

not in cutlet form and was not specially selected; it was alleged to be misbranded further in that it was food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the package.

On November 14, 1938, no claimant having appeared, judgment of condemnation was entered and the product was ordered delivered to a public institution.

M. L. WILSON, *Acting Secretary of Agriculture.*

29746. Misbranding of canned mackerel. U. S. v. 49 Cases and 257 Cases of Canned Mackerel. Consent decree of condemnation. Product released under bond to be relabeled. (F. & D. Nos. 44038, 44201. Sample Nos. 20303-D, 20324-D.)

This product was short of the declared weight.

On or about October 1 and October 24, 1938, the United States attorney for the Southern District of Florida, acting upon reports by the Secretary of Agriculture, filed in the district court libels praying seizure and condemnation of 2 lots, consisting of 49 cases and 257 cases of canned mackerel, at Jacksonville, Fla.; and alleging that the article had been shipped in interstate commerce, the former on or about September 13, 1938, from Fullerton, Calif., and the latter on or about September 27, 1938, from Wilmington, Calif. The libels alleged that the former shipment had been made by the Val Vita Food Products, Inc., and that the latter had been made by the Coast Fishing Co. The former was a pool shipment and the court in pronouncing judgment found as a fact that both shipments had been made by the Coast Fishing Co. The article was labeled in part: "King Solomon Brand Fancy Mackerel Contents 1 Lb. * * * Distributed by Coast Fishing Co., Wilmington, Cal."

It was alleged to be misbranded in that the statement "Contents 1 Lb." was false and misleading and tended to deceive and mislead the purchaser when applied to an article that was short weight; and in that it was food in package form and the quantity of contents was not plainly and conspicuously marked on the outside of the package since the statement made was incorrect.

On November 9, 1938, the cases having been consolidated and the Coast Fishing Co., claimant, having consented to the entry of a decree, judgment of condemnation was entered and the product was ordered released under bond conditioned that it be properly relabeled.

M. L. WILSON, *Acting Secretary of Agriculture.*

29747. Adulteration of flour. U. S. v. 46 Bags and 75 Bags of Flour. Default decree of condemnation and destruction. (F. & D. Nos. 43474, 43475. Sample Nos. 38205-D, 38206-D.)

This product having been shipped in interstate commerce and remaining unsold and in the original packages, was at the time of examination found to be insect-infested.

On August 26, 1938, the United States attorney for the Eastern District of Louisiana, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 121 bags of flour at Baton Rouge, La.; alleging that the article had been shipped on or about May 2, 1938, from East St. Louis, Ill., by Hall Milling Co.; and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Flaky Bake Flour."

The article was alleged to be adulterated in that it consisted wholly or in part of a filthy vegetable substance.

On November 5, 1938, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

M. L. WILSON, *Acting Secretary of Agriculture.*

29748. Adulteration of flour. U. S. v. 123 Bags of Flour. Decree of condemnation. Product released under bond to be salvaged as animal food. (F. & D. No. 43968. Sample No. 49753-D.)

This product having been shipped in interstate commerce and remaining unsold and in the original packages, was at the time of examination found to be insect-infested and to contain rodent hairs.

On or about September 28, 1938, the United States attorney for the Northern District of Mississippi, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 123 bags of flour at Greenwood, Miss.; alleging that the article had been shipped on or about March 22, 1938, by Nashville Roller Mills from Nashville, Tenn.; and

charging adulteration in violation of the Food and Drugs Act. It was labeled in part: "Tempt-U Self-Rising Flour."

The article was alleged to be adulterated in that it consisted wholly or in part of a filthy vegetable substance.

On October 27, 1938, Le Flore Grocer Co., Greenwood, Miss., having appeared as claimant, judgment of condemnation was entered, and the product was ordered released under bond conditioned that it be denatured so that it could not be used for human consumption but might be used for animal feed.

M. L. WILSON, *Acting Secretary of Agriculture.*

29749. Alleged adulteration and misbranding of sweetened orange juice. U. S. v. 492 Cases of Orange Juice, Tried to the court. Judgment for claimant. Affirmed by Circuit Court of Appeals. (F. & D. No. 38183. Sample Nos. 6747-C, 6748-C.)

On August 18, 1936, the United States attorney for the Eastern District of Louisiana, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 492 cases of orange juice at New Orleans, La.; alleging that the article had been shipped in interstate commerce by Nesbitt Fruit Products, Inc., from Los Angeles, Calif., in part on or about June 18, 1936, and in part on or about July 2, 1936; and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Nesbitts California Orange Juice Sweetened."

On September 21, 1936, Nesbitt Fruit Products filed a claim and answer denying the adulteration of the product. On December 4, 1936, an amended and supplemental libel was filed, amending the adulteration charge and adding a charge of misbranding. These charges appear in the opinion.

On March 8, 1937, the claimant having filed an amended answer, the case came on for trial before the court, a jury having been waived. On March 9, 1937, at the close of all the evidence, the Government and claimant filed motions for judgment. The Government's motion was overruled. Both parties submitted requests for findings of fact and conclusions of law. Decision was reserved. On September 13, 1937, the court denied the Government's request and filed findings of fact and conclusions of law for the claimant. On January 3, 1938, judgment was entered dismissing the libel. The Government having perfected an appeal, on May 24, 1938, the Circuit Court of Appeals for the Fifth Circuit handed down the following opinion affirming the judgment of the district court, Justice Foster dissenting:

(SIBLEY, *Circuit Judge*) "The appeal is from a judgment of the court, jury having been waived, which refused to condemn and forfeit 492 cases of 1-gallon jugs labeled 'Nesbitt's California Orange Juice Sweetened,' with ingredients and directions following. The amended libel asserted that 'the aforesaid product is adulterated in violation of Section 7 of the Food and Drugs Act, paragraph fourth, in the case of food, in that orange juice, orange-peel flavor, sugar, and acid have been mixed and colored in a manner whereby inferiority is concealed,' and that 'the aforesaid product is misbranded within the meaning of the Food and Drugs Act, Section 8, general paragraph and paragraph second, in the case of food, in that the statement on the label, "Orange Juice Sweetened," is false and misleading and tends to deceive and mislead the purchaser as applied to a product containing approximately 50 percent of added sugar.' The only question is whether the evidence required a finding that either of these allegations is sustained.

"As to the misbranding, the contention was that in the trade 'Orange Juice Sweetened' is used to indicate a sugar content of about 15 percent, whereas Nesbitt's product had over 50 percent sugar. The court was justified in finding that the phrase 'Orange Juice, sugar added,' had been applied to products having about 15 percent sugar, and that 'Syrup' was applied to products having about 65 percent sugar, but that there was no special meaning in the trade of the term 'sweetened.' The label in question has been used on Nesbitt's product for 10 years. In the natural meaning of the word 'sweetened' there is no implication of any particular percentage of sugar. We find no falsity in the label on this point, the only one alleged in the libel.

"On the question of adulteration, the act declares a food adulterated: 'Fourth, if it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed.' 21 U. S. C. A. Sec. 8. Nesbitt's product is not claimed to be damaged goods. The sole question is on the concealment of inferiority by mixing and coloring. Inferiority is a term of comparison. It implies some standard. That standard must be found in the usual qualities of the