ALLEGED SHIPMENT: On or about May 23, 1951, from the State of South Dakota into the State of Illinois.

LABEL, IN PART: "Frozen Egg Whites And Yolks Mixed Armour Cloverbloom."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in part of a decomposed substance by reason of the presence of decomposed eggs.

DISPOSITION: November 18, 1952. A plea of guilty having been entered, the court fined the defendant $25.

**19368. Adulteration of frozen eggs. U. S. v. 140 Cans * * *.** (F. D. C. No. 33388. Sample No. 42305–L.)

LIBEL FILED: June 16, 1952, Northern District of California.

ALLEGED SHIPMENT: On or about May 31, 1952, by the D. M. Edmonds Co., from Salt Lake City, Utah.

PRODUCT: 140 30-pound cans of frozen eggs at San Francisco, Calif.

LABEL, IN PART: "Whole Eggs * * * Brysons Salt Lake City."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance by reason of the presence of decomposed eggs.

DISPOSITION: August 14, 1952. The shipper, claimant, having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be released under bond, for the segregation of the fit from the unfit portion, under the supervision of the Federal Security Agency. 54 cans of the product were salvaged and 86 cans were destroyed.

**19369. Adulteration of frozen eggs. U. S. v. 39 Cans * * *.** (F. D. C. No. 33432. Sample No. 27774–L.)

LIBEL FILED: July 1, 1952, Northern District of California.

ALLEGED SHIPMENT: On or about November 26, 1951, by the Producers Produce Co., from Springfield, Mo.

PRODUCT: 39 30-pound cans of frozen eggs at Stockton, Calif.

LABEL, IN PART: (Can) "Whole Eggs."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a decomposed substance by reason of the presence of decomposed eggs.

DISPOSITION: August 14, 1952. The Poultry Producers of Central California, claimant, having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be released under bond, conditioned that the fit be segregated from the unfit, under the supervision of the Food and Drug Administration. Of the 37 cans seized, 23 were found unfit and were destroyed and the remainder were released.

## FISH AND SHELLFISH

**19370. Adulteration of canned herring roe. U. S. v. 24 Cases, etc. Claimant's motion denied for dismissal of libel against 24-case lot. Decree of condemnation and destruction.** (F. D. C. No. 26385. Sample Nos. 5539–K, 39301–K.)

LIBEL FILED: January 6, 1949, District of Maine.

ALLEGED SHIPMENT: Between May 11 and October 25, 1948, from Whiteville, Laurinburg, Rocky Mount, and Raleigh, N. C., and Lebanon, Pa. These were return shipments.

PRODUCT: 24 cases and 181 cases, each case containing 24 15-ounce cans, of herring roe at Eastport, Maine.

LABEL, IN PART: (Can) "Custom House Herring Roe."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article in the 181-case lot consisted in whole or in part of a decomposed substance, and the article in the 181-case lot and the 24-case lot was unfit for food by reason of its tough, rubbery consistency.

DISPOSITION: The Riviera Packing Co., Eastport, Maine, claimant, filed a motion for dismissal of the libel insofar as it related to the 24-case lot, and on November 16, 1949, the court, after consideration of the briefs and arguments of counsel, handed down the following opinion in denial of such motion:

CLIFFORD, *District Judge:* "This is a motion by claimant to dismiss a libel in rem in so far as the libel relates to that part of the libelled goods, consisting of twenty-four cases of canned herring roe. The libel was brought by the United States of America under the Federal Food, Drug and Cosmetic Act, (1938) 52 Stat. C. 675, 21 U. S. C. secs. 301 and following, for the seizure and condemnation, under section 334 of said Act, of two lots of canned herring roe. These lots contained 181 and 24 cases, respectively, each case containing 24 cans of this product. The libel alleged that both lots were shipped in interstate commerce; that the contents of the 181-case lot were unfit for food, within the meaning of the Act, in that they consisted wholly or in part of a decomposed substance; and that the contents of both lots were unfit for food, within the meaning of the Act, in that they were of a 'tough, rubbery consistency.'

"A default decree was entered by this Court in this case, on February 9, 1949, condemning both lots of herring roe, and ordering their destruction. By order of this Court filed February 19, 1949, made pursuant to agreement of the parties, the default decree was vacated and the case reinstated to the docket. Thereafter, the claimant, Riviera Packing Company, filed this motion to dismiss the complaint, so far as it relates to the lot consisting of 24 cases.

"The only allegation contained in the complaint against the 24-case lot rests on the claim that the product therein contained was of a 'tough, rubbery, consistency.' By its motion to dismiss the complaint so far as it relates to the 24-case lot, claimant raises the question whether a food product, not otherwise unfit for food, may ever be condemned as unfit for food merely because it is 'of a tough and rubbery consistency.'

"The motion to dismiss this portion of the libel should not be granted unless it appears to a certainty that the Government could not prevail under any state of facts which could be proved in support of the libel.

"Section 334 of the Act, 1938, 52 Stat. C 675, sec. 334, 21 U. S. C. sec. 334, provides for the seizure and condemnation of 'any article of food . . . that is adulterated . . . when introduced into or while in interstate commerce.'

"Section 402 (a) (3) of the Act, 1938, 52 Stat. C. 675, sec. 402 (a) (3), 21 U. S. C. sec. 342 (a) (3), provides as follows:

> A food shall be deemed to be adulterated—(a) . . . (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, *or if it is otherwise unfit for food,* . . . [emphasis supplied.]

"The answer to the question raised by the motion at bar is not to be found in any of the cases cited by counsel for the Government or for the claimant.

"The claimant's brief, supporting this motion, argues that the man on the street would never interpret or understand the word 'adulterated' to include the sense 'of a tough and rubbery consistency.' The claimant argues that the statutory words 'otherwise unfit for food' are intended merely to enlarge the

ban of the statute from 'filthy, putrid, and decomposed' matter, and to reach only other substances not within that classification but in some other way injurious to health. Finally, claimant urges that toughness is a term peculiarly subject to personal taste and therefore not a proper subject for regulation under the Food, Drug and Cosmetic Act. These points will be considered in order.

"In its interpretation of the word 'adulterated' this Court must be guided by the definition given in the statute. See *United States* v. *Coca Cola Company*, 241 U. S. 265 (1916), construing the 1906 Food and Drugs Act, and the construction placed upon it by the Court. This definition and its construction clearly extend beyond the dictionary meaning of the word, which is 'corruption by the addition of a foreign substance.'

"The statutory phrase 'otherwise unfit for food' is general on its face. The Government's brief lays great stress on the policy of Congress, as expressed in the Food, Drug and Cosmetic Act, to protect the consuming public in the purchase of food products. Counsel for the Government cite several cases where the Act has been applied, in carrying out this policy, to condemn food products which contained no filthy, putrid or decomposed substances, nor any other harmful material, but which were characterized by an abnormal odor, taste, or color. F. D. C. 12002, 12012, 12090, 12122, 12284, 12299, 12543, and 12591.

"The case of *United States* v. *184 Barrels Dried Whole Eggs*, 53 F. Supp. 652 (Dist. Ct. E. D. Wis., 1943), from which claimant quotes extensively, rules that the words 'filthy, putrid, or decomposed substances'—which had stood alone in an earlier version of the statute and had been construed to apply whether or not the decomposed substance made the product injurious to health—lost none of their force by the addition of the words 'or otherwise unfit for food.' *Accord*, *United States* v. *1851 Cartons, etc.*, 146 F. (2d) 760 (C. C. A. 10, 1945). It is the opinion of this Court that the words 'otherwise unfit for food,' following as they do the word 'or,' must be construed as having strengthened and enlarged the intended scope of the coverage of the Act.

"Toughness was the issue in a recent case in the United States District Court for the District of Oregon, *United States* v. *238 cases* decided May 9, 1949 but not reported. In that case the court considered whether canned center cuts of asparagus were too tough and woody to be fit for food. The case was heard on the merits: the Court himself sampled the product and dismissed the case, ruling that the product was fit for food. Fairly to be understood, but not expressed in his ruling was the assumption that the product could have been so tough as to warrant condemnation as unfit for food.

"It is the opinion of this Court that a food product may conceivably be 'unfit for food' by reason of an excessively tough or rubbery consistency; and that a product which is unfit for food for this reason, as for any other, properly falls within the construction of the statute and the policy of the Congress, that such products should be condemned for the protection of the consumer. The issue, whether the product is so tough as to be unfit for food, is solely a factual one, and must be determined by the Court in a trial on the merits.

"The question of the standard to be applied in determining the degree of toughness which constitutes an article unfit for food may be somewhat troublesome. As claimant has argued, the question is, in large measure, one of personal taste. Some products are, by their very nature, much tougher to eat than others. The fussy, fastidious, finicky individual might, with disdain, refuse to accept and throw out the product of the claimant, because, to his taste it was too tough and rubbery to eat; yet the case hardened individual who brags he can eat anything, might, with relish, eat and enjoy the product of the claimant. We cannot accept as the standard or test that which might be applied by either one of these two types of individuals.

"In the opinion of this Court, in order for a product to be subject to condemnation as unfit for food, on account of its tough and rubbery consistency, the product must be proved to be so tough and rubbery that it cannot be masticated and swallowed by the average, normal person.

"It is therefore Ordered, Adjudged and Decreed that the motion of claimant to dismiss that part of the libel relating to the 24-case lot of canned herring roe be, and is hereby, dismissed."

On December 1, 1949, the court amended the above opinion as follows:

CLIFFORD, *District Judge:* "The Opinion and Order of the Court filed in the above-entitled matter on November 16, 1949, is hereby amended by deleting so much of the first paragraph on Page six of said Opinion and Order as reads, 'that it cannot be masticated and swallowed by the average, normal person,' and by inserting in lieu thereof, the following: 'that the average, normal person, under ordinary conditions, would not chew and swallow it.'"

On November 24, 1952, the claimant having failed to pursue the matter further, judgment of condemnation was entered and the court ordered that the product be destroyed.

**19371. Adulteration of frozen blowfish tails. U. S. v. 52 Cartons * * *.** (F. D. C. No. 33290. Sample No. 23238–L.)

LIBEL FILED: June 13, 1952, Southern District of New York.

ALLEGED SHIPMENT: On or about May 19, 1952, by N. B. Riggin, from Crisfield, Md.

PRODUCT: 52 5-pound cartons of frozen blowfish tails at New York, N. Y.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance by reason of the presence of decomposed fish tails.

DISPOSITION: August 29, 1952. Default decree of condemnation and destruction.

**19372. Adulteration of frozen cod fillets. U. S. v. 1,937 Cases * * *.** (F. D. C. No. 33293. Sample No. 49199–L.)

LIBEL FILED: June 13, 1952, Southern District of New York.

ALLEGED SHIPMENT: On or about March 15, 1952, by the Wylax Canning Co., from Woudrichem, Holland.

PRODUCT: 1,937 25-pound cases of frozen cod fillets at New York, N. Y.

LABEL, IN PART: "Wylax Brand Single Frozen Cod-Fillets."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance by reason of the presence of decomposed fish.

DISPOSITION: September 18, 1952. Stamm-Schulman & Co., New York, N. Y., claimant, having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be released under bond, for the segregation of the fit from the unfit portion, under the supervision of the Federal Security Agency.

1,969 cases of the product actually were seized. Salvaging operations involving 430 cases resulted in the segregation of 5,340 pounds of the product as fit for human consumption and in the destruction of 2,759 pounds. No further salvaging operations were attempted on the remaining 1,539 cases, and this portion of the product was destroyed.

**19373. Adulteration of canned kipper snacks. U. S. v. 74 Cases * * *.** (F. D. C. No. 33409. Sample No. 29666–L.)

LIBEL FILED: June 23, 1952, District of Montana.

ALLEGED SHIPMENT: On or about April 10, 1952, from Galewood, Ill.

PRODUCT: 74 cases, each containing 50 3¼-ounce cans, of kipper snacks at Great Falls, Mont.