

2. A merchant or dealer or demonstrator does not violate the law in coloring oleomargarine for demonstration purposes, not for sale.

3. A dealer, agent or solicitor not licensed under the oleomargarine law violates the law when he takes orders for oleomargarine manufactured in or already within the state for sale.

4. "Pacific Nut," under the facts stated, may be legally sold.

March 6, 1936.

Mr. B. F. Thrailkill
Chief, Montana State Dairy Division
The Capitol

You have submitted the following:

"Does the housewife violate the law when she adds coloring to oleomargarine?"

Section 1 of Chapter 120, Laws of 1931, provides: "Hereafter no person, firm or corporation shall, within the State of Montana, manufacture, sell, offer for sale or possess with the intent to sell any oleomargarine or any substance made either wholly or in part from vegetable or animal fats or oils (not from milk or cream) which said oleomargarine or other substance is either colored like or in imitation of butter or in any shade of yellow, or is made, composed or compounded in whole or in part of any material or ingredient causing the same to resemble the color of butter or any shade of yellow."

Section 38, Chapter 93, Laws of 1929, provides: "No person shall coat, powder, or color with annato or any coloring whatsoever, butterine, or oleomargarine, or any compound of the same, or any product or manufacture made in whole or in part from animal fats or animal and vegetable oils not produced from unadulterated milk or cream by which means such product, manufacture or compound shall resemble butter or cheese, the product of the dairy; nor shall he have the same in his possession with the intent to sell, nor shall he sell or offer the same for sale. * * *"

Opinion No. 260.

Oleomargarine, Coloring of—Housewife—Merchant—Dealer—Demonstrator—Agents—"Pacific Nut"

HELD: 1. A housewife does not violate the law when she adds coloring to oleomargarine.

In order to correctly construe these sections, it is necessary to have in mind their purpose. The purpose of

the law no doubt was to protect the consumer from being deceived, imposed upon or defrauded by the sale of imitation butter, under the guise of real butter.

While said Section 1, Chapter 120, uses the word "manufacture" without the qualification "for sale" and said Section 38 uses the word "color" without this limitation, it is my opinion that the intention was to forbid the "manufacture for sale" and the "coloring for sale" of oleomargarine. This qualification was used in both sections in forbidding possession of oleomargarine when colored like butter "with the intent to sell." In using the word "manufacture," no doubt it was used in the meaning of manufacturing in considerable quantities and as a regular business, or as an industry (38 C. J. 966, notes 50, 54); that is, to manufacture for sale. The same may be said of the verb "color" and the verbs "coat" and "powder" used in said Section 38.

Where a housewife colors oleomargarine or manufactures oleomargarine "colored like or in imitation of butter," for the purpose of making it more palatable or appetizing for herself and family, she is neither deceived, imposed upon nor defrauded. Had the legislature intended to prevent her from coloring oleomargarine for her own use, surely it would have said so in unmistakable terms.

The sale of oleomargarine is not prohibited by statute. It may be sold legally by wholesalers and retailers when properly licensed (Chapter 87, Laws of 1931, amending Section 40, Chapter 93, Laws of 1929). Nor is the manufacture of oleomargarine when not colored forbidden. While oleomargarine may not possess as many food values as butter, it is not, as such, injurious to the health in the sense that its consumption should be forbidden by law. When harmless coloring matter has been added, its wholesomeness has not been impaired. To forbid a housewife from adding such coloring matter may be denying her one of her "natural, essential and inalienable rights of acquiring and possessing property." (Section 3, Article III, Montana constitution). On the construction we have given to these sections, it is not necessary to

consider the question of constitutionality. Any other construction, however, might subject these sections to the infirmity of unconstitutionality and such construction, if possible, is to be avoided.

"Does the merchant or dealer or demonstrator employed by the dealer or factory violate the law when they color this oleomargarine and have it in their possession in the store to demonstrate to the people by spreading it on crackers and passing it around to the store patrons showing how nearly it resembles butter?"

The construction we have given to these sections requires us to say that the merchant, dealer or demonstrator, in coloring oleomargarine for demonstration purposes, not for sale, does not violate the law. Such demonstration and free distribution is not forbidden by statute.

"Does the dealer, agent or solicitor not licensed under the oleomargarine law violate the law when they take orders for oleomargarine in either a wholesale or retail way and ship it to licensed dealers or deliver with their own trucks? We understand that oleomargarine can be shipped from one state to the other but we would like to know if after this oleomargarine is in the state, are these people violating the law and should they come under the license for dealing in oleomargarine?"

From your question we assume that the orders taken are for oleomargarine manufactured in or already within the state for sale, so that no question of interfering with interstate commerce is involved (12 C. J. 61, Section 73). See also our opinion to A. B. Middleton, dated December 27, 1935, No. 220, Volume 16, Opinions of the Attorney General, and opinion No. 294, dated August 8, 1933, Volume 15, Opinions of the Attorney General, 199.

On account of the express provisions of Sections 2 and 3, Chapter 120, Laws of 1931, this question, in my opinion, should be answered in the affirmative.

You have also submitted the following:

"We also have a product now being

sold in the state called 'Pacific Nut.' This is put up in packages resembling the packages that butter is packed in. It is manufactured out of vegetable oils and it is nothing more or less than any other shortening such as Crisco or cotton seed oil. They are also manufacturing and distributing in the state a product they call Food Flavoring. This product is made of dried and condensed milk to which salt and coloring are added. These two products are supposed to be sold separately to the consumer. They are to be mixed and after they are mixed together they make oleomargarine or a substitute for butter. We notice in the purchases we have made that when we buy one of these products, the merchants advise us to get the other and explain how the mixture is to be made and also mention the fact to the customer that this is one way oleomargarine can be made without paying any state or federal tax or license. We also know that the merchant mixes up a lot of this product and has in his store the finished product to show his customers how it is made and the quality of the finished product, which is nothing more or less than a colored oleomargarine.

"We would like to know if the merchant violates any of the oleomargarine laws or state laws by selling these products, or if the merchant is violating the law by mixing these products in his store and making oleomargarine. In this case also, we would like to know whether the housewife is violating the law by mixing these products in her home. Would the merchant and the housewife be classed as manufacturers?"

Since "Pacific Nut," according to your statement "is nothing more or less than other shortening, such as Crisco or cotton seed oil" and does not become oleomargarine until it is mixed with other ingredients, and since the merchant does not sell the finished product, which is oleomargarine, but only the separate elements from which oleomargarine may be made, if the consumer chooses to make it, it does not appear to me that such merchant violates the law as now worded and in force, by sell-

ing the several unmixed ingredients without a license.

For the reasons stated hereinbefore, neither the housewife nor the merchant violates the law.