

On May 13 and 16, 1944, the United States attorneys for the District of Maine and the District of Rhode Island filed libels against 35 bottles of Oliv-Tone at Brunswick, Maine, and 180 packages of Oliv-Tone at Davisville, R. I., alleging that the article had been shipped on or about February 8 and April 12, 1944, from Boston, Mass., by the Great Atlantic Laboratories, Inc.; and charging that it was adulterated and misbranded. The article was labeled in part: "Oliv-Tone for Hair and Scalp."

The article was alleged to be adulterated in that it was a cosmetic that was not a hair dye, and it contained a coal-tar color known as "butter yellow" that has not been listed for use in cosmetics in accordance with the regulations, and it was other than one from a batch that had been certified.

The article was alleged to be misbranded in that the name "Oliv-Tone" created a false and misleading impression that the article contained olive oil.

On June 13 and July 13, 1944, no claimant having appeared, judgments of condemnation were entered and the product was ordered destroyed.

#### COSMETICS CHARGED TO BE ACTIONABLE BECAUSE OF FALSE AND MISLEADING STATEMENTS ON THE LABELING\*

##### 104. Misbranding of shaving medium. U. S. v. 45% Dozen Packages of U-X Improved Shaving Medium. Tried to the court. Decree of condemnation and destruction. (F. D. C. No. 4098. Sample No. 19198-E.)

On April 1, 1941, the United States attorney for the Western District of Pennsylvania filed a libel against 45% dozen packages of the above-named product at Pittsburgh, Pa., alleging that such article had been shipped on or about October 4 and 21, 1940, by the U-X Manufacturing Co., Inc. from New York, N. Y.; and charging that it was misbranded.

Examination showed that the article consisted essentially of magnesium carbonate, peroxide, such as magnesium peroxide, and urea peroxide, together with small amounts of soap, gum arabic, and milk sugar.

The article was alleged to be misbranded as a cosmetic in that the following statements, appearing on the carton and in a circular contained in the package, were false and misleading since they represented that the article was efficacious for the purposes recommended, whereas it was not efficacious for such purposes: (Carton) "The oxygen shave \* \* \* Due to oxygen content U-X improves the shave. \* \* \* U-X scientifically conditions the skin and prevents shaving irritation . . . the oxygen does it. \* \* \* Oxygen shave", and (circular) "U-X is an exclusive successful scientific preparation. \* \* \* Superior to any shaving preparation now offered. \* \* \* U-X is absolutely non-irritating. Highly recommended by the medical profession for its skin protecting soothing properties. Over and over again men praise the beneficial effects of U-X, its soothing qualities and its unsurpassed 'oxygen-action' on the toughest beards and tenderest skin. Redness, smarting and chin-chafe will disappear with use of U-X. \* \* \* it is made of substances with a definite value which are beneficial to the skin. \* \* \* the best possible shaving preparation. By capillary action the oxygen is drawn to the hair bulb—thus the irritating effects of a 'close' shave are avoided. As the oxygen penetrates to the base of the hair a thin white layer or coating is formed on the beard. \* \* \* The hair is kept upright—the oxygen forms a film and lets the blade cut clean without dragging. Thus there is no pull against the direction of natural growth and the skin remains intact and unirritated. \* \* \* allowing time for the skin to rid itself of all other substances with which it may have become impregnated by ordinary shaving methods. \* \* \* 'At last I've found a shaving medium that has helped me to get rid of that old irritated, inflamed collar line. Now I shave against the grain without the pain and pulling of hair. \* \* \* \* \* My skin was scraped and chafed. Since using U-X my skin is healthy and clear. \* \* \* \* \* My skin is allergic to a pimple condition and U-X is most beneficial.'"

On May 2, 1941, the U-X Manufacturing Co., Inc., claimant, filed an answer denying that the article was a cosmetic and that it was misbranded; and on June 7, 1941, pursuant to the stipulation of the parties, the case was ordered removed to the United States District Court for the District of Connecticut. On or about December 10, 1941, the United States attorney for the District of Connecticut filed an amendment to the libel, charging that the article was misbranded under the provision of the law applicable to drugs, as reported in the notices of judgment

\*See also No. 103

on drugs and devices. Subsequently, a motion and petition dated February 13, 1942, for the removal of the case to the Southern District of New York, was filed by the claimant and, the motion having been consented to by the government's attorney, an order was entered on February 16, 1942, for the removal of the case to the United States District Court for that District. On February 23, 1942, a motion to revoke the transfer was filed in the aforesaid court for the District of Connecticut and thereafter the court denied the motion, stating that, since the case had been removed and all papers transferred to the Southern District of New York, a proper motion should be addressed to the court for that District. A motion was then filed in the United States District Court for the Southern District of New York for the retransfer of the case to the District of Connecticut and, at the conclusion of the argument thereon, which took place on May 8, 1942, the court handed down the following opinion in denial of the motion:

GODDARD, *District Judge*:

"The United States Attorney for the Southern District of New York moves for an order transferring this proceeding back to the United States District Court of Connecticut. It is urged in support of this motion that the case had been transferred from the United States District Court for the Western District of Pennsylvania to the United States District Court of Connecticut, and that under the provisions of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. § 334 (a)) the Connecticut Court was without power to transfer the case a second time, or to transfer the case to a district where the claimant has his principal place of business.

"Claimant contends that the order transferring the case to this court had been consented to by the United States Attorney for the District of Connecticut, and, accordingly, such transfer was permissible under the statute. I agree with this contention. The statute specifically provides that a proceeding 'pending or instituted' shall on application of the claimant be removed to any district agreed upon by stipulation between the parties. The consent of the United States Attorney for the District of Connecticut was in effect a stipulation. Nowhere is it provided that by stipulation a proceeding may be transferred only once, and then only to a district where the claimant does not have his principal place of business.

"Motion denied. Settle order on notice."

The case came on for trial before the court on October 29 and 30, 1942. At the conclusion of the trial the court took the case under advisement, and on November 19, 1942, judgment of condemnation was entered holding that the product was both a cosmetic and a drug and ordering that it be destroyed.

**105. Alleged misbranding of Nutri-Tonic Oil Permanent Wave Solution, and Nutri-Tonic Wave Set. U. S. v. 45 12-Ounce Bottles and 117 1-Quart Bottles of Nutri-Tonic Oil. Tried to a jury; verdict for the claimant. Decree ordering goods returned to the claimant. (F. D. C. No. 6800. Sample Nos. 79164-E, 81105-E.)**

On January 31, 1942, the United States attorney for the Middle District of Tennessee filed a libel against 45 12-ounce bottles and 117 1-quart bottles of Nutri-Tonic Oil at Nashville, Tenn., alleging that the article had been shipped or caused to be shipped by the Waval Permanent Wave Supply Company and Thermal Wavpaks, Inc., on or about November 17, 1941, from Hollywood, Calif.; and charging that it was misbranded.

Examination of a sample of the article showed that it consisted essentially of water, ammonia, and ammonium sulfite.

The libel alleged that the article was misbranded in that the designation "Nutri-Tonic Oil" was false and misleading since it was a cosmetic and not a nutrient, a tonic, or an oil.

On February 25, 1942, Samuel O. Ronk of Los Angeles, Calif., without entering his appearance for any other purpose, moved the court for removal of the case to the District Court for the Southern District of California at Los Angeles. On March 23, 1942, the Government filed a motion to strike the motion of Samuel O. Ronk, on the ground that he had no standing in court and because the court was without jurisdiction to order the removal of the proceedings to the principal place of business of the intervenor. On March 26, Samuel O. Ronk, with permission of the court, amended the motion of February 25, 1942, and for the purpose of entering his appearance generally, moved that the court transfer the cause to a District of reasonable proximity to the claimant's principal place of business in the event that the court was of the opinion that the cause should not be transferred to the District of his residence.