

**29674. Adulteration and misbranding of fruit butter. U. S. v. 10 Cases of Pineapple and Orange Butter, and 8 Cases of Fig and Orange Butter. Default decree of condemnation and destruction. (F. & D. Nos. 43885, 43886. Sample Nos. 20083-D, 20084-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 show evidence of fermentation in some of the jars. The net weight was not plainly and conspicuously declared.

On September 15, 1938, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 18 cases of fruit butters at New York, N. Y.; alleging that the articles had been shipped in interstate commerce on or about August 10, 1938, by Pure Foods Corporation from Los Angeles, Calif.; and charging adulteration and misbranding in violation of the Food and Drugs Act as amended. The articles were labeled in part: "Golden Flow Brand Pure Pineapple & Orange [or "Fig & Orange"] Butter \* \* \* Net Contents 5 Oz." The figure 5 had been written in ink over the printed figure 6, and in many instances the 5 was not recognizable and the 6 was plainly visible.

The articles were alleged to be adulterated in that they consisted in whole or in part of decomposed vegetable substances.

They were alleged to be misbranded in that they were food in package form and the quantity of the contents was not plainly and conspicuously marked on the outside of the packages.

On October 4, 1938, no claimant having appeared, judgment of condemnation was entered and the products were ordered destroyed.

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

**29675. Adulteration of pears. U. S. v. 14 Bushels of Pears. Default decree of condemnation and destruction. (F. & D. No. 43943. Sample No. 32795-D.)**

This product was contaminated with arsenic and lead.

On August 30, 1938, the United States attorney for the Northern District of Illinois, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 14 bushels of pears at Chicago, Ill.; alleging that the article had been shipped in interstate commerce on or about August 25, 1938, by P. Furchtsam & Son from South Haven, Mich.; and charging adulteration in violation of the Food and Drugs Act.

Adulteration was alleged in that the article contained added poisonous or deleterious ingredients, arsenic and lead, which might have rendered it harmful to health.

On October 18, 1938, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

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

**29676. Alleged adulteration and misbranding of Kololiva and Olivaromol. U. S. v. 1 Can of Kololiva (and one similar seizure action). Tried to the court without a jury. Judgment dismissing libels. (F. & D. Nos. 36547, 36613. Sample Nos. 43459-B, 43471-B.)**

On October 31 and November 12, 1935, the United States attorney for the District of Massachusetts, acting upon reports by the Secretary of Agriculture, filed in the district court two libels praying seizure and condemnation of one can of Kololiva and one container of Olivaromol at Boston, Mass.; alleging that the articles had been shipped in interstate commerce on or about September 14 and October 4, 1935, from Brooklyn, N. Y., by David Kleckner & Son, Inc.; and charging adulteration and misbranding in violation of the Food and Drugs Act. The charges appear in the opinion.

On November 18, 1935, David Kleckner & Son, Inc., appeared as claimant and filed answers denying the allegations of the libels. On May 5, 1938, the cases having been consolidated and trial of the issues by jury having been waived, the consolidated case came on for trial before the court, whereupon evidence was adduced, arguments were heard, and the case was submitted to the court upon libellant's and claimant's respective motions for judgment and costs. Decision was reserved.

On June 21, 1938, the court handed down the following opinion, denying libellant's and granting claimant's motion for judgment, but denying claimant's motion for costs:

(McCLELLAN, *Judge*) "These libels, one for the condemnation of a can of Kololiva and the other for the condemnation of a container of Olivaromol, were

tried without a jury. Both articles were shipped by the claimant in interstate commerce, and at the times of the filing of the libels, both articles remained unsold in the possession of the consignee and within the jurisdiction of this court.

"The can of Kololiva was labeled: 'Kleckner's 10 kilos Kololiva Grade A Soluble in Fats & Oils David Kleckner & Son, Inc. Importers and Manufacturers 4304-12th Avenue Brooklyn, N. Y.'

"The libel alleges and the claimant denies that this article is adulterated in violation of Section 7 of the Food and Drugs Act, in that it contains added poisonous and deleterious ingredients, lead and copper, which may render it harmful to health. The libel also alleges and the claimant denies that this article is misbranded in violation of Section 8 of the Food and Drugs Act, in that the name 'Kololiva' deceives and misleads the purchaser in that it suggests that this is a product containing olive oil or a color derived from olive oil, and in that it was sold under the distinctive name of another article.

"The libelant at the trial abandoned the claim as to the copper content of the article.

"The product Kololiva is prepared by mixing 75 pounds of coconut oil with 25 pounds of chlorophyll in an enamel kettle and heating it. The evidence discloses nothing with reference to the coconut oil requiring comment. Judicial notice may be taken of the fact that chlorophyll is the green coloring matter of plants, and that, owing to its instability, it has never been obtained absolutely pure. According to Dr. J. Stewart Rooney, a qualified toxicologist, who was called as a witness by the libelant, commercial chlorophyll contains some lead. The chlorophyll used by the claimant was purchased from Merck & Co., Inc., manufacturing chemists, who represented the product as a purely vegetable green color obtained from Germany. Though the libelant's brief suggests that the lead in Kololiva might have been absorbed in part from solder in the can, there is no adequate evidence that the lead there contained was derived from any other source than from the unstable chlorophyll.

"Kololiva, composed as heretofore stated, of coconut oil and chlorophyll, is a coloring compound which is sold to dealers who use it for blending, mixing, or compounding edible oils. It is not sold for consumption as such. The dealers mix about two pounds of Kololiva with about a gallon of edible oil, and then about 2 ounces of this mixture is combined with a barrel (about 50 gallons) of edible oil. This product is then distributed by the dealer to retailers or consumers. The consumer uses the final product with food in somewhat the ratio of an ounce of the oil to 2 pounds of food.

"The parties have stipulated and I find that in its original state the Kololiva here involved contained 81 parts of lead to 1,000,000 parts of the whole product. In view of the fact that lead is a cumulative poison, I daresay that if Kololiva were intended or used as a food in its original state, the amount of lead therein would be such as to render it harmful to health. But Kololiva, as such, is not used for food, drink, confectionery, or condiment. It is used as a coloring compound in the mixing or blending of edible oils, which edible oils are consumed usually with food. Without pausing to complete the arithmetical process, it seems sufficient to say that when 2 pounds of Kololiva is combined with a gallon of edible oil, and 2 ounces of this mixture is combined with a barrel of about 50 gallons of edible oil, the proportionate part of lead in the final product is insignificant, even when increased by the amount of the lead content in the other product called Olivaromol. The statute only condemns food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food injurious to health. See *United States of America v. Lewington Mill & Elevator Company*, 232 U. S. 399, 58 Law. Ed. 658. The test is not the proportionate amount of lead in Kololiva, but the amount thereof contained in the final product intended to be consumed by the public. See *Four Hundred and Forty-three Cans of Frozen Egg Product v. United States of America*, 226 U. S. 172, 57 Law. Ed. 174. Applying this test and guided largely by the testimony of the libelant's own expert as to the harmlessness of such a small quantity of lead as is contained in the final product, I conclude that the Kololiva here involved is not an adulterated food containing 'added poisonous or other added deleterious ingredient which may render such article injurious to health,' within the meaning of Section 7 of the Food and Drugs Act.

"The libelant has not sustained the burden of showing that Kololiva deceives and misleads purchasers in that it suggests that it contains olive oil or a color derived from olive oil. See *United States of America v. Lewington Mill & Elevator Company*, supra; *United States v. Washington Dehydrated Food Company*, 89 Fed. (2d) 606.

"On the question whether Kololiva was sold under the distinctive name of another article, a certified food color, the evidence was conflicting and I find that it was not so sold.

"In the case against Kleckner's Olivaromol, the libel states in substance that Olivaromol is adulterated in violation of Section 7 of the Food and Drugs Act in that it contains an added poisonous and deleterious ingredient, lead, which may render it harmful to health. It is alleged further that the article is misbranded in violation of Section 8 of the Food and Drugs Act, in that the name 'Olivaromol' appearing upon the label is false and misleading and tends to deceive and mislead the purchaser in that it creates the impression that the article is a flavor derived from olives or olive oil.

"Olivaromol contains coconut oil, certain ethers, a yellow color (AB color) certified by the Department of Agriculture, and an amount of chlorophyll. It is not, as such, intended for human consumption, but it is a flavoring only. As stipulated, Olivaromol contains 94 parts of lead to 1,000,000 parts of the total product. This product finds its way into the edible oil designed for human consumption in substantially the same proportions as in the case of Kololiva.

"The amount of lead which, through the medium of Olivaromol and Kololiva, reaches the final product is so insignificant as, on the basis of the testimony of the libelant's expert, almost require a finding that neither of the claimant's products contained a sufficient quantity of lead to render the ultimate article possibly harmful to health.

"It is true that the claimant's trade mark covers the word 'Olevaromol,' and that the label on the can seized had on it the word 'Olivaromol.' The label, however, was an old one, and I am satisfied it was used by mistake. See *United States v. S. Gumpert et al.*, (C. C. New York), White & Gate's book on the Food and Drugs Act, page 182.

"What has been said as to the alleged charge of a misbranding in connection with Kololiva applies in the main to Olivaromol. The libelant has not sustained the burden of showing a misbranding within the meaning of the Food and Drugs Act.

"In each case the libelant's motion for judgment is denied.

"The claimant moves for judgment and for costs. In each case a judgment or decree is to be entered denying condemnation and directing the return of the seized article by the marshal to the claimant, but upon the authority of *United States v. French Sardine Company, Inc.*, 80 Fed. (2nd) 325, that portion of the claimant's motions for judgment seeking the assessment of costs against the United States is denied."

On October 18, 1938, judgment was entered ordering that the libels be dismissed and that the products be returned to the claimant.

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

**29677. Adulteration and misbranding of cheese. U. S. v. 80 Cases, 35 Cases, and 35 Cases of Creamed Old English Cheese. Tried to the court. Judgment for the Government. Decrees of condemnation and destruction. (F. & D. Nos. 37654, 37705. Sample Nos. 63223-B, 63270-B, 63271-B.)**

This product contained added red pepper.

On April 25 and May 2, 1936, the United States attorney for the District of Minnesota, acting upon reports by the Secretary of Agriculture, filed in the district court libels praying seizure and condemnation of 150 cases, each containing 60 half-pound packages of cheese, at Minneapolis, Minn.; alleging that the article had been shipped in interstate commerce, within the period from on or about April 9, 1936, to on or about April 23, 1936, by the Kraft-Phenix Cheese Corporation from Green Bay, Wis.; and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled in part: "Creamed Old English Cheese."

Adulteration was alleged in that cheese containing added red pepper had been mixed and packed with the article so as to reduce or lower its quality or strength; in that cheese containing added red pepper had been substituted in whole or in part for the article; and in that it was mixed in a manner whereby inferiority was concealed.

Misbranding was alleged in that the statements on the label, "Old English Cheese \* \* \* Sharp, Aged Cheese Pasteurized with added cream \* \* \* The Choice of the Cheese Connoisseur \* \* \* with a bit of tingle on the tongue \* \* \* rare, sharp, old Cheddar, unmistakably," were false and misleading and tended to deceive and mislead the purchaser when applied to cheese containing added red pepper.