14090. Adulteration of canned cherries. U. S. v. 384 Cases of Canned Cherries. Tried to the court. Judgment for the Government. Decree of condemnation, forfeiture, and destruction entered. (F. & D. No. 20017. I. S. Nos. 8866-v, 8867-v. S. No. C-5014.)

On April 18, 1925, the United States attorney for the Northern District of Ohio, 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 384 cases of canned cherries, at Akron, Ohio, alleging that the article had been shipped by the Fredonia Preserving Co., from Fredonia, N. Y., on or about August 11, 1924, and transported from the State of New York into the State of Ohio, and charging adulteration in violation of the food and drugs act. The article was labeled in part: (Can) "Roselle Brand Cherries."

It was alleged in the libel that the article was adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance.

On November 12, 1925, the Fredonia Preserving Co., Fredonia, N. Y., having appeared as claimant for the property, the case came on for trial before the court without a jury. After the submission of evidence and arguments by counsel the court pronounced judgment for the Government as will more fully and at large appear from the following opinion (Westenhaver, *D. J.*):

"This libel is filed under act of Congress, June 30, 1906, known as the food and drugs act, against 384 cases, more or less, of cherries. The Fredonia Preserving Co., of New York, has intervened as claimant and makes defense. It is admitted that these cases of cherries were shipped by the claimant in interstate commerce to the Summit Wholesale Grocery Co., at Akron, Ohio. Condemnation is sought on the ground that these cases of cherries consist in whole or in part of filthy, decomposed, or putrid vegetable or animal substance, contrary to and in violation of section 7, paragraph 6 under "Food" of said food and drugs act. Neither party demanding a jury, the case was tried to the court.

"The Government was permitted to withdraw 30 cans at random from the several cases and have tests and examinations made of the contents by chemists. The claimant was permitted to withdraw in like manner a dozen cans and have examinations and tests made thereof by an expert chemist. The claimant's counsel conceded on the hearing that the cans were fairly drawn and were typical of the entire shipment.

"The Government's witnesses testified that each can contained decomposed and spotted cherries and also worms or larvae. Each can contained between 875 and 980 cherries. In one group of six cans, the average number of larvae or worms in the can was 39.3. The highest number in any one can was 119 worms, and the lowest, 18. In the same lot of six cans the average number of decomposed or spotted cherries was 43. The highest in any one can was 107, and the lowest, 8. The Government witness testified that in another lot of 12 cans the average number of worms to the can was 75. The highest in any one can was 353, and the lowest, 10. In the same group the average number of decomposed and spotted cherries to each can was 22.8. The highest number in any one can was 47, and the lowest, 3. The Government witness testified that in still another group of 12 cans the average number of worms to each can was 25.6. The highest number in any one can was 71, and the lowest, 2. In the same group, he testified, the average number of decomposed and spotted cherries to each can was 32.4. The highest number to any one can was 78, and the lowest, 10. In the group of six cans examined by respondent's expert he divides the so-called worms into two families, the offspring of the cherry fly and the offspring of the curculio; but for our purposes the totals only of both need be stated. He testified that the average number of worms or larvae found in each was 28. The highest number in any one can was 53, and the lowest, 11. He testified that the average number of cherries in each can showing fungus growth was 53. The highest in any one can, he testified, was 77, and the lowest, 21. He excludes from this classification all cherries showing merely a brown spot or its equivalent on one or both sides, because mere spots, while perhaps evidence of the beginning of decomposition or rot, do not indicate such an advanced state of decomposition as would be the equivalent of rot or decay or disintegration of the substance of the cherry.

"Thus it appears that there is little or no difference between the results as given by witnesses for libellant and for claimant. It was conceded that the cans were fairly drawn and were typical. It was found that every can contained worms, averaging in one group of six, 43 to the can; in another group of twelve, 75 to the can; in another group of twelve, 25.6 to the can; and in the group examined by respondent's witnesses, 28 to the can. In one can

the number ran as high as 353 and was only rarely below 12. Hence the presence of cherry fly or curculio larvae in substantial numbers in each can can not be denied. The larvae thus found were preserved in glass vials and produced and exhibited in evidence. The sight of them makes a very disagreeable, not to say repulsive, impression on the trier of facts. Equal certainty is not possible in weighing the evidence as to decomposition or decay. The cherries were seeded before being canned. The mutilation and disintegration incident to manufacturing and subsequent handling make it difficult for a nonexpert witness to distinguish between sound and decomposed or decayed cherries. Even so, the results as testified to by the Government witnesses are substantially the same as given by claimant's expert. The decomposed cherries, as well as some samples of sound cherries, are preserved. The impression made on me is that the Government witnesses were not resolving doubts against claimant.

"Upon the basis of the above facts I am of the opinion that these cases of cherries must be condemned as adulterated. Evidence that adulteration is injurious to health is not required. Whether an adulterated product should be condemned is not dependent on the degree of care the manufacturer exercised in producing it. It is still subject to condemnation if shipped in interstate commerce, even *though the manufacturer* was unable to procure cherries free from worms or free from decomposition. Claimant urges that some margin of tolerance should be allowed because it is impossible to produce a food product 100 per cent pure. The food and drugs act has not established a precise standard whereby adulteration can be determined. Because of this fact the courts have uniformly permitted each case to be judged upon its own special facts. It would be unwise, even if practicable, to establish a standard of count whereby a can of cherries should be condemned if that standard were exceeded. It is sufficient in the present case to say that the adulteration, particularly in the number of worms, exceeds any reasonable allowance for accidents or results unavoidable by the exercise of due care.

"The authorities need not be reviewed. I am informed by counsel that Hon. John C. Knox, United States District Judge, in a recent case involving a shipment of cherries made by the same claimant and presenting facts substantially the same, announced the law as herein set forth, and, when the jury returned a verdict in claimant's favor, set it aside as against the clear weight of the evidence. The principles of law and the application thereof to a situation somewhat analogous will be found set forth in the following cases to which reference is made:

"United States v. 200 Cases Catsup (D. C.), 211 Fed. 780. United States v. 462 Boxes Oranges (D. C.), 249 Fed. 505. Union Dairy Co. v. United States (7. C. C. A.), 250 Fed. 231. Anderson & Co. v. United States (9 C. C. A.), 284 Fed. 542.

"Judgment of condemnation will be entered, with costs against claimant. An exception may be noted."

On December 18, 1925, a decree of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

R. W. DUNLAP, *Acting Secretary of Agriculture.*

14091. Misbranding of candy. U. S. v. Sophie Mae Candy Corporation. Plea of guilty. Fine, $50. (F. & D. No. 19593. I. S. Nos. 18126–v, 18135–v, 18137–v.

On March 17, 1925, the United States attorney for the Northern District of Georgia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Sophie Mae Candy Corp., Atlanta, Ga., alleging shipment by said company, in violation of the food and drugs act as amended, in various consignments, namely, on or about December 4, 1923, and February 5, 1924, respectively, from the State of Georgia into the State of Mississippi, and on or about December 14, 1923, from the State of Georgia into the State of Louisiana, of quantities of candy which was misbranded. A portion of the article was labeled in part: "Sophie Mae Atlanta * * * Fancy Stick Candy * * * Full Pound 39¢ Sophie Mae Stick Candy." The remainder of the said article was labeled in part: "Sophie Mae Atlanta Candies of Quality Chocolate Chocolate Caramel."

Misbranding was alleged in the information with respect to the stick candy for the reason that the statement "Full Pound," borne on the packages containing the said stick candy, was false and misleading, in that the said statement represented that the packages contained 1 full pound of candy, and for the further reason that it was labeled as aforesaid so as to deceive and mislead