LIBELED: 3–19–58, N. Dist. Ill.; amended libel 5–27–58.

CHARGE: 502(a)—while held for sale, the labeling of the article contained false and misleading representations that the article was an adequate and effective treatment for drunkenness; 502(j)—the article was dangerous to health when used in the dosage and with the frequency and duration prescribed, recommended, and suggested in its labeling; and 503(b)(4)—the article was a drug to which 503(b)(1) applied, and its label failed to bear the statement "Caution: Federal law prohibits dispensing without prescription."

DISPOSITION: 10–1–59. Default—destruction.

DRUG FOR VETERINARY USE

5982. Giles veterinary medicine. (F.D.C. No. 43171. S. Nos. 58–465/6 P.)

QUANTITY: 4 1-gal. cans and 4 1-qt. btls. at Denver Colo.

SHIPPED: (Cans) 5–5–58, and (btls.), some time prior to 1955, from Oak Park, Ill., by Giles Remedy Co.

LABEL IN PART: (Can and btl.) "The Great 'Giles' Veterinary Medicine Oleum Lini-Aether Sulphuricus Ten Per Cent — Camphora * * * A Veterinary Compound for Internal and External Use * * * prepared for Horses and Cattle * * * Made only by Giles Remedy Co. of Illinois."

RESULTS OF INVESTIGATION: Examination showed that the article was a yellow-colored, oily liquid, having odors of ether, camphor, and linseed oil.

LIBELED: 6–10–59, Dist. Colo.

CHARGE: 502(a)—the label of the article contained false and misleading representations and suggestions that the article was an adequate and effective treatment in horses and cattle for preventing or correcting "layups," loss of appetite and stamina, chills, colds, colic, and bloat, and for preventing and relieving shipping fever, and ailments caused by exposure; 502(e)(2)—the label of the article failed to bear the common or usual name of each of the active ingredients contained therein; 502(f)(2)—the labeling of the article failed to bear adequate warnings against use where its use may be dangerous to health and against unsafe dosage and methods and duration of administration or application; and 502(j)—the article was dangerous to health when used in the eyes, and internally, as directed in its labeling.

DISPOSITION: 7–22–59. Default—destruction.

NEW DRUGS SHIPPED WITHOUT EFFECTIVE APPLICATION

5983. Bee Royale Capsules. (F.D.C. No. 39873. S. No. 50–245 M.)

QUANTITY: 42 jars at Cambridge, Mass., in possession of Nature Food Centres, Inc.

SHIPPED: 1–23–57, from New York, N.Y.

LABEL IN PART: "Bee Royale Capsules * * * Contents 30 Capsules Each Capsule Contains: Royal Jelly 5 mg. Thiamine Hcl 10 mg. Pyridoxin 0.5 mg. Nucleic Acid 2 mg. *Calcium Pantothenate 10 mg. *Biotin 0.5 mcg. Directions: Adults: One Capsule daily with principal meal."

LIBELED: 2–13–57, Dist. Mass.; amended libel 4–10–57.

CHARGE: 502(f)(1)—while held for sale, the labeling of the article failed to bear adequate directions for use for delaying old age, restoring sexual vigor, rejuvenating impaired glands, restoring vigor, eliminating a chronic feeling of tiredness, growing hair, restoring youthful sex functions to women in meno-

pause, producing a general state of well being, acting as a "fountain-of-youth cocktail," and overcoming neurasthenia, which were the conditions and purposes for which the article was offered in the leaflet entitled "Have you read these headlines" disseminated by, and on behalf of, the consignee, Nature Food Centres, Inc., Cambridge, Mass.; and 505(a)—the article was a new drug which may not be introduced into interstate commerce, and an application filed pursuant to law was not effective with respect to such drug.

DISPOSITION: Bee Royale, Inc., New York, N.Y., appeared as claimant and filed an answer denying that the article was misbranded as alleged in the libel. On 12–3–57, pursuant to stipulation of the parties the case was transferred to the United States District Court for the District of New Jersey. Interrogatories were then prepared and served upon the claimant by the Government. Thereafter, the claimant filed a motion for dismissal of the libel and for summary judgment. After consideration of the briefs and arguments of counsel, the court, on 4–11–58, handed down the following opinion in respect to the denial of claimant's motion (160 F. Supp. 818):

HARTSHORNE, *District Judge:* "Under the provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 344(a),[1] the libelant seized 42 jars of what are called 'Bee Royale Capsules,' as a drug which was misbranded, while held for sale after shipment in interstate commerce, within the meaning of the statute (21 U.S.C. § 352(f)(1)),[2] in that its labeling did not set forth the claimed conditions for the cure of which the product was purportedly sold, as it should have done, *U.S.* v. *El Rancho Adolphus Products*, 140 F. Supp. 645, 648 (M.D.Pa. 1956), affirmed sub, nom. *U.S.* v. *Hohensee*, 243 F. 2d 367, 370 (3rd Cir. 1957); *Irons* v. *U.S.*, 244 F. 2d 34 (1st Cir. 1957); and also in that the said product was a 'new drug' within the meaning of the statute, 21 U.S.C. § 321(p)(1), as to which no effective application had been filed previously, as required by the statute.[3]

"While the libel was filed and the seizure occurred in the District of Massachusetts, the case was removed by order to this Court for trial, 21 U.S.C. § 334(a). Bee Royale, Inc., a New York corporation, appeared here as owner and claimant, filed answer, and now moves to dismiss the libel and for summary judgment under the Rules, F.R.C.P. 12(b), 56(b).

"The sole basis upon which the claimant makes such motion is that, subsequent to the above seizure, proceedings were instituted by the Post Office Department, not against this claimant but against Nature Food Centres, involving its selling Bee Royale Capsules through the mails. These proceedings were on the ground that such sale was 'a scheme for obtaining money through the mails by means of false and fraudulent pretenses * * *', in violation of 39 U.S.C. § 259 and § 732. Bee Royale, Inc. claims that these subsequent Post Office proceedings had meanwhile been adjudicated in its favor, so that the Government is now estopped to claim that these similar drugs violate either of the above provisions of the Federal Food, Drug and Cosmetic Act, primarily on the theory of *res judicata*, as applied in the recent case of *U.S.* v. *R.C.A. and National Broadcasting Company*, 158 F. Supp. 333 (E.D.Pa. 1958). We turn to the legal principles there involved.

"It is elemental that to constitute *res judicata* there must have been, prior to the instant suit (1) and adjudication (2) of the same issues here involved (3) between the same parties or their privies. *U.S.* v. *International Building Co.*, 345 U.S. 502, 504 (1952); *Lawlor* v. *National Screen Service*, 349 U.S. 322,

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[1] "Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found * * *"

[2] "A drug or device shall be deemed to be misbranded * * * (f) Unless its labeling bears (1) adequate directions for use; * * *"

[3] 21 U.S.C. § 355 "(a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug."

326 (1955). Nor does the theory of collateral estoppel apply, save as to issues 'actually litigated and determined in the prior suit.' *Lawlor, supra.*

"But here none of these essential elements appears. (1) There has been no prior adjudication; (2) the issues 'adjusted,' not adjudicated, in the Post Office Department proceeding, are not the same as those here involved; (3) while the U.S. is the moving party in both proceedings, no privity has been shown to exist between Bee Royale, Inc. and Nature Food Centres.

"Not only so, but if Bee Royale, Inc. and Nature Food Centres are perchance privy, then the present claimant is privy to an agreement with the Post Office Department that such proceedings 'will not act as a defense or relieve the undersigned of responsibility for violation of any other statute' than the above mailing statute. See 'Affidavit of Agreement' annexed to the present motion papers as Exhibit B.[4]

"That this 'Affidavit of Agreement,' the final act of the parties in the above Post Office proceedings, was not an adjudication of any res but a mere 'settlement' or 'adjustment' of the controversy between the Post Office Department and Nature Food Centres, as authorized by the Federal Administrative Procedure Act, Title 5, Executive Departments, § 1004(b),[5] is clear from its terms.

"In the next place, the issues in these Post Office proceedings differ from those involved in the present libel. The gist of the Government's charge in the Post Office Department proceedings was that the shipper of the capsules made specific and fraudulent representations as to the marvelous cures the capsules would achieve. These proceedings connoted a charge of intentional fraud. *Reilly* v. *Pinkus*, 338 U.S. 269 (1949); *Pinkus* v. *Reilly*, 157 F. Supp. 548 (D.N.J. 1957). On the contrary, the present libel does not charge a false representation, let alone one involving actual fraud. It charges a *failure to represent*, i.e., to state on the labeling of the capsules the ailments or conditions for the cure of which they were to be used by the public. Clearly this is a different issue than that presented in the Post Office Department proceedings, quite regardless of the lack of an adjudication there. Similar is the difference between the above Post Office proceedings and the other charge here made that the capsules are a 'new drug,' as to which the claimant has not proceeded as required by the statute.

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[4] "* * * With a view to obviating the necessity for further proceedings herein, it is voluntarily agreed:

"That in any future mail order operation of the enterprise involved in this proceeding, affiant will not represent or make any claims for the preparation being sold in said enterprise that: 1. It will 'rejuvenate failing or worn-out glandular activities in human beings'; 2. It constitutes 'a fountain of youth' and a 'restorer of sexual vigor,' or that it will restore sexual vitality to impotent persons; 3. It will grow hair on bald heads or where the hair is thinning; 4. It will restore youthful sex functions to women in menopause; 5. It will insure good health to users.

"That the acceptance of this affidavit by the Assistant General Counsel, Fraud and Mailability Division, of the Post Office Department, as a basis for disposing of the pending charges now involved herein shall not be construed as an approval of any business which the said affiant has conducted or may hereafter conduct under the name aforesaid set forth in the caption hereof, or any other name or names;

"It is further agreed that if the Post Office Department receives evidence showing the resumption of the enterprise as herein agreed to be discontinued, in violation of the terms of this affidavit, the Assistant General Counsel, Fraud and Mailability Division, Post Office Department, may issue or cause to be issued to affiant a ten (10) days' notice for a hearing to determine whether a violation of the said affidavit has been made and that in the event of any affirmative determination of that issue, a fraud order may issue forthwith against any name or names then employed by affiant in the operation of the said mail order enterprise;

"Affiant understands that this affidavit relates exclusively to the proceedings specified in the caption hereof and its filing will not act as a defense or relieve the undersigned of responsibility for violation of any other statute, but the filing shall not be construed as a confession that the said instant statutes or any other statute has been violated:

"The undersigned, upon acceptance of this affidavit by the Assistant General Counsel, Fraud and Mailability Division of the Post Office Department, as a basis for disposing of the pending charges, waives all rights to any present or future indemnity covering insured or c.o.d. shipments of the merchandise sold under the above names and involved in this proceeding, and agrees that any such claim may be forthwith disallowed by the Post Office Department."

[5] "(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title." (Title 5, Executive Departments, § 1004(b).)

"Nor is the decision of *U.S.* v. *R.C.A.*, *supra*, at all to the contrary. There the court was passing on the validity of an agreement between the National Broadcasting Company and the Westinghouse Broadcasting Company in exchanging between themselves two television and radio stations. This transaction had been specifically approved by the Federal Communications Commission. Thereafter the Government brought the instant proceedings to adjudge this exchange agreement to be in violation of the Sherman Act. The court held in the above case:

> There is no doubt that in finding that the exchange was in the public interest, it [the Federal Communications Commission] necessarily decided * * * that the exchange did not involve a violation of a law [the Sherman Act] which declares and implements a basic economic policy of the United States. 158 F. Supp. at 336.

In other words, the court found that the first adjudication did involve the very issue which the Government later sought to raise.

"Claimant also argues double jeopardy. But this argument, as well, is insubstantial, both because of the difference in issues, and because of the basic principle that double jeopardy applies only to criminal proceedings. The libel proceedings here are civil.

"An order may be entered dismissing the above motion."

On 4–25–58, the claimant filed an objection to answering the Government's interrogatories based on the ground that to answer such interrogatories would violate the privilege against self-incrimination of the corporation or its officers and agents. On 6–11–58, the court handed down the following opinion relating to the claimant's objection (162 F. Supp. 944):

HARTSHORNE, *District Judge:* "Libellant, United States Government, has seized a quantity of 'Bee Royale' capsules, under the provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. § 334(a), as having been misbranded. It also claims that the said product was a 'new drug' within the meaning of the statute, 21 U.S.C.A. § 321(p)(1), as to which statutory conditions precedent had not been taken by their producers and owners. Bee Royale, Inc., a New York corporation, now appears as owner and claimant and, after its application for summary judgment was denied herein,[1] filed objections to a series of interrogatories asked of it as discovery, by libellant. The point presently raised by claimant against these interrogatories is that they deny it the constitutional privilege of freedom from self-incrimination. U.S. Const. Amendment V.

"However, it will be noted that claimant is not an individual but a corporation. It has long been the established law that a corporation cannot claim the privilege of freedom from self-incrimination. This is because this constitutional privilege was designed to protect a natural person from being condemned out of his own mouth by governmental compulsion, torture, star chamber proceedings, and the like, as practiced in England before the American Revolution. Therefore this privilege did not apply to a mere artificial person, created by the State, to enable that person to set at naught its obligations to its creator, *Hale* v. *Henkel*, 1906, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652; *United States* v. *White*, 1944, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542; *Oklahoma Press Pub. Co.* v. *Walling*, 1946, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614; *Curcio* v. *U.S.*, 1957, 354 U.S. 118, 77 S. Ct. 1145, 1 L. Ed. 2d 1225. Furthermore, this privilege of freedom from self-incrimination is a purely personal one, which can be claimed only by the person who is sought to be incriminated, and not by him on behalf of third parties, *Rogers* v. *U.S.*, 1951, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344.

"It will further be noted that the sole party that is called on to answer these interrogatories under the Rules is this same corporation, the claimant. Thus, assuming that the duty of this corporation to answer these interrogatories amounts to a compulsion similar to that of a subpoena, *Bowles* v. *Trow-*

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[1] See this Court's opinion. *United States* v. *42 Jars* * * * *"Bee Royale Capsules* * * *," D.C.N.J., 160 F. Supp. 818.

bridge, D.C. Cal. 1945, 60 F. Supp. 48, it is quite clear that this party, solely under compulsion, has no right to plead this privilege.

"True it is that the answer of this corporation to this interrogatory must be sworn to by some individual, who is its 'officer or agent, who shall furnish such information as is available to the party.' F.R.C.P. 33, 28 U.S.C.A. Of course, if any such officer or agent, who is directed by the corporation to make these answers, can establish that such answers will incriminate him, he can refuse to answer them, because of his right to avail himself of the aforesaid privilege. *United States* v. *White*, supra. But if the corporation select such a person to answer these interrogatories, and, because of his pleading this privilege, these interrogatories are therefore not answered, the corporation itself will be in default, for not making the requisite discovery under the Rules. It will thus be the clear duty of the corporation to select an officer or agent for the above purpose, who will not have personally participated in anywise in any such questionable transaction, and who thus cannot be incriminated by such answers. This the corporation can easily do under its broad corporate powers, using even its attorney, for instance, whose duty it would then be to 'furnish such information as is available to the party'—the sum total of the corporate information. 2 Barron & Holtzoff, Fed. Practice & Procedure, § 774; 4 Moore, Fed. Practice, 2nd ed., § 33.07; *Holler* v. *General Motors Corp.* D.C.E.D. Mo. 1944, 3 F.R.D. 296; *Societe Internationale etc.* v. *McGranery*, D.C.D.C. 1953, 14 F.R.D. 44, 50.

"Nor is this officer or agent, appointed by the corporation for that purpose, then acting as an individual, under compulsion of the Government or of this Court. The interrogatories are addressed not to him but to the corporation. He answers solely because of his undertaking so to do at the sole instance of the corporation. He is free to refuse the request of his employer, the corporation, in that regard. But, of course, if he refuses such corporate request, that leaves the corporation in default as to its duty to make discovery, and subject to the sanctions provided by the Rules in such event. F.R.C.P. 37.

"Nor, when such an officer or agent of the corporation, who will not be incriminated by making that discovery on behalf of the corporation, makes such discovery, can he claim the privilege from self-incrimination, because of the fact that such discovery may indicate that some other officer or agent of the corporation has participated in such questionable transaction. This is because, as stated above, this privilege is a purely personal one.

"It therefore follows that since (1) this corporation can appoint some officer or agent to answer interrogatories for it, who will not be personally incriminated by such answers, and since (2) the corporation itself cannot claim any privilege against self-incrimination, it has no right to plead that privilege, as an objection to answering the interrogatories here in question.

"Such objection will therefore be stricken on order."

On 6–16–58, an order was entered denying and overruling claimant's objections to the interrogatories. On 6–23–58, it appearing that the claimant was electing to stand on its self-incrimination objection by refusing to answer the interrogatories served upon it, the court granted a Government motion for a default decree and ordered that the article be condemned and destroyed. Claimant appealed to the United States Court of Appeals, and, on 3–12–59, the following opinion was handed down by that court affirming the judgment of the district court (264 F. 2d 666):

GOODRICH, *Circuit Judge:* "This case deals with two points. One is the scope to be given to finality of administrative action. The other has to do with corporate answers to interrogatories under Rule 33.[1]

"The points come up in this fashion. In February, 1957, a libel was filed in the United States District Court in Massachusetts alleging that a drug called 'Bee Royale Capsules' was misbranded while being held for sale following interstate commerce shipment, in that its label did not bear adequate directions for use.[2] An amendment to the libel was filed in April adding the allega-

[1] Fed. R. Civ. P. 33.

[2] 21 U.S.C.A. § 352(f)(1) (Supp. 1958). Seizure and condemnation of the capsules was sought under 21 U.S.C.A. § 334 (Supp. 1958).

tion that the article was a 'new drug' which may not be introduced into interstate commerce without an effective application establishing its safety.[3] Bee Royale, Inc., a New York corporation, filed a claim of ownership in a Massachusetts action.

"In the meantime, in March, 1957, subsequent to the filing of the libel just described, the Post Office Department issued a fraud complaint against two companies called 'Nature Food Centres' and 'Nature Food Centres, Inc.' of Cambridge, Massachusetts. The charge was that these concerns were obtaining money through the mails by fraudulent representations of benefits to be had by taking Bee Royale Capsules.[4] The controversy with the Post Office Department was settled by an agreement on the part of the Nature Food Centres people to withdraw from its advertising several specified claims with regard to the beneficial effects of the capsules.[5] This settlement was in the form of an affidavit signed by Henry Rosenberger, owner of Nature Food Centres and Nature Food Centres, Inc. One paragraph of the affidavit stated that the signer 'understands that this affidavit relates exclusively to the proceedings specified * * * and its filing will not act as a defense or relieve the undersigned of responsibility for violations of any other statute * * *.' Thus ended, so far as we know, the controversy between Mr. Rosenberger's enterprises and the Post Office Department.

"In the meantime the Massachusetts case had been removed to the District of New Jersey under 21 U.S.C.A. § 334(a) (Supp. 1958). The claimant moved to dismiss the action basing its motion upon the Post Office's fraud complaint and subsequent settlement. This motion the trial court denied. 160 F. Supp. 818 (D.N.J. 1958). Written interrogatories, pursuant to Fed. R. Civ. P. 33, had been served on the claimant, Bee Royale, Inc., by the Government. The claimant objected to all the Government's interrogatories. The only objection now relevant is that of the Fifth Amendment. The district judge rejected the claimant's point that its refusal to answer the interrogatories was privileged under the Fifth Amendment. 162 F. Supp. 944 (D.N.J. 1958). Upon the further refusal of the claimant to answer the interrogatories he gave a default decree of condemnation under Fed. R. Civ. P. 37(d).

I. Res Administrata.

"Bee Royale, Inc., readily admits that the orthodox established doctrine of res judicata does not help it in this case. That admission is well founded. The parties were not the same in the Post Office proceeding as they are in this action for seizure. If there is any privity between Bee Royale, Inc. and Mr. Rosenberger's Nature Food Centres, that fact is not disclosed. Neither are the issues the same. The Post Office proceeding was based upon an alleged fraud as the section of the statute cited will show.[6] The condemnation action under the statute already cited is based on misbranding and does not require fraud.[7] Furthermore, there was no 'final adjudication' in any ordinary sense of that term in the Post Office proceeding. Mr. Rosenberger filed an affidavit and the charges made against his business concerns were ended so long as his promises were kept. Since there was neither privity of parties, identity of issues nor final adjudication there is not anything in the two proceedings that even faintly resembles the basis for res judicata. See Restatement, Judgments, § 1 (1942); Von-Moschzisker, Res Judicata, 38 Yale L.J. 299, 300 (1929).

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[3] A "new drug" defined in 21 U.S.C.A. § 321(p) (Supp. 1958), cannot lawfully be introduced into interstate commerce unless an application designed to establish its safety is "effective" with respect to the drug. 21 U.S.C.A. § 355 (Supp. 1958). Violation of this section subjects the drug to condemnation under section 334.

[4] This action was based upon 39 U.S.C.A. §§ 259, 732 (1928).

[5] The claims agreed to be withdrawn were that:

"1. it will 'reiuvenate failing or worn-out glandular activities in human beings';
"2. it constitutes 'a fountain of youth' and a 'restorer of sexual vigor,' or that it will restore sexual vitality to impotent persons;
"3. it will grow hair on bald heads or where the hair is thinning;
"4. it will restore youthful sex functions to women in menopause;
"5. it will insure good health to users."

[6] See note 4, *supra*.

[7] *United States* v. *Dotterweich*, 320 U.S. 277, 281 (1943); *Alberty Food Products* v. *United States*, 194 F. 2d 463, 464 (9th Cir. 1952).

"The common element in the two proceedings has to do with the claim of alleged benefits to be derived from the consumption of Bee Royale Capsules. Based upon this common factor the appellant urges us that the court should create a doctrine known as 'res administrata.' It points out the confusion which may be created in the mind of a citizen by finishing up one matter with one department of Government and then finding that he is not out of difficulty with another department. So the suggestion is that by the adoption of the proposed rule of 'res administrata' the right hand of Government will be conclusively presumed to know what its left hand has done. An adjudication, or a settlement, or a ruling or whatever by one administrative agency will end all matters relating to that general question, whatever other departments or statutes are involved.[8] We take it that this is to be the effect regardless of any privity of parties and regardles of departments, commissions or agencies involved. And perhaps regardless, too, of any consent given by a party in conflict with a Governmental agency that the settlement of his case is limited to that controversy only.[9] A benevolent Uncle Sam is, as the cartoons show him, to be treated as a unified individual with the addition of a degree of omniscience not accorded to him by anyone before. Furthermore, all his citizens, both natural and corporate, are included in the family of his children thus to create privity, or something akin to it, between them.

"It is hardly necessary to add that a court cannot swallow any such broad proposition as this. Yet such a broad assertion would be necessary if the appellant were to get any help here.

"That the administrative process has created difficulties for citizens in their relation to Government is a truism.[10] The judicial control of agency action was a subject of thoughtful consideration for a long time both by the Congress and the American Bar Association. This consideration resulted in the Administrative Procedure Act of 1946, 5 U.S.C.A. §§ 1001–11 (Cum. Supp. 1949), and gave a standard for court supervision of administrative action. There is a growing recognition of the doctrine of res judicata as applied to action by administrative tribunals.[11] It takes fifty-one pages in Professor Davis' book on administrative law to discuss it.[12] We shall, no doubt, have growth in this area. But the growth will come step by step; at least it will if courts are to be in charge of it.

"Furthermore, while there may be cases where the administrative process works hardship, this is not one of them. As indicated above, there is not a single fibril to connect these two pieces of Government procedure except certain claims made on behalf of that product known as Bee Royale jelly.[13]

II. The Unanswered Interrogatories.

"We think it clear that if Judge Hartshorne was correct in overruling the claimant's appeal to the Fifth Amendment as a protection against answering the interrogatories that the imposition of the judgment against it was within the court's discretion. Fed. R. Civ. P. 37(d).[14]

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[8] But cf. *United States* v. *Radio Corp. of America*,—U.S.—(Feb. 24, 1959), reversing 158 F. Supp. 333 (E.D. Pa. 1958).

[9] Appellant says that the agreement between the Post Office Department and the Nature Food Centres people is binding on other executive agencies of Government. But appellant evidently asserts that it should not be bound by the agreement, or at least that portion of it which waives the agreement as a defense to violations of other statutes. According to appellant, privity is a one way street.

[10] E. G., see the Hoover Commission *Task Force Report on Regulatory Commissions* (1949); *Jackson, The Supreme Court in the American System of Government*, 50, 51 (1955). See also with a happier but nonetheless pungent approach *Parkinson, Parkinson's Law* (1957).

[11] Compare *United States* v. *Five Cases . . .* of Capon Springs Water, 156 F. 2d 493 (2d Cir. 1946), with *United States* v. *Willard Tablet Co.*, 141 F. 2d 141 (7th Cir. 1944). Both of these cases are clearly distinguishable from the case at bar. See also Kleinfeld and Goding, *Res Judicata and Two Coordinate Federal Agencies*, 95 U. Pa. L. Rev. 388 (1947); *Davis, Administrative Law* 579–80 (1951).

[12] *Davis, Administrative Law* 563–613 (1951). Other references are listed in *Gellhorn and Byse, Administrative Law* 1183, n. 1 (1954).

[13] See *United States* v. *3963 bottles*, etc.—F. Supp.—(E.D. Ill. Sept. 8, 1958).

[14] In *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), the Supreme Court modified district court action taken under Rule 37(b). That case was one of extreme hardship because the plaintiff had done all in its power to obey the court order but was frustrated in its efforts to comply completely since Swiss law prevented it from doing so.

"Bee Royale, Inc. does not claim that it, as a corporation, can raise the question of the constitutional provision of freedom from disclosure as applied to it. Its argument concedes that the corporation itself may not claim the Fifth Amendment. *United States* v. *White*, 322 U.S. 694 (1944); *Wilson* v. *United States*, 221 U.S. 361 (1911).

"The argument has a further basis, however. It says that answers by a corporation to interrogatories addressed to it must, obviously, be made by some human being on its behalf. Now if the corporate officer who gives the answers, on behalf of the corporation, states things that may involve criminal responsibility, he may find himself involved in a criminal prosecution, especially since liability of corporate officers under the food and drug act is one at peril and no mens rea is involved. See *United States* v. *Dotterweich*, 320 U.S. 377 (1943). But personal criminal liability was the very point involved in the *White* case, *supra*.

"This argument would present more possibilities for hardship if the questions were to be answered only by an officer who would be competent to testify on the corporation's behalf, as was the rule prior to the 1948 amendment. See 4 Moore, Federal Practice § 33.07 (2d ed. 1950). Under the amended rule the agent who answers on behalf of the corporation does not need to have personal knowledge. The corporation's attorney will do. 4 Moore, Federal Practice § 33.07 (2d ed. 1950).

"But we are getting into unnecessary difficulties here. The Fifth Amendment plea is a personal one and a corporation cannot take advantage of it. That is really all that is involved as this case came to the district court and as it comes to us. Accord: *United States* v. *48 Jars* etc. — F. Supp. — (D.D.C. Nov. 14, 1958).

"The judgment of the district court will be affirmed."

5984. Vitamin B_{12} injection. (F.D.C. No. 41285. S. No. 79–243 M.)

QUANTITY: 991 packaged vials at Brooklyn, N.Y.

SHIPPED: 11–13–57, from Chicago, Ill., by Hallmark Laboratories, Inc.

LABEL IN PART: (Vial) "10 cc Vial * * * Vitamin B_{12} Crystalline U.S.P. 1000 Micrograms per cc in Isotonic Sod. Chloride Soln. with 2% Benzyl Alcohol Intramuscular–Intravenous * * * 051177."

RESULTS OF INVESTIGATION: Examination showed that each cubic centimeter of the article contained 995 micrograms of cyanocobalamin (vitamin B_{12}), 8.96 milligrams of sodium chloride, and a substantial amount of unidentified dissolved material.

LIBELED: 12–18–57, E. Dist. N.Y.

CHARGE: 501(b)—when shipped, the quality and purity of the article fell below the standard for *cyanocobalamin injection* set forth in the United States Pharmacopeia since it contained a substantial amount of unidentified dissolved material which is not permitted by the standard as an ingredient of *cyanocobalamin injection*; and 505(a)—the article, because of the presence of unidentified dissolved material, was a new drug within the meaning of the law, and an application filed pursuant to the law was not effective with respect to such drug.

DISPOSITION: 4–29–59. Consent—destruction.

DRUG FOR VETERINARY USE

5985. Cardiobee 15 Injection and Pangamic Acid (B–15) capsules. (F.D.C. No. 42313. S. Nos. 1–412 P, 2–316 P.)

QUANTITY: 584 cartoned vials of *Cardiobee 15 Injection* and 1 vial of *Pangamic Acid capsules* at Hialeah, Fla.

SHIPPED: Between 4–17–58 and 8–6–58, from San Francisco, Calif., by John Beard Memorial Foundation.