

represented that the article contained not less than 55 per cent of protein, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it contained not less than 55 per cent of protein, whereas, in truth and in fact, it did contain less than 55 per cent of protein, the said lots containing approximately 52 per cent and 48.08 per cent of protein, respectively.

On June 9, 1924, the defendant having failed to enter an appearance, the \$50 collateral which had been deposited by him to insure his appearance was declared forfeited by the court.

HOWARD M. GORE, *Acting Secretary of Agriculture.*

**12381. (Supplement to Notice of Judgment 11442.) Adulteration of canned salmon. U. S. v. 1,974 Cases of Canned Salmon. Tried to the court and a jury. Verdict for the Government. Decree of condemnation and forfeiture. Product released under bond to be sorted. (F. & D. No. 14262. I. S. No. 10533-t. S. No. W-847.)**

On March 13, 1924, the case involving the shipment of 1,974 cases of Hypatia brand pink salmon from the Territory of Alaska into the State of Washington, which had been remanded by the Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the Western District of Washington, came on for retrial before the court and a jury. After the submission of evidence and arguments of counsel the court delivered the following instructions to the jury (Cushman, *D. J.*):

"The arguments in the case having been concluded, gentlemen of the jury, it is the Court's duty to instruct you regarding the law.

"The plaintiff has filed a libel in this case, seeking to have condemned this parcel of salmon. In that libel it is alleged that this parcel of salmon was shipped in interstate commerce and that it was an adulterated food. It is alleged in the libel that it consisted in whole or in part of filthy, decomposed animal substance. The claimant has denied that it was adulterated or that it consisted in whole or in part of filthy, decomposed, or putrid animal substance. These are the issues that you are to try. There is no dispute here, as I understand, regarding its having been transported in interstate commerce. You understand this case is here because of that allegation. If this had been a shipment wholly within the State of Washington, this court would not have been concerned with it, because no Federal law would have been involved.

"This law provides for the condemnation of adulterated foods, and adulteration is defined, in substance, that an article of food is adulterated when it consists, in whole or in part, of filthy, decomposed, or putrid animal substance making it unfit for food.

"There has been in this case much said, in argument and in the testimony, regarding decomposition. There has been evidence in this case that decomposition begins when life ends. Fish is not decomposed, within the meaning of this law, at that early stage. To be decomposed within the meaning of this law means more than the beginning of decomposition; it contemplates a state of decomposition making the article unfit for human food. It does not have to be so decomposed that it has disintegrated and passed to its original elements, because the statute says a decomposed animal substance. Well, when it is entirely decomposed and has passed into its original elements, it has ceased to be an animal substance. All works of man and all that lives eventually becomes so decomposed that it is broken up and separated and the atoms which once composed it mingle again with the earth or the air or the sea. It is not in this sense that the word 'decomposed' is used in this statute.

"The evidence in this case has taken a wide range. Counsel in their arguments have not been at all restricted. You understand that you are to pass upon the questions of fact in this case, including this question of the extent of decomposition and whether these samples and this lot of salmon, this parcel of salmon, is unfit for human food. Those are questions of fact for your sole determination, and if the Court in the course of its instructions or in the course of the trial has said anything touching the weight of evidence on these questions of fact, or stated any question of fact that is submitted to you for your determination, you should disregard any such statements of the Court, unless they agree with the conclusions reached by yourselves. On the other hand, so far as counsel in their arguments have stated what the law was, if they have stated the law to be different in any respect from what the Court instructs you, you will disregard their statements concerning the law and follow the instructions which the Court gives you regarding the law. As

examples of this, counsel for the plaintiff in his argument stated to you that this pure food law provided that butter should not be shipped in interstate commerce, that contained a greater percentage of water than that prescribed in the law, that that renders it adulterated. That is true, but it is a dangerous argument in this case. The pure food law has two main objects, that is, the fitness for food and to protect the public from fraud. Now, regarding the water in butter, that does not make butter unfit for food, but by injecting water into the butter a fraud may be worked on the buyer by selling him water and not butter. So far as this section of the law that is involved in this case is concerned, what the law is aiming at is to protect the public from unfit food. The counsel on the other side, in his argument, advised you that he thought the Court would instruct you that if there had been no negligence on the part of the packers of this salmon, that you should not condemn the salmon, if care had been used. Well, that is a dangerous argument in this case. You are not trying the men who packed this salmon, you are not trying the officers of the Bureau who are witnesses in this case or had something to do with instituting these proceedings; you are trying this article of food to determine whether it is so filthy, decomposed or putrid as to make it unfit for human food, and the evidence on that issue has taken, as I have told you, a wide range. The Court has permitted evidence to go in here regarding whether or not anyone had ever been made sick from eating tainted salmon and as to the condition of this salmon and this cannery where it was packed and the traps and their proximity to one another—evidence concerning those conditions was admitted; evidence was admitted regarding whether any complaints had come from consumers of this salmon; evidence was admitted regarding the situation in which persons who may have instituted this complaint were, as bearing on the question of whether the original complaint was begun because of unfitness of the food, or the salmon, or for some other reason. Now, all that evidence and other evidence that was admitted in the case was admitted to enable you to determine whether it was in fact fit for human food. You can understand that if taint in salmon—decomposition—rendered it deadly and that it was impossible to detect it except by reason of the fact that a person who ate it died, that you might reasonably conclude, on a smaller percentage, that that article was unfit for food than if the testimony showed that it was wholly innocuous and did not injure and was easily and readily detected when it was decomposed, when the state of decomposition existed.

“On the question of whether this salmon was fit for food, you are to understand this provision of the law that it is adulterated when it is filthy, decomposed, or putrid, making it unfit for food; that unfit for food means there just what you would ordinarily understand that expression to mean. When language is used in the statute—and this is a statute of the United States, a statute of Congress—when ordinary language is used in the statute, having no technical meaning, why, then it is to be interpreted by what men ordinarily understand by the expression. Now, ‘unfit for food’ does not mean that no one could be found so fastidious as to complain of it. On the other hand, it does not mean that it has to be so filthy or putrid that no one could be found who under any circumstances would eat it. It means what you would ordinarily understand by the expression ‘unfit for food.’

“In this case there is evidence regarding the testing of this product, of this parcel of canned salmon. The Court instructs you that before you can find this parcel of salmon guilty, that there must be a fair preponderance of the evidence showing these disputed allegations in the libel, which I have outlined to you. Where the entire parcel of food—in this case salmon—is not tested, it is nevertheless necessary, before the verdict can be guilty, that a fair preponderance of the evidence show that the adulteration extends to the whole product. If the evidence on this point—the preponderance of the evidence—is with the claimant, or if it is evenly balanced so that it does not turn one way or the other, your verdict would be not guilty.

“There may be such a small percentage of adulteration in such a small number of samples as to fail to show adulteration of the entire product. On the other hand, there may be such a large percentage of adulteration shown as to show that the entire product was adulterated.

“I have pointed out to you that the main question for you to decide in the case was this question of adulteration, and I have told you that the evidence regarding the care taken in conditioning and canning this salmon was admitted not that you were to acquit the salmon if care had been taken, but that the

taking of care was one of the circumstances from which you would determine whether it was probably fit for human food. If it is adulterated within the meaning of this law, it does not make any difference how it happened, whether care was taken or care was not taken, whether it was caused by sabotage among employees, or in any other way. If it is adulterated, it should be condemned, and your verdict should be guilty if the evidence so shows.

"I have told you that the verdict should be guilty unless these allegations of the libel that I have pointed out have been shown to be true by a fair preponderance of the evidence. A preponderance of the evidence means the greater weight of evidence; that evidence preponderates which is of such a character and makes such an appeal to your intelligence and reason and your experience, as to create and induce a belief in your minds, and where there is a dispute in the evidence, that evidence preponderates which is so strong in these particulars as to create and induce a belief in your minds in spite of the opposing evidence and in spite of assaults made upon it by way of argument.

"You are in this case, as in every case where questions of fact are tried to a jury, the sole and exclusive judges of every fact in the case and of the weight of the evidence and the credibility of the witnesses. In weighing the evidence and measuring the credit of the witnesses who appeared before you and testified, the law does not undertake to say everything that you should take into account in measuring the credit of these witnesses, but it has been settled that certain things you should consider. You should give consideration to the appearance and conduct and demeanor of each witness who has come upon the stand and testified; whether the appearance and conduct and manner of that witness in giving his testimony was such as to inspire you with confidence and lead you to believe that the witness was trying to tell the exact truth, neither adding to it nor taking from it, or whether some witnesses may have been reluctant or evasive, contradictory, or hesitating in their testimony; whether others may have been too willing, possibly evidencing an inclination to get something into the case that had not been inquired about. You will also take into account the reasonableness of the testimony of each witness, by itself, in view of the circumstances, whether it appears reasonable and probable or whether it appears unlikely and unreasonable; whether the testimony of a witness agrees with his conduct; whether he has acted at the time of the transaction and since consistently with the testimony he has given; also take into account whether the testimony of a witness has been corroborated where you would expect it to be corroborated if it were true, or whether it has been contradicted by other creditable testimony.

"Where in the progress of the trial it develops that there are other witnesses or other testimony that could be produced to support the position taken by one side or the other, and the presence of that witness is not obtained or he is not brought here, and no explanation given for his absence, you have a right to conclude that that witness, if summoned, would not support the contention of the party that you would expect to bring that witness. You will also take into account, in measuring the credit of the witness, the situation in which he was placed as enabling you to know exactly what the facts were and exactly what took place, as one witness, by reason of his favorable situation and connection with the matters to which he testified, might have a great advantage in telling you exactly what the facts were, over another witness who was not so happily situated; also take into account the interest that any witness may have been shown to have in the case, an interest either shown by the manner by which the witness gave his testimony or as shown by his relation to the case."

Mr. McCord. "There is one other exception that I would like to call Your Honor's attention to, and that is based upon Judge Pollock's decision.

"I except to Your Honor's instruction that the claimant was not entitled to have a verdict for the release of these goods upon the showing that the cannery where they were packed was operated with the usual care and skill and judgment that the ordinarily prudent canneryman would exercise in the operation of his canning plant. In other words, as the law cannot be literally construed, must be given a reasonable interpretation, it is our contention that the reasonableness means that if the goods that are sought to be libeled are packed by an ordinarily prudent packer, who has reasonably complied with this law and has been guilty of no negligence, his goods ought not to be condemned, even though there may be a percentage of adulteration contained in them. I

base this exception very largely upon Judge Pollock's opinion in St. Louis, who took that view, as I understand it."

THE COURT. "No, it is the Court's view that the product should be reasonably fit for food. The jury is so instructed. If it is not reasonably fit for food, then it is unfit for food, and it is not a question of whether reasonable and ordinary care or extraordinary care, for that matter, was taken in putting it up. If it is decomposed within the meaning of this law as I have instructed the jury, in spite of extraordinary care, then the parcel should be condemned."

MR. McCORD. "You will allow me an exception, Your Honor?"

THE COURT. "Exception allowed."

MR. SHACKELFORD. "If Your Honor please, I am not sure that the jury understands, when you refer to what is to be condemned, that they understand that it is what is still in existence, instead of the samples that were taken."

THE COURT. "The jury will so understand. If there is nothing further, is a sealed verdict agreed to?"

MR. McCORD. "Yes sir, as far as we are concerned."

MR. HILL. "It is entirely satisfactory to the Government."

THE COURT. "This form of verdict, gentlemen of the jury, is just the one form: 'We, the jury in the above entitled cause, find the respondent 1,974 cases of canned salmon labeled in part Hypatia Brand pink salmon — guilty as charged in the libel of information filed herein.' If, under the evidence and the instructions as to the law that have been given you, you find the respondent salmon to be guilty, you will write in that blank the word 'is.' If you find the salmon not guilty, you will write in that blank the word 'not,' and have your foreman sign it after you have completed it, and seal it up and report with your verdict here in court tomorrow morning at ten o'clock."

The jury then retired and after due deliberation returned a verdict for the Government.

On July 7, 1924, a decree of condemnation and forfeiture was entered, and it was ordered by the court that the product be released to the claimant, A. O. Anderson & Co., Seattle, Wash., upon payment of the costs of the proceedings and the execution of a bond in the sum of \$2,000, in conformity with section 10 of the act, conditioned in part that the good portion be separated from the bad portion and the latter destroyed.

HOWARD M. GORE, *Acting Secretary of Agriculture.*

**12382. Adulteration of canned salmon. U. S. v. 3,706 Cases of Canned Salmon. Consent decree of condemnation and forfeiture. Product released under bond.** (F. & D. No. 17890. I. S. No. 12069-v. S. No. W-1433.)

On October 31, 1923, the United States attorney for the Western District of Washington, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 3,706 cases of canned salmon remaining in the original unbroken packages at Seattle, Wash., alleging that the article had been shipped by the Hetta Packing Co., from Coppermount, Alaska, September 28, 1923, and transported from the Territory of Alaska into the State of Washington, 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 wholly or in part of a filthy, decomposed, and putrid animal substance.

On April 7, 1924, the Hetta Packing Co., Coppermount, Alaska, claimant, having admitted the allegations of the libel and consented to the entry of a decree, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be released to the said claimant upon payment of the costs of the proceedings and the execution of a bond in the sum of \$7,500, in conformity with section 10 of the act, conditioned in part that the good portion be separated from the bad portion, under the supervision of this department, the bad portion destroyed, and the good portion released.

HOWARD M. GORE, *Acting Secretary of Agriculture.*

**12383. Adulteration and misbranding of colors. U. S. v. Louis Feldman and Irving Safferman (L. Feldman & Co.). Pleas of guilty. Fines, \$400.** (F. & D. No. 18346. I. S. Nos. 1568-v, 2682-v, 2683-v, 2768-v.)

On May 5, 1924, 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 of the United States for said district an information against Louis Feld-