dairy feed. U. S. v. El Reno Mill & Elevator Co., a corporation. Plea of nolo contendere. Fine, $20 and costs. (F. & D. no. 36050. Sample no. 10156-B.)

This case involved dairy feed that showed a marked excess of crude fiber, a deficiency in nitrogen-free extract, and a wide variation in the composition of the product from that declared on the label.

On November 25, 1935, the United States attorney for the Western District of Oklahoma, acting upon a report by the Secretary of Agriculture, filed in the district court an information against the El Reno Mill & Elevator Co., a corporation, trading at El Reno, Okla., alleging that on or about May 14, 1935, the defendant company shipped from the State of Oklahoma into the State of Texas a number of sacks of dairy feed, which was adulterated and