12862. Alleged misbranding of Ayds candy. U. S. v. 14 Cartons * * *. Plea of res judicata. Judgment for the claimant. Libel dismissed. (F. D. C. No. 16774. Sample No. 22170–H.)

LIBEL FILED: July 16, 1945, Eastern District of Missouri.

ALLEGED SHIPMENT: On or about March 1 and 13, May 23, and June 4, 1945, by the Carlay Company, from Chicago, Ill.

PRODUCT: 14 cartons, each containing 24 packages, of Ayds candy at St. Louis, Mo., and a number of leaflets entitled "A Beautiful Figure" and "I Lost 52 Pounds," window streamers entitled "Are You Overweight?" and placards entitled "I Lost 52 Pounds" and "Before After." This printed material was shipped with the product. Enclosed in the retail packages were direction leaflets entitled "Ayds Vitamin Candy Reducing Plan."

Examination showed that the article was candy with small proportions of added materials, including compounds of calcium, phosphorus, and iron, and vitamins B_1, B_2, A, and D, as stated on the label.

LABEL, IN PART: "Ayds Candy Contains dextrose, corn syrup, sugar, condensed whole and skimmed milk, vegetable oil, soya flour, malt syrup, powdered egg yolk, powdered carrots, salt, imitation vanilla flavor * * * Each 4 pieces of Ayds is fortified with 200 units of Vitamin A from fish liver oil, 500 units of Vitamin D (ergosterol), 500 units of Vitamin B_1 (Thiamin), 1 milligram of B_2 (Riboflavin), 175 milligrams calcium, 130 milligrams of phosphorus, 5 milligrams of iron (ferric phosphate insoluble)."

NATURE OF CHARGE: Misbranding, Section 403 (a).

DISPOSITION: August 15, 1945. The Carlay Company, claimant, filed an answer denying the charge of misbranding, and for a second defense pleaded res judicata and requested ruling on this issue prior to trial on the merits, to which the Government agreed. On June 10, 1946, the court handed down the following memorandum opinion, sustaining the claimant's defense:

RUBEY M. HULEN, *District Judge*: "This is a libel case. Plaintiff would confiscate fourteen cartons of Ayds Candy, a product recommended for weight reduction, because misbranded under Title 21, U. S. C., Section 343a. The Carlay Company claims ownership of the product. Claimant's answer (second defense) presents a plea of res adjudicata, that

> all of the issues set forth in the libel herein with respect to all printed matters and articles described and set forth in the libel and the right of the libelant to libel the same, have been heretofore determined and adjudicated by the Federal Trade Commission, an agency of the United States of America, of co-ordinate authority with this honorable Court, in a proceeding entitled "In the matter of The Carlay Company, a corporation, Federal Trade Commission Docket No. 4898 (1944)," and in which proceeding this claimant was party respondent and the United States of America, acting through the Federal Trade Commission was party complainant, and in which proceeding the truth or falsity of the statements alleged in this libel to constitute misbranding were fully adjudicated in favor of this claimant, and in which the order issued by the Federal Trade Commission was appealed to the United States Circuit Court of Appeals for the Seventh Circuit, on a Petition for Review of Order of the Federal Trade Commission: * * *

Both parties request ruling on this issue prior to trial of cause on its merits and same is now before the Court.

"The package in which the product is sold, the printed matter on it and accompanying it, constitute plaintiff's case. Claimant offered complaint of the Federal Trade Commission, order of Federal Trade Commission, Findings as to the Facts and Conclusions of the Commission, proceedings before the Federal Trade Commission, and Exhibits offered by Claimant in Federal Trade Commission Case, Docket Number 4898, being the case prosecuted by the Commission against claimant.

"The question before this Court is, was the main underlying issue in the case before the Federal Trade Commission the same as presented by the libel? The Commission's complaint charged claimant disseminated false advertising concerning their product for the purpose of inducing its purchase, the statements contained in circulars, leaflets, pamphlets and other advertising literature being:

> Many overweights praise the Ayds Candy reducing plan. It is easy. It is pleasant. No drugs. No exercising. It is usually effective where overweight is caused by overnutrition. One or two delicious pieces eaten just before each meal * * * and Ayds Candy curbs the craving for rich, fattening foods. Ayds contain vitamins A, B, and D and other essential nutrients. The diet is reduced automatically without the usual effort * * * without weakening effects * * * without hunger pangs.
>
> Many lose weight by "Eat Candy" plan. Delicious Ayds Candy, eaten as directed by Ayds plan, curbs appetite for fattening foods.

Ayds plan calls for no exercising. Many simply eat this delicious candy to curb their appetites for rich, fattening foods. Ayds plan is effective only in cases of overweight due to over-indulgence in eating, which includes most overweight people. Ayds Candy helps supply Vitamins A, B and D to prevent deficiencies that might occur due to lessened appetite.

Would you like to lose up to 10 lbs. in 5 days? Try this New Home Lemon Juice Recipe Way to lose ugly fat! Here's marvelous news for women who are overweight! Now you can make a reducing supplement right in your own kitchen, to help you lose those Ugly, unwanted pounds! It's so simple—so easy—and so effective! Some lose as much as 10 pounds in their first 5 days using this Plan! You never starve yourself. You use no drugs. You take no laxatives. You take no more exercise than you are accustomed to take. You eat plenty of healthful, satisfying foods. Yet you lose weight.

Why be fat? Here's an amazing, Easy Way to Lose Weight. No starvation diet. No strenuous exercises. Everywhere in America women are praising this simple, new way to lose ugly, unwanted pounds. By this easy plan many an overweight has been able to regain a more slender, more graceful figure. Many Now Eat Candy While They Grow Thin. It's so easy, you just eat one or two delicious pieces of Ayds Candy, with a glass of water before meals. This encourages you not to eat the rich, fattening foods, high in calories. You eat plenty—never go hungry! You don't cut out sweets and starchy foods. You just cut them down. You really *enjoy* reducing by this plan.

The Eat Candy plan * * * now eat candy and grow thin—new, easy plan.

You never starve yourself. You eat plenty of healthful, satisfying foods.

I lose 42 pounds in 60 days.

You can lose ugly pounds and have a slender, graceful figure. No dangerous dieting. No drugs. No exercising. You simply eat this pure delicious food candy as directed and grow thin.

Don't worry about those extra pounds. Many lose weight by new plan—eat candy every day.

At last I wear size sixteen again! Lost 36 pounds without exercising—using Ayds plan and candy.

The charge was that by these statements, 'all of which purport to be descriptive of the weight reducing properties' of claimant's product, claimants have represented that the use of 'Ayds' and claimants' 'plans' presents a new, easy way to reduce excess fat without dieting or exercise; 'that the use of Ayds candy plays a significant and important part in the reducing plan offered by respondents; that the use of Ayds Candy will curb or dull the appetite for fattening foods, and that respondents' plans for reducing will result in the loss of excess weight in an easy, pleasant way without the necessity of strict dieting.' Further charge was that the 'plans' are not revealed to the purchaser before the purchase and the purchaser is led to believe through such 'concealment' of the actual facts, that the only essential requirement, in order to obtain a reduction in weight, is the eating of a few pieces of the Ayds Candy before meals, when in fact a 'severely restricted low calorie diet in addition to the use of respondents' product' is required.

"The Commission's complaint charges (1) the statements (quoted above) to be false and misleading, and (2) the plans to be deceptive. The particulars in which the statements and plans are misleading and false are set forth in detail:

The Ayds play no significant role in the reducing program, their only function being to furnish some degree of vitamin and mineral supplementation for a reducing diet. The use of Ayds is not a new, easy way to reduce excess weight, but on the contrary it is necessary for the individual to follow a rigidly restricted dietary program. There is nothing easy about either the selection of, or adherence to, such a diet. * * * The effect of Ayds upon the appetite is only temporary, and does not curb or dull the appetite or mitigate the pangs of hunger between meals. In order to be successful in reducing weight it is still necessary for the user to follow a rigidly restricted, low calorie diet, with all the discomforts and annoyances which are inherent in such diets. Moreover, such low calorie diets ordinarily supply sufficient quantities of essential nutritive elements, including proteins, vitamins and minerals, without the necessity of supplementing them by Ayds or other vitamin-enriched products.

Any loss of weight that may be experienced by a person following the regimen advocated by respondents is due primarily to the restricted diet and not to the Ayds. Furthermore, respondents' representation as to loss of weight that may be expected by the use of their reducing methods are grossly exaggerated.

"The Commission sustained the charges. Its findings conclude:

Through the use of these statements and others of a similar nature, respondents have represented, directly or by implication, that the use of their candy and "plan" provides an easy way or method whereby excess weight may be removed from the body, and that such reduction in weight is effected without the necessity of restricting the diet.

* * * Respondents' "plan" for the removal of excess weight calls for the eating of one or two pieces of the candy before each meal and the observance of one of three restricted diets prescribed by respondents in the printed directions enclosed in each box of candy. Respondents' theory as to the part played by the candy in the weight reducing program is that the eating of the candy curbs the appetite, with the result that less food is eaten. The only virtue claimed by respondents for the vitamins and minerals in the candy is that they afford some protection against any nutritional deficiency which might result from the purported decrease in the food intake. * * *

As in the case of any sweet, the eating of respondents' candy immediately preceding a meal may to some extent curb or dull the appetite and make it some easier to refrain from overeating at that particular meal. This effect, however, is only temporary; the desire for food will soon return, and unless such desire is restrained and the diet adhered to, the effort to reduce weight will result in failure.

In short, any reduction in weight following the use of respondents' plan results from the adherence to the diet prescribed by respondents and not from the use of the candy. One following the diet would lose weight regardless of whether the candy is used or not, and the use of the candy without adherence to the diet would prove ineffectual.

The removal of excess weight from the body, therefore, cannot be accomplished through the use of respondents' candy and "plan" without the necessity of dieting. On the contrary, respondents' "plan" contemplates the adherence to a low caloric diet, and such adherence is in fact essential. Nor is the use of the "plan" "easy" as claimed by respondents. The adherence to restricted diets such as are prescribed by respondents is usually a difficult matter, particularly for individuals who are overweight, and requires the exercise of an unusual amount of will power and self-restraint.

* * * The Commission therefore finds that the representations made by respondents with respect to their candy and to their plan for the removal of excess weight, as set forth in paragraphs three and four hereof, are erroneous and misleading and constitute false advertisements.

"On review, the Circuit Court of Appeals, in *Carlay et al vs. Federal Trade Commission*, (7th C. C. A. February 15, 1946) 153 F. 2d 493, ruled:

There is no evidence in this record to support a finding that it is necessary, in order to follow the suggested "plan," that the user adhere to a restricted diet. The facts are plain, it being undisputed that eating candy before meals curbs the appetite, lessens intake of food and involves no restriction of diet but automatically restrains the desire for food. This, we think, is all that petitioners have ever claimed; this, we think, is all that their advertising represents. There is absolute absence of any deceptive representation. It follows that *there is lack of substantial evidence* to support the finding that a rigorous or restricted diet is necessary.

* * * * * * *

The Commission says that carrying the "plan" into execution is not "easy." The term obviously is one of comparative or relative connotation. Whether one plan is easy and another hard, whether one is easier than another, whether one simple and another intricate, are all questions of comparative character and quality. The statement of practically all the witnesses is that the plan is easy and simple, and we think the only inference possible to draw from the undisputed facts leads necessarily to the conclusion that the plan is not a complicated one, but rather a relatively easy one involving no drugs, no restricted or rigorous diet; that its workings are simple in that it is only necessary for the user to eat the candy before meals and thus curb his desire for food, resulting not in the necessity of exercise of will power in refraining from consumption of certain foods, but in less desire for and less intake of all kinds of foods. * * * *Consequently there was nothing deceptive in the advertising in this respect.*

* * * * * * *

Respondent urges that inasmuch as the details of the plan were contained only in the pamphlet inclosed in the candy box, the advertisements were deceptive in that they failed to advise the reader that the plan involved taking less food. Respondent terms this "a restricted diet" but, as we have seen, in truth and in fact it is not a matter of dieting so much as the eating of sweet food to reduce the desire for food of higher calories. As we have observed, each of the advertisements refers to a plan. Anyone who reads them knows that eating the candy was to be accompanied by a suggested plan and that the candy and the plan together constituted the entire helpful contribution. When the reader obtained his candy and perused the plan, of which he had been given notice, he learned not that the advertisement was wrong but merely that the plan coincided with what the advertising told him, when to eat the candy, and what the purpose was in eating it. [Emphasis added.]

"The libel charges misbranding in that statements and certain 'leaflets' which are attached to the libel as 'Exhibit A,' are false in that such statements and designs represent and suggest and create in the minds of the readers thereof the impression that consumption of the article is effective (1) to cause loss of body fat and a reduction of body weight, (2) to enable the user to have a slenderer, more graceful figure, (3) to accomplish such a result quickly, easily, pleasantly, and without conscious dieting, (4) to curb the appetite and unconsciously train the user to reduce his food intake so that his weight, once reduced, will not increase, (5) to enable the user to look better, feel better and younger and appear lovely, (6) to supply minerals and vitamins in proper amounts not only to prevent disease but enough for buoyant health, (7) to build up resistance of the body to disease by reason of its Vitamin A content, (8) and to help to maintain pep and energy and continued good health; whereas, consumption of the article is not effective for such purposes.

"When the specifications of misbranding in the libel are compared with the Commission's complaint, its findings and conclusions, and the ruling of the Circuit Court of Appeals in the Carlay case, we find that what was charged to be false before the Commission is substantially the same as charged in the libel. The libel couches its charge in different language, in some respects, from the

Commission's complaint, but we cannot escape the conclusion that the underlying issue in the two proceedings is the same. The advertising matter used by claimant and relied upon by plaintiff to sustain its libel is the same advertising matter relied upon by the Commission to sustain its case. Thus libelant in effect admits that the basis of its case is the same evidence as was presented before the Commission.

"Plaintiff would avoid the effect of the decision of the Court of Appeals in the Commission's case, on four grounds:

(1) such (to hold a ruling in a Federal Trade Commission case res adjudicata in a libel proceeding) was not the intent of Congress;
(2) it (such a holding) would be against public policy;
(3) the order of the Federal Trade Commission even when affirmed, modified or set aside by the Circuit Court of Appeals does not possess the element of finality to support a plea of res adjudicata; and
(4) there is no mutuality of estoppel. [Plaintiff's brief, page 38.]

Not included in this summary, it is also urged by plaintiff that the two proceedings under consideration are different. The proceeding before the Commission is 'designed to restrain the unlawful advertising of *Ayds Candy*, while the latter (libel) seeks the condemnation of a shipment of the product.' Both proceedings are based on the same alleged false advertising. It would be an incongruous situation if that which was not false advertising before one Department of the Federal Government were held to be false advertising before another, on the hypothesis that in the one case the Government was only seeking to restrain the advertising, while in the other the Government was confiscating the product advertised. Government regulations, of necessity, have become complex in their nature, but this Court is unwilling to approve procedure of the character now contended for by the Government. Plaintiff's position, in our judgment, is contrary to the ruling of the Court of Appeals for the Eighth Circuit. In *George H. Lee Company vs. Federal Trade Commission*, 113 F. 2d 583, the Federal Trade Commission had proceeded against the appellant, charging false and misleading representations in the sale of 'gizzard capsules.' In a libel proceeding involving the same charge of falsity in advertising, the trial court resolved the issue in favor of the petitioner and dismissed the proceeding, from which no appeal was taken. The petitioner, being unsuccessful in its plea of res adjudicata before the Commission, was sustained by the Court of Appeals. The Court said:

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. * * * 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. * * * Where a suit binds the United States, it binds its subordinate officials. * * * The United States may not relitigate the same issue in successive libel proceedings involving different quantities of the same product (George H. Lee Co. v. United States, 9 Cir., 41 F. 2d (460), nor may it relitigate the same issue in any proceeding in which the parties are the same and the product is the same. The rule is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

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.

"In *United States versus Willard Tablet Company* (7th C. C. A.) 141 F. 2d 141, the United States instituted libel proceedings for condemnation of a quantity of Willard tablets on the ground that the labeling was false. The claimant there, as here, answered, setting up a plea of res adjudicata, based upon a prior proceeding before the Federal Trade Commission, where the charge was dismissed. The plea of res adjudicata was sustained in the trial court and affirmed on appeal, the Court citing the Lee case as authority for its ruling.

"These two cases, one on an order of the Commission in which a judgment in a libel proceeding was successfully interposed on a plea of res adjudicata, and the other a libel in which an order on a Commission ruling was successfully

interposed as res adjudicata, in our opinion dispose of the question presented by the record in this case and the points urged by plaintiff.

"Order will go accordingly."

On June 19, 1946, the court handed down findings of facts and conclusions of law consonant with the foregoing opinion and ordered the libel dismissed.

12863. Adulteration of candy. U. S. v. 39 Boxes, etc. (and 3 other seizure actions). (F. D. C. Nos. 24442, 24443, 24445, 24446. Sample Nos. 24064–K to 24066–K, incl., 24466–K, 24897–K, 24898–K.)

LIBELS FILED: On or about February 17, 18, and 19, 1948, Western District of Wisconsin, Southern District of Iowa, and District of North Dakota.

ALLEGED SHIPMENT: Between the approximate dates of December 3, 1947, and January 26, 1948, by Candymasters, Inc., from Minneapolis, Minn.

PRODUCT: 98 boxes at Eau Claire, Wis., 57 boxes at Des Moines, Iowa, 29 boxes at Marshalltown, Iowa, and 234 boxes at Fargo, N. Dak., each box containing 24 1-ounce candy bars.

LABEL, IN PART: "Walnut Hill," or "Master Mint."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole are in part of a filthy substance by reason of the presence of insect fragments, insects, and rodent hair fragments; and, Section 402 (a) (4), it had been prepared under insanitary conditions whereby it may have become contaminated with filth.

DISPOSITION: March 9, April 29, and May 10, 1948. Default decrees of condemnation and destruction.

12864. Adulteration of candy. U. S. v. 39 Boxes * * *. (F. D. C. No. 24496. Sample No. 18481–K.)

LIBEL FILED: March 19, 1948, Western District of Kentucky.

ALLEGED SHIPMENT: On or about February 13, 1948, by the Whitson Candy Co., from Knoxville, Tenn.

PRODUCT: 39 boxes, each containing 120 sticks, of candy at Campbellsville, Ky.

LABEL, IN PART: "Whitson's Pure Sugar Full Value Penny Stick Candy."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a filthy substance by reason of the presence of rodent hair fragments; and, Section 402 (a) (4), it had been prepared under insanitary conditions whereby it may have become contaminated with filth.

DISPOSITION: April 23, 1948. Default decree of condemnation and destruction.

12865. Adulteration of candy. U. S. v. 25 Boxes * * *. (F. D. C. No. 23930. Sample No. 710–K.)

LIBEL FILED: November 17, 1947, Southern District of Florida.

ALLEGED SHIPMENT: On or about September 10, 1947, by the Lee Chocolate Co., from Atlanta, Ga.

PRODUCT: 25 boxes, each containing 24 1½-ounce bars, of candy at Jacksonville, Fla.

LABEL, IN PART: "Lee's Cocoanut Bar."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of insects and insect fragments; and, Section 402 (a) (4), it had been prepared under insanitary conditions whereby it may have become contaminated with filth.

DISPOSITION: January 22, 1948. Default decree of condemnation and destruction.

12866. Adulteration and misbranding of candy. U. S. v. 5 Cartons, etc. (F. D. C. No. 23750. Sample No. 78809–H.)

LIBEL FILED: September 30, 1947, Western District of Washington.

ALLEGED SHIPMENT: On or about August 14, 1947, by Kandy McNutt, from Whittier, Calif.

PRODUCT: Candy. 5 cartons, each containing 24 bars, and 1 carton, containing 20 bars, at Mount Vernon, Wash.