

in the District Court of the United States for said district a libel praying seizure and condemnation of 250 cases of canned string beans, remaining in the original packages at Breckenridge, Tex., alleging that the article had been shipped from the Pitkin Canning Co., West Fork, Ark., on or about September 11, 1925, and transported from the State of Arkansas into the State of Texas, and charging adulteration in violation of the food and drugs act. The article was labeled in part: (Can) "Appleby's Zat-Zit Brand Cut String Beans Packed By Appleby Bros. Fayetteville, Ark."

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

On May 14, 1926, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

W. M. JARDINE, *Secretary of Agriculture.*

**14338. Adulteration of canned string beans. U. S. v. 99 Cases of Canned String Beans, et al. Default decrees of condemnation, forfeiture, and destruction.** (F. & D. Nos. 20617, 20619. I. S. Nos. 9535-x, 9538-x. S. Nos. C-4863, C-4867.)

On or about December 2 and 3, 1925, respectively, the United States attorney for the Northern District of Texas, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district libels praying the seizure and condemnation of 209 cases of canned string beans, remaining in the original packages in part at Big Springs, Tex., and in part at Abilene, Tex., alleging that the article had been shipped by Appleby Bros., Fayetteville, Ark., in two consignments, on or about September 7 and 9, 1925, respectively, and transported from the State of Arkansas into the State of Texas, and charging adulteration in violation of the food and drugs act. The article was labeled in part: (Can) "Zat-Zit Brand Cut String Beans \* \* \* Appleby's Zat-Zit Brand Packed By Appleby Bros. Fayetteville, Ark."

Adulteration of the article was alleged in the libels for the reason that it consisted in whole or in part of a filthy, decomposed, or putrid vegetable substance.

On May 14, 1926, no claimant having appeared for the property, judgments of condemnation and forfeiture were entered, and it was ordered by the court that the product be destroyed by the United States marshal.

W. M. JARDINE, *Secretary of Agriculture.*

**14339. Adulteration and alleged misbranding of canned cherries. U. S. v. 800 Cases of Red Sour Pitted Cherries, et al. Tried to the court. Finding for Government on adulteration charge and for claimant on misbranding charge. Decrees of condemnation and forfeiture entered. Product released under bond.** (F. & D. Nos. 20345, 20430. I. S. Nos. 6045-x, 6055-x. S. Nos. E-5366, E-5465.)

On August 12 and September 14, 1925, respectively, the United States attorney for the Eastern District of Pennsylvania, acting upon reports by the Secretary of Agriculture, filed in the District Court of the United States for said district libels praying seizure and condemnation of 897 cases of canned cherries, remaining in the original unbroken packages at Philadelphia, Pa., alleging that the article had been shipped from Fredonia, N. Y., in two consignments, on or about July 29 and 31, 1925, respectively, and transported from the State of New York into the State of Pennsylvania, and charging adulteration and misbranding in violation of the food and drugs act. The article was labeled in part: (Can) "Sky Lark Brand Red Sour Pitted Cherries \* \* \* Packed By Fredonia Salsina Canning Co., Inc."

Adulteration of the article was alleged in the libels for the reason that it consisted in whole or in part of a filthy, decomposed and putrid vegetable substance. Adulteration was alleged for the further reason that cherry pits had been mixed and packed with the article and had been substituted wholly or in part for pitted cherries.

Misbranding was alleged for the reason that the statement "Red Sour Pitted Cherries," borne on the label, was false and misleading and deceived and misled the purchaser when applied to a product containing an excessive amount of pits.

On February 8, 1926, the Fredonia Salsina Canning Co., Fredonia, N. Y., having filed a claim and answer denying the material allegations of the libels, the cases came on for trial before the court on bill and answer and proofs. On

February 16, 1926, the court handed down the following opinion, finding in favor of the Government on the adulteration charge and for the claimant on the misbranding charge (Dickinson, *D. J.*):

"We frankly confess our utter inability to find any wholly satisfactory ground on which to base a ruling in this cause or any standard by which to judge it.

"The libels are based upon the food and drugs act, which provides that any food which enters into interstate commerce may be confiscated if it is adulterated or misbranded. This double charge is made in this case. The act defines 'adulteration' in respect to food, and 'any animal or vegetable substance' for use as a food which is 'filthy, decomposed, or putrid' is adulterated within the meaning of the act. These cherries are not animals, although they are charged to be the abode of animalculae in the form of worms. We are relieved of the task of deciding whether a cherry is a vegetable substance because no point is made of this as it is agreed that it has been ruled that fruits are vegetables within the meaning of this law.

"The only fact left to be found is whether they are 'filthy, decomposed, or putrid' within the meaning of this act. We could not honestly find that they are either filthy or putrid as we use these words in common speech. They are certainly not decomposed or they would not be in existence as cherries. We assume the fair meaning of this word to be whether they are so far what is called 'afflicted with rot' as to be unfit for food. A fair general finding would be, under the weight of the evidence, that some of them are. They are put up in can containers of the No. 10 size, each holding in round numbers 1,000 cherries. How would it be practically possible with the utmost practicable care to get 1,000 cherries together without the presence of some bad ones? The problem then becomes how many bad ones would give such character to the whole as to condemn the lot? This is not a mathematical question and yet numbers and percentages enter into it. Before numbers can be found or percentages figured it must be determined what a bad cherry is. We had a concrete illustration of the difficulty of even this easy part of the general problem. There is a defect in the appearance of a cherry known as a limb bruise. Some crops, for obvious reasons, would show more of such cherries than others. No commercial man would call such a cherry bad. All would agree, however, that it would depend upon the depth of the bruise, and that rot would more speedily attack such cherries than it would others. When such a cherry was submitted to the witnesses, as any one would have known beforehand, all those who are commonly called technical experts pronounced it a bad cherry and all the commercial experts called it a limb bruised cherry. Numbers and percentages follow the classification adopted.

"What we have said about bad cherries applies to wormy cherries, with this difference. You can tell by ocular inspection whether a cherry is rotten. You can not be sure of the absence of a worm without opening the cherry. In consequence, all that is practicable to do is to select what might be called a fair sample of the lot and assume that what the sample showed the whole lot would show. Here again numbers and percentages enter into the general finding. How many worms would condemn the lot or how many wormless cherries would save it? The only historical guide we know of is that applied by the angel to the cities of Sodom and Gomorrah. We would hesitate to accept this standard because we suspect that the angel knew what the count would disclose before he agreed to abide by it or he would not have been so liberal. If this general question were being submitted to the unerring—because inscrutable—wisdom of a jury, the task of the trial judge would be easy. The task of the jury would likewise be relatively easy because they would not be called upon to give any reasons for their decision. It would be easy to decide this cause and perhaps decide it right, at least to the satisfaction of one of the parties. It is well-nigh impossible to give reasons for the ruling without probable error and giving dissatisfaction to both parties and to everybody else who was interested enough to care. The motive back of the general purpose of this act is to assure the supply of wholesome food to the people. This law and all like laws command the sympathy and support of everyone in their motives. The real situation might as well be faced. Such laws, aside from the beneficent results intended to be reached, touch two important classes. One is the commercial class and the other those who wield what are called the political forces of a self-governing people. The commercial class of necessity have but one test for everything, and that is salability or the money test. With those who deal in food products the sale test is, Will the product sell at a remunerative price? Wholesomeness enters into it only secondarily although

importantly. If the dealer can earn a reputation for his product as being what they advertise it to be, 'absolutely pure,' the product will sell readily and for a good price. Two results follow. One is they will spend money and go to any trouble to have their product good and wholesome to the point of a return in remunerative sales and prices but at this line they will stop, not because they want to stop there but because commercially they must. The other result is that, generally speaking, they will all welcome and abide by a law of this kind, and those of them whose products are wholesome wish, for obvious reasons, to have the law rigorously enforced. One reason is that they by this law add to their own advertising claim of purity the 'guarantee,' as it is termed, of the United States Government that the food has been inspected and found to be pure. Just here caution should enter into the establishment of any standard. As was pointed out by the exceptionally intelligent inspectors who testified in this case, there must in the practical workings of this law be allowed a zone of tolerance. This must of necessity be more liberal than the general commercial standard. The moment, however, it becomes known to the dealers it is inevitable that some of them will 'edge up' to the more liberal standard, and the moment some do all must or be under-sold. The political consequences seem to receive little attention from anyone but they are very grave. We are speaking of it, of course, in a wholly impersonal sense. Subject anyone, as nearly every trade and all business is now subjected, to the control of officials appointed by an executive and what becomes of our boasted self-government? The only haven of refuge is to give to business people the assurance that they are subject to the personal control of no one but to the rule of law alone. We have spoken in no spirit of criticism of either the commercial class or of the politicians. They both run true to form, and great numbers of each are as much better than their customers and constituents permit them to be as they find they dare be. All these considerations bear upon the duty of the courts in construing these laws, but it makes that duty an especially delicate one. The courts must protect the dealer from any unjust, undue or arbitrary exercise of power or our Government ceases to be one of law. The officials must be supported in the performance of their lawful duty or these laws become a mockery.

"We put on record our finding that the officials charged with the execution of this law have exhibited a spirit of fairness and of consideration of the interests of everyone affected, and have acted throughout with a good sense in the discharge of their difficult duties which is highly commendable.

"To bring this long discussion to a close, with one further comment before announcing the conclusions reached. The comment is that this case as a case has already cost more in its investigation than the product concerned is worth, and we have no wish to prolong it or to add to the expense, but we do wish to accord to both parties all their rights, and among these the right to decide for themselves how far to push the litigation.

"As our conclusions are both of findings which we can not make and of those which we do make, we will state the former first. We are unable to find that these cherries are "filthy or putrid" in the ordinary meaning and acceptance of those words in common speech, and refuse to so find. We further refuse to find that the cherries were misbranded.

"The conclusions reached are as follows:

"1. As the act of Congress gives to the claimant the right to a jury trial, we accord to the claimants here that right, and if exercised within 15 days from the filing of this opinion the entry of any judgment hereon is to be withheld.

"2. We find the condition and state of these cherries to have justified their stoppage and seizure, and that they were and are adulterated within the meaning of this act of Congress.

"3. A formal order or judgment sustaining the libels may be submitted if no jury trial is asked for within the time above limited.

"4. We retain jurisdiction of the cause for the purpose of making formal and, so far as concerns this court, final disposition of it."

On May 7, 1926, no jury trial having been demanded by the claimant, the court, in accordance with the above opinion, entered decrees, ordering condemnation and forfeiture of the product, and it was further 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 bonds in the aggregate sum of \$4,000, the terms of said bonds requiring that the product be reconditioned under the supervision of this department.

W. M. JARDINE, *Secretary of Agriculture.*