30403. Adulteration of frozen haddock. U. S. v. 75 Cases of Frozen Haddock. Consent decree of condemnation and destruction. (F. & D. No. 45095. Sample Nos. 31195–D, 41214–D.)

This product, which had been shipped in interstate commerce and remained unsold and in the original packages at the time of examination, was in whole or in part decomposed.

On March 25, 1939, the United States attorney for the District of Colorado, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 75 cases of frozen haddock at Denver, Colo.; alleging that the article had been shipped on or about February 27, 1939, from Boston, Mass.; and charging adulteration in violation of the Food and Drugs Act. The article was label in part: "Taste o' Sea Tenderloins Skinless Haddock * * * O'Donnell-Usen Fisheries Corp."

It was alleged to be adulterated in that it consisted wholly or in part of a decomposed and putrid animal substance.

On April 8, 1939, O'Donnell-Usen Fisheries Corporation, Boston, Mass., having signed an authorization for taking of final decree, judgment of condemnation was entered and the product was ordered destroyed.

M. L. WILSON, *Acting Secretary of Agriculture.*

30404. Adulteration of frozen lobster tails. U. S. v. 10 Cases of Lobster Tails. Default decree of condemnation and destruction. (F. & D. No. 45058. Sample No. 59857–D.)

This product, which had been imported, at the time of examination was in part decomposed.

On March 20, 1939, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 10 cases of lobster tails at New York, N. Y.; alleging that the article had been shipped from Capetown, South Africa, on or about March 23, 1938, by Hout Bay Canning Co.; and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Selected Frozen Cape Spiny Lobster Tails * * * Produce of Union of South Africa Rising Sun Brand."

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

On April 10, 1939, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

M. L. WILSON, *Acting Secretary of Agriculture.*

30405. Alleged adulteration and misbranding of preserves and jams. U. S. v. Fresh Grown Preserve Corporation. Tried to the court and jury. Verdict of not guilty. (F. & D. No. 37933. Sample Nos. 21684–B to 21687–B, inclusive, 43016–B to 43019–B, inclusive, 43023–B, 49913–B to 49917–B, inclusive.)

On June 2, 1937, the United States attorney for the Eastern District of New York, acting upon a report by the Secretary of Agriculture, filed in the district court an information against the Fresh Grown Preserve Corporation, Brooklyn, N. Y., alleging shipment by said company in violation of the Food and Drugs Act, within the period from on or about September 5 to on or about October 25, 1935, from the State of New York into the States of New Jersey and Connecticut, of quantities of preserves and jams which were adulterated and misbranded. The articles were labeled in part: "Natures Own Brand * * * Fresh Grown Preserve Corp."; or "Milrey Brand * * * Milrey Packing Co."

The information alleged that the articles were adulterated in that mixtures deficient in fruit and which contained excess sugar, added water, and added pectin, some of which also contained added acid and others added phosphate, had been substituted for pure blackberry, peach, raspberry, and strawberry preserves, and strawberry, raspberry, cherry, pineapple, and blackberry jams which they purported to be. One lot of raspberry jam was alleged to be adulterated further in that it was artificially colored so as to simulate the appearance of pure raspberry jam and in a manner whereby its inferiority to raspberry jam was concealed.

Misbranding was alleged in that the statements on the labels, "Pure Blackberry [or "Peach," "Raspberry," or "Strawberry"] Preserve," "Pure Strawberry [or "Raspberry," "Cherry," or "Blackberry"] Jam," and "Pineapple Jam," were false and misleading.

On May 9, 1938, a plea of not guilty having been entered on behalf of the defendant, the case came on for trial before the court and a jury. On May 16, 1938, the Government rested, whereupon the defendant moved for dismissal of the information and for a directed verdict, which motions were argued and denied. On May 17, 1938, the defendant having introduced its evidence and arguments of counsel having been concluded, the court dismissed counts 15 and 16 covering the pineapple jam, and submitted the case to the jury with the following instructions:

CAMPBELL, *District Judge.* "Members of the Jury, it becomes my duty now to instruct you upon the law of this case.

"This corporate defendant has been presented hereupon an information which contained 28 counts. I have withdrawn from your consideration the 15th and the 16th counts. There will be for your consideration but 26 counts, the 15th and 16th being dismissed.

"The information is but a charge, it is a method whereby the defendant is placed on trial. Guilt cannot be found merely because this information was filed; but guilt, if found, must be found as a result of proof offered here on the stand.

"The defendant is presumed to be innocent. That presumption is with it from the beginning of the case right down to the time when you, by your verdict, determine whether that presumption has been rebutted or sustained. And it is the duty of the Government to prove the guilt of the defendant beyond a reasonable doubt. That applies to each count, because each count is a separate charge and it applies to each element necessary to sustain that count.

"Reasonable doubt is exactly what its name implies, not some mere whim or preconceived prejudice, but a fair doubt on the evidence, a doubt for which you can give a reason satisfactory to your conscience. In other words, if, after considering all the evidence and the instructions of the court as to any count, any number of counts, all counts, your minds should be in such condition that you are not convinced to a moral certainty of the guilt of the defendant, then you would have a reasonable doubt.

"These 26 counts that are being presented to you fall into two classes, the odd-numbered counts charging adulteration, the even-numbered counts charging misbranding.

"Of course, in order to determine whether there has been adulteration or whether there has been misbranding, you must first determine what are the constituent elements of the article in question, and that is, as to pure fruit preserves or pure fruit jams, there has been no standard adopted by the Department of Agriculture, and, therefore, you must determine first what are pure fruit preserves and what are pure fruit jams—what they are, not to one person, not to a number of persons, but what those words mean to the trade as a whole and have meant for a long period of time.

"The Government contends, and they have offered in evidence to sustain that contention, if it be believed, that a pure fruit preserve or a pure fruit jam is one which contains 45 pounds of fruit and 55 pounds of sugar. They say anything which contains less fruit than that is not a pure fruit preserve or not a pure fruit jam. You have had many witnesses. Is that the meaning of those words? If it is, then we go on to the next step, but that you must be convinced of beyond a reasonable doubt.

"In all of the 26 counts which I have left for your consideration, that means eliminating the 15th and the 16th, it is alleged that the branding was of pure fruit preserves or pure fruit jam of whatever kind it may have been—strawberry, blackberry, or whatever it may have been. Now, is that so? When that brand was placed upon the article did it mean to hold forth that that was composed of 45 pounds of fruit to 55 pounds of sugar, or a quantity according to those ratios or proportions? If that is so, did they produce that character of article which was shipped under that brand? Of course, in order for this court to have jurisdiction, the articles in question about which complaint was made must have been shipped in interstate commerce, that is, in commerce from one State to another. A shipment merely within the State would not have met this proposition. But we have a stipulation here which has been made that these particular articles were shipped and that the samples were taken from goods in shipment. So that question may well be said to be resolved.

"Now we come to the point: You have here this question always before you, as to the content of fruit and sugar. Bear in mind that the Government was not able before the preserve or the jam was made to determine what went into it, because it had been made and it was in transit when the samples were taken. Therefore the Government, in order to analyze and determine what was the fruit content, had to pursue some plan, some method. There is a dispute as to method. You have heard a great deal of talk about words that are unfamiliar. You have heard the Government's experts say that there is a relationship between the potash found in the ash and the fruit content. They say that the way to analyze is to take a portion soluble in water, determine the potash content, and then from that determine the ash content, and that the fruit in the article will be in the proportion which they have stated to you is the proportion that customarily exists between the ash and the fruit. They say that when you take the portion thereof which is soluble in water, you will give an advantage to the manufacturer because there the proportion will be favorable to him. The defense contends that that is wrong. They say that the way to determine is to take the ash content, the whole ash content of the article, and then find the potash that is in it, and then you will find your proportion and by that be able to say what was the fruit content. So the contest is largely between the two methods. You have heard it discussed. I very much hope you have understood it. I am trying to make it plain to you, if I can, that is, exactly what the difference is.

"You understand that when they take this portion which is soluble in water, they reduce it down and burn it and find the ash. Of course, there is always ash in the part that is insoluble. Of course, 'soluble' generally means something you can take into solution with water. There are other solvents, but we are not concerned with them. The solvent here is water. Of course, all of the fruit is not soluble. There is a portion which remains that is insoluble and the defense says that they are deprived of a right which they should have for the determination of this question, the finding of the ash which is in the insoluble portion; whereas on the other hand, the Government says that by taking the ash which is in the portion soluble in water, they give even a little advantage to the manufacturer in that the proportion would be to his advantage.

"Now, that is the question.

"Of course, if pure fruit jam and pure fruit preserves mean fruit preserves and fruit jams made up of 45 parts of fruit to 55 parts of sugar and you have been convinced of that beyond a reasonable doubt, then, of course, the question would be whether or not the defendant has shipped these particular samples, which contain a smaller proportion of fruit, and, in addition, which contain other articles which were not contemplated within the meaning of the term, which were used for the purpose of, perhaps, giving a better appearance or perhaps giving some greater advantage in way of the supposedly fruit content.

"Of course, in order for the defendant to be guilty here, it is not necessary that the adulterated or misbranded article must contain that which is dangerous to health. That is not so. Because, if it be adulterated or be misbranded because there is contained in it less fruit than there should be, or because there is contained in it something which has no place in it, but it is added for some purpose, whether to give it a better color or to raise the standard apparently of that which was not quite up to standard, that would be misbranding if it was branded as pure fruit preserve or pure fruit jam, even though it would not be dangerous or deleterious to health.

"You understand, of course, preserves and jams of this character, that is, pure fruit preserves or pure fruit jams, are 'food' under the provisions of the Federal Food and Drugs Act.

"It is not necessary, in order to find guilt on the part of the defendant, to show that the defendant has placed in the article that which would be known to be deleterious or dangerous.

"Counts 1, 3, 7, 9, 13, 15, and 25 charge that the alleged blackberry preserve, peach preserve, strawberry preserve, strawberry jam, cherry jam, pineapple jam, raspberry jam, therein respectively referred to, are adulterated within the meaning of the Food and Drugs Act, in that mixtures deficient in fruit, containing excess sugar, added pectin, added acid, added water, and added phosphate have been substituted for pure preserves and jams.

"Of course, if you accept the 45–55 ratio as to fruit and sugar, the placing in these of less than that proportion of fruit would be adulteration, and the branding of it as pure fruit preserve or pure fruit jam, if you accept that as

the description of the article, according to the count, that, of course, would be misbranding if it carried the words 'Pure fruit preserves' or 'Pure fruit jam.'

"When you come to the addition of pectin, the testimony on the part of the Government was to the effect, as I remember it—and it is your recollection and not mine that governs—that a small quantity of pectin might be added. If that is so, then you must be convinced beyond a reasonable doubt that more than a small quantity was added.

"So far as the acid, added water, added phosphate, what is the purpose? Of course, water might be added in order to produce a larger quantity, perhaps. Water, of course, would not be bad in and of itself, but it might be added in a quantity which would change the proportions to some extent. There was some talk about acid. Was there a quantity of acid here more than negligible? Was there a quantity of acid here which was an adulteration? And the same thing with phosphate, was there phosphate added? Of course, we have to realize, and I do not know whether it is in evidence, so nobody can complain if I say it, since there are certain acids in fruit and there are certain phosphates that are found in fruit, they are constituent elements of it, and what this means is not that there be found some acid and not that there be found some phosphate, which are elements of the fruit itself, but it really means an addition of phosphate or an addition of acid which of itself makes some change and therefore may be held to be an adulteration. Of course, if they have adulterated these, then, of course, that is a crime.

"Counts 5, 11, 17, 19, and 27 charge adulteration of the alleged raspberry preserve, blackberry preserve, strawberry jam therein respectively referred to in that a mixture deficient in fruit and containing excess of sugar, added pectin, added water, have been substituted for pure fruit preserves. Well, that is exactly the same as I have called to your attention before. If there is less fruit than 45 parts, and there are 55 parts of sugar, why, of course, then the proportion has not been retained. And if there be more than 55 parts of sugar, then, of course, if you have accepted the 45–55 ratio, then, of course, there would be adulteration, and if it was adulterated, there would be misbranding.

"The same thing with reference to pectin. There must have been proof to show you that there was pectin beyond that which the Government says might be added, and that should be beyond a reasonable doubt, otherwise there was no adulteration by the addition of the pectin.

"And water, if water was added so as to change the constituent elements in any way, why, of course, that would be adulteration.

"Count 21 charges adulteration of the alleged strawberry preserve in that a mixture deficient in fruit, containing excess sugar, added water, added pectin, added acid, has been substituted for pure strawberry preserve. What I have said before applies equally to that.

"Count 25 charges the raspberry jam to be further adulterated in that it was an article inferior to pure raspberry jam, in that it was artificially colored so as to simulate the appearance of pure raspberry jam in a manner whereby its inferiority to pure raspberry jam was concealed. If that be true, and you have accepted a 45–55 ratio, that, of course, would be adulteration if the object and the result were to give to an inferior article the appearance of a better grade of article. If that was not accomplished by it, why, then, of course, it would not be adulteration; and if it was, it would.

"Counts 2, 4, 6, 8, 10, 12, 14, 18, 20, 22, 24, 26, and 28 describe the label and each of the labels involved in said counts, and on each of the labels the article involved is described as a pure fruit preserve or jam. I have called your attention to that because I struck out counts 15 and 16 because they did not carry the word 'pure.'

"Were these false and misleading labels? When they used the word 'pure,' what was meant? Again we come back to the point, do you accept the 45–55 ratio of fruit and sugar? Were the articles that were branded as 'pure,' articles which contained those proportions of sugar and fruit? Or did they contain smaller quantities of fruit in proportion? Or were they adulterated, as I have defined that to you? If they were, and they were shipped under these labels and the labels did not correctly describe the article which was contained therein, then, of course, they were misbranded. It is a question of fact. It is for you to determine exactly what the facts are in each of these cases.

"It is charged in count 26 that the alleged pure raspberry jam was misbranded in that it was a mixture deficient in fruit and which contained excess sugar, added water, added pectin, added acid, added phosphate, artificially colored, prepared in imitation of pure raspberry jam in that said article was

offered for sale under the distinctive name of another article, to wit, pure raspberry jam.

"I have already instructed you as to the meaning of pure raspberry jam, if you accept that definition, as including that which was made consisting of 45 parts of fruit to 55 parts of sugar. And where there was addition, if you find there was such addition, of the articles alleged, or where there was a deficiency, then it is for you to say whether or not the brand that was contained on that article really and fairly described it.

"The Government has not introduced evidence to show that there was any intention on the part of the shipper to violate the law, but that is not necessary. This law is one which is described as mala prohibita. There are two kinds of crimes: there are crimes that are mala per se and crimes that are mala prohibita. A crime that is mala per se is one which is wrong in and of itself. A crime which is mala prohibita is an act which is a crime simply because Congress has chosen to say that it was a crime. Of course, what was done here must have been done by the defendant unlawfully or there could be no conviction. That is unlawful which Congress has seen fit to describe as unlawful and as to which punishment is provided.

"Of course, it is for you to say whether or not, if in a large number of cases, as to any one or two counts there should be a slight variation, whether that is a variation which is incidental and found frequently, because as to counts 9, 10, 13, and 14, the Government itself contended that there was not more than 42 pounds of fruit, and as to counts 27 and 28 they contended there was not more than 41 pounds of fruit. Of course, that is a narrow margin. It must receive consideration for you to determine.

"There is a conflict here in the testimony as to the manner in which this analysis should be made. Therefore, when you come to counts where the margin is small, those counts require special consideration because that must be taken into account, for we are all human beings, and there are certain things that do happen over which it is not so easy to exercise control.

"You have heard all the evidence. It is for you to say whom you are going to believe. It is for you to determine where the truth lies. Which is the right method? Was the defendant acting in good faith? Is the expert for the defendant presenting to you that which merits consideration? Because of apparent failure, is it true that the right way to determine the fruit content is by way of the water-soluble portion, or is the right way to determine the fruit content by the path of determining the entire ash? Which is right? Would there be such a change by the defendant's contended method as to bring them clearly under the 45–55 ratio? Because, on their own contention, you have something to guide you. As I remember, it was the first (I may be wrong, and if I am it is unintentional), but, as I remember it, it was under the first sample that the defendant's expert testified that it would be 33 percent fruit under the Government's method; but he said that if his method was applied, 25 percent would be added, which would have been 58 percent. That is the defendant's method. That is applied to that one sample. Applying it mathematically to the other sample, would the defendant on his own showing then have some of them at least which show less than the 45–55? Or, applying that method, would they all be up to the 45? It is for you to say. But equally applying their own method, if any of these should be under the 45–55 ratio, as to that, quite naturally, it would seem to be that the proof would warrant a finding of guilt, regardless of which method you accepted; but if you accept the Government's method of analysis, then, of course, you have their testimony, and, if you believe it, why, it is for you to say whether they are guilty or not.

"Weigh this case with care. Do not be moved by any prejudice, do not be moved by any bias. That is not fair. We are not here, you know, to put our stamp of disapproval upon this particular preserve or this particular jam, or we are not here to worry because possibly we might get a jam, or have received one, which was 1 or 2 percent too little or 5 or 10 percent too little. That is not the question before us at all. This is just a hard cold question of fact. Did this defendant violate the law by adulterating or misbranding, or both? And did they in all the instances, that is, as to every count, or did they as to some counts and not to others? Because your verdict must be rendered on each count, and I called your attention to some counts by numbers. I hope you have remembered it. But if you do not, you can get information at any time by asking the court. I want you to weigh it with care, I want you to consider it on the basis of the evidence, and on the law as I have given it to you.

"That there be no mistake in your minds about this adulteration, I say: If any substance has been substituted wholly or in part for the article, it would be adulterated; if any valuable constituent of the article has been wholly or in part abstracted, it would be adulterated; if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed, it would be adulterated.

"Take this case, take the exhibits, and give it your consideration.

"There is no witness here before us who may be called an interested witness. The expert called by the defendant is the same as experts called by the Government. Nobody here before us is an interested witness. So that their testimony is not in any sense burdened by that. Most of the witnesses we have had before us have been experts and they are called here to give you the benefit of their knowledge that they have gained in the work they have done in this particular line. Quite naturally, we who are laymen are not informed as to all these things. Some of us may have more or less information as the occasion may have required us to gain it, but they are called here to assist you. They do not take your place at all. You are the sole judges of the facts. You are not bound by any opinion on the facts I might have. If you thought I had one, and you knew what it was, you should disregard it, because you must determine the facts for yourselves.

"You are bound, however, to take my instructions on the law, because that is the law of this case here and at this time, and when you go out, you have no right to say: 'Well, that is not the law. I will make the law for myself.' No, that is not fair, it is not right to anyone, because—remember, and I will make it plain to you—what I say here as the law is taken down by the stenographer and becomes a part of the record and if I make any mistake in my instructions on the law, my error can be corrected; but the law presumes that you will accept my instructions on the law as the law and follow them. Therefore, if you go out and assume to determine the law for yourselves, contrary to my instructions on the law, and thereby you commit an error, nobody on earth could ever correct it because nobody would know it.

"It is a simple proposition. Take it on the evidence and on the law as I have given it to you."

Mr. HALLE. "May I make one suggestion, that as to the publications, that the contents of the publications are as much in evidence as in the testimony?"

THE COURT. "Of course, all the evidence written and spoken is all for your consideration. I said the evidence."

Mr. HALLE. "Your Honor covered quite thoroughly the charge, but I do not get that part about the percentage, the poundage, that if they should find that 45——"

THE COURT. "45 and 55."

Mr. HALLE. "Yes, they must find that beyond a reasonable doubt."

THE COURT. "That is beyond a reasonable doubt, I said. That was the first stage. Until they find that, there is nothing on which to proceed. Having found that, then you proceed to consider. If you do not find that, then, of course, there would be no conviction, there would be no standard.

"Look over the documentary proof so nothing goes to the jury which should not.

"Now, then, the two alternate jurors are excused. We have not required your further labors, fortunately."

(Jury retired at 4:00 p. m.; returned at 4:45 p. m.)

THE COURT. "I am sorry that I cannot give you what you ask, because it was not offered in evidence. The only thing that was offered in evidence was the answer, which you have in the photostat copy, but the letter from the defendant or its representatives to the Government was never offered in evidence. Therefore I cannot give it to you.

JUROR No. 9. "May I ask a question?"

THE COURT. "Yes."

JUROR No. 9. "Couldn't we pay—should we pay any attention to the reading of that letter?"

THE COURT. "What?"

JUROR No. 9. "Should we pay any attention to the reading of that letter?"

THE COURT. "The letter is not in evidence."

JUROR No. 9. "It is not?"

THE COURT. "You cannot pay any attention to what is not in evidence and it has not been presented. You have the letter in evidence which was supposed

to be the reply to it, but the letter itself was not offered in evidence. Whatever the reply shows, that, of course, you can consider. That is in evidence.

"There is an exhibit here which has something that is closed and you are not to consider, of course, anything that it is attempted to conceal. All that was in evidence was this color, the color alone. The other was not in evidence. They have attempted to conceal it, so do not consider anything but that. That is Exhibit No. 16. Consider only that color. The rest of it they have attempted to conceal.

"You understand, the letter you have in evidence purports to be in answer to the letter which you were speaking about. Now, insofar as the letter that you have in evidence refers to the terms of the other letter, why, that far, of course, you can go. You are not to speculate on the contents of the letter beyond what could be reasonably inferred from the letter you have in evidence. That is plain, isn't it?

Mr. HALLE. "And also the enclosure, that is part of that exhibit."

THE COURT. "Yes, whatever—consider all that is a part of the letter, but you cannot consider the letter which is not in evidence except insofar as that letter may be referred to in the answer and you can draw the terms of the first letter from the answer. To that extent you can consider it, of course.

"You may retire."

On May 17, 1938, the jury returned a verdict of not guilty.

M. L. WILSON, *Acting Secretary of Agriculture.*

30406. Adulteration of candy. U. S. v. Three Punchboard Deals of Candy. Default decree of condemnation and destruction. (F. & D. No. 43697. Sample No. 37994–D.)

This product, which had been shipped in interstate commerce and remained unsold and in the original packages at the time of examination, was found to be insect-infested.

On October 20, 1938, the United States attorney for the Southern District of Mississippi, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of three punchboard deals of candy at Hattiesburg, Miss.; alleging that the article had been shipped on or about January 22, 1938, by Jacobs Candy Co. from New Orleans, La.; and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part "Pecan Heart."

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

On April 11, 1939, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

M. L. WILSON, *Acting Secretary of Agriculture.*

30407. Misbranding of cottonseed screenings. U. S. v. Southland Cotton Oil Co. Plea of guilty. Fine, $200. (F. & D. No. 42635. Sample No. 4151–D.)

This product was short weight and contained a smaller percentage of protein than that declared on the label.

On January 7, 1939, the United States attorney for the Northern District of Texas, acting upon a report by the Secretary of Agriculture, filed in the district court an information against the Southland Cotton Oil Co., a corporation, Waxahachie, Tex., alleging shipment by said company in violation of the Food and Drugs Act, on or about August 18, 1938, from the State of Texas into the State of Kansas of a quantity of cottonseed screenings which were misbranded. The article was labeled in part: "Army Brand Prime Quality 43% Protein Cottonseed Cake and Meal Manufactured For And Guaranteed By Louis Tobian & Company Dallas, Texas."

Misbranding was alleged in that the statements, "100 Lbs. (Net)," "43% Protein," and "Crude Protein, not less than 43.00%," borne on the tag attached to the sacks containing the article, were false and misleading and were borne on the said tag so as to deceive and mislead the purchaser since the sacks contained less than 100 pounds net of the article, and it contained less than 43 percent, namely, not more than 41.75 percent of crude protein.

On February 20, 1939, a plea of guilty was entered on behalf of the defendant and the court imposed a fine of $200.

M. L. WILSON, *Acting Secretary of Agriculture.*