5527. Adulteration of tomato pulp. U. S. * * * v. 5,060 Cans * * * of Tomato Pulp. Tried to the court and a jury. Verdict for the Government. Decree of condemnation, forfeiture, and destruction. (F. & D. No. 6811. I. S. Nos. 16511–k, 15484–k. S. No. C–294.)

On August 10, 1915, the United States attorney for the Northern District of Illinois, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 5,060 cans, each containing 1 gallon of tomato pulp, remaining unsold in the original unbroken packages at Sycamore, Ill., alleging that the article had been shipped on December 4, 1914, by the Ladoga Canning Co., Brownsburg, Ind., and transported from the State of Indiana into the State of Illinois, and charging adulteration in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libel for the reason that it consisted in part of a decomposed vegetable substance; for the further reason that it consisted in part of a filthy vegetable substance; and for the further reason that it consisted in part of a putrid vegetable substance.

On December 7, 1915, the Sycamore Preserve Works, Sycamore, Ill., claimant, filed its answer denying the allegations of the libel. On January 16, 1917, the case came on for trial before the court and a jury, and at the outset of the trial the charge that the article consisted in part of a putrid vegetable substance was withdrawn by leave of the court. The trial thereupon proceeded, and after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Landis, *D. J.*):

Gentlemen of the jury, in this case there is one fact for you to find, and that fact is whether or not the product involved in this inquiry was composed, in whole or in part, of decomposed or filthy vegetable substance. That is the issue which is tendered to you in this case. The matter comes into the Federal court because the substance was transported in interstate commerce, and solely because it was transported in interstate commerce. If it never had left the confines of the State of Indiana, it would be a matter for State determination, but being an interstate transaction, it falls within the jurisdiction of the act of Congress known as the Pure Food Law, and therefore the obligation and the authority of the Federal Government attaches to it. And the authority to seize having been exercised by its officers charged by law with the enforcement of its provisions, has set in motion the machinery that has cast upon you now the obligation of determining the fact whether or not the articles, as stated before, in whole or in part, are decomposed or filthy vegetable substance.

This is a civil action, and being a civil action, the rule is that the case of the Umted States is to be established by the preponderance of the evidence, or the greater weight of the evidence, as distinguished from what the rule would be in a criminal case where the doctrine of presumption of innocence, and the doctrine of reasonable doubt control.

Now, by preponderance of evidence is meant not which side has the great number of witnesses, but it is that side of this controversy on which is the believable statement of facts, as distinguished from the other side. One hundred witnesses testifying to a thing that is obviously untrue, or to a thing that is obviously an error, does not give to that side the preponderance of evidence against one witness testifying in favor of a thing that is obviously true. So, it is not to be determined solely by the number of witnesses.

Now, in determining here where is the preponderance, whether the preponderance is in favor of the accusation against the product, namely, that it is composed in whole or in part of filthy or decomposed vegetable substance, bring to bear upon this controversy that common sense and judgment that would characterize your consideration of a controversy away from court, at home, or in your business, dealing with a matter of concern to you personally.

The seizure in this case was made at Sycamore, Ill. The product seized is called tomato pulp. It was found in upward of 5,000 sealed cans. The charge of the Government, as I stated before, is that the pulp contains decomposed or filthy vegetable matter. The fact, therefore, for the witnesses is whether or not at the time the product entered interstate commerce—that is to say, when it was

put aboard cars at Brownsberg—it was in part filthy or decomposed in its contents.

Now, to determine the question, to elucidate to you the question respecting that matter, the United States presented a number of witnesses who testified as to examinations made by them of the product after its arrival at Sycamore—microscopists, biologists, and other expert witnesses—and they testified to you what they found, and they gave you, on the basis of that testimony, including in that testimony other evidence given by other witnesses of conditions, their judgment as to whether this commodity contained in part decomposed or filthy matter. There was evidence as to tests made by one or more of the Government's witnesses, in the tomato pulp manufacturing industry at canneries covering a substantial period of years, one witness dealing with tests made in the United States and in Italy, in connection with the preparation and manufacture of this article.

Now, the defendant, the manufacturer, or superintendent, secretary and treasurer of the manufacturing concern testified as to conditions at the plant, the treatment of tomatoes up to the time they went into the boiling vat, including inspection, cleansing and so forth. For the defendant, the witness Wesner testified. He gave you no evidence of tests such as you have in mind when you think of expert tests, that is to say, he did not use a microscope. He made no technical bacteriological test; he made no chemical test; there was no such evidence introduced by the defendant, that is to say, no expert evidence, the evidence being evidence based upon the test made by the witness who subjected the articles to an examination by the three senses, taste, smell, and sight.

There was introduced by the United States in rebuttal, after the close of the defendant's case, four bottles of an article testified to be pulp, and the witness testified that he manufactured it, and gave you the condition under which it was done. Those four bottles were submitted to the witness Wesner while he was on the stand, and he subjected them to the same test that he had previously testified he had subjected most of the articles in question here to, and which tests he made in your presence, and you recall his evidence as to the content of those four bottles, or jars. Now, I make no comment upon it, as to what that means in view of the evidence as to the content of the four bottles, what went into it, how it was made, what it was made of, but, I call it to your attention as being worth your while to recall and determine it, the weight of the evidence of the witness Wesner as to the sufficiency of the eye test and smell test of an article of this kind in an effort to determine its content with a view to answering the question, does it contain decomposed or filthy matter in whole or in part. Now, so much for that.

There were many witnesses called by the prosecution. In determining the weight you will give to their evidence, you have in mind many other things—I will include all the witnesses in this for the prosecution and the defense, experts and everybody else—having in mind first, the kind of witness he is, the kind of man, how the witness appears to you here, whether the witness seems to be engaged in an effort to deceive or mislead you to a false judgment in this case; and in determining that fact, ask yourselves the question about the various witnesses, what interest has this witness in deceiving and misleading the jury; what is to be gained by deceiving you. Then have in mind the intelligence of the witness as disclosed by his demeanor in the court room and on the stand, whether he knows what he is talking about, apparently. You are not obliged to accept the statement of a man that is inherently improper, that is repulsive to your intelligence, merely because he swears to it. Ultimately it is for you to put it in the scales and weigh it and to appraise it, what it is worth. What I have said in that respect applies to witnesses on both sides. If you find that any witness has started out here, or, being a witness, has entered upon the enterprise of telling you something that is not true, of getting into your mind a judgment about this controversy that is false or erroneous, you excuse that gentleman from this case entirely, respecting everything that he said, except insofar as any of the testimony he has given is corroborated by other witnesses, whose testimony you believe, or by facts and circumstances proved on this trial. In other words, in determining what the fact is here, decomposed or not, filthy or not, approach the controversy as I said a while ago, just as you would a controversy of concern to you at home or in your business.

Now, it is not a question solely whether this stuff—I do not use that word "stuff" in any significant way—this article, is fit or unfit for food. I will tell you why I say that. The evidence is this article is sterile; that means the contents has its injury producing qualities killed by heat; so that even though this article was 5 per cent bad, that is, 5 per cent bad tomatoes, and 95 per cent good tomatoes, or 10 per cent bad tomatoes and 90 per cent good tomatoes at the time the tomatoes went into the boiling vat down there in Brownsberg, the evidence in this case is, if you eat this tomato pulp, the 5 or 10 per cent rotten tomatoes have undergone such treatment that their power to injure you has been killed by the heat. I will say no more upon that. You gentlemen all understand that principle.

So I say, the question is not whether it is fit for food. The question is, whether or not, in manufacturing, the 10 per cent bad tomatoes did go in, or the 5 per cent bad tomatoes did go in. That is the question. And if you find it did, your verdict will have to be against the tomato pulp, even though you believe—even though you know that you could eat the whole cargo of the product without suffering any evil consequences.

I do not know whether I ought to say anything about the high cost of living which my brother Batchelder talked about. I hesitate to speak upon the subject that a lawyer brings in in his argument, with the broad latitude given a lawyer. I expect probably nobody ever enjoyed that latitude any wider, or further than I did when I was practicing law, but it is your business, and mine not to be enticed away from our duty, when we have submitted to us a question to decide, by getting into closing argument, that suggests to us considerations that may have a tendency away from court to induce us to take a liberal or broad view of subjects. There may be men on the jury that raise tomatoes; certainly there are men on the jury that eat tomatoes. Don't consider this controversy from the standpoint of either the man that raises tomatoes, or the man that eats them. Denude yourself of that, and decide this question as though you never would or had raised tomatoes, or never would or had eaten tomatoes. You can do that thing. The high cost of living has got nothing to do with this thing. At all events, counsel did not mean to solve the problem of the high cost of living, by having us eat bad tomatoes. He did not mean that.

Of course, if there is an order of destruction here, somebody has got to lose. That has not anything to do with your judgment. In a criminal case, if there is a verdict of guilty, somebody is punished, but in determining the question of fact whether or not the man is guilty, in determining the question of fact whether in this commodity there is filthy or decomposed vegetable substance, it won't afford you the slightest aid in finding the fact in this case to have in mind that if you reach a certain verdict somebody will lose. What happens to this tomato pulp in the event of a verdict of guilty—a verdict of condemnation, a verdict that it is composed in whole or in part of decomposed or filthy matter, is of no concern to you. It is to me. Wisely or unwisely, the law has cast upon the judge the authority and responsibility in the event of a verdict against the pulp by you, of disposing of the matter. And in deciding the question which the law has submitted to you, of course you will not be influenced even to the slightest extent by any thought or speculation as to what I may do with it, in the event you reach a verdict a certain way.

Any exceptions, Mr. Batchelder? Any suggestions, Mr. Prosecutor?

Mr. DICKINSON. I have none, your honor.

The COURT. I neglected to give the technical legal names of the litigants. In this case, in this kind of a proceeding, the paper that is filed by the United States, which contains the formal accusation against the pulp is called a libel; in a criminal case an indictment; in a civil action for damages, a declaration; in this case it is called a libel. The Government in this case is called the libelant, the person that brings the action, the libelant. The claimant in this case, represented by Mr. Batchelder, and his associate, is called the claimant. That is the person that represents the article against which the libelant proceeds for condemnation.

So, if you find against the tomato pulp, that is, that it is composed in whole or in part of decomposed or filthy vegetable substance, the form of your verdict will be, "We, the jury, find the issues for the libelant." If you find for the tomato pulp, that is, that it is not composed in whole or in part of filthy or decomposed vegetable substance, the form of your verdict will be, "We, the jury, find the issues for the claimant." That means for the pulp.

You may retire, gentlemen.

The jury thereupon retired and after due deliberation returned a verdict favorable to the Government on January 20, 1917, and on January 22, 1917, the claimant company filed its motion for a new trial, which said motion, on February 9, 1917, was overruled, and a formal decree of condemnation and forfeiture was entered, and it was ordered by the court that the product should be destroyed by the United States marshal and that said claimant company should pay the costs of the proceeding.

CARL VROOMAN, *Acting Secretary of Agriculture.*