

5375. Adulteration of butter. U. S. * * * v. 9 Barrels of Butter. Tried to the court and a jury. Verdict for Government. Decree of condemnation and forfeiture. Product ordered released on bond. (F. & D. No. 7893. I. S. No. 2531-m. S. No. E-763.)

On December 2, 1916, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 9 barrels, each containing 225 pounds of butter, remaining unsold in the original unbroken packages at New York, N. Y., alleging that the article had been shipped on or about November 15, 1916, by the C. G. Anderson Produce Co., Knoxville, Tenn., and transported from the State of Tennessee into the State of New York, and charging adulteration in violation of the Food and Drugs Act.

Adulteration of the article was alleged in the libel for the reason that it consisted in whole or in part of a filthy, decomposed, and putrid animal substance, to wit, moldy, rancid, filthy, and decomposed butter; and for the further reason that floor sweepings and chicken feathers had been mixed and packed with the article so as to reduce, lower, and injuriously affect its quality and strength; and for the further reason that the article contained added poisonous and other added deleterious ingredients, to wit, floor sweepings and chicken feathers, which rendered it injurious to health.

On April 6, 1917, the case came on for trial before the court and a jury of one, in accordance with the stipulations of the parties, and after the presentation of evidence the case was submitted to the jury, and a verdict was returned in favor of the Government by direction of the court, the claimants, Samuel K. Cohen and Jacob Cohen, doing business under the name of the New York Butter Packing Co., New York, N. Y., having admitted that the butter was substantially in the condition charged in the libel. Thereupon the matter was taken under advisement by the court, and on April 9, 1917, a formal decision was rendered by the court upon the following statement of facts:

This is an action at law for the destruction of nine barrels of number two grade packing butter shipped from Nashville, Tennessee, to New York and consigned to the claimant, New York Butter Packing Company. The butter was packed in nine barrels, stout and double-headed except two, which were covered on one end with burlap. When examined in New York they disclosed the presence in substantial quantity of dirt, feathers, paper, aniline dyes which ran from the paper, the excrement of rats, and cheesy particles, as well as a substantial volume of the butter gone rancid. The claimant depends for its defense upon two theories; first, that the title to the butter had passed to it at Nashville, Tennessee, on or before the date of its delivery to the carrier, a fact which was conceded; second, that the butter was destined for retreatment by which most of the impurities were removed. This retreatment is known as, "ladling," and consists in dividing the butter into small portions, a pound or more in size, and in manually picking out with a trowel such parts as show dirty to the eye of the operator. The amount so removed varies generally from two to five per cent. but sometimes rises much higher. The butter thus cleansed is then put into a room at about 85° F., which makes it plastic and capable of being moulded into pats of proper size and homogeneous quality. It is then colored evenly and sold only to bakers. In baking the butter passes through a temperature of from 350° to 500° F., under which most of the rancid oils are volatilized and driven off. Under the evidence as given it must be assumed that the butter so used by bakers is not deleterious to the public health.

DECISION OF THE COURT; HAND, D. J.: The first point of the claimant is met and answered by the case of *Hipolite Egg Co. v. United States*, 220 U. S. 45, and needs no other discussion. In that case the eggs had been shipped by Clark & Company to themselves and were in storage at the time in question. That case was stronger for the claimant than the case at bar.

The second point is in fact also decided by the same case, which was almost precisely like this in that aspect. Doubts may arise where goods are shipped in

interstate commerce which may or may not be articles of food, as their ultimate destination may determine, but this case does not raise them. By no chance can this butter be called anything but an article of food; by no chance can I avoid the conclusion that it was filthy and decomposed in part. As such it came within the terms of the statute even though it might be saved and reclaimed by being made clean and palatable. Questions of that sort arise under section ten and under that alone. Under that section I have the power to destroy, sell or redeliver to the owner under bond. The conditions of redelivery therefore become the important question in the case; I may deliver the goods to the owner upon condition that they "ladle" the butter, or that they otherwise treat it so as to secure the health of the community, in either case subject to a bond.

As to "ladling", I shall not allow the butter to be so treated. Certainly some filth must remain, and while baking may remove any injury to health, the question is somewhat meagrely presented, and the claimant does not press its right to do so. There is, however, another and much more radical, method of cleansing such butter, known as "renovating", which is as follows: The butter is melted to a fluid so that all solid matters fall to the bottom. It is then strained and blown into a spray, in which condition hot water is allowed to percolate through the butter oil. The water is then drawn off and an emulsion made with milk is then cooled into crystals, salted and packed in containers. As such it is sold for table butter and in many instances is unquestionably a useful article of food, and is permitted access to the markets, where it is not unlawful.

I shall allow this butter to be "renovated" by the process mentioned and after renovation the plaintiff shall have opportunity to examine it and if it will not pass it, to convince me that it is still filthy or decomposed, and should be destroyed. Therefore, the decree will be that the butter be destroyed, unless the claimant elects within five days to "renovate" the same, upon giving suitable security as hereinafter described. If it does so decide, the butter shall be delivered to said claimant and after renovation to be completed within a suitable time shall be again submitted to the plaintiff for examination. If the plaintiff at that time is not satisfied with its purity, it may apply to this court for a writ of destruction notwithstanding delivery to the claimant. The claimant shall give a bond in the sum of two thousand dollars conditioned that it will renovate said butter within a time to be fixed and will submit the product to the plaintiff for inspection; further conditioned that it will satisfy the court of the identity of the renovated butter with the subject of this action, and will hold such renovated butter subject to any writ of destruction to be hereafter issued.

If a writ of error is taken, the claimant's option to renovate may be exercised notwithstanding the same, but the bond must extend to the determination of the appeal, in which case no writ of destruction will issue until that time.

The claimant will bear the costs under section ten.

Thereafter, on April 20, 1917, a formal decree of condemnation and forfeiture was entered in accordance with the foregoing decision, and it was ordered by the court that the United States recover of said claimants the costs of the proceedings and that the product might be delivered to said claimants to be subjected to the process known as renovation, as defined in section 4 of the act of May 9, 1902, upon the execution of a bond in the sum of \$2,000, in conformity with section 10 of the Food and Drugs Act.

CARL VROOMAN, *Acting Secretary of Agriculture.*