

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

thing which the product under question purports to be. If Nesbitt's product purported to be orange juice, we should look to see if inferior orange juice was mixed and colored to conceal the inferiority. But it does not profess to be mere orange juice, but orange juice sweetened; and the label on the jugs does not stop there, but states there has been added fruit acid, certified color, and 0.01 percent of benzoate of soda, and gives 'Directions: Use one part with five parts plain water well iced.' It is thus offered as a basis for dilution into an iced drink, with the statement that it is a mixture of orange juice, sugar, fruit acid, certified color, and benzoate of soda. The evidence shows that the label is entirely truthful, and that all the ingredients are pure and harmless. The coloring matter, called 'sunset yellow,' is approved by the Food and Drug Administration as proper for use in foods. The color of the product is far deeper than that of orange juice, and looking at it one would know that it was not mere orange juice. But when diluted in the customer's presence by the retailer, it becomes of about the color of orange juice and simulates its taste. It is true that the beverage which the retailer thus prepares and sells is inferior to pure orange juice in its vitamin content, and the added color tends to conceal the weakness of the orange juice content, but this beverage is not shipped in interstate commerce, and its preparation and sale is not within the Food and Drugs Act. The retailer who buys these jugs of Nesbitt's product, which are shipped in interstate commerce, does not buy them as orange juice but as a mixture whose ingredients are disclosed from which he may prepare a beverage. In practice the jug is placed upon the retailer's counter with the full label in plain view, and the dilution is made in the customer's presence. There is intended by the producer no concealment of the fact that there is used a synthetic mixture based on orange juice sweetened. Every ingredient being pure and wholesome, color being openly added not to conceal anything but to make the final result more pleasing to the eye, we are unable to say that the Nesbitt product is adulterated and to be forfeited."

Judgment affirmed.

(FOSTER, *Circuit Judge*, dissenting) "Conceding that the product is not deleterious to health, it certainly is not orange juice sweetened in the ordinary meaning of those words. It might as well be called sugar acidulated. The words 'Orange Juice Sweetened' are in large type. Other parts of the label fairly describing the ingredients are in very much smaller type. It is not probable that a purchaser of a drink made from the compound would notice the fine print. I consider the label tends to deceive and mislead the ultimate purchaser and therefore the article is misbranded within the prohibition of the Food and Drugs Act.

"With all due respect, I therefore dissent."

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

**29750. Adulteration of flour. U. S. v. 242 Bags of Flour (and four similar seizure actions.) Consolidated decree of condemnation. Product released under bond to be reconditioned.** (F. & D. Nos. 43909, 43914, 43945, 43946, 43959. Sample Nos. 33962-D to 33965-D, inclusive, 33967-D to 33974-D, inclusive.)

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 September 17, 19, and 22, 1938, the United States attorney for the Eastern District of Virginia, acting upon reports by the Secretary of Agriculture, filed in the district court libels praying seizure and condemnation of 1,963 bags of flour at Norfolk, Va.; alleging that the article had been shipped within the period from June 1, 1937, to May 21, 1938, by Fisher Flouring Mills Co. from Seattle, Wash.; and charging adulteration in violation of the Food and Drugs Act. The product was variously labeled in part: "Fisher's Turako [or "Green Tag," "Blended," "Mainsail," "Blue Tag," "Fisher Boy," "Famous 21," "Blendako," "White Spear Pastry," or "White Tag"] Flour."

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

On October 26, 1938, the cases having been consolidated and the Fisher Flouring Mills Co., claimant, having admitted the allegations of the libel, judgment of condemnation was entered, and the product was ordered released under bond conditioned that it be brought into conformity with the law under the supervision of this Department.

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