31107. Alleged misbranding of Z–G Herbs. U. S. v. 24 Packages of Z–G Herbs No. 17 Double Strength, 19 Packages of Z–G Herbs No. 17. Tried to the court. Judgment for the Government in the district court. Appeal to the Circuit Court of Appeals. Judgment of district court reversed. Libel dismissed and product ordered returned to claimant. (F. & D. No. 30669. Sample No. 36388–A.

U. S. v. 119 Packages of Z–G Herbs No. 17 Double Strength. Claim and answer and motion to dismiss filed. Motion to dismiss granted. (F. & D. No. 31150. Sample No. 45493–A.)

U. S. v. Sinclair G. Stanley (Z–G Herbs Co.). Demurrer to information sustained and information dismissed. (F. & D. No. 32232. Sample Nos. 43493–A, 43497–A, 43498–A.)

This report is based upon seizure actions against two lots of the above-named drug the labeling of which was alleged to be false and fraudulent and a criminal prosecution based upon various shipments of the drug.

On June 26 and September 26, 1933, the United States attorneys for the Eastern District of Michigan and the Southern District of New York filed libels against 24 packages of Z–G Herbs No. 17 Double Strength and 19 packages of Z–G Herbs No. 17 at Detroit, Mich., and 119 packages of Z–G Herbs No. 17 Double Strength at New York, N. Y., alleging that the article had been shipped in interstate commerce on or about June 7 and August 12, 1933, by the Z–G Herbs Co. from Chicago, Ill.; and charging that it was misbranded in violation of the food and drugs act as amended.

On January 7, 1935, an information was filed in the Northern District of Illinois against Sinclair G. Stanley, trading as the Z–G Herbs Co., Chicago, Ill., charging interstate shipment by the defendant of certain quantities of Z–G Herbs from the State of Illinois into the States of Michigan and New York, also a quantity of the same drug product into the State of New Jersey.

It was alleged in the libels and in the information that the following representations in the labeling, (carton for both products) "of unequaled value in all stomach, intestinal, digestive and blood disturbances. It is a powerful blood purifier and tonic * * * for tonic effect * * * Children * * * it certainly will improve their appetite making them strong and healthy," were statements regarding the curative or therapeutic effects of the article and were false and fraudulent.

On February 18, 1935, the defendant Sinclair G. Stanley filed a motion to quash the information filed in the Northern District of Illinois, which motion was overruled but the defendant was granted leave to file a demurrer. On April 29, 1935, the court sustained the demurrer to the information without opinion.

On April 30, 1936, Sinclair G. Stanley, trading as the Z–G Herbs Co., claimant in both seizure actions, having moved for dismissal of the libel filed in the Southern District of New York the motion was granted with the following opinion:

HULBERT, *District Judge*. "After the institution of this action, the Government proceeded against the claimant by filing an information in criminal proceedings in the District Court of the United States for the Northern District of Illinois, eastern division.

"The second count of the information covers the precise shipment of merchandise which is the subject matter of this action.

"On April 29, 1935, the court sustained a demurrer to said information, writing no opinion. Among the grounds of the demurrer, were: "The count does not charge any offense under the Pure Foods and Drug Act or any law of the United States because the count shows on its face that the statements, designs, or devices alleged to have been borne by the packages were not statements of curative or therapeutic effect, and therefore the court does not charge that the packages bore statements, designs, or devices regarding curative or therapeutic effect. The count does not charge any offense under the Pure Foods and Drug Act or any of the laws of the United States, because the count does not allege any statements, designs, or devices regarding the curative or therapeutic effect which are false and fraudulent or which could be deemed false and fraudulent.'

"In *United States* v. *Oppenheimer*, 242 U. S. 85, the court said at page 87: 'We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. * * * Of course the quashing of a bad indictment, is no bar for a prosecution upon a good one * * *.'

"The Government neither appealed nor filed a superseding information but the defendant amended its answer in this action to set up that judgment as res adjudicata and now moves to dismiss.

"In *Northern Pacific* v. *Slaught*, 205 U. S. 122, it was held that a judgment on demurrer is as conclusive as one rendered upon proof. The court there said: 'The record shows that the demurrer was not upon mere formal, or technical defects, but went to the merits.'

"The court is loathe to interpret the determination made by another judge in another district, but from the record before me in that case it appears that the demurrer was sustained upon the ground that the goods were not misbranded. It was, therefore, disposed of upon the merits and not upon a mere technical defect.

"Motion granted. Settle order on 2 days' notice."

On April 14, 1936, the claimant filed an amended answer to the libel filed in the Eastern District of Michigan denying the allegations of the libel and setting up as an affirmative defense that the dismissal of the information filed in the Northern District of Illinois was res judicata.

On December 6, 1937, the claimant's motion to dismiss was denied. On July 1, 1938, the case came on for trial in the district court and judgment was entered for the Government. In pronouncing judgment for the Government the court handed down the following opinion:

O'BRIEN, *District Judge*. "The court finds that by a preponderance of the evidence the Government has sustained its case in every essential element. There is no question but that the articles libeled come into this jurisdiction in interstate commerce. In fact, I assume that is admitted."

MR. CLARKE. "That is not admitted, if the court please."

THE COURT. "Then I so find that that is established by a preponderance of the evidence. And as to each of the elements alleged in the libel that are necessary for the sustaining of the Government's case, I find that each has been sustained by a fair preponderance of the evidence.

"The only thing in the allegations in the libel that I want to comment on is paragraph 4 of the libel, which alleges that said products are misbranded in violation of section 8, of the Food and Drug Law, paragraph 3 as amended, in the case of the drugs, and the following statements appearing upon the carton of the product are statements regarding curative and therapeutic effects of the articles and are false and fraudulent in this, that the articles contain no ingredient or combination of ingredients capable of producing the effect claimed and that the same were applied to the said articles knowingly and in reckless and wanton disregard of their truth and falsity.

"Then follows the legend upon the carton, 'Of unequalled value in all stomach, intestinal, and blood disturbances, as a powerful blood purifier and tonic. For tonic effects on children it will certainly improve their appetite, make them strong and healthy.' I find that the Government has sustained the allegations in this paragraph that this was misbranding and that it did proclaim curative effect and therapeutic effect. In fact, I think that is the most dangerous and malignant type. The Food and Drugs Act was passed by the Congress of the United States regulating the use, advertising and consumption, and things of that character, which of course were visible to anyone who took them for the purposes indicated, and it was the purpose of that act to do away with the sale of dangerous nostrums and patent medicines.

"Then because of the act, the makers of these nostrums, such as this one in question here, engaged men more skillful in the use of the English language and they then prepared a sort of verbal Houdini act which evaded the spirit and the meaning of the law, and yet endeavored to purvey to the ignorant upon whom they preyed, the unsuspecting public, their nostrums, very often with fatal effect. I cannot conceive of any words more powerful than 'of unequalled value.' There is not any expression that I can think of that surpasses it in its all-embracing claim and promise, and instead of saying 'diseases of the stomach, intestinal and digestive tract, and blood diseases,' it says, 'disturbances,' a more euphonic expression. What can it be but a disease? It might mean cancer. It might mean ulcers of the stomach. It might mean the most virulent type of infection of the intestinal tract. It might mean a disease that called immediately for an emergency operation. That is a disturbance of the intestinal tract, as the doctor illustrated, as I had in mind while he was talking. I would say the only established use for the predominant drug in this concoction is as a cathartic. Even a layman knows that if a person with a case of appendicitis which called for immediate operative relief took such a

thing, the chances are certainly predominating that there would be a rupture and it is possible that there would be peritonitis, and with peritonitis the percentage of deaths is prevailing. So the broad and all-comprehensive nature of this language that includes every possible kind of disturbance, which means every conceivable kind of disease, the holding out to the public that there exists nothing in the world of equal value to this, I think is a misbranding that is malignant in its possible effect. It is certainly dangerous to the public and in direct violation of the act, the spirit of the act and the wording of the act. I find further that these words were used knowingly, with reckless and wanton disregard of their truth or falsity.

"For these reasons the Government must prevail in its libel, and the Government may take an order in harmony with the court's opinion.

"The motions of various kinds urged by the claimant for a verdict, every motion of the claimant on every ground advanced, is denied and the claimant given a general exception to the findings of the court, and an individual exception to each denial.

"The proposed findings of fact submitted by the Government are adopted by the court. The claimant may submit, for the purpose of the record, proposed findings of fact."

MR. CLARKE. "May I have an exception?"

THE COURT. "I have granted you an exception. You may have it again if you wish. I have granted you a general exception to the statements of the court and each individual statement of the court, and each motion denied."

MR. CLARKE. "If the court please, may I have the usual time for bill of exceptions?"

THE COURT. "Twenty and sixty days."

MR. CLARKE. "Also may the court order that the goods seized be not condemned?"

THE COURT. "They shall not be condemned. The Government shall preserve them until the time for appeal has expired."

MR. CLARKE. "I would like to have an order to make sure that the goods are kept and that the case is not academic. If the goods are not in existence, there is no use in quarreling about them."

MR. RAY. "We have the marshal's return. They are in his possession."

THE COURT. "He would not destroy them without an order of the court, and this court has made no such order."

MR. CLARKE. "They were destroyed in New York."

THE COURT. "You can confer with the Government about that."

The claimant filed an appeal to the Circuit Court of Appeals for the Sixth Circuit and on April 9, 1940, the circuit court entered the following order reversing the district court and remanding the case for a new trial:

SIMONS, *Circuit Judge*. "Upon appeal from a judgment rendered against the appellant for misbranding articles in violation of section 8 of the Pure Food and Drug Law, 21 U. S. C. A. 10.

"It appearing from the stipulation of facts that the articles sought to be condemned are the identical articles that formed the basis of an indictment against the appellant in the District Court of the United States for the Northern District of Illinois, eastern division, in which court the indictment was, upon demurrer, dismissed because showing on its face that the statements, designs, or devices alleged to have been borne by the packages were not statements of curative or therapeutic effect within the language of the statute, in consequence of which the indictment was held not to state an offense against the United States; and

"It being the view of the court that the decision in the District Court of Illinois is res judicata of present issues, the decision there being upon the merits with respect to the charge of misbranding.

"It is Hereby Ordered That the judgment below be and it is hereby reversed. *U. S. v. Oppenheimer*, 242 U. S. 85, 87; *U. S. v. Barber*, 219 U. S. 72; *Coffey v. U. S.*, 116 U. S. 436, 445. To the same effect is U. S. v. 119 Packages, etc., 15 Fed. Supp. 327 (D. C., N. Y.). The cause is remanded for new trial in conformity herewith."

On June 11, 1940, the case was reopened by mandate of the Circuit Court of Appeals. On September 25, 1940, a motion for judgment in conformation with the findings of the Circuit Court of Appeals was filed and judgment thereon was entered on October 29, 1940, dismissing the libel and ordering the return of the product to the claimant.