

DISPOSITION: May 12, 1944. No claimant having appeared, judgment of condemnation was entered and the product was ordered delivered to local charitable institutions after removal of the labels.

6402. Adulteration of green coffee. U. S. v. 420 Bags and 268 Bags of Green Coffee. Decrees of condemnation. Product ordered released under bond. (F. D. C. No. 11792. Sample Nos. 41519-F to 41521-F, incl.)

LIBEL FILED: February 12, 1944, Eastern District of Louisiana.

ALLEGED SHIPMENT: From the city of Parangua and the city of Santos, Republic of Brazil; arrived at New Orleans, La., on or about August 2 and October 17, 1943.

PRODUCT: 688 bags of green coffee at New Orleans, La., in possession of the Standard Warehouse Co.

The coffee was stored under insanitary conditions after shipment. The bags had been cut by rodents, and rodent excreta and urine strains were found on them. Examination of samples showed that the product contained rodent excreta, rodent hairs, and insect fragments.

VIOLATIONS CHARGED: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance; Section 402 (a) (4), it had been held under insanitary conditions whereby it might have become contaminated with filth.

DISPOSITION: March 9 and 15, 1944. The David G. Evans Coffee Co., St. Louis, Mo., claimant for one lot, and Westfeldt Bros., New Orleans, La., claimant for the remaining lot, having admitted the allegations of the respective libels, judgments of condemnation were entered and the product was ordered released under bond to be cleaned and reconditioned under the supervision of the Food and Drug Administration. All filth was eliminated and the product was thoroughly cleaned.

6403. Misbranding of roasted malted barley (coffee substitute). U. S. v. 650 Bags of Roasted Malted Cereal, and 100 Cases of Malted Beverage Cereal. Tried to the court. Judgment for the Government. Decree of condemnation entered and the product ordered released under bond to be used in making animal feed. (F. D. C. No. 10031. Sample Nos. 3356-F, 3357-F, 43402-F.)

LIBEL FILED: June 7, 1943; amended libel filed, October 1, 1943, Western District of Missouri.

ALLEGED SHIPMENT: March 12 and 22, and April 7, 1943, by the Froedtert Grain & Malting Co., Inc., Milwaukee, Wis.

PRODUCT: 650 100-pound bags of roasted malted cereal and 100 cases, each containing 24 1-pound cartons, of malted beverage cereal at Kansas City, Mo.

LABEL, IN PART: "Froemco Roasted Malted Cereal."

VIOLATIONS CHARGED: Misbranding, Section 403 (a), the statement, "A Coffee Substitute," on the label, was false and misleading since the article was not a coffee substitute in that it had no stimulating ingredient such as caffeine, nor did it have the taste of coffee; and, Section 402 (i) (1), the label failed to bear the common or usual name of the product, roasted malted barley.

DISPOSITION: The Froedtert Grain & Malting Co., Inc., and the Klopff Sales Co., Kansas City, Mo., having filed exceptions to the libel on December 2, 1943, the court overruled the exceptions and handed down the following memorandum opinion:

REEVES, District Judge: "It is contended by the intervenors that the amended libel fails to state a cause of action for the forfeiture of either one of the articles mentioned therein and moreover that the amended libel lacks definiteness and fullness in the respect that the misbranding asserted is not set out with particularity. In addition to the above, one of the intervenors charged that the libel did not assert it had moved one of the articles complained against in interstate commerce.

"The amended libel charges the violation of subsection (a) Section 343, Title 21 U. S. C. A. and subdivision (1) of subsection (i) of said section. Subsection (a) provides in substance that 'a food shall be deemed to be misbranded (a) if its labeling is false or misleading in any particular.' Subdivision (1) of subsection (i) of said section provides as follows with respect to the label, 'if it is not subject to the provisions of paragraph (g) of this section unless its label bears (1) the common or usual name of the food, if any there be.'

"It is charged in the libel that 650 bags, more or less, of 'Froemco Roasted Malted Cereal' and 100 cases, more or less, 'Brazilian Style MO-JV A Malted Beverage Cereal' not only moved in interstate commerce but were misbranded by reason of a designation that they were a coffee substitute. It is stated in the libel that in truth and in fact such products were malted, roasted, ground barley.

"1. The amended libel is commendably brief in compliance with procedural rules. It contains a direct charge that both articles enumerated were falsely branded and that such branding was misleading. The 650 bags were marked 'Froemco Roasted Malted Cereal.' There was no designation as to the kind of cereal. The 100 cases were designated as 'Brazilian Style MO-JV A Malted Beverage Cereal.'

"It will be noted from this that such product was designated as a cereal product. Nevertheless it contained a label that it was a 'coffee substitute.' It is well known that no cereal can be utilized to produce a coffee substitute. A substitute according to the weight of authorities must contain qualities akin to that of the article for which substituted. According to Webster's Dictionary, a substitute as used in this case would mean a 'thing put in place of another.' Cereal coffee is not a substitute for genuine coffee.

"In the case of *E. C. Hazard & Co. v. United States*, 164 Fed. 907, the district court for the Southern District of New York followed the opinion of one of the general appraisers with respect to a tax on an alleged coffee substitute. In that case the liquid extract had actually been taken from the coffee bean. It was contended by the owner that it was a coffee substitute. Both the board of appraisers and the court held that it was not.

"In the case of *Ex parte Hunnicutt*, 123 Pac. 179, 1. c. 185, 7 Okla. Cr. 213, the court held that an alleged substitute for malt liquor could not be considered as a substitute unless it contained a forbidden quantum of alcohol 'measured by volume.'

"A substitute should possess some of the qualities of the article for which it is substituted. The article may have been branded a coffee cereal but not a coffee substitute. The statute required that the label shall disclose the common or usual name of the food.

"The intervenors did not comply with this statutory requirement where it referred to the product as a 'malted beverage cereal.' There are many cereals from which such products may be made. It would have been a simple matter for the intervenors to have designated these products as malted and roasted ground barley, as alleged in the libel.

"2. The intervenors are familiar with the libelled product; they know the nature of the product and how it has been branded. The government should not be called upon to make a fuller or more particular statement of facts with which both sides are entirely familiar. The labels are both false and misleading. It would follow that the libel should be sustained.

"3. One of the intervenors pointed out in its exception that it did not cause the alleged offending articles to be moved in interstate commerce. The proceeding is against the articles themselves, which is a proper procedure, and the libel contains an appropriate averment that the products were in fact moved in interstate commerce. This was sufficient.

"In view of the above, the exceptions to the libel are overruled and the intervenors will be allowed 20 days to plead further."

An answer having been filed denying that the labeling was false and misleading in any respect or that it did not contain the common or usual name of the product, the court, on February 3, 1944, handed down findings of fact and conclusions of law to the effect that the statement in the label which represented that the product was a coffee substitute would mislead prospective purchasers into believing that the product had a stimulating ingredient such as caffeine and had the taste of coffee; and that the statement designating the product as a coffee substitute was false and misleading as the product was not useful as a coffee substitute; and that roasted malted cereal was not a common or usual name of roasted malted barley. The court concluded that the article was misbranded since it was not a coffee substitute and the label failed to describe the product by its common or usual name.

On February 4, 1944, judgment of condemnation was entered, and on February 14, 1944, the Klopf Sales Co., having appeared as claimant, the product was ordered released under bond to be used in making animal feed under the supervision of the Food and Drug Administration.