PRODUCT: 1,750 cans, each containing 20-pounds, of frozen blueberries at Portland, Maine.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a decomposed substance by reason of the presence of moldy blueberries. The article was adulterated while held for sale after shipment in interstate commerce.

DISPOSITION: January 27, 1950. No claim having been filed with respect to the product, judgment of condemnation was entered and the court ordered that the product be destroyed.

15829. Adulteration of frozen black raspberries. U. S. v. 18 Cans, etc. (F. D. C. No. 28564. Sample No. 72004–K.)

LIBEL FILED: December 14, 1949, Southern District of Ohio.

ALLEGED SHIPMENT: On or about July 10, 1949, by the Lawrence Frozen Foods Co., from Lawrence, Mich.

PRODUCT: 94 25-pound cans of frozen black raspberries at Columbus, Ohio.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a decomposed substance by reason of the presence of moldy berries.

DISPOSITION: February 7, 1950. Default decree of destruction.

MISCELLANEOUS FRUIT PRODUCTS

15830. Adulteration and misbranding of peach fountain fruit and pineapple fountain fruit. U. S. v. 23 Cases * * * (and 4 other seizure actions). Tried to the court. Verdict for Government. Decree of condemnation. (F. D. C. Nos. 22292, 22302, 22303, 22317, 22918. Sample Nos. 43178–H, 43196–H, 69701–H, 69702–H, 90735–H.)

LIBELS FILED: Between the approximate dates of February 18 and April 10, 1947, Western District of Virginia, Northern District of Illinois, and Eastern District of Tennessee.

ALLEGED SHIPMENT: Four lots of fountain fruits were shipped on or about November 7, 11, 12, and 20, 1946, by Southland Preserving Co., Inc., from Chattanooga, Tenn., and 1 other lot was returned to the company in a shipment made from Washington, D. C., on or about January 31, 1947.

PRODUCT: 471 cases, each containing 24 14-ounce jars, of fountain fruit at Radford and Roanoke, Va., Chicago, Ill., and Chattanooga, Tenn.

LABEL, IN PART: (Jars) "Southland Peach Fountain Fruit (Delicious as a Spread) Contains: Peach, Grain Syrup, Sugar, Citric Acid, Vegetable Gums, and 1/10 of 1% Sodium Benzoate," "Tara [or "Southland"] Pineapple Fountain Fruit Contains: Pineapple, Sugar, Honey, Grain Syrup, Citric Acid, Vegetable Gums, and 1/10 of 1% Sodium Benzoate," and "Tara * * * Pineapple Fountain Fruit Contains: Pineapple, Pear, Peaches, Sugar, Grain Syrup, Citric Acid, Vegetable Gums and 1/10 of 1% sodium benzoate."

NATURE OF CHARGE: Peach fountain fruit. Adulteration, Section 402 (b) (2), a substance consisting primarily of a mixture of peaches and sugar, or sugars, and having a soluble-solids content of less than 65 percent, had been substituted for peach preserves. Misbranding, Section 403 (g) (1), the article purported to be peach preserves, and it failed to conform to the definition and standard of identity for peach preserves since the soluble-solids content

of the article was less than 65 percent, the minimum permitted by the standard.

Pineapple fountain fruit. Adulteration, Section 402 (b) (2), a product of less than 68 percent soluble-solids content, two of the three lots consisting primarily of a mixture of pineapple and sugar or sugars and the third lot consisting primarily of a mixture of pineapple with pear, peaches, sugar, or sugars, had been substituted for pineapple preserves. Misbranding, Section 403 (g) (1), all lots of the article purported to be pineapple preserves, and they failed to conform to the definition and standard of identity for pineapple preserves since the soluble-solids content of the article was less than 68 percent, the minimum permitted by the definition and standard. Further misbranding Section 403 (a), the name "Pineapple Fountain Fruit" borne on the label of the article was false and misleading as applied to the portion of the article which contained pear and peaches in addition to pineapple.

DISPOSITION: Upon petition of the Southland Preserving Co., Inc., claimant, an order was entered directing the consolidation of the various libel actions for trial in the Eastern District of Tennessee. A motion was made thereafter on behalf of the Government to vacate the order of consolidation, and after consideration of the briefs of the parties, the court handed down the following decision in denial of such motion:

DARR, *District Judge:* "Heretofore an order was entered consolidating this case with four other like cases pending in other jurisdictions under authority of a provision of the Federal Food, Drug and Cosmetic Act as codified at 21 U. S. C. A. sec. 334 (b).

"The plaintiff has a motion to set aside this order upon the ground that in the several cases the issues are not the same.

"I am not sure what requirement would be upon a court to ascertain whether the issues were the same. In view of the statements made by the claimant in its brief, I feel that I am not concerned about this question.

"The following statements are made in the claimant's brief:

> It is true that some of the suits involve Pineapple Fountain Fruit and some of them involve Peach Fountain Fruit; however, the claimant has admitted in the answer filed and will admit in all of the other cases that it has not made either peach or pineapple preserves so far as the property attached is concerned, but that it has made either Peach or Pineapple Fountain Fruit, for which no definition or standard of identity has been prescribed by the regulations.
>
> * * * * *
>
> As has already been said, however, the only issue in this case, as we see it, is does the Government have the right to condemn and forfeit Fountain Fruit because it does not comply with the regulations as to preserves. . . .

"I understand these statements to be an admission to the effect that if the claimant's products are preserves, then all the elements necessary for the seizure and confiscation are made out. That is, the claimant does not make the defense that the products meet the requirements as preserves. The claimant contends that the products are not preserves but a 'Fountain Fruit.'

"The Plaintiff asks for seizure and forfeiture upon the ground that the products are misbranded preserves.

"The issue then is whether the products are preserves or some other form of fruit food.

"As preserves are made from all kinds of fruits, the use of different fruits would not affect the question of whether a commodity is preserves. Whether the products meet the standards of the regulations concerning preserves will not be for consideration. The claimant says that the products are not preserves at all, but something else not covered in the regulations. Therefore, actually the issues in all the proceedings are the same and become one issue upon consolidation.

"With the understanding that the issue is so confined in each of the proceedings, the motion to vacate the order of consolidation is overruled. Procedure will go forward under the order consolidating the cases."

The case came on for trial before the court without a jury on June 30, 1948, and at its conclusion the matter was taken under advisement by the court. On September 10, 1948, the following opinion was handed down by the court:

DARR, *District Judge:* "The suit seeks to condemn articles of food, under the provisions of 21 U. S. C. sec. 342 (b) (2) and 21 U. S. C. sec. 343 (g), upon the claim of adulteration and misbranding. The claimant made answer and denied these contentions.

"The products seized were small fourteen-ounce jars, which claimant sold to wholesale groceries and retail stores, and bore different labels as follows: 'Southland Peach Fountain Fruit (Delicious as a Spread)' and 'Tara Fruit of the Good Earth Pineapple Fountain Fruit.'

"The parties have agreed that the products were introduced in commerce and that they did not come up to the required standard of preserves. Therefore, the single question for determination is whether the products purport to be, or are represented as, the standardized articles, peach and pineapple preserves, within the meaning of 21 U. S. C. sec. 343 (g).

"An examination of the jars shows that the labels contain the name of the fruit or trade name in large letters and the words 'Fountain Fruit' are in small letters. The term 'fountain fruit' does not have a recognized meaning as a food product. A product of this character has not been submitted to the trade in containers similar to the ones claimant used. So-called fountain fruit appears to have been generally put upon the market for family use in small containers of about six ounces and plainly labeled by such words as 'Topping,' 'Sundaettes,' etc., or this type product has been sold in large containers of a quart or more to confectioners and soda fountains for use in their business. The size jar used by the claimant is comparable to that ordinarily used for preserves and jams.

"The proof reflects that the merchants bought these products with the idea that they were preserves, that they were mixed upon the shelves of the retail stores with real preserves, jams and jellies. So the libelant claims that this conduct amounted to a purporting of furnishing the products to the public as preserves. The claimant says that the products were plainly labeled 'fountain fruit' and that there was no deception or imposition.

"There are some cases defining the Congressional meaning of the word 'purport' as used in this statute. *United States* v. *306 Cases* * * * *Tomato Catsup*, 55 F. Supp. 725; *Libby, McNeill* v. *United States*, 148 F. 2d 71.

"Also, the statute may be violated without any wrongful intent. *United States* v. *11½ Dozen Packages, etc.*, 40 F. Supp. 208.

"Considering this construction of the word 'purport' and in view of all the testimony and considering that I have viewed the labels themselves together with the pictures of the products in stores, I am of the opinion that these products did purport to be preserves.

"It must be remembered that the products were on sale during the time when there was a scarcity of sugar and the buying public was anxious to obtain sweets for family use. I have the impression that under all these conditions a housewife or other purchaser would buy these products thinking they were preserves, particularly when it is further considered that this type of food had never been on the market for table use as a spread or as a substitute for preserves.

"This was, indeed, a new venture in trying out a table food, and had the claimant plainly labeled the food by true description, the label being in bold type, recommending it for use in place of preserves, jam or jelly, there could have been no objection.

"For the reasons stated, however, I feel it my duty to sustain the proceedings for condemnation.

"The claimant, so the proof discloses, ceased the manufacture of the products at the time these proceedings were begun and, as I understand, has no plans or desire to manufacture the products in the future.

"In view of this and of the whole case, I direct that the claimant be granted the privilege, upon making proper bond, of taking over the condemned products, the same to be used and disposed of under the supervision of the Food and Drug Administration. If claimant elects not to retake the property, application will be made for disposition thereof in some other manner."

On October 27, 1949, the following supplemental opinion was rendered by the court:

DARR, *District Judge*: "On September 10, 1948, a memorandum for the judgment was announced and filed, but no judgment has been entered pursuant thereto. The delay has been caused by a desire of the plaintiff to make application for a change in a certain portion of the original memorandum for the judgment, which portion was obiter dicta and is as follows:

This was, indeed, a new venture in trying out a table food, and had the claimant plainly labeled the food by true description, the label being in bold type, recommending it for use in place of preserves, jam, or jelly, there could have been no objection.

"Upon consideration the Court feels that this statement might be misleading and the further consideration that this announcement had no merit insofar as the decision of the controversy is concerned, the same is deleted and taken from the original memorandum for the judgment and will not be considered a part thereof."

In accordance with the foregoing opinions, findings, of fact and conclusions of law were filed on November 10, 1949. On December 20, 1949, judgment of condemnation was entered and the court ordered that the products be delivered to the Salvation Army for its use and not for sale.

15831. Adulteration of canned strained applesauce. U. S. v. 132 Cases * * *. (F. D. C. No. 28302. Sample No. 48613-K.)

LIBEL FILED: November 17, 1949, Eastern District of Pennsylvania.

ALLEGED SHIPMENT: On or about October 25, 1949, by American Home Foods, Inc., from Rochester, N. Y.

PRODUCT: 132 cases, each containing 24 4¾-ounce cans, of strained applesauce at Philadephia, Pa.

LABEL, IN PART: (Can) "Clapp's Strained Apple Sauce."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance. (Examination showed that the product was decomposed.)

DISPOSITION: December 22, 1949. Default decree of condemnation and destruction.

15832. Adulteration of strawberry preserves. U. S. v. 15 Cases * * * (and 1 other seizure action). (F. D. C. Nos. 28273, 28299. Sample Nos. 57277-K, 57279-K.)

LIBELS FILED: November 7 and 18, 1949, District of Connecticut.

ALLEGED SHIPMENT: On or about July 18 and August 15, 1949, by the Fruitcrest Corp., from Brooklyn, N. Y.

PRODUCT: Strawberry preserves. 15 cases at Bristol, Conn., and 31 cases at New Britain, Conn. Each case contained 24 1-pound jars.

LABEL, IN PART: (Jar) "Fruitcrest Pure De Luxe Strawberry Preserves."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a decomposed substance by reason of the presence of decomposed strawberry material.

DISPOSITION: On November 18 and December 1, 1949, on motions of the claimant, orders were entered by the court, releasing samples to the claimant. On January 23 and February 10, 1950, the claimant having consented thereto, decrees of condemnation and destruction were entered by the court.