

3869. Misbranding of Buffalo lithia water. U. S. v. 7 Cases, more or less, of Buffalo Lithia Water. Tried to the court. Judgment for the Government. Product ordered released on bond. (F. & D. No. 2178. I. S. Nos. 10252-c, 10253-c, 10257-c. S. No. 795.)

On December 21, 1910, the United States attorney for the District of Columbia, acting upon a report by the Secretary of Agriculture, filed in the Supreme Court of said District, holding a District court, a libel for the seizure and condemnation of 7 cases, more or less, each containing 12 one-half gallon bottles of a liquid purporting to be a food and drug, to wit, Buffalo lithia water, remaining unsold in the original unbroken packages at Washington, D. C., alleging that 5 of the cases had been transported from the State of Virginia into the District of Columbia, and that 2 of the cases had been transported from the State of Maryland into the District of Columbia, and charging misbranding in violation of the Food and Drugs Act. The product was labeled: "Buffalo Lithia Water—Springs No. 2, Buffalo Lithia Springs Water—Nature's Materia Medica, Buffalo Lithia Springs Water Company, Buffalo Lithia Springs, Va."

Misbranding of the product was alleged in the libel for the reason that each and every bottle in the cases purported to contain a food and drug, that is to say, a liquid known as lithia water, the said cases and bottles bearing labels as aforesaid, which said labels bore certain statements regarding said food and drug, which were false and misleading in that said statements imported that the liquid contained in said bottles was a lithia water, whereas, in truth and in fact, it did not contain an appreciable amount of lithium, and would not give the therapeutic effect of lithium when a reasonable quantity of the water was consumed; and, further, the said water was not a lithia water, or entitled by reason of its ingredients to be so called. Misbranding was alleged for the further reason that the product was offered for sale under the distinctive name of another article, to wit, under the name of lithia water, when, in truth and in fact, it was not a lithia water, or entitled to be so called; and, further, in that said bottles were labeled and branded so as to deceive and mislead the purchasers thereof.

On March 6, 1911, Rosa C. Goode et al., claimants and intervenors, filed their demurrer to the libel, and on April 6, 1912, said demurrer was sustained, as will more fully appear from the following decision by the court (Clabaugh, C. J.):

This case comes up upon a libel filed by the Government against certain packages containing what is known as "Buffalo Lithia Water," or "Buffalo Lithia Springs Water," there being some doubt as to whether it is "Buffalo Lithia Water" or "Buffalo Lithia Springs Water." It does not impress me that there is much difference in these two positions in the aspect in which it presents itself to me.

Now, the libel that was filed is based upon two different positions, one of which was that the label upon these bottles of lithia water was unfair to the people reading it and using the water under that label, because it resulted in their being deceived as to the character of the water, which was bad. Likewise it was said that the label was wrong and subjected the water to procedure, because it was not true. Now, in the argument of this case the label was inserted in the brief of counsel, but after investigation by the court it was agreed by both counsel that that label was not in there; therefore I have not considered it at all.

The very first question to be considered, it seems to me, is that raised by counsel for the defendants, who have now demurred to the libel, as to whether or not the court has jurisdiction; that is, whether there can be these proceedings for seizure. Now, it was Judge Hollister, I think, who was quoted on behalf of the claimants for the demurrer, as having passed upon that question, and said that inasmuch as the rules in this Food and Drugs Act were to be guided by the rules and according to the procedure in admiralty, the goods were not subject to seizure before the proceedings were brought. That was the foundation of the suit. And Judge Hollister has decided, after a carefully prepared opinion, that that was true, and that the court did not have jurisdiction without the seizure having first taken place. The practice is all against that point of view, and the Circuit Court of Appeals, in passing upon Judge Hollister's opinion, reversed it and held exactly opposite, and of course this court will follow that ruling. And even though it were not for that fact I believe under the reasoning of the case itself—I hesitate very much to say that, because of the very elaborate and learned opinion delivered by Judge Hollister—but having had the advice of the Circuit Court

of Appeals upon that opinion, I think that we are entirely right. At all events, I don't think this court can be in error, nor that the proceedings of this court were without jurisdiction for that reason. And the same is true with the oath that has been attacked. That, likewise, is in the usual form, and I am quite doubtful if any oath is necessary at all; but even if there be one, the oath used in this case is the one which ought to be used in similar cases in standard practice, and I think it is all right in this case.

The real question before the court is whether there has been sufficient in this libel to hold that the branding of this water as "Buffalo Lithia Water," or "Buffalo Lithia Springs Water"—whatever it may be—is sufficient to justify the condemnation of these goods.

Now, I am inclined to say, gentlemen, that this case has been very ably presented to the court by both sides, and I have gone over the briefs with all the care and consideration that I can give it, but I do not believe that this is a case in which the Government is entitled to seize these goods and condemn them, and my reasons are based largely upon this reason. It is admitted by counsel for the Government, not only in oral argument, but in his brief, that there is no standard for lithia water in the Pharmacopœia, and there is no recognized standard for this character of water, whether it be a drug or a food, or both a drug and a food. Now, when it is said that this misleads the public by calling it lithia water, two reasons are assigned. One is that the lithia contained in the water is not in any appreciable quantity, the statement in the libel being: "And the drug contained in said bottles does not contain an appreciable amount of lithium, and will not give the therapeutic effect of lithium when a reasonable quantity of the said water is consumed." Those are the charges, that it does not contain an appreciable amount of lithium, nor does it give the therapeutic effect. Now, what is an appreciable amount? The court, in another case which is almost similar to this in many respects, the case of *United States v. American Drug Syndicate*, in the United States Circuit Court, has said that if it has any amount, if the label on the drug is not false and misleading in any particulars, no offense is committed under the Food and Drugs Act. If an article contains some quantity of a certain ingredient, no matter how small, the statement of it on the label is not a misbranding, as would be involved in the case of remedial effects claimed for a drug. So, practically the same language used in this case is used in the case at bar. Therefore, the Government concedes that there is some lithia or lithium in this water, though not an appreciable amount. Now, there is no averment in the label as to the effect of lithia in a case where there is an appreciable amount, or where there is not an appreciable amount. The court, in other words, is expected to say that though a lithia water may contain lithium, still it is in an inappreciable amount, and does not have the therapeutic effect. Now, we all know, outside of the record, that many of these mineral waters are supposed to have great remedial effects, even though the particular drug is lacking in any appreciable amount, and the mere fact that it has some in it, together with the fact that we drink the water, produces a remedial effect oftentimes. But in this case there is no standard for lithia water—there is no standard by which you can say that it requires a certain amount of lithium in it to give it any effect at all, and therefore the court has nothing before it.

My difficulty in this case was whether or not some of the questions raised were not questions of evidence rather than questions of pleading, but the libel goes on and says that it is not in an appreciable quantity and does not produce the therapeutic effect by the use of an ordinary amount of lithia water. Now, when does it have the therapeutic effect? Who is to judge what that therapeutic effect is? How is the court to say, as a matter of law, from the mere statement—which is a conclusion, not a statement of anything that the court can see upon its face—how much of this character of water will produce a therapeutic effect? It simply says it will not produce a therapeutic effect. Now, to say that, results in a pure conclusion on the part of the libel, because it may be that this therapeutic effect is dependent upon a great many other conditions. Now, if it be dependent upon any other conditions, it is essential to state what that condition is, so that the defendant can find a reply and have knowledge of what is expected to be shown against this character of water. But where you indulge in a pure question of what I say is a conclusion, it does not seem to me to be in a condition for them now to go to trial to disprove anything as to the character of the food that could be brought against them, because there is no standard by which it can be measured.

Now, we all know the different positions that physicians take upon this subject. We know that for any therapeutic effect in almost any drug one school thinks that a greater amount is required, and another school of medicine—certainly by their physicians—believes that the most infinitesimal dose is sufficient. Now, when you use the language in respect to this water and say that it contains some lithium, but

not to an appreciable amount, it would be a difficult matter for these parties to go to trial upon that question, unaware as to really what they have to meet, either from that standard or from the other standard of not producing any therapeutic effect. Now, what is there in this label described in the libel that would indicate that this water is expected to have any therapeutic effect? It seems to me—whilst I have the highest regard for this law and think it is one of the most valuable laws we have ever had—that this would be the most extreme application of it, in the case of a lithia water which has some lithia in it and does not pretend to say anything about any therapeutic effect, or, in fact, anything about it, but simply describes it as being “Buffalo Lithia Water.” This would be, it seems to me, going too far, under this act, when the Supreme Court has already decided that it does not matter what it may have been in its curative effects, though, as in that case, it might claim to cure everything. In this case the court is asked to say that it is not a proper water to put upon the market, because the lithia is in such small quantities that it does not produce a therapeutic effect, which, if they had claimed, the Supreme Court of the United States has said would be utterly immaterial, because the law does not provide for it.

So it is pretty difficult to thoroughly express the difficulties about this libel, but I think they are largely from the fact that they have not sufficiently set out any explanation of the language used as to not being an appreciable quantity, and not having this curative effect taken in reasonable doses. Now, then, if they had said that it did produce a curative effect upon every possible disease, the Supreme Court has said that that is not within the act. Now, the Government contends here that because it did not say anything about having any curative effect, therefore it follows that it must have been put upon the market with the intent to have a therapeutic effect. So it rather seems to me that the court would have to argue in a circle to sustain the contention of the Government in this case. It is true that in many of these cases the language of the act is all that is sufficient to recite. In an indictment, for instance, the terms of the act are sufficient, but that is where the terms of the act are sufficiently full in themselves to purport a crime, but in this case the whole thing must be done by inference, because the court must say, as a matter of law under this demurrer, that the labeling of water as lithia water when it only contains lithia in an inappreciable quantity, is false, because it does not produce any therapeutic effect. Now, that would have the same effect as if the court said that the parties selling this water are in the same position as if they had used the most extravagant language, even though they make no claim for it at all. Because of that fact the court has the right to infer that they meant to say they didn't have a thing, which, if they had said, would be a violation of the Supreme Court decision.

As I say, this case was splendidly argued both in the briefs and the oral argument, and counsel have been as helpful to the court as they could possibly be; yet the court has not been able to take the position of the Government. The demurrer will therefore be sustained.

On April 6, 1912, it was ordered by the court that an amendment to the libel might be filed and the charge that the product did not contain an appreciable amount of lithium and would not give the therapeutic effect of lithium when a reasonable quantity of the water was consumed was stricken from the libel, and it was charged in the amendment to the libel that the product was misbranded for the reason that each and every bottle in the cases purported to contain a food and drug, that is to say, a liquid known as lithia water, the said cases and bottles bearing labels as aforesaid, which said bottles bore certain statements regarding said food and drug, which were false and misleading in that said statements imported that the product was a lithia water, whereas, in truth and in fact, it was not a lithia water, or entitled by reason of its ingredients to be so called; further, in that the same was offered for sale under the distinctive name of another article, to wit, under the name of lithia water, when, in truth and in fact, it was not a lithia water, or entitled to be so called; and, further, in that the product was labeled and branded so as to deceive and mislead the purchaser thereof.

On April 30, 1912, said claimants and intervenors filed their demurrer to the libel, as amended, and on May 24, 1912, said demurrer was overruled, as will more fully appear from the following decision by the court (Barnard, J.):

In this case a libel was filed in which it is averred that the seven cases, more or less, of Buffalo Lithia Water, and each and every bottle thereof, are misbranded, within

the meaning of the act regarding food and drugs, for the reason that each bottle purports to contain a food and drug known as "lithia water," and said bottles bear labels which contain certain statements regarding said food and drug that are false and misleading in this, that the said statements import that the water contained in said bottles is a lithia water, whereas, in truth and in fact, the food and drug contained in said bottles is not a lithia water, and is not entitled, by reason of its ingredients, to be so called.

To this libel the claimants have filed a demurrer, in which they state that the said libel is bad in substance, because it does not state facts sufficient to constitute a violation of the said act of Congress of June 30, 1906 (34 Stat., 768), and that it does not show that the said goods are misbranded, within the meaning of said act; and that the construction of the label quoted is a question of law for the court; and its plain meaning is, that the contents of said packages and bottles is a natural mineral water from a spring situated at Buffalo Lithia Springs Post Office, Va., containing lithia, and other substances employed in medicine, unchanged by man; and that there is no charge of fact in said libel which shows that the contents of the said bottles is not a mineral water from said spring, containing lithia, and other substances employed in medicine, just as represented by the label quoted.

In the original libel in this case there was a statement that the said bottles did not contain an appreciable amount of lithium, and that it would not give the therapeutic effect of lithium when a reasonable quantity of said water was consumed; and a demurrer was sustained to that libel, and the present or amended libel was filed, and those words undertaking to define what lithia water is were left out, leaving the allegation as above stated.

The label contains the following words and figures:

"Buffalo Lithia Water, Springs No. 2."

"Buffalo Lithia Springs Water, Nature's Materia Medica."

"Buffalo Lithia Springs Water Company, Buffalo Lithia Springs, Virginia."

The label contains directions for properly keeping the water and for using it in various diseases or ailments, and refers to a pamphlet for further directions.

It also contains a picture of a woman with a pitcher, and at the bottom of the picture the words, "Trademark Pat.," the printing on the scroll around the picture containing the other words above quoted, to wit, "Buffalo Lithia Springs Water, Nature's Materia Medica."

It also contains these words:

"Guaranteed under the Food and Drugs Act, June 30, 1906, by Buffalo Lithia Springs Water Co., Serial No. 15,055."

Counsel for the claimants contend that this label shows that it is the registered trade-mark under which the Buffalo Lithia Springs Water Co. sells its water, being the figure of a woman in a sitting posture, holding in her hands a pitcher which is surrounded by the words "Buffalo Lithia Springs Water, Nature's Materia Medica"; and they are in turn surrounded by the words "Buffalo Lithia Water, Springs No. 2," and that the meaning of this label is a question of law for the court, to be determined upon the demurrer without proof.

The counsel for the Government contends that the contents of the bottles seized in this case is not entitled to be called "lithia water," and therefore that the claimants can not use the word "lithia" as an adjective, in describing the contents in the label, without deceiving customers who wish to buy lithia water.

The said act of June 30, 1906, does not define any standard by which it can be certainly ascertained when water is entitled to be called "lithia water."

Section 8 of the act, however, does provide that the term *misbranded* shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding said article, or the ingredients or substance contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

It is claimed here that the words that are misleading to the public are the words which refer to the contents of these bottles as "lithia water," and which lead the purchaser to believe that they contain lithia water.

The demurrer admits the facts, for the purposes of the argument as to the law, and therefore, the statement in the libel, that the water contained in said bottles is not a lithia water, is admitted; and also the averment that it is not entitled, by reason of its ingredients, to be so called. Whether or not it is a lithia water, is a matter of fact, to be determined from the evidence at the trial. The brand on the bottles calls it a "lithia water," in connection with other descriptions; but if it is not a lithia water in fact, can the claimants so brand it without violating the provisions of said statute?

The court is compelled to ascertain, if possible, what is understood, or what should be understood, from the words "lithia water," and for this purpose must examine the authorities, as in case of any other word that must be defined.

The Standard Dictionary gives the definition of lithia water as follows: "A natural mineral water containing lithium salts, valued for use in certain diseases, as lithemia."

The Century Dictionary says: "Lithia water is mineral water containing a considerable portion of lithia salts, found in natural springs in the United States. The name is also applied to artificial mineral waters of similar constitution."

Counsel for claimants contend that the label, taken as a whole, does not mislead the purchaser, and the court should reach that conclusion by reading it and giving it a proper construction.

I am unable to agree with counsel as to this contention, because it seems to me that the label, taken as a whole, would lead a purchaser to conclude that he was buying a lithia water. It is true the other portions of the label confine the water contained in the bottles to the Buffalo Lithia Springs of Virginia, but it does more than that. It defines the water to be Buffalo *Lithia* Water; and I am unable to put any other construction upon that than to say that it is lithia water taken from the Buffalo Springs. The ordinary purchaser, looking at the label, and having lithia water prescribed by his physician, would not hesitate to purchase this as lithia water.

The question as to whether there is a standard, or not, for lithia water, seems to me can not be properly raised at this time, if it is admitted that there is such a water known in the market as "lithia water;" for the libel expressly charges that the contents of these bottles is not lithia water, when the label necessarily indicates that it is lithia water of a particular brand.

It seems to me, therefore, that the allegation of the libel is one of fact, and the demurrer admitting that fact, counsel can not properly contend that the label is not misleading, and that it does not indicate that the bottles contain lithia water.

The demurrer to the original libel was no doubt properly sustained, because of the indefinite statements made in an attempt to define what lithia water was; but in the present libel there is the bald fact stated, that these packages do not contain lithia water. If that is true, then the label should be amended, so as to drop that adjective, in order that persons desiring to purchase lithia water may not be misled.

As the Century Dictionary says, there is an artificial mineral water, of similar constitution to that found in natural springs in the United States, containing a considerable portion of lithia salts; and the court assumes that the proof will throw further light on this kind of lithia water, as well as the natural lithia water found in our springs. What must be that considerable portion in order to entitle mineral water to be called "lithia water," may depend upon expert testimony; but in the libel as now framed, the statement is made that the contents of these bottles is not lithia water; and there seems to be no way to escape the effect of that fact, unless it can be disproved at the hearing.

I am therefore forced to the conclusion that the demurrer must be overruled, and issue joined on this libel, and the question of fact determined by the proof.

On June 13, 1912, an order was entered accordingly, overruling the demurrer to the libel, as amended, and on December 10, 1912, the answer of the Buffalo Lithia Springs Water Co. was filed. On February 16, 1914, the case having come on for final hearing before the court, after the submission of evidence and argument by counsel, the product was found to be misbranded, as will more fully appear from the following opinion by the court (Gould, J.):

The original bill in this case was filed December 21, 1910. It sought to condemn seven cases of bottles containing water labeled as "Buffalo Lithia Water," on the ground that they were misbranded and thereby violated the act of June 30, 1906, the misbranding being alleged to consist of statements that the liquid was a lithia water, whereas it did not contain an appreciable amount of lithium, and would not give the therapeutic effect of lithium when a reasonable quantity was consumed, and, further, that the water was not a lithia water, or entitled by reason of its ingredients to be so called. The libel also alleged, as a further misbranding, that the bottles were offered for sale under the distinctive name of lithia water, when in fact it was not lithia water, and that the bottles were labeled and branded so as to deceive and mislead the purchaser thereof.

A demurrer having been sustained to this libel on April 6, 1912, an amended libel was filed April 6, 1912, omitting the original allegation that the water did "not contain an appreciable amount of lithium, and will not give the therapeutic effect of lithium when a reasonable quantity" is consumed. A demurrer to the amended

libel was overruled June 13, 1912, whereupon the claimants, on December 12, 1912, filed their answer denying that the water was misbranded. Upon the issue thus joined, voluminous testimony has been taken in different parts of the country. The questions of fact involved have, by agreement, been submitted to the court sitting as a jury.

It is somewhat difficult to accurately describe the label as it is voluminous, but the most striking feature of it are the words "Buffalo Lithia Water Springs No. 2," in white letters, relatively large, on a blue field, surrounding the figure of a draped woman, in a sitting posture, holding an urn on her lap, and herself surrounded by the words in much smaller type "Buffalo Lithia Springs Water, Nature's Materia Medica." Beneath the foregoing, in smaller but plain type is the following: "This water is indicated in all affections due to the Uric Acid Diathesis—Gout or Rheumatism in all their forms, Stone in the Bladder, Kidneys or Liver, Bright's Disease and Kidney Diseases of every form, Albuminuria of Pregnancy or Scarlet Fever, Uraemia and its accompanying troubles, Menstrual Irregularities, Acid Dyspepsia, Nervous Disorder in all its forms, Malarial Fevers, and in the preparation of Artificial Food for Infants. Dose. From six to eight glasses of the ordinary size per day is the average dose. Many persons, however, take a larger quantity." At the bottom of the label are the words "Buffalo Lithia Springs Water Co., Buffalo Springs, Virginia." At the top are the words "Guaranteed under the Food and Drugs Act, June 30, 1906."

It is admitted by the Government that the water in controversy is a natural spring water taken from a spring known as "Buffalo Lithia Springs" situated at Buffalo Lithia Springs, in Mecklenburg County, Virginia. It is also admitted that the claimants, or their predecessors, have been continuously shipping and selling this water from this spring since 1878 under the label or brand "Buffalo Lithia Water."

There is little dispute as to the essential facts of the case. Naturally the first question which the controversy suggests, is, what is a "lithia water?" There appears to be no definition given by the Pure Food Act or by the United States Pharmacopoeia as to the quantity of lithium which a given amount of water must contain in order to reasonably entitle it to be designated "lithia" water. The Government has offered the testimony of chemists, pharmacologists, physicians and druggists to the effect that the common understanding is that a natural lithia water is one that contains enough lithium so that when a reasonable quantity is consumed a physiological or therapeutic effect would be obtained in consequence of the lithium content. This appears not only to be a fair and reasonably accurate definition, one which appeals to the common sense and understanding of a nonscientific person, but is supported by the overwhelming weight of the testimony in the case. Speaking generally, and as an individual of average intelligence and information, it would seem that if one were offered a water which the vendor told him was a "lithia" water, one would have the right to expect enough lithium in the water to justify its characterization as such, thus differentiating it from ordinary potable water; and this amount would reasonably be expected to have some effect upon the consumer of the water by reason of the presence of the lithium.

This is especially true in view of the fact that lithium has been quite commonly believed to have a therapeutic effect on physical ailments which may be classified generally under the head of the uric acid diathesis.

The second question which also arises quite naturally is as to the actual lithium content in a given quantity of the water in controversy. Several analyses were offered in evidence, made by both the Government and by the claimants. As these differ so slightly in respect to the amount of lithium found in a given quantity of water, those made by the Government will be taken as accurate. In addition, the evidence is uncontradicted that the analyses made by the Government experts were made according to the most improved methods, and no attempt was made to impugn their accuracy or fairness.

Dr. Collins, an expert chemist employed in the Bureau of Chemistry, examined three samples of the water in controversy, two of which were part of the water seized. He gives in great detail every step taken by him in his analyses to determine the quantity of lithium. The result was that in two litres of the water (about two and one-fifth quarts) he found no weighable amount of lithium. That is, a chemical analysis showed absolutely no appreciable amount of lithium in the bottle of water of the size usually sold. By the use of the spectroscope, however, it was found that there was two-thousandths of a milligram in a litre; that is, about one ten-thousandth of a grain per gallon of water, or one grain in ten thousand gallons of water. To further illustrate the infinitesimal quantity of lithium in this water, it was testified that the average dose of lithium as a uric acid solvent was from five to seven and a half grains three times a day. So that, for a person to obtain a therapeutic dose of lithium by drinking Buffalo Lithia Water he would have to drink from one hundred and fifty thousand to two hundred and twenty-five thousand gallons of water per

day. It was further testified, without contradiction, that Potomac River water contains five times as much lithium per gallon as the water in controversy.

It has already been stated that the claimants made no question as to the accuracy of the Government analysis; it might be added that their own latest analysis, by the Lederle Laboratories, in New York City, showed only a spectroscopic trace of lithium in the water.

The Government also produced pharmacologists and physicians, eminent in their professions, who testified that the amount of lithium disclosed in this water, either singly or in combination with the other elements contained in it, could not, by any possibility, have any physiological or therapeutic effect upon the consumer.

It is concluded, therefore, that a person drinking Buffalo Lithia Water for the hoped-for benefit he may derive from the lithium in it, is deceived and misled, because a potable quantity contains no appreciable lithium.

Moreover, this deception is increased and aggravated by the language on the label accompanying its designation as "Buffalo Lithia Water." Lithium is supposed to be a solvent for uric acid, to prevent the formation of calculi, and to remove it from the system in rheumatism and gout. The label, immediately under the large letters "Buffalo Lithia Water," and in the center of the label, contains this language: "This water is indicated in all affections due to the Uric Acid Diathesis—Gout or Rheumatism in all their forms, Stone in the Bladder, Kidneys or Liver, Albuminuria of Pregnancy or Scarlet Fever, Uraemia and its accompanying troubles, Menstrual irregularities, Acid Dyspepsia, Nervous Disorders in all its forms, Malarial Fevers, and in the preparation of Artificial Food for Infants." The word "indicated" as a medical term, as defined by Webster, means "to point as to the proper remedy." The uric acid diathesis means the class of diseases due to the presence of an excess of uric acid. So that the purport and effect of the label to a purchaser is to tell him that this water, by reason of the lithium in it, is the proper remedy for those diseases which are due to uric acid, of which lithia is a solvent.

It becomes pertinent to notice the attitude of the courts towards labels of this character, irrespective of the Pure Food Act.

Where the manufacturer of a liquid laxative medicine to which he gave the name of "Syrup of Figs," and who had spent vast sums in advertising it, sought to enjoin another from using the name, it was held that he was not entitled to the injunction because he falsely represented to the public that the juice of the fig was the important medicinal agent in the composition of the medicine, when in fact only a suspicion of fig juice was put into it and the real laxative was senna. This was so held notwithstanding there was much evidence showing that it was a very useful medicine and prescribed by physicians of high standing. In deciding the case Judge Taft said: "This is a fraud upon the public. It is true it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of and is dependent upon such deceit." *California Fig Syrup Co. v. Frederick Stearns & Co.*, 73 Fed., 812.

This case was subsequently approved and followed by the Supreme Court in *Worden v. California Fig Syrup Co.*, 187 U. S., 519.

The same principle was applied in the cases of *Memphis Keeley Institute v. Leslie E. Keeley Co.* (C. C. A. Sixth Circuit), 155 Fed., 964; and *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 N. J. Eq., 595.

If the courts assume this attitude towards falsely labelled articles under the general rules of law and equity, a fortiori should they assume it in applying a statute, such as the Pure Food Act, which has for its objects "not only to protect the public from unwholesome food and drink, but to require that any article of food, drink, or medicine sold *shall be correctly described by its label.*" *U. S. v. Morgan et al.*, 181 Fed., 587.

In the very able oral argument and elaborate brief of claimant's learned counsel, there are two main contentions:

1st. They deny that the label represents that the contents of said bottles is a "lithia water." They insist that the label distinctly states that the contents of the bottles is that "particular natural mineral water known both as Buffalo Lithia Water and Buffalo Lithia Springs Water, and was taken" from the Buffalo Lithia springs No. 2, etc.

In other words, the argument seems to be that if Buffalo Lithia Springs are falsely named, being called "Lithia" Springs, when they do not flow water containing lithium, therefore the proprietors have the right to sell the product as being Buffalo Lithia Springs Water, thus perpetuating upon the public the misnomer connected with the origin of the water. It is not apparent how the deceit practiced upon the public by the label is mitigated by carrying it back to the designation of the spring from which the water comes.

2nd. It is next contended that if the word "lithia," as used on the label, can be construed to represent that the contents of the bottles is "lithia water," such representation would not be false or misleading within the purview of the Food and Drugs Act, because the contents of the bottles is a lithia water as the term is understood in the English language, viz, a natural spring water containing "some lithia" or "a trace of lithium."

Assuming that the term lithia water requires only "some" lithium in the water, it would seem that even that flexible term should not be attenuated to include a water which contained only one ten-thousandth of a grain in a gallon, and in which even a trace in two litres could only be ascertained by the use of the spectroscope. But the evidence in the case is overwhelming that the term lithia water, as ordinarily understood, means a water containing a sufficient amount of lithium to give a therapeutic effect when drank in reasonable quantities. It is true that the Food and Drugs Act does not prescribe the quantity of lithium that a water should contain to entitle it to the name "lithia water." But that this is not a fatal objection to the law has been frequently held. *Shawnee Milling Co. v. Temple*, 179 Fed., 517; *United States v. Sacks of Flour*, 180 Fed., 518.

And, even if a standard were fixed as to the quantity which would entitle a water to such designation, it is reasonable to suppose that it would require at least a weighable or appreciable amount in a potable quantity of water.

It is also argued that no natural water designated as lithia water contains sufficient lithium to give a therapeutic effect by drinking a reasonable quantity. The evidence is not quite clear on this question; but the most it would prove would be the misbranding of other so-called lithia waters.

It is therefore concluded that the statement "Buffalo Lithia Water," on the labels on the bottles seized, is false and misleading within the meaning of the first general paragraph of section 8 of the Food and Drugs Act, and judgment will be accordingly entered for the libellant.

On November 23, 1914, a formal decree of condemnation and forfeiture was entered, in conformity with the foregoing opinion, and it was ordered by the court that the product should be delivered and restored by the United States marshal to the intervenors upon payment of all the costs of the proceedings and execution of a bond in the sum of \$100, in conformity with section 10 of the act. On the same date the said intervenors, Rosa C. Goode et al., noted an appeal to the Court of Appeals of the District of Columbia, where the case is now pending.

CARL VROOMAN, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., May 11, 1915.