

overcome chronic ailments; that it would restore the kidneys, liver, and other organs to normal; that it would be efficacious in the treatment of rheumatism, kidney and liver sluggishness, neuritis, gallbladder troubles, hyperacidity, complexion troubles, and auto-intoxication; and that it would remove the cause of teeth or tonsil infection. The article would not be efficacious for such purposes.

It was alleged to be misbranded further (1) in that it was a laxative and its labeling failed to warn that it should not be used when abdominal pain, nausea, vomiting, or other symptoms of appendicitis were present, and that frequent or continued use might result in dependence on laxatives; and (2) in that its labeling was misleading since it failed to reveal the fact that the article was essentially a laxative mixture of sodium sulfate and table salt with a small proportion of Epsom salt, which fact was material in view of the following representations borne on the labels: "Active Ingredients Magnesium 0.87% Sodium 32.13% Potassium 1.20% Carbonate 0.25% Sulphate 45.80% Chloride 18.96% Silica 0.01% Calcium Trace Iron Oxide Trace Aluminum Oxide Trace."

On September 26, 1944, a plea of nolo contendere having been entered, the defendant was fined \$100.

1356. Alleged misbranding of Willard's Tablets. U. S. v. 265 Packages and 258 Packages of Willard's Tablets, and 450 Envelopes of Printed Matter. Tried to the court. Judgment for claimant. Decree ordering dismissal of the libel and release of the goods. Judgment affirmed on appeal to the circuit court of appeals. (F. D. C. No. 8607. Sample Nos. 4011-F, 4066-F.)

On November 5, 1942, the United States attorney for the Southern District of Indiana filed a libel against 265 100-tablet packages and 258 15-tablet packages of Willard's Tablets, and against approximately 450 envelopes bearing the designation "Willard's Message," each envelope containing a circular letter entitled "A Healthy Stomach—A Happy Life" and leaflets entitled "Willard's Message to Acid Stomach Sufferers" and "The Willard Treatment used from Coast to Coast." It was alleged in the libel that the tablets had been shipped between the approximate dates of January 9 and October 9, 1942, by the Willard Tablet Co., from Chicago, Ill., and that the envelopes and contents were received by the consignee at Indianapolis, Ind., at or about the same time that each of the shipments of the tablets was received. On February 25, 1943, an amended libel was filed.

Examination of a sample of the article showed that each tablet contained approximately 10 grains each of bismuth subnitrate, sodium carbonate, and magnesium oxide, together with small amounts of pancreatin and peppermint oil.

The article was alleged to be misbranded in that its labeling failed to bear adequate directions for use since the directions, "Take one tablet immediately after each meal, three times a day," provided for administration of the article at regular and stated intervals, whereas adequate directions would provide for administration only at such times as symptoms of excess acid in the stomach appeared.

It was alleged to be misbranded further in that certain statements on the cartons and bottles and on the envelope and contents accompanying the article were false and misleading since those statements created the impression that the tablets, when taken as directed, would be effective in the treatment and alleviation of stomach distress symptoms due to excess acid, stomach and duodenal ulcers, poor digestion, upset stomach, bad breath, sleeplessness, and jaded appetite, whereas the tablets, when taken as directed, would not be effective for such purposes.

On March 18, 1943, the Willard Tablet Co., claimant, filed its answer to the libel, denying the misbranding charges and alleging as an affirmative defense that the issue of the truth of the statements which were charged to be false and misleading had, therefore been finally determined by the Federal Trade Commission in favor of the claimant, and that the Commission's decision was *res judicata* on that issue.

On March 24, 1943, pursuant to agreement by the parties, a stipulation was filed with the court, setting forth the facts of the case as follows: That the claimant was the same company which was the respondent in the above-mentioned proceedings before the Commission; that the Commission on April 8, 1937, proceeded against the claimant by complaint, alleging unfair competition arising out of the advertising of the same "Willard's Tablets"; that the complaint charged, among other things, that the claimant falsely represented that the tablets constituted a competent and adequate cure or remedy for stomach and duodenal ulcers due to hyperacidity, and for poor digestion, acid dyspepsia, sour or upset stomach, gaseousness, bloating, heartburn, constipation, bad breath, sleeplessness, headaches, and jaded appetite, when such conditions were due to

or persisted because of excess acid; that an answer was filed by the claimant, denying such charges; that, after a hearing on the complaint, the Commission on October 15, 1938, ordered the claimant to cease and desist from representing, among other things, that the drug was a competent and adequate remedy or cure for ulcers which are due to or persist because of an excess acid condition, or that it would do more than neutralize excess acid and temporarily relieve the symptoms of distress due to such a condition, or that it would do more than provide relief from symptoms of distress caused by an excess acid condition and by ulcers which are due to or persist because of excess acid, unless such representation also stated that any benefit obtained other than such relief would be variable, depending upon the individual's reaction to the drug; that a modified cease and desist order was issued by the Commission on January 5, 1939, the modification made therein not being material in the instant libel action; that, as a result of such cease and desist order and in pursuance of the direction of the Commission, the claimant submitted to the Commission sample advertising matter to indicate compliance with such order; and that the representations which were claimed to constitute false and misleading statements under the Federal Food, Drug, and Cosmetic Act, were included in the sample advertising matter submitted to and approved by the Commission.

On June 4, 1943, the court adopted as special findings of fact the stipulation of the parties, and stated as a conclusion of law that the final order of the Federal Trade Commission between the same parties was *res judicata* of the issues in the libel action. On June 8, 1943, judgment was entered ordering the dismissal of the action and the release of the libelled property. Notice of appeal was filed by the government on August 4, 1943, and on March 7, 1944, the United States Circuit Court of Appeals for the Seventh Circuit handed down the following opinion, which affirmed the judgment of the district court:

MAJOR, *Circuit Judge*: "The United States (libelant) instituted this proceeding for condemnation of a quantity of Willard's Tablets shipped in interstate commerce on the ground that the labeling thereof was false, in violation of the Food, Drug and Cosmetic Act, 21 U. S. C. A. 352 (a), 352 (f), and the articles were therefore subject to seizure and confiscation (21 U. S. C. A. 334). The claimant filed an answer to the government's amended libel, setting up three affirmative defenses. The lower court sustained the claimant's defense of *res judicata*, based upon a prior proceeding before the Federal Trade Commission, and dismissed the action. From the order of dismissal, the government has appealed.

"The only question for decision is whether the proceedings before the Federal Trade Commission are *res judicata*, and, therefore, binding upon the District Court and determinative of the issues involved herein.

"The government urges as a basis for overruling the lower court's holding that: (1) the issues herein involved were not determined by the Federal Trade Commission; (2) unaffirmed decisions of the Federal Trade Commission do not have the finality necessary to constitute *res judicata*; (3) there is no mutuality of estoppel; (4) the lower court's holding would impair the enforcement of the Food, Drug and Cosmetic Act; and (5) the District Court improperly dismissed the amended libel as to that part alleging that the directions for use on the labeling were inadequate.

"The facts as stipulated and adopted by the lower court effectively dispose of the government's first contention. The stipulation discloses: (1) that the statements relied upon by the government to uphold the charge of misbranding are identical with those approved by the Federal Trade Commission; (2) that the fundamental issue of fact as to whether the Willard Tablets would give the relief claimed was considered by the Federal Trade Commission. We, therefore, have the incongruous situation of one branch of the government approving the method now pursued by the claimant and another branch seeking to condemn. This is, to say the least, placing claimant in an embarrassing situation and should be avoided if possible.

"In *George H. Lee Co. v. Federal Trade Commission*, 113 Fed. (2d) 583, the Circuit Court of Appeals for the Eighth Circuit upheld, and we think properly so, the defense of *res judicata*. Therein, the condemnation proceedings were instituted prior to the action before the Federal Trade Commission. The court on page 585 said:

Although the remedies sought by the government in the two proceedings were different—condemnation in the first, and a cease and desist order in the second,—it is obvious that the alleged falsity of the representations of the petitioner with respect to the therapeutic value and effectiveness of its product constituted the main basis for each of the proceedings * * *

And further, on page 586 :

If the question of the falsity of the representations of the petitioner contained on its labels and circulars had been determined adversely to the petitioner in the libel proceeding, it could not have been heard to say in the proceedings instituted by the Commission that such representations were true. By the same token, the United States and its instrumentality, the Commission, were not, after the decree in the libel proceeding, entitled to say that the representations made by the petitioner which had been finally adjudged not to be false, were in fact false. The government had had its full day in court on that issue, had lost its case, and could not collaterally attack, either directly or indirectly, the decree entered against it.

And on page 585, the court stated :

Where the underlying issue in two suits is the same, the adjudication of the issue in the first suit is determinative of the same issue in the second suit.

"As was stated by the Supreme Court in *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 402 :

A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. *Cromwell v. County of Sac*, 94 U. S. 351. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. See *Tait v. Western Maryland Ry. Co.*, 289 U. S. 620.

"The government's second contention seems to rest solely upon the provisions of the Federal Trade Commission Act, as amended (15 U. S. C. A. 45 (b) (g)), that the Commission may, under certain conditions, modify its order after the expiration of time for appeal. Therefore, the contention is that such power of modification leaves an unappealed order without that finality essential to invoke the doctrine of *res judicata*. With this contention we do not agree.

"The Act provides that an order of the Commission shall become *final* at the expiration of sixty days if no appeal is taken (45 (g)), and further provides for heavy penalties for violation of such order (45 (1)). It further provides that "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive." Thus, even the reviewing court in the same proceeding is bound by the findings of the Commission. To allow their finality to be attacked in a collateral proceeding would seem to run counter to the provisions and purposes of the Act. As was said in the case of *United States v. Piuma*, 40 Fed. Supp. 119, 122 :

Is it the province of the court to try the truth or falsity of the defendant's advertisements already found to be false by the Commission? The answer to this question depends upon the meaning to be given the word 'final' as used in subsection (g). The purpose of the provision was to bring the doctrine of *res judicata* into the Federal Trade Commission's jurisprudence. * * * This court will not now retry that issue.

With this construction of the Act we agree. We must, therefore, uphold the decision of the lower court that the issues of fact tried by the Commission have a finality upon which *res judicata* may be predicated.

"We agree with appellee's contention that mutuality of estoppel is not herein involved. We have held that the facts found by the Federal Trade Commission are conclusive and binding upon the District Court. The same result would obtain if the government were depending upon these findings to sustain its charge of misbranding. The doctrine of *res judicata* is not dependent upon mutuality of estoppel by judgment, as is contended by the government. The cases cited in support of this contention are not applicable to the instant situation.

"What we have heretofore said sufficiently disposes of the argument that the decisions of the Federal Trade Commission should not be allowed to impair the enforcement of the Food, Drug and Cosmetic Act. Under the facts stipulated herein and to which this decision is limited, there can be no impairment of the enforcement of the aforementioned Act.

"The last contention of the government to be considered is that the plea of *res judicata* was directed to but one count of the libel and that it is entitled to a trial upon the other count, *i. e.*, upon the issue of whether the labels gave adequate direction for use. We are of the view that this contention is not tenable. As appears from the record, this case was submitted by both parties upon a stipulation of 'all of the facts.' The parties so understood it and so did the lower court. The suit was tried upon the issue of *res judicata* as to the whole libel, and the government's contention to the contrary comes too late.

"The judgment of the District Court is

AFFIRMED."