

# FEDERAL SECURITY AGENCY

## FOOD AND DRUG ADMINISTRATION

### NOTICES OF JUDGMENT UNDER THE FOOD AND DRUGS ACT

[Given pursuant to section 4 of the Food and Drugs Act]

31076-31105

[Approved by the Federal Security Administrator, Washington, D. C., November 20, 1940]

**31076. Alleged adulteration and misbranding of olive oil. U. S. v. Thirteen 1-Gallon Cans, et al., of Olive Oil. Tried to the court. Judgment for claimant. Decree dismissing libel and ordering product delivered to claimant.** (F. & D. No. 37404. Sample Nos. 70407-B, 70408-B, 70409-B.)  
**U. S. v. 47 Gallon Cans of Olive Oil, et al. Decree dismissing libel and ordering product delivered to claimant.** (F. & D. No. 37432. Sample No. 61227-B.)

These actions were instituted on charges based on the alleged presence of tea-seed oil in a product labeled "Pure Olive Oil."

On March 20 and 27, 1936, the United States attorneys for the Eastern District of Pennsylvania and the District of New Jersey, acting upon reports by the Secretary of Agriculture, filed libels against 13 gallon cans, 104 pint cans, and 296 half-pint cans of olive oil at Philadelphia, Pa.; and 47 gallon cans, 119 half-gallon cans, and 119 quarter-gallon cans of olive oil at Paterson, N. J., alleging that the article had been shipped in interstate commerce by the Agash Refining Corporation from Brooklyn, N. Y., the lot at Philadelphia, Pa., on or about September 24, 1934, and the lot at Paterson, N. J., on or about March 5, 1936; and charging that it was adulterated and misbranded.

It was alleged in the libels that the article was adulterated in that tea-seed oil had been mixed and packed with it so as to reduce or lower its quality or strength and had been substituted in whole or in part for olive oil, which it purported to be.

It was also alleged in the libels that the article was misbranded in that the following statements and designs on the can labels were false and misleading and tended to deceive and mislead the purchaser when applied to a product containing tea-seed oil: "Italian Product Pure [or "Virgin"] Olive Oil \* \* \* Italy \* \* \* Prodotti Italiana Olio D'Oliiva Puro [or "Vergine"] Marca Agash Italia [design of olive tree] The Olive Oil contained in this can is pressed from fresh picked high grown fruit in Italy. It is \* \* \* guaranteed to be absolutely pure. L'olio d'oliva contenuto in questa latta e stato spremuto da olive fresche raccolte in Italia. Especialmente raccomandato per tavola, medicinale ed e garantito assolutamente puro [designs of olive branches and Italian coat of arms with the Italian flag]." The libels alleged that the article was misbranded further in that it was offered for sale under the distinctive name of another article, namely, olive oil.

On May 6, 1936, the Modern Dairy & Grocery Co., Paterson, N. J., appeared as claimant for the product seized in the District of New Jersey and on May 22, 1936, an order was entered by the court permitting withdrawal of samples of the seized oil. On June 5, the United States attorney moved the court to dismiss the libel in said case, stating as the reason for said motion that the Government was unable to substantiate the allegations of the libel having found the product described therein to be pure and unadulterated and not misbranded. The court thereupon entered judgment dismissing the libel and ordering that the marshal deliver the seized goods to the claimants.

On February 16, 1937, the Agash Refining Corporation filed a claim for the product seized at Philadelphia, Pa., and also filed an answer denying that the product was adulterated or misbranded and praying that the libel be dismissed. On March 11, 1937, the case came on for trial before the court without a jury. Evidence was introduced on behalf of the claimant and the Government, the

taking of such testimony being concluded on March 24, 1937. The case was argued by counsel for the Government and for the claimant on April 2, 1937; and on April 5, 1937, the court handed down the following opinion:

DICKINSON, *Judge*. "We have had the benefit in this case of helpful aid. Libellant's counsel, or perhaps we should say proctor, has made an exhaustive study of his case, mastered and forcibly presented it, and counsel for the intervenor has shown himself proficient in all the learning of the schools in the science of chemistry.

"The case calls for some general comments. One is that it has taken up too much time. We confess our own contribution to this. We have been indulgent, perhaps overly indulgent, because the practical consequences of the decision strike much deeper than the mere judgment entered. The latter is in itself unimportant.

"The value of the product which is the subject of this seizure would probably not exceed \$50. The stenographer's charges for the notes of testimony must alone reach \$1,000 or more. The aggregate expense incurred, including the compensation of the numerous expert witnesses, we would hesitate to estimate. This supplies a commentary on one great defect of our system of administering legal justice. It is inordinately expensive.

"A product of the value of \$50 is seized in a proceeding such as this. The shipper believes the seizure to be unjustified. Is he driven to the dilemma of submitting to the injustice or incurring thousands of dollars of expense in vindicating the integrity of his product? On the other hand, those charged with the enforcement of the law are likewise confronted with a dilemma. Should they permit what are believed to be unlawful products to be dealt in and thereby in practical effect, connive at the practice? We are merely describing a situation; not indulging in criticism for the situation is one not easily to be dealt with.

"The Pure Food and Drug Acts have a highly commendable purpose. This is too obvious to call for its statement. On the other hand, freedom of commerce is not only important but necessary. It should not lightly be interfered with by regulations. To hold fast to the good, and at the same time avoid the evil, demands the highest skill in administration. More than this, is the implication and effect of a finding. It may mean the destruction of an entire business.

"These comments have been provoked by a regrettable incident of this trial. As a legal proposition we have presented to us the duty of making a simple fact finding. Does the olive oil here in question contain an admixture of tea-seed oil?

"We may interpolate a word of commendation of counsel for their refreshingly frank attitude toward this question. It is conceded to be the sole question in the cause. The case, however, has developed into a scientific controversy. Is what is known to this record as the Fitelson color test, scientifically a convincing test of the presence of tea-seed oil in an olive oil mixture? Tea-seed oil, when subjected to chemical treatment, displays a characteristic color. The Fitelson test, as indeed several others, will disclose this. A chemical test of a product may thus demonstrate the presence of tea-seed oil in a mixture and be evidence from which the fact of its presence may be found. Those who deny the conclusiveness of the Fitelson test point out, however, that there are brands of olive oil which will display the same color which tea-seed oil, when present in limited quantity, displays or so nearly like it as not to be distinguished from it. In consequence, if the mixture contains olive oil, it could not be determined whether the color displayed was due to the presence of tea-seed oil or of the olive oil.

"It may be further interpolated that it seems to be conceded that if the mixture contains a large percentage of tea-seed oil—say 50 percent or more—the Fitelson test would disclose its presence. The real controversy is in a case, such as is here averred, in which the percentage of tea-seed oil is 25 percent, more or less.

"We have had, in addition to the testimony of a number of eminent chemists, the benefit of the testimony of the undoubtedly very competent chemist who discovered or developed the Fitelson test and after whom it was named. He has likewise favored us with demonstrations of his test conducted in open court. His skill and scientific knowledge as a chemist is unquestioned and the value of his contribution to the art is admitted. His test, however, has itself not yet been fully subjected to what one of the opposing witnesses frequently spoke of as 'the acid test of time and experiment.' The point of this is that there have been other tests which were, for a time favorably thought of but afterwards found to be unreliable. The Fitelson test was developed within the last

3 years. It was not made public until 1935 or 1936, when it was disclosed in so-called 'Press Releases.' The tone of these publications would provoke unfavorable comment. The test, was, however, submitted to the chemical profession. It aroused a widespread interest and has been, as it is being, subjected to trial by members of the profession. It has many believers in its efficiency and has zealous advocates. It would not, however, be as yet said to have been accepted by the profession generally, although it has been widely approved. The point made against it is the one before mentioned that there are many varieties of olives. They differ in origin, color, condition of maturity, and the oil is obtained by different processes. We have, because of this, had rather fine distinctions drawn between oils 'exuded,' 'extracted,' 'pressed,' and 'obtained' from olives. What results, it is said, is that some olive oils will display the color of tea-seed oil, or so near it, as to be indistinguishable from it. It is confidently asserted on the other hand that the Fitelson test will enable a chemist to pronounce judgment upon the presence of tea-seed oil.

"The limits of an opinion will not permit of a discussion of the merits of the Fitelson test even if we felt qualified to pass upon it. The regrettable feature, from the legal point of view, is that the case has been changed from one of the presence of tea-seed oil in the seized product, to that of a test of the Fitelson test.

"We leave this branch of the subject with this finding. We are not able from the application of the test alone to make a finding of the fact that tea-seed oil is present in the seized oil. A chemist and a court have the same question presented. Is tea-seed oil present in this oil? The chemist seeks an answer to this question through the method of applying an accepted chemical test. Indeed you could not satisfy his mind otherwise. The law accepts and adopts a scientific test as evidence but it has methods of its own to some of which the scientist would be indifferent. The law deals with litigants. A fact is to be found. The first inquiry of the law is upon whom rests the burden of proof? Here it undoubtedly rests upon the libelant. Convictions of truth vary in degree. These degrees are attempted to be expressed in the phrases "Preponderance of evidence"; 'beyond reasonable doubt'; 'clear, precise, and indubitable'; and that mixture of all which is given us in determining priority of invention in patent cases.

"Without discussing these gradations and what real help, if any, these phrases may be to us, it will be admitted that in cases of condemnation, confiscation, or forfeiture because of the existence of a fact, the evidence of its existence must be such that the mind of the trier of fact rests comfortably satisfied with an affirmative finding. The distinction we have in mind is that between a judgment of the comparative weight of evidence pro and con, which generally speaking is followed in civil cases, and a finding of on which side the truth may be. We will recur to this later as it is really the turning point in the decision of this case.

"Starting with the proposition that the libelant must offer evidence from which we can find with reasonable satisfaction of its truth, that the seized oil is intermixed with tea-seed oil, we follow it with the proposition that, if present, it was introduced by someone. The evidence thus might be the testimony of a witness who introduced it or saw it put in. This might be corroborated or contradicted by a chemical test of its presence or absence. If contradicted, the conflicting evidence must be considered and weighed. The first kind of evidence would ordinarily not be obtainable, so that resort must be had, as here, to the second. This might, again as here, take two forms. One the application of the test, so that the observer, if sufficiently skilled, could determine the fact. The other that of resort to opinion testimony of expert witnesses who had conducted or observed the test, to testify to their opinions of its significance. All the law does is to make this opinion testimony evidentiary. To the trier of fact, observation of the test might be convincing. If, however, the full significance of it was lost upon him he must determine the question from the expert testimony, and if conflicting, weigh it.

"This takes us back to the question of the degree of conviction required. We confess the conclusion to which we have come, to be 'a lame and impotent' one. It makes of this long trial a drawn battle. We endeavor to state it definitely so that the parties may be able to test the soundness of the ruling made.

"We are asked by the libelant to find as a fact that the seized oil is intermixed with at least 20 percent of tea-seed oil.

"This finding we decline to make because unconvinced of its truth so far that our mind would rest reasonably satisfied with the finding.

"We are asked by the intervenor to find as a fact that the seized oil was free from any admixture of tea-seed oil. This we decline to do for the like reason stated.

"The test as conducted before us failed to convince us of the presence of tea-seed oil in the seized oil. This is because we distrust our ability to judge of it.

"The expert opinion testimony to the presence of the tea-seed oil has likewise failed to convince us of the fact because of the opposing testimony of other expert witnesses whose competency and good faith is not questioned.

"It may be objected that this is to apply in a civil case the doctrine of reasonable doubt resorted to in criminal cases. This, in a sense, it is, but what is in doubt is not the fact in dispute but the proofs of it. The distinction attempted may be thus presented. A chemist prepares a mixture of olive oil and tea-seed oil in the proportions of 4 to 1. To this he applies the Fitelson test. He is not seeking to learn whether the mixture contains tea-seed oil because he already knows it does. There is no element of factual doubt in his mind. What is in his mind, after he has completed the test, is the judgment that the test does or does not prove the presence of tea-seed oil. The doubt which enters, if it may be said to be present, is in the mind of the trier of fact after he has listened to conflicting expert opinion testimony. Any fact in question may be said to be in doubt. Here it is the presence of tea-seed oil in the seized product. There may be doubt of its presence but there is no doubt of the other fact that the trier is unconvinced of its presence. Such a discussion partakes too much of the metaphysical to be profitably pursued.

"The point we are endeavoring to make is illustrated by an incident of this trial. Partly to relieve the tedium of the trial but also for the serious purpose of presenting the real nature of the controversy which had been provoked, the question was asked whether the claimant was an 'intervener' or an 'intervenor.' Disputes in orthography or pronunciation are usually settled by an appeal to lexicographers. The correct spelling or pronunciation is determined by authority. When, however, 'doctors differ who shall decide?' So here the question of fact of tea-seed oil or no tea-seed oil, has become wholly submerged in the other question of the merits of the Fitelson test.

"We dispose of it by declining to pass upon it.

"The comment should perhaps be added that in the parlance or terminology of chemists the term 'negative' applied to the result of a test such as one for the presence of tea-seed oil in an olive oil mixture, carries with it the idea of negation as that no tea-seed oil is present. The term is not used in the agnostic sense it conveys to lay minds.

"Being unconvinced of the truth of the averments of the libel, we state the following Findings of Fact and Conclusions of Law.

"Findings of Fact. 1. So far as it is a question of fact, we make the finding that the evidence has left us unconvinced that the seized oil had been adulterated with tea-seed oil.

"Conclusions of Law. 1. In the absence of a finding that the seized oil had been adulterated by the admixture of tea-seed oil, the oil of the seizure was neither adulterated nor misbranded.

"2. The libel should be dismissed."

On April 7, 1937, judgment was entered finding that the product was neither adulterated nor misbranded and it was ordered by the court that the libel be dismissed and the seized oil delivered to the claimant.

PAUL V. McNUTT, *Administrator.*

**31077. Adulteration and misbranding of olive oil. U. S. v. 143 Gallon Cans and 95 Quart Cans of Olive Oil. Default decree of condemnation and destruction. (F. & D. No. 37427. Sample No. 67699-B.)**  
**Adulteration and misbranding of olive oil. U. S. v. 8 Gallon Cans, 21 Pint Cans, and 31 Half-Pint Cans of Alleged Olive Oil. Trial by jury. Verdict for Government. Judgment of condemnation. Product ordered sold or destroyed. Product destroyed. (F. & D. No. 37438. Sample No. 62644-B.)**

Samples of this product were found to contain tea-seed oil.

On March 26, 1936, the United States attorneys for the Western District of Pennsylvania and the District of Maryland, acting upon reports by the Secretary of Agriculture, filed libels against 143 gallon cans and 95 quart cans of olive oil at Pittsburgh, Pa., and 8 gallon cans, 21 pint cans, and 31 half-pint cans of olive oil at Baltimore, Md., alleging the article had been shipped in interstate commerce on or about October 23 and November 3, 1935, from Brook-