at Globe, Ariz., alleging that the article had been shipped in interstate commerce on or about November 12, 1941, by Kern Food Products, Inc., from Los Angeles, Calif.; and charging that it was adulterated in that it consisted in whole or in part of a decomposed substance. It was labeled in part: "California Club Brand."

On June 22, 1942, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

Nos. 3758 to 3768 report the seizure and disposition of tomato products that contained excessive mold, indicating the presence of decomposed material.

3758. Adulteration of tomato catsup. U. S. v. 117 Cases of Tomato Catsup. Default decree of condemnation and destruction. (F. D. C. No. 7335. Sample No. 95037–E.)

On April 14, 1942, the United States attorney for the Eastern District of New York filed a libel against 117 cases of tomato catsup at Brooklyn, N. Y., alleging that the article had been shipped in interstate commerce on or about March 17, 1942, by Foster & Wood Canning Co. from Lodi, Calif.; and charging that it was adulterated in that it consisted in whole or in part of a decomposed substance. The article was labeled in part: (Cans) "Public Seal Brand Tomato Catsup * * * Kent Food Corporation Distributors Brooklyn, N.Y."

On August 14, 1942, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

3759. Adulteration of catsup. U. S. v. 296 Cases of Catsup. Consent decree of condemnation. Product ordered released under bond for segregation and destruction of unfit portion. (F. D. C. No. 7065. Sample No. 95012–E.)

On March 20, 1942, the United States attorney for the District of Rhode Island filed a libel against 296 cases of catsup at Providence, R. I., alleging that the article had been shipped in interstate commerce on or about February 28, 1942, by the Globe Sales Co. from San Francisco, Calif.; and charging that it was adulterated in that it consisted in whole or in part of a decomposed substance. The article was labeled in part: "Valley Bloom Brand Tomato Catsup."

On July 3, 1942, Stockton Food Products, Inc., Stockton, Calif, claimant, having admitted the allegations of the libel, judgment of condemnation was entered and the product was ordered released under bond conditioned that the unfit portion be segregated and destroyed under the supervision of the Food and Drug Administration.

3760. Adulteration of tomato juice. U. S. v. 454 Cases and 251 Cases of Tomato Juice. Default decree of condemnation and destruction. (F. D. C. No. 6533. Sample Nos. 90273–E, 90274–E.)

On December 15, 1941, the United States attorney for the District of Massachusetts filed a libel against 454 cases each containing 24 20-ounce cans, and 251 cases each containing 24 24-ounce cans of tomato juice at Springfield, Mass., alleging that the article had been shipped in interstate commerce on or about September 26 and October 7, 1941, by Gilbert Foods Corporation from Webster, N. Y.; and charging that it was adulterated in that it consisted in whole or in part of a filthy substance. It was labeled in part: "Tomato Juice * * * Sweet Life * * * Distributed by Sweet Life Food Corp."; or "Nessco * * * Tomato Juice * * * New England Stores Service Corporation, Distributors."

On July 20, 1942, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

3761. Adulteration of tomato paste. U. S. v. 1,375 Cases of Tomato Paste. Tried to the court. Judgment for the Government. Decree of condemnation entered and product ordered released under bond for segregation and destruction of decomposed portion. (F. D. C. No. 1816. Sample No. 92046–D.)

On April 16, 1940, the United States attorney for the District of Connecticut filed a libel against 1,375 cases, each containing 100 cans of tomato paste, at New Haven, Conn., alleging that the article had been shipped in interstate commerce on or about February 3, 1940, by Aron Canning Co. from Stockton, Calif.; and charging that it was adulterated in that it consisted in whole or in part of a decomposed substance. The article was labeled in part: "Atrani Brand Tomato Paste * * * Net Weight 6 Oz. Avoir. Packed in California for Perrelli Bros. New Haven, Conn."

On March 25, 1941, Aron Hershel, trading as the Aron Canning Co., having appeared as claimant, and a jury having been waived, the case came on for trial before the court. The trial was concluded on March 27, 1941, whereupon the court made tentative findings of fact and conclusions of law and ordered that both sides submit briefs.

On January 14, 1942, the court handed down the following opinion sustaining the Government:

HINCKS, *Circuit Judge*. "The Federal Food, Drug and Cosmetic Act of 1938 (52 Stat. 1040, 21 U. S. C. A. 342) classified food as 'adulterated,' and hence subject to condemnation if shipped in interstate commerce under 21 U. S. C. A. 334, 'if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food.' The only issue of law raised in this case is whether under this provision of the act the Government is entitled to a decree upon proof of a substantial amount of decomposed matter in the shipment, or whether it must also prove that the product was unfit for food.

"The claimant contends that the clause 'or if it is otherwise unfit for food' modifies the preceding class of substances; that the use of the phrase '*otherwise* unfit for food' necessarily imports that the class of decomposed substances which is subject to condemnation must also, within the legislative intent, be unfit for food.

"With this I cannot agree. The whole subject matter of this subdivision of the statute is covered by two coordinate 'if' clauses, and the second 'if' indicates plainly that the second clause introduced thereby is coordinate and independent rather than a qualification of the antecedent clause. The first clause plainly banned all products composed in whole or in part of any decomposed substance, and the second clause went on to add to the ban substances which were unfit for food for any other reason.

"To be sure, the other subdivisions of section 342 (a) specify as characteristics of the banned products that they shall be 'deleterious,' 'injurious to health,' or 'the product of diseased animals,' etc. These specified characteristics thus became essential prerequisites to be proved in cases brought under these subdivisions of the act. But in the first clause of subdivision (3) of section 342 (a) the sweeping ban of products consisting in whole or in part of any decomposed substance imports a Congressional finding that the presence of any substantial amount of rot in any food product is at least a sign of danger which alone justifies the exclusion of the product from unrestricted circulation in interstate commerce. That being so, proof that the product is actually unfit for food is no part of the Government's case in a prosecution under section 342 (a) (3). And there is no question here that the classification of the act has a reasonable relation to its objective, or that the objective was a proper one. For the claimant does not attack the validity of the statute; it raises only the question of its proper construction.

"If there can be any doubt as to the propriety of my conclusion, the doubt is set at rest by the history of this legislation. The Food and Drugs Act of 1906 (34 Stat. 769, 21 U. S. C. A. Sec. 8) by subdivision 6 of section 8 subjected to condemnation products consisting 'in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.'

"Under this act the courts have consistently decreed the condemnation of decomposed substances without proof of any injurious effect upon health. *U. S.* v. *133 Cases of Tomato Paste*, 22 Fed. Supp. 515; *Knapp* v. *Callaway*, 52 Fed. (2nd) 476; *U. S.* v. *Krumm*, 269 Fed. 848; *A. O. Andersen & Co.* v. *U. S.* 284 Fed. 542; *U. S.* v. *200 Cases of Canned Salmon*, 289 Fed. 157; *U. S.* v. *200 Cases of Catsup*, 211 Fed. 780. These cases are not at all inconsistent with the observation frequently made (e. g., *U. S.* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399) that the primary objective of the statute was to prevent injury to the public health. Rather, they recognize, at least tacitly, the power of Congress to decide for itself what classes of products in interstate commerce might endanger the public health. It is true that in some of these cases the judge in his opinion stated that the particular subject matter of condemnation with which the court was there concerned was unfit for food. But in none of the cases cited, nor in any other case that I have found, has it ever been held that a finding by the court that the subject matter was unfit for food was essential to a decree: a bare finding that the subject matter consisted at least in part of decomposed matter was legally sufficient.

"Such then was the uniform construction of the earlier act of 1906. And the act of 1938 follows the earlier act (on this point) so closely that it is only reasonable to infer that Congress intended to continue the substance of the earlier act as judicially construed. This conclusion is further confirmed by Senate Report No. 361, March 13, 1935, on S. 5, calendar 375, 74th Congress, First Session, introduced by Senator Copeland on January 3, 1935. This report states: 'the provisions of section 301 (2), (3), and (5) (later incorporated into 21 U. S. C. A. 342 (a)) dealing with filthy food and food from diseased animals are essentially the same as those of the present law.' And the report of the Committee on Interstate and Foreign Commerce, 75th Congress, Third Session, on S. 5, states: 'The measure * * * amplified and strengthens the provisions to safeguard the public health.' Thus clearly Congress intended that the clause 'or if it is otherwise unfit for food,' which the act of 1938 added to the earlier act, should enlarge rather than restrict the class of products subject to condemnation.

"Some of the Government witnesses in their testimony took the position that the product here involved, although not deleterious to health, was nonetheless unfit for food. As my findings in paragraph 7 show, I have been unable to find any convincing proofs here to substantiate this distinction.

"But the mere fact that under my construction of the act cases may occasionally occur—of which this is perhaps one—in which a product is condemned though not actually unfit for food, by no means demonstrates that I have erroneously construed the act. It suggests only that Congress considered that the unrestricted circulation in interstate commerce of foods containing decomposed substances was a practice fraught with such dangerous tendencies that that broad class of substances should be prescribed. But section 306 of the act, 21 U. S. C. A. 336, vests a broad discretion in the Secretary of Agriculture to forego the prosecution of 'minor violations.' Thus Congress definitely recognized that cases might occasionally fall within the ban of the act as having a dangerous tendency, even though the tendency, in the judgment of the Secretary, was too slight or remote to justify prosecution. In other words, the *degree* of the violation is important only for its effect upon the administrative discretion; it affects not at all the scope of the legislative ban which the judicial power when once invoked must apply."

On April 18, 1942, judgment of condemnation was entered, and the product was ordered released to the claimant under bond, conditioned that certain codes which previous examination had shown to contain decomposed material be separated from the lot and destroyed, and that the balance be examined further and the bad portion separated and destroyed under the supervision of the Food and Drug Administration.

3762. Adulteration of tomato paste. U. S. v. 700 Cases of Tomato Paste (and 2 other seizure actions against tomato paste). Default decrees of condemnation and destruction. (F. D. C. Nos. 6513, 6515–6517, incl. Sample Nos. 22869–E, 22870–E, 23239–E, 23240–E, 23701–E, 23702–E, 23703–E.)

On December 15, 16, and 29, 1941, the United States attorney for the District of Maryland, the Eastern District of Louisiana, and the Eastern District of New York filed libels against 2,840 cases of tomato paste at New Orleans, La., 325 cases at Baltimore, Md., and 1,000 cases at Brooklyn, N. Y., alleging that the article had been shipped in interstate commerce on or about November 19 and 22, 1941, by Herschel California Fruit Products Co., Inc., from San Jose, Calif.; and charging that it was adulterated in that it consisted in whole or in part of a decomposed substance. The article was labeled in part: "Contadina [or "Pacific Star"] Tomato Paste."

On January 17, 1942, an order was entered in the District of Maryland, permitting the packer, Herschel California Fruit Products Co., Inc., and the Government to take samples; and ordering that 10 cases which had been seized but were not included in the libel, be returned to the owner. On March 30, April 8, and June 23, 1942, no claim having been entered, judgments of condemnation were entered, and the product was ordered destroyed.

3763. Adulteration of tomato paste. U. S. v. 124 Cases of Tomato Paste (and 2 other seizure actions against tomato paste). Consent decree of condemnation. Product ordered released under bond for segregation and destruction of decomposed portion. (F. D. C. Nos. 6971, 7147, 7426, 7427. Sample Nos. 81551–E, 81609–E, 81613–E, 81738–E.)

Between March 3 and May 2, 1942, the United States attorney for the District of Colorado filed libels against 232 cases of tomato paste at Denver, and 77 cases at Colorado Springs, Colo., which had been consigned by Herschel California