

BEVERAGES AND BEVERAGE MATERIALS

16751. Adulteration of coffee sweepings. U. S. v. 391 Bags * * *. Tried to the court. Judgment for Government. Decree of condemnation and destruction. (F. D. C. No. 27559. Sample No. 11534-K.)

LIBEL FILED: July 8, 1949, Eastern District of New York.

ALLEGED SHIPMENT: The dates of shipment are unknown. Shipments were made from various foreign countries, to New York, N. Y.

PRODUCT: 391 second-hand bags, each containing 100 pounds, of roasted coffee sweepings.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance, and was otherwise unfit for food by reason of the presence of wood splinters, dirt, rodent excreta, and other extraneous material, and because of contamination with polluted sea water.

DISPOSITION: The Lorraine Trading Corp., Brooklyn, N. Y., having appeared as claimant, the matter came on for trial before the court on May 16, 1950, and judgment was entered for the Government. The court handed down the following memorandum opinion, findings of fact, and conclusions of law:

INCH, District Judge: "This is a proceeding brought under the Federal Food, Drug and Cosmetic Act (21 U. S. C. A., Sec. 301, *et seq.*) to condemn a certain quantity of roasted coffee contained in bags. The libel alleges that the coffee was adulterated when introduced into, and while in, interstate commerce within the meaning of the Act, in that it consists in whole or in part of a filthy substance, and is otherwise unfit for food by reason of the presence therein of wood splinters, dirt, rodent excreta and other extraneous material and because of contamination with polluted sea water.

"It appears that a concern, Coffette Products, Inc., had been engaged in the manufacture of chemical products, such as detergents, soap, cosmetics, shampoos, dyes, etc., from condemned coffees which were unfit for beverage purposes. In 1944 and 1945 it had purchased various quantities of coffee and stored it at its premises in Brooklyn, where there was a fire in December of 1945. As a result of the fire most of the bags were split open and their contents strewn about the premises and sprayed with water by the Fire Department. After being reprocessed to remove pieces of wood and nails, the coffee was rebagged and again stored in one of the Coffette buildings.

"In 1946 Coffette also purchased two freight carloads of coffee which had been sunk in the Hudson River while being transported on floats of the Pennsylvania Railroad from New York City to a town in Pennsylvania. A health officer of the Jersey City Board of Health testified that the water in which the coffee had been submerged for about two days was tested for bathing purposes and found to be 'highly polluted with sewage.' After the cars were salvaged from the River they were transported to Jersey City and placed under embargo by the Jersey City Board of Health and later released under bond to Coffette for non-food purposes.

"Coffette Products, Inc., thereafter became bankrupt, and at the bankruptcy sale of its assets on June 14, 1949, claimant, Lorraine Trading Corp., purchased 391 bags of the coffee.

"The president of Coffette testified that of these bags, 50 or 60 came from the submerged Pennsylvania Railroad cars, and the remainder was coffee salvaged from the fire. Claimant purchased the coffee for 75¢ a bag, or $\frac{3}{4}$ of a cent a pound, and there is proof that a sign reading 'Old Bad Coffee' was posted at the sale, and that claimant purchased the coffee knowing it was unfit for human consumption.

"A government chemist testified to the presence in the coffee of dirty and scorched paper, nails, charcoal, wood splinters, glass, metal fragments, small stones, dirt, roasted grains, manure fragments and rodent pellets, all of which were separated from numerous samples of the coffee and placed in cellophane bags and introduced into evidence. In order to show that the coffee had been contaminated with sea-water, the government also presented evidence of chem-

ical tests showing the presence of an excess amount of chlorides in the coffee beans. A number of experts associated with some of the largest coffee concerns in New York City testified on behalf of the government that as a result of 'cup tests' they found the coffee to be damaged, rancid, putrid and unfit for human consumption.

"Claimant's witness, Slomowitz, testified that he purchased the coffee at a private sale immediately after someone at the auction had failed to carry out a bid; that the auctioneer told him the coffee was under the supervision of the 'Pure Food and Drug'; and that he intended to ship the coffee to Belgium, and showed one of the employees of the Pure Food and Drug Administration a letter from a Belgian broker offering to purchase it. Claimant also presented expert testimony by a chemist to the effect that his examination of certain samples did not reveal the presence of any extraneous matter such as wood splinters, dirt or rodent excreta, or any other foreign matter.

"Title 21 U. S. C. A. Sec. 342 provides:

A food shall be deemed to be adulterated * * * (a) * * * (3) if it consists in whole or in part of any filthy, putrid or decomposed substance, or if it is otherwise unfit for food. [Emphasis supplied.]

"There can be no doubt that this coffee, with its history of part having been submerged in highly polluted water for two days, and the remainder having been salvaged from a fire, and having present in it the collection of extraneous matter found by the government chemist, is plainly 'adulterated' and unfit for human consumption within the meaning of the Act. The government has more than sustained the burden of proof on that issue.

"Claimant citing *United States v. Phelps-Dodge Mercantile Co.*, 9 Cir., 157 F. 2d 453, Cert. denied 330 U. S. 818, contends that this coffee, even if adulterated, was not adulterated 'when introduced into or while in interstate commerce.' Sec. 334 (a) of the Act provides in part:

Any article of food * * * that is adulterated * * * when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce * * * shall be liable to be proceeded against * * *. [Emphasis supplied.]

The italicized clause was added to the statute by the Act of June 24, 1948 (62 Stat. 582), and claimant contends that it should not be deemed to operate retroactively. As for the original provision of the section that it applies to food adulterated 'when introduced into or while in interstate commerce,' claimant says that at the time the coffee was adulterated as a result of the fire in Brooklyn, it was not then in interstate commerce. However, it cannot be overlooked that the 50 or 60 bags of coffee which were contaminated by the waters of the Hudson River were at that time being transported from New York City to a town in Pennsylvania and were thus clearly adulterated 'while in interstate commerce.' Further, after being released by the Jersey City Board of Health, they were shipped to Coffette in Brooklyn, New York, and were adulterated 'when introduced into or while in interstate commerce' at that time. It was proven, and it is admitted in claimant's brief, that those 50 or 60 bags cannot be identified and separated from the lot seized. Thus that part of the libeled coffee which was in an adulterated condition when introduced and while in interstate commerce is substantial enough to warrant condemning the entire lot, particularly since it is inextricably mixed with coffee which was adulterated after shipment in interstate commerce. It therefore, becomes unnecessary to depend upon a retroactive effect, if any, of the 1948 amendment, or the government's application after trial to amend the libel in conformance therewith.

"The other contentions of claimant to the effect that the coffee is not contraband under the Act have been fully examined and found to be without merit.

"Claimant contends that it should be permitted to export the coffee to Belgium under the provisions of Sec. 381 (d). Even were I inclined to permit the export of this coffee to a foreign country, which I am not, it has been held in *United States v. Kent Food Corporation*, 2 Cir., 168 F. 2d, 632, that it is beyond the jurisdiction of this Court to allow the exportation of food condemned under the provisions of the Act. (See also: *230 Bowes, More or Less, of Fish v. United States*, 6 Cir., 168 F. 2d 360.)

"The government has no objection to claimant being permitted to salvage the coffee under the provisions of Sec. 334 (d), provided that it is used for commercial purposes only and other than food. The coffee will be condemned

forthwith, and unless claimant wishes to accept the government's offer, it will be otherwise disposed of in accordance with the provisions of Sec. 334 (d).

FINDINGS OF FACT

"1. This proceeding was commenced by the filing of a libel on July 8, 1949. Monition was issued on that date and the article was seized by the Marshal on July 13, 1949, in the possession of Bowne Morton Stores, Inc., 595 Smith Street, Brooklyn, New York, to the account of Lorraine Trading Corp., Brooklyn, New York.

"2. Lorraine Trading Corp., a New York corporation, intervened as claimant and owner of the seized article.

"3. The article seized consisted of 391 bags, each containing approximately 100 pounds, of roasted coffee beans.

"4. On June 14, 1949, claimant purchased this coffee at an auction conducted for the sale of the bankrupt stock of Coffette Products, Inc., in Brooklyn, New York.

"5. That the aforesaid coffee contained wood splinters, dirt, rodent excreta and other extraneous material and added chlorides. The presence of much of this extraneous matter resulted from part of the coffee having been salvaged from a fire, and the remainder having been submerged for about two days in polluted sewage water of the Hudson River off Jersey City, New Jersey.

"6. The coffee herein is unfit for food but may be used for commercial purposes.

CONCLUSIONS OF LAW

"1. This Court has jurisdiction of the subject matter of the above-entitled proceeding and of the parties thereto by virtue of 21 U. S. C. 334 (a).

"2. The coffee seized is an article used for drink by man, and is, therefore, a food within the meaning of 21 U. S. C. 321 (f).

"3. The article seized was shipped in interstate commerce within the meaning of 21 U. S. C. 321 (b).

"4. The food seized was adulterated within the meaning of 21 U. S. C. 342 (a) (3) while in interstate commerce.

"5. The food seized is subject to condemnation pursuant to 21 U. S. C. 334 (a), and libellant is entitled under 21 U. S. C. 334 (e) to costs incurred in this proceeding.

"6. If the claimant so desires, it may, by posting good and sufficient bond within ten days from the entry of the decree and payment of costs, salvage the coffee for commercial purposes under the supervision of the Federal Security Agency in accordance with the provisions of 21 U. S. C. 334 (d)."

On May 31, 1950, the court entered a decree providing for the destruction of the product.

16752. Adulteration of coffee sweepings. U. S. v. 34 Bags, etc. (F. D. C. No. 27562. Sample Nos. 56701-K to 56703-K, incl.)

LIBEL FILED: July 8, 1949, Eastern District of New York.

ALLEGED SHIPMENT: On or about February 19 and April 17, 1949, from various foreign countries.

PRODUCT: 34 second-hand burlap bags, each containing approximately 132 pounds, and 21 bags, each containing approximately 145 pounds, of coffee sweepings at Brooklyn, N. Y.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product was unfit for food by reason of the presence of wood splinters, metal fragments, dirt, and other extraneous material.

DISPOSITION: December 4, 1950. The Lorraine Trading Corp., claimant, having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be released under bond for denaturing under the supervision of the Food and Drug Administration, so that it could not be used for human food but could be used for commercial purposes.