28603. Misbranding of Strawberry Flow and Raspberry Flow. U. S. v. 30 Cases of Strawberry Flow and 50 Cases of Raspberry Flow. Default decrees of condemnation and destruction. (F. & D. Nos. 40676, 40725. Sample Nos. 10538–C, 10548–C.)

These products consisted respectively of diluted sweetened strawberry and raspberry juice. The Strawberry Flow failed to bear on its label a plain and conspicuous statement of the quantity of contents.

On November 4 and 12, 1937, the United States attorney for the Eastern District of Pennsylvania, acting upon reports by the Secretary of Agriculture, filed in the district court libels praying seizure and condemnation of 80 cases of Strawberry Flow and Raspberry Flow at Philadelphia, Pa., alleging that the articles had been shipped in interstate commerce on or about October 1 and 14, 1937, from Los Angeles, Calif., by Pure Foods Corporation, of Los Angeles, Calif., and charging misbranding in violation of the Food and Drugs Act.

The articles were labeled in part: "Golden Flow Brand Pure Strawberry [or "Raspberry"] Flow * * * Pure Foods Corp. Los Angeles, Calif." The label of the Strawberry Flow bore the printed statement "Net Contents 15 Fl. Oz." An apparent attempt had been made to change the figure "15" to "12" with pencil. However, the "15" was still conspicuous and the "12" illegible.

The Strawberry Flow was alleged to be misbranded in that the statements, "Pure Strawberry Flow * * * 'Drink Your Berries' * * * A Pure Juice Beverage Made from Genuine Strawberries—Sweetened," and the design of juice flowing out of a cornucopia into a glass, were false and misleading and tended to deceive and mislead the purchaser as applied to a diluted sweetened strawberry juice; and in 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 since the printed statement "Net Contents 15 fl. oz." was not correct.

The Raspberry Flow was alleged to be misbranded in that the statements "Pure Raspberry Fow * * * Fruit Juice Beverage" and the designs of whole raspberries and of juice flowing out of a cornucopia into a glass, were false and misleading and tended to deceive and mislead the purchaser since they represented that the article was raspberry juice; whereas the article was not raspberry juice, and this was not corrected by the inconspicuous statement on the side panel, "the juice and pulp of genuine raspberries—water—sweetened."

On February 18, 1938, no claimant having appeared, judgments of condemnation were entered and the products were ordered destroyed.

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

28604. Adulteration of crab meat. U. S. v. Carl L. Veach (J. M. Clayton Co.). Tried to the court and a jury. Verdict of guilty. Motion for new trial overruled. Fine, $50 and costs. (F. & D. No. 38651. Sample Nos. 7806–C, 7958–C, 7961–C, 7969–C, 7971–C, 7975–C.)

This product consisted in part of a filthy animal substance.

On April 16, 1937, the United States attorney for the District of Maryland, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Carl L. Veach, a member of a partnership trading as the J. M. Clayton Co., Cambridge, Md., alleging shipment by the defendant on or about August 19, 20, 24, 25, and 26, 1936, from the State of Maryland into the District of Columbia and the States of New York, New Jersey, and Delaware of quantities of crab meat that was adulterated in violation of the Food and Drugs Act.

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

On December 10, 1937, the case came on for trial before the court and a jury and was concluded on December 11, 1937. Following the arguments of counsel the court instructed the jury as follows:

CHESNUT, *District Judge:* Well, gentlemen of the jury, the custom in this Court is that, at the conclusion of the testimony, it becomes the duty then of the Court to instruct the Jury as to the law of the case and to make some summary of the evidence for the purpose of aiding the jury, possibly, in reaching their verdict.

The proper way to reach a verdict in any law case is to apply the law of the case to the facts of the case as found by the jury, and the product of that logical process is the verdict which you reach. And, of course, the law—certain as it is—has to be applied not to any certain facts, but to a situation in which a judge has to contemplate that the jury may find the facts to be either one way or the other. While the law is certain, the facts are to be determined by the jury. Therefore, the ultimate question of your verdict has to be stated more or less hypothetically because if you find the facts one way then your verdict will be so and so; if you find the facts the other way, then your verdict will be so and so. But in each case you are to take the law which the Judge announces to you and apply it to the facts as you find them.

Now, the relative functions of the judge and the jury in this court are that all matters with regard to the law are to be determined by the judge. That is his responsibility. And the jury need not concern themselves about that other than to accept the law and to apply it to the facts as they find them. If the judge makes a mistake in construing or applying the law, there is a remedy through an appeal. Of course, your verdict on the facts has more finality than that and it is not to be set aside on appeal unless the verdict should be based on evidence that is wholly insufficient.

Now, I might also tell you that this is a case of a criminal nature. That is to say, it is a prosecution by the Government against the defendant on what is known as information, on official information by the United States Attorney. The line of distinction between prosecutions of criminal cases by indictment or by information is drawn with respect to the degree or gravity of the offense charged. The Constitution of the United States provides that for serious crimes, what are called infamous crimes, the prosecution can be only when a grand jury has found a bill of indictment, but for less serious offenses than infamous crimes, the procedure on official information filed by the United States Attorney, based on what seems to be reasonable grounds, although certainly not conclusive grounds, is sufficient.

Now, this particular charge is a charge of violating the Food and Drugs Act, and the maximum penalty is two or three hundred dollars fine. I think there is a possibility, in the discretion of the Court in certain instances, of imprisonment, but that has not been customary in any of these ordinary cases under the Food and Drugs Act. Nevertheless, it is a criminal prosecution and in the weighing of the facts in a criminal case there is a difference in the quantitative amount of the evidence that the jury should have from that rule which prevails in a civil case. In ordinary civil cases, suits for damages, or suits with regard to property between two individuals—citizens—the case is decided on the basis of the preponderance of the evidence. That is to say, which is the weightier evidence, that produced by the plaintiff or that produced by the defendant on the controverted issue of fact? But in a criminal case the burden of proof is on the Government, which is prosecuting the case, to establish the charge made by more than a preponderance of evidence. It has to be by evidence which is sufficiently weighty in your judgment to prove the case beyond a reasonable doubt. And it is right hard to define in abstract terms what is a reasonable doubt. Sometimes it has been said that it is a sufficient amount of proof to be an abiding conviction to a moral certainty of the truth of the charge. Nevertheless, it is not possible to prove any case in any court with the mathematical precision that scientists are accustomed to. All human processes are subject to some error. Therefore, you do not have to be satisfied in such a nice way that every possible lingering, whimsical or imaginary doubt is removed. You have to be satisfied in a practical way beyond a reasonable doubt. That is to say, satisfied more than a mere preponderance of the evidence—the evidence must be such as to carry conviction to your minds of the truth of the charge.

Now, when we come to ask ourselves what this charge is, we find that it is an alleged violation by the defendant of the Food and Drugs Act of Congress passed in 1906. Some or all of you may remember back that far and remember that there was a good deal of discussion as to whether Congress should pass such an act. It was an innovation, of course, at the time, but in the thirty years or more succeeding, certainly those who are habitually in the courts—in this Court, especially—have become familiar with the matter and it is now well-established law. The advance of science, of course, from time to time, has brought about the general public feeling that greater care should be taken with regard to drugs and foods, and this Act of 1906 was

passed by Congress in recognition of that advance in public sentiment with regard to the measure of care that should be taken by people who are dealing in drugs and food products; and that, of course, is for the purpose of protecting the public against spurious, adulterated, and misbranded foods and drugs. Indeed, you have, perhaps, noted in the public press in recent years that quite a number of people are advocating still further extension of Government activity with regard to this subject matter of food and drugs, and bills have been pending in Congress to make the law more rigid than it now is. Of course, we are not here concerned with that in any way, and I only mention it in passing to bring the general subject matter to your attention. What we have to deal with, of course, is the present Act of Congress upon the subject.

Now, the Act is not abstruse or ambiguous, and it has been considered by the courts in a great number of cases and its constitutional validity has been upheld.

Of course, you will realize that the Federal Government has no authority, no power, to deal with the subject matter of food and drugs in so far as it relates only to transactions within a particular State. That is to say, the power in such matters is given to the Federal Government only when there are interstate shipments or transactions. So long as this defendant confines his sales to people in the State of Maryland, it is the State of Maryland and not the Federal Government that has the power to regulate his method of doing business and to say to what extent his food products should be absolutely pure. But when he sells articles in interstate commerce, then the Federal Government has power over interstate commerce and the food and drug acts of Congress relate only to sales made between States, interstate sales, and Congress has always had power over that part of it ever since the formation of the Constitution, because that is one of the express powers delegated to Congress by the Constitution, to regulate interstate commerce, and this Food and Drugs Act is a regulation of interstate commerce. Of course, so far as the District of Columbia is concerned, and the territories where Congress has full power, they can regulate the activities there even though there is no shipment beyond the territory, or beyond the District of Columbia; but so far as Maryland is concerned—one of the original thirteen States—the power of Congress does not extend to intrastate transactions, but it does clearly extend to interstate transactions.

Now, the Government charges in this case that in six separate instances, six separate shipments, each made within the interval of time from about August 19, 1936, to August 26, 1936—within the period of that week, it is charged that the defendant made these six interstate shipments which offended the requirements of the Food and Drugs Act.

Now, the fundamental law is in Section 2 of that Act of 1906, and I will read you the words of it:

"The introduction into any State or Territory, or the District of Columbia, from any other State or Territory, or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of Sections 1 to 15, inclusive, of this title, is prohibited and any person who shall ship or deliver for shipment in interstate commerce articles of such a nature as so defined, is guilty of a misdemeanor, and for such offense shall be fined not exceeding $200 for the first offense, and upon conviction for each subsequent offense not exceeding $300, or be imprisoned not exceeding one year, or both, in the discretion of the court."

As I say, we have not had any cases under the Food and Drugs Act in this Court for many years past where the imprisonment feature has been applied, so far as I know or recall. I only say that, gentlemen, in general comment with regard to the Act because naturally as jurors and citizens, you wish to know whether these Acts are being reasonably administered by the Courts. The fact, however, should not be mistaken that a conviction of this defendant would put it in the power of the Court to impose the maximum penalty authorized by the Act, but that is a matter with which you really have no concern at all—that would be a matter for my judgment and discretion. I am only telling you what has been the general practice in such matters.

Now, when we turn to the definition of what is "adulteration," we find it in Section 8 of the Act, and the term "adulterated" has a special meaning as defined by Congress. It is not the mere, ordinary use of the word "adulterated" as we know it in common speech. Congress has expressly defined what they

mean by "adulterated." After giving a number of definitions, such as the substitution of a spurious element for a genuine element, or the dilution of a product, food products, where it loses its value as food to some extent, or where inferior articles are substituted for genuine articles—those are all illustrations of adulteration—we have nothing directly to do with them in this case because this case is predicated on the provision in the law which defines "adulteration" as follows: "Food"—that is the product, the crab meat, in this case—"Food, which consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance," and so on.

Now, the particular charge made by the Government in this case is that the crab meat shipped by the defendant in these six shipments, or any one of them, contained in part a filthy animal substance. The contention of the Government is that the filthy substance consisted of the fecal matter resulting from uncleanly personal habits of toilet on the part of employees of the defendant who were engaged in picking the claws of crabs, getting the crab meat out with their hands and fingers, and that their hands and fingers were not kept clean after toilet operation. Now, that is the charge made by the Government and the Government must establish to your satisfaction beyond a reasonable doubt that these shipments, or some one of them—because if any one of them offends it is offense pro-tanto—that is to say, to the extent of the one. So it is not necessary for the Government to show that all six had filthy substances in them. If the Government establishes that any one of them had a filthy substance, that would be sufficient. But that is not a very critical distinction in this particular case, because the testimony is similar with regard to each of the six transactions and no doubt if you find existence in one, the same methods would satisfy you in this particular case as to all. But that is a matter for you to determine.

Now, the real question in controversy in the case is whether the crab meat that the defendant packed and shipped in interstate commerce did contain a filthy substance. It is on that point you must be satisfied beyond a reasonable doubt by the evidence in the case.

Now, in dealing with that and in reaching your conclusion about it, it seems to me that there are really three separate questions that you ought to consider. In the first place, you have the question of fact as to whether these shipments contained the substance which the Government contends they did contain, which is described as a fecal variety of *B. coli.* That is to say, portions, small portions of the excrement of human beings, or any animal substance. But in this case the point is that the Government says that the toilet operations of the employees who were engaged in picking and packing these crabs were not cleanly and not kept cleanly, and there was not enough supervision to make them cleanly, to keep their hands clean, as the result of which in picking the crab meat it became contaminated with the dirt and filth, as they call it, from their hands, and that was transmitted into some portion of the crab meat and packed in the cans. Now, that is the contention of the Government.

Now, the Government offers you proof of that by a bacteriologist who is employed in the Government service to make analyses of various products from time to time. He is a young man, a graduate, apparently, of the University of Maryland at College Park. You saw him and heard him on the stand. I do not understand that his qualifications to do this analytical work are directly challenged, but the contention of the defendant is that the process of discriminating by chemical analyses between non fecal bacilli of the colon, and fecal is such a difficult process that they dispute the ability of this gentleman to make that distinction. Now, you must consider for yourselves whether you are convinced that he is qualified to do that, that he did succeed in doing that. He says it is the ordinary routine work of his department, that they are doing it all the time. It is just a matter of no difficulty to him: he has a process, a Government process, by which he can make that discrimination and he is doing it regularly all the time.

Then the defendant produced some testimony to indicate that from its point of view it is practically impossible to make that discrimination. Well, it is for you to say, gentlemen, whether you are satisfied on that by the Government's testimony.

Now, suppose you are satisfied that this bacteriologist did succeed, by analysis, in determining the presence, in the way he says, of these bacterial elements in the crab meat? The next question for you to determine is whether they constitute filthy matter.

Now, on that, as a matter of law, I have to charge you that it is not essential or necessary for the Government to show that the matter was, of itself, harmful to health. That is to say, one definition of adulteration is the inclusion in food products of something which is definitely deleterious or harmful to health. That is one element of the definition, but that is not the element that we are dealing with here, because the language is, "if the substance consists in whole or in part," and "in part" would mean even in small part, "of a filthy substance." One of the objects of this Food and Drugs Act—it is called the Pure Food and Drugs Act—and if some substance gets in which is filthy of its nature, why, then, there has been an offense under the Act and it is not necessary for the Government to prove that substance, if it is filthy, is necessarily of itself, or per se, as one of the witnesses referred to, that is, of itself, directly harmful to health. If it is a filthy substance, the object of the law is to keep it out.

It is, however, a matter that you must find affirmatively, that this crab meat did contain a filthy substance in part. Now, if you can conceive of such a perfectly outrageous thing as an intentional placing of human fecal matter, even in a very small quantity, in the can of crab meat to be sold and eaten by a member of the public, I suppose we would all say that that was a filthy substance to put in there, even though it might, in fact, be not directly harmful in that the person from whom it came may not have been suffering from any disease and it may not be actually deleterious to health. But the point of view of the law with regard to filth in this connection is that bacteria of this kind are liable, of course, to spread and multiply and cause disease; and then, furthermore, the object of the law in condemning the inclusion, even in part or in a small part, of filthy substances is that they want to keep the food and drugs pure. Bacteria, as we know, are liable to multiply greatly and something that may have a sufficient number of bacteria to be harmless at the moment may, of course, sooner or later, by the multiplication of bacteria become really poisonous, so that the object is to keep the food products as clean as possible.

I think you could consider the matter, perhaps more readily, just for illustration and analogy, if you thought of the presence of material of this kind in the milk supply. Now, you know—probably many of you as boys knew that not very much attention was given to the subject of pure or impure milk. Certainly the habits of dairy farms with regard to the production of milk were anything but sanitary forty or fifty years ago as compared to the present condition. Here in Baltimore City I think we all know, as a matter of general information, that very extraordinary precautions are taken by our local Health Department to insure the most sanitary production of milk within an area around Baltimore, which is called the Milk Shed. Not so long ago we had a case in this Court which dealt very specifically with that matter and I think it was said at that time that Baltimore City had the purest and best Milk Shed of any of the large cities of the United States, a very creditable thing which was done, or the inspiration for it, came from the wisdom and scientific knowledge of Dr. William H. Welch, who was, of course, for many years, pathologist at the Johns Hopkins Medical School, and took an interest in local affairs dealing with health, and especially with the purity of the milk supply.

Now, we all know, as a matter of common knowledge, that milk when produced from the cow does have some bacteria in it, and the problem is, by sanitary methods, to keep that down to a bare minimum; and, therefore, it is very desirable in preparing any food product to keep out bacteria to the extent that is reasonably possible, consistent with practical operations. You can not, of course, achieve one hundred percent purity in many food products, certainly not in milk, because the very nature of its production is such that it has some bacteria in it. One operation in the effort to keep milk pure, so far as human consumption is concerned, or at least to keep it harmless so far as human consumption is concerned, is to pasteurize it or sterilize it. Some few dairies around Baltimore—I think the Emerson Dairy out at Brooklandwood was one of them—are allowed to sell unpasteurized milk. That means that they are subject to very rigid precautions in the production of their milk so that the bacteria are kept down to a very small figure.

We are not dealing, of course, here with the problem of milk, and the problem with regard to crab meat may differ in degree from that. I only mentioned the milk problem for the purpose of bringing more clearly to your general understanding the nature of the product. That is to say, to keep foods pure you must keep them as free ordinarily of bacteria—certainly

harmful bacteria—as possible, and if the bacteria are permitted to be there, that is to say bacteria of this nature we are talking about, fecal *B. coli*, the question for the jury to determine is whether it is there in such a way and under such circumstances that it can be regarded as a filthy portion of the food product.

Now, suppose you reach the conclusion, as a matter of fact, that this substance was there in the crab meat, the next question of fact for you to determine is, How did it get there? Did it get there in the packing of the crab meat by the defendant's employees, as the Government contends, or did it get there after the crab meat was packed and shipped in the way suggested by the defendant's cross-examination of some of the witnesses? Counsel for the defendant have endeavored to present to you the possibility, or probability, from their standpoint, that the crab meat contained none of this bacteria when it was packed and shipped from the factory of the defendant, but that the Government inspectors in handling it, put the bacteria in there by the contamination from their hands. Now, that is a question of fact for you to consider. The defendant's counsel have a right to argue that matter before you. The testimony, as I recall it, in substance, from the Government witnesses was that while it is humanly conceivable to be possible that if the inspectors' hands did have these bacteria on them, that their handling of the crab meat might in some way have gotten the substance into the cans, but that it is extremely improbable. That is the testimony of the Government. The defendant's testimony is that it is a possible thing. But it is for you to say whether, from the evidence you have heard in this Court, you think that is one of these speculative, conjectural possibilities that is so remote as to its actually having happened, that you can put it aside as negligible. However, that is a question of fact for you to determine. If you find the bacteria was in the cans when examined and analyzed, but that it was not put there by any employee of the defendant, but by the employees of the Government in their handling of it, why, then, of course, you should find a verdict for the defendant. If you find that the stuff was not there at all, and you are not satisfied that it was there as told you by the analyst, then you should find a verdict for the defendant.

Now, there is just one third thing, in the way of matter of fact evidence that I think you ought to consider in this case, and that is the defendant's contention, as I understand it, that even if this bacteria was there, it was there in such small proportions and got there despite every reasonable precaution to the contrary, that it should be regarded as negligible and as of no consequence. Now, counsel for the defendant will develop that theory before you in argument. I shall not dwell on it at any great length. You have to consider the professional and scientific testimony in this case bearing on that and the somewhat conflicting views expressed by the witnesses on different sides of the case. You have the testimony of Dr. Hunter. You saw and heard him. You can size him up as a witness. On the other hand, you have the testimony of Dr. Damon, of the Johns Hopkins University, who is the bacteriologist over there. Now, Dr. Hunter's view, very definitely and clearly set forth, was that reasonable precautions in the handling and packing of crab meat would have kept this substance out of the cans. On the other hand, Dr. Damon's view, as I understood it—of course, it is for you to determine what impression the testimony made on you, but it seemed, as his testimony went along, that he was seeking to give the impression that the matter was negligible. However, when he was asked whether it was negligible from the standpoint of a health officer, the responsible health officer, I think he qualified that view to some extent.

Now, you gentlemen must determine for yourselves from all of the testimony whether you find that the amount of this bacteria, in a substance put out by the defendant, was of negligible proportions, or whether it could have been eliminated by reasonable precautions. That is a matter for you to determine. Even if it got there in very small quantities and you are satisfied that, as the defendant—I understand—contends, any crab picker whose hands are not surgically clean—which means that they have been washed in antiseptics and sterilized and kept clean every five or ten minutes, like a dentist who washes his hands when he fixes your teeth—if you go to a dentist to have your teeth fixed, every now and then the dentist, if he is a careful scientist, will be washing his hands in order to keep them just as surgically clean as possible—now, the defendant contends in this case that the only way to keep this fecal *B. coli* out of packed crab meat would be to have the operatives wash their hands in sterilized preparations every five minutes—now, if you believe that to be

the case from the testimony, you may say, "Well, that is such an extreme standard of care that it is not practicable with regard to ordinary manufacturing conditions," and that the minute amount of deleterious matter that gets into the food product is negligible. In other words, gentlemen, I want you to consider in this case, the testimony of the defendant that he has done everything that is practicable to do in the manufacture of his product and that insistence upon the standards which are apparently insisted on by the Government Bureau in this case would be an unreasonable insistence and beyond ordinary practical manufacturing conditions. In other words, that the amount of contamination, if any, in the food product here was practically negligible. But that is a question for you to consider. The view of the Government, explained by its witnesses, is definitely that the amount here is not negligible, and that it could have been avoided by reasonable standards of manufacturing under sanitary conditions and by a more rigid supervision of the employees when they go and come back from the toilet as to the washing of their hands. The law does not, of course, expect anything unreasonable from a citizen or scientist in the preparation of his food products, but the law does expect him and require him to conform with the standard of the law when to do so is only in accordance with cautions which are reasonable; possibly, even if they did cost money because the public is entitled to be protected against impure food products and no manufacturer has a right to put out a product which is contaminated to an extent that can be avoided by adequate supervision that is reasonably possible.

Now, I hope I have made that plain and submitted to you the contentions of the defendant as well as of the Government in the matter. Bear in mind, also, gentlemen, that the mere filing of the information in this case is not of itself any evidence against the defendant. You have to find the defendant guilty, if you do find him guilty from the testimony that is submitted to you in this case, and it must be sufficient to satisfy you beyond a reasonable doubt of the truth of the charge.

May I say one other thing, gentlemen? In this court it is the practice very often of the judge to ask questions of witnesses for the purpose of getting the true facts of the case as clearly as possible before the jury. Now, my asking questions in this case was not for the purpose in any way of indicating any opinion that I might have. That is solely a matter for you, and my participation in the development of the testimony was for only one purpose—to sharpen the testimony for your consideration where I thought possibly a question would help to bring out the facts more clearly and definitely than the witness had previously stated them. After all, it is your view of the facts, and not mine—even if I had one and desired to express it—that is to control. This is a case in which the question for the jury is whether the defendant's product is in compliance or noncompliance with those standards set up by the Pure Food and Drugs Act, and the enforcement of laws like this are largely in accordance with the standards of reasonability in interpreting and applying the acts which jurors of a particular community believe should be enforced. If you are satisfied that the defendant has not complied with the Act, why, then you should find him guilty. If, on the other hand, even though you find the presence, technically, of this substance in the product, but that it is not humanly and reasonably possible under ordinary standards to have kept it from being there, then you ought not to exact a measure of regulation from the defendant which is beyond reasonable attainment. On the other hand, if it is possible for him to have complied with the conditions—even at a little greater expense, or more rigid supervision of his employees—he is bound to do that to comply with the Act, all in the interest of the consumer of food to the end that it may be pure as required by the Act.

Now, do counsel desire to note any exceptions to the Charge?

Mr. FRAMPTON: If your Honor pleases, we had some prayers which we wished to submit.

The COURT: I will be glad to see them.

Mr. FRAMPTON: You have covered many of the matters in the prayers but, in particular, you said, "If you find that this *B. coli* was filthy," we also suggest that, as the information says, they must also find that it was an animal substance.

The COURT: Yes, you are right on that because the information says that it is an animal substance. The statute says, "animal or vegetable," and I

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.*