

affected. For pains in the back, side, joints, * * * Pyorrhea or diseased gums apply with cotton. Prevents Spanish Influenza, * * * Catarrh;" (Maxey's One Minute liniment, carton) "Relieves Headache, Toothache, Earache, or Neuralgia * * * Relieves pains in back, sides, shoulders, arms or limbs * * * Rheumatism, pneumonia or pleurisy pains * * * Catarrh of the head * * * Pyorrhea or diseased gums, * * * will keep poison, inflammation and soreness. * * * Pyorrhea or Diseased Gums;" (Maxey's One Minute liniment, circular) "For Rheumatic Pains, Pneumonia Pains, Pains in or across Back, in the limbs or joints. * * * For Catarrh * * * Headache. * * * For Headaches or Neuralgia * * * For Pyorrhea or Diseased Gums * * * For Rheumatism, Kidney and Back Trouble, also Female Trouble, remove pains, soreness, also stiffness with * * * A sure preventative of Spanish Influenza."

On June 24, 1931, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the products be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

18652. Misbranding of Number Twenty Seven. U. S. v. 11½ Dozen Small Bottles, et al., of Number Twenty Seven. Default decree of condemnation and destruction. (F. & D. No. 23488. I. S. Nos. 04130, 04131. S. No. 1698.)

Examination of a drug product, known as Number Twenty Seven, from the lot herein described having shown that the bottle label and circular bore statements representing that the article possessed curative and therapeutic properties which it did not possess, the Secretary of Agriculture reported the matter to the United States attorney for the District of Columbia.

On March 5, 1929, the United States attorney filed in the Supreme Court of the district aforesaid, holding a District Court, a libel praying seizure and condemnation of 11½ dozen small and 28 medium-sized bottles of Number Twenty Seven, remaining in the original unbroken packages at Washington, D. C., alleging that the article was being sold and offered for sale by the Washington Wholesale Drug Exchange at its premises in Washington, D. C., and charging misbranding in violation of the food and drugs act as amended.

Analysis of a sample of the article by this department showed that it consisted essentially of magnesium sulphate (63.5 grams per 100 milliliters), quinine sulphate (1 gram per 100 milliliters), an iron compound, and water.

It was alleged in the libel that the article was misbranded in that the following statements regarding the curative and therapeutic effects of the said article, appearing on the bottle label and in the accompanying circular, were false and fraudulent, since it contained no ingredient or combination of ingredients capable of producing the effects claimed: (Bottle label) "For * * * Grippe, Chills & Fever, Malaria, * * * Purifies the system;" (circular) "For * * * La Grippe, Chills and Fever, Malaria, Indigestion, * * * Gas on Stomach and Many Other Ailments of the Human System * * * Number Twenty Seven Cleanses the System of all poisonous matter, acts on the kidneys and liver, and does away with that tired sluggish feeling. For * * * La Grippe * * * Guard Your Health. You don't have to be sick before you take Number 27. When you get up in the morning with that tired lazy feeling, and feel worn out before your day's work is begun, you should take Number 27 and cleanse your system of those poisonous germs which may cause sickness later on."

On August 20, 1929, no claimant having appeared for the property, judgment of condemnation was entered and it was ordered by the court that the product be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

18653. Alleged misbranding of Lee's Save The Baby. U. S. v. 23 7/12 Dozen Bottles, et al., of Lee's Save The Baby. Claim and answer filed. Case tried to the court. Judgment for claimant. Libel ordered dismissed. (F. & D. No. 23482. I. S. No. 03678. S. No. 1650.)

Examination of the bottle and carton labels of this product and of the circular inclosed in the carton disclosed that the article was intended to be used in the treatment of various ailments, particular emphasis being placed on the efficacy of the product in the treatment of infants and young children. This department deemed the statements, "Save the Baby," "For Croup," "For Sore Throat," "For Coughs," "Used in cases of Grippe, Bronchitis, Laryngitis, Tonsillitis, Pneumonia, etc.," and other statements contained in the said labels, to be

curative and therapeutic claims which were not justified by the composition of the article.

On March 1, 1929, the United States attorney for the District of Connecticut, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for the district aforesaid a libel, which was amended on March 14, 1929, praying seizure and condemnation of 23½ dozen 35-cent-sized and 12½ dozen 70-cent-sized bottles of the said Lee's Save The Baby, remaining in the original unbroken packages at New Haven, Conn. It was alleged in the libel as amended that the article had been shipped in interstate commerce by Wm. W. Lee & Co., from Troy, N. Y., on various dates from March 5, 1928, to and including January 15, 1929, into the State of Connecticut, and that it was misbranded in violation of the food and drugs act as amended.

Analysis of a sample of the article by this department showed that it consisted essentially of an ointment with a lard base containing camphor, Canada balsam, origanum oil, rosemary oil, and a small proportion of alcohol.

The libel as amended alleged that the article was misbranded in that the following statements regarding the curative and therapeutic effects of the said article, appearing in the labeling, were false and fraudulent, since it contained no ingredient or combination of ingredients capable of producing the effects claimed, and that the said statements were applied to the article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers, and create in the minds of such purchasers, the impression and belief that it was composed of, or contained, ingredients or medicinal agents effective in the diseases and conditions named therein: (Front bottle label) "Save The Baby;" (back bottle label) "For Croup apply with the hand or by saturating * * * cloth and laying it over the throat and chest; also apply over the nose. In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. * * * For Sore throat apply on the throat; also take one-half a teaspoonful internally. For Coughs * * * apply on the chest, also take one teaspoonful morning and night. For ague in breast, apply to the parts affected;" (small carton) "Save the Baby * * * Croup Mixture * * * For Croup, * * * Coughs and Sore Throat, * * * used in cases of Grippe, Bronchitis, Laryngitis, Tonsillitis, Pneumonia, etc.;" (large carton) "Save the Baby. For Croup, Coughs, * * * etc.;" (circular) "Save The Baby * * * For Croup * * * Coughs, Tonsillitis, Bronchitis, * * * Sore Throat and similar ailments. * * * What Mother or Father has not been alarmed when awakened in the night by the childish cry of pain and the dread sound of croup? Or who of us has not shuddered when whooping cough, pneumonia or a hard cold has racked our children with pain and coughing spasms. It was because of a child's suffering that 'Save the Baby' came into being * * * a wee girl lay seriously sick with croup. * * * he administered a remedy of his own compounding * * * found * * * child completely out of danger. This physician prescribed the remedy * * * in other cases, always with gratifying results. * * * 'Save the Baby,' * * * by that name it had come to be known. * * * 'Save the Baby' for use in * * * croup, * * * tonsillitis, bronchitis, sore throat and all similar ailments in children and adults. * * * Use it * * * The results will be beneficial. For Adults—'Save the Baby' works * * * with as good results for adults as it does for children. The * * * relief given in coughs, bronchitis, pneumonia and other congested conditions of the head, throat or lungs * * * 'Save the Baby' * * * effective when used Hot. For Croup: * * * In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. * * * For Coughs * * * Apply on chest and throat; also take one teaspoonful morning and night. Influenza, Grippe and Pneumonia: * * * use 'Save the Baby' * * * In severe cases give half teaspoonful internally every half hour. * * * Use 'Save the Baby' * * * For Sore Throat and Tonsillitis: Apply on the throat and along the cord that runs from behind the ear down the neck; also take one half teaspoonful internally. Take from one half to one teaspoonful internally for all chest congestions and gathering of phlegm."

On March 26, 1929, William W. Lee & Co., a copartnership, Watervliet, N. Y., filed a claim and answer praying that the libel be dismissed and the seized goods returned to claimant. On motion by counsel for the Government, which motion was argued September 24, 1929, portions of claimant's answer were stricken, as will more fully appear from the following memorandum decision handed down by the court December 14, 1929 (Thomas, J.):

"The United States filed its libel for condemnation against certain bottles and their contents shipped in interstate commerce and prayed that the same be condemned upon the ground that they were misbranded within the meaning of the food and drugs act. The libel alleges the transportation as of January 15, 1929.

"The bottles were labeled 'Save the Baby.' On the back of the bottle is a label setting forth the following: 'For Croup apply with the hand or by saturating * * * cloth and laying it over the throat and chest; also apply over the nose. In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. * * * For Sore throat apply on the throat; also take one-half a teaspoonful internally. For Coughs * * * apply on the chest, also take one teaspoonful morning and night. For ague, in breast, apply to the parts affected.' * * *

"On the small carton the following legend appears: 'Save the baby * * * croup mixture * * * For Croup, * * * Coughs and Sore Throat * * * used in cases of Grippe, Bronchitis, Laryngitis, Tonsillitis, Pneumonia, etc.' There is considerably more of the same nature on the labels on the large cartons and on the circulars enclosed.

"The libel proceeds to charge that the alleged drugs in question were misbranded within the meaning of the food and drugs act of June 30, 1906, as amended, section 8, paragraph third, because they contained 'no ingredient or combination of ingredients capable of producing the effects claimed,' and that the labels were applied in reckless and wanton disregard of their truth and with intent to mislead purchasers.

"The claimant appears to be William W. Lee & Co., a partnership doing business in Watervliet, Albany County, N. Y. in the Northern District of New York. There is nothing to indicate who, at the present time, composes the copartnership. Both the answer and notice of claim are silent on this point.

"In their answer the claimants, after entering denial as to the alleged misbranding, set up a separate defense which is contained in paragraph four of the answer to which the motion to strike is addressed, wherein, inter alia, the claimant alleges: That on February 24, 1916, the United States attorney for the Northern District of New York laid an information against this claimant, William W. Lee & Co., and the several copartners thereof, pursuant to the food and drugs act, accusing them individually and as such copartnership of unlawfully shipping and delivering for shipment in interstate commerce articles of drugs identical in kind, nature, and composition with the articles of drugs which are the subject of the present libel, which articles then bore labels, wrappers, and reading matter substantially identical with the labels, wrappers, and reading matter present on the articles seized under this libel; and that said information charged the claimant of violating the identical statute involved in this proceeding in the same particulars as charged in this libel and that thereafter the information was duly dismissed on the merits and an order to that effect entered on or about November 13, 1916, all of which is exhibited in a copy of the information and order annexed to the answer.

"The answer then proceeds further to allege that on July 26, 1920, an information was laid by the United States attorney for the Northern District of New York which again charged the claimants with violation of the food and drugs act, in that the claimants shipped, on or about September 17, 1917, articles of drugs identical with those in suit and bearing the identical labels which said articles were claimed to be misbranded, and that on the 16th day of February, 1922, the information was dismissed, or nolle prossed, on motion of the United States attorney, as also appears by a copy of the information and order.

"The whole of the information of 1916 is not annexed but merely count 2 thereof, and it discloses that one Charles Samuel Ulcher and Carrie L. Ulcher, trading as William W. Lee & Co., did unlawfully ship and deliver from New York to Boston certain packages labeled substantially similar to the labels on the packages at bar, and it was charged that those labels constituted a misbranding. The order of the District Court of October 27, 1916, discloses that the defendants then pleaded guilty to the first count of the information (though what that first count was we can not tell), and were fined on their plea of guilty, \$25. The order dismissed the second count.

"There is nothing from the nature of the order to indicate just what the reason was for the dismissal. There is no recital that the issues were tried nor is there anything to indicate whether the dismissal was because of the insufficiency in the information or what. I think that a fair interpretation of the order would indicate the second count was dismissed on consent of the United

States attorney. Otherwise the dismissal would appear to have been founded on nothing whatsoever. The second information was also against the same defendants and charged a shipment of misbranded articles of the same kind as those involved in the first information and charged the misbranding thereof in the same way. The order which was entered thereon in February, 1922, recited the charge involved in the information at length, and that the defendants had entered a plea of former jeopardy and thereupon and on motion of the United States attorney the second information was dismissed.

"In the case at bar the Government moves to strike out the matter embodied in the separate defense upon the ground that: 'A, the allegations and matters contained in said paragraph 4 and said annexes do not constitute a valid defense to any matters charged in the libel; and B, the allegations and matters contained in said paragraph 4 and said annexes are incompetent, immaterial, irrelevant, and have no bearing whatever on the issues in this case.'

"The matters set up as a separate defense can be available only on one theory, and that is, that as to the libel at bar, they are *res adjudicata*. It is contended by the claimant that the dismissal of the two former informations against them involved an adjudication to the effect that articles so constituted and so labeled, as in the case at bar, are not misbranded and that such an adjudication is binding forever after.

"The doctrine of *res adjudicata* is, like many other legal principles, simple enough in its statement, but difficult, at times, in its application. A former judgment on the merits concludes the parties and their privies as to all matters which were litigated or which should or could have been litigated within the field of the specific controversy. Therefore, in any action between the same parties upon the identical claim or demand upon which a judgment has already been rendered, that judgment is conclusive. Where the action between the same parties is upon a different claim, the former judgment may, nevertheless, operate as an estoppel as to any matter litigated between the parties or actually determined therein.

"It is to be noted, then, that a former judgment is conclusive only as to the parties. It binds no one but the parties, or those who derive their interest in the subject matter from the parties. There is nothing in this record which indicates who the claimants are other than that they are persons operating under a partnership name. Whether there are 2 persons or 20 persons, and whether they are the identical persons who operated under the same partnership name in 1916 and 1920 does not appear. While it is true that the United States attorney has raised no question on this point the court, nevertheless, in its decision on the sufficiency of the answer set forth by defendants, is not restricted to a consideration only of the points made in the brief filed by counsel.

"Assuming, however, the identity of the parties, I find no identity of subject matter. In fact, there is no claim that there is an identity of subject matter, except that the claimants allege that the articles charged to be misbranded have the same composition and bear the same labels as the articles charged to have been misbranded in the criminal actions. It is not claimed, however, that the identical articles involved in the criminal proceedings had more than ten years ago are the subject of the seizure in New Haven in 1929. At best they are only similar. They are not the same. It follows, then, that the claim of *res adjudicata* must rest upon the theory that the dismissals of the two informations involved the determination, that articles of the substance of the articles at bar labeled in the same way, are not knowingly misbranded or their transportation in interstate traffic is not made with knowledge that they are misbranded. This brings us to the crux of the matter.

"I have been referred to only one type of case where a judgment in a criminal action may, in any sense, be said to be determinative of an issue in a civil action. That is the type of case involved in *Coffey v. United States*, 116 U. S. 436. Coffey had been prosecuted on a charge of having manufactured distilled spirits without paying the tax imposed by law. He was acquitted of that charge, and then an information in rem was filed against certain property alleged to have been used by Coffey in the manufacture of the distilled spirits. In his answer in the latter proceedings, Coffey pleaded in bar to the maintenance of the forfeiture proceedings the judgment of acquittal in the criminal case, and it was held by the Supreme Court of the United States that the plea was good. On page 443, Mr. Justice Blatchford, speaking for the court, said: 'Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person,

that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem. * * * There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.

"It will be noted that in the Coffey case the information in rem involved a claim to the forfeiture of the identical articles that were the basis for the criminal prosecution. We have no such situation in the case at bar. It must be further noted that in the Coffey case there had been a trial on the merits and an acquittal, which facts also are not present in the case under consideration. Later on the Supreme Court had occasion to construe its own decision in the Coffey case in the case of *Stone v. United States*, 167 U. S. 178 and Mr. Justice Harlan, speaking for the court, on page 184 said: 'But this court held that as the demurrer to the answer admitted that the fraudulent acts and attempts to defraud, alleged in the criminal information and covered by the verdict and judgment in the criminal case, embraced all the acts, attempts, and intents averred in the libel for the forfeiture of Coffey's personal property, the judgment of acquittal in the criminal case was a bar to the proceeding by libel.'

"It must be obvious that the Coffey case did not determine that an acquittal establishes immunity against prosecution for subsequent conduct or misconduct upon a similar charge; no judgment can do that. The Coffey case held, merely, that just as the Government would be estopped by a plea of former jeopardy from again prosecuting the defendants for the identical acts charged in the first indictment, so it would be estopped from bringing a proceeding in rem upon such identical facts. And it seems clear enough that a plea of former jeopardy could hardly be sustained against an indictment charging the commission of acts occurring after the first indictment had been dismissed. And if an acquittal could not be pleaded in bar to such an indictment, on what theory can such acquittal be said to be res adjudicata on such an information in rem?

"I think that the essential fallacy of the claimants' position lies in the obvious confounding of two wholly distinct conceptions, namely, that of res adjudicata and that of stare decisis. Res adjudicata constitutes a plea in bar founded upon a specific judgment determinative of a specific controversy. Stare decisis is not a plea at all. It is the rule of precedent. A person who has been indicted for buying intoxicating liquor may be acquitted upon the ground that buying liquor is no crime. If he be again indicted for buying the same liquor he may plead in bar the former acquittal. This would be a plea of former jeopardy and in its civil aspect, it is called res adjudicata. But if he be indicted for buying other liquor, he cannot plead former jeopardy, but he may demur to the indictment upon the ground that it fails to charge a crime, and then, proceeding upon an application of the doctrine of stare decisis, he may urge the former judgment of acquittal as a precedent to guide the court in the disposition of his demurrer. And it may well be that the second court, even though it be a court of coördinate jurisdiction, may disagree with the first and not permit the precedent to rule it. Had, however, the plea of res adjudicata been available then the court, whether of coördinate or of higher jurisdiction, would be compelled to give effect to it.

"These considerations apply with peculiar force to the case at bar. Let us assume that ten years ago these claimants were tried upon an indictment charging them with the offense of misbranding and that such charge arose out of conditions similar to those set out in the libel. Let us further assume that they were acquitted after a trial on the merits. The most that could be said of such an acquittal would be that the court, composed of a judge and a jury, determined that the product sold by the claimants was not then misbranded within the meaning of the statute. Such a judgment might have value as a precedent, though even in such a case, the value would be highly doubtful as the court could hardly be said to have established a rule of any kind. For, it is obvious, that in a criminal case, a plea of not guilty offers a traverse to every material allegation of the indictment and an acquittal necessarily follows if the Government fails in its proof on any one essential element in its case. Thus in a criminal trial for misbranding, it may be that the Government is unable to establish the interstate character of the shipment; or that it was the defendants who did the misbranding; or that the articles were shipped at the time charged in the indictment. An acquittal eventuating upon the

failure of proof beyond a reasonable doubt of any one of these necessary elements could hardly be said to adjudge that the labels were not false in fact and fraudulent in purpose. But in the case at bar there was never even any trial and acquittal. At any rate the record discloses none. The first information was dismissed for what reason does not appear. If there was a trial then the judgment is strangely silent concerning the matter. As for the second information the judgment shows that it was nolle prossed by the United States attorney upon the tender of the plea of former jeopardy. It may be that this record exhibits an adjudication on the merits of something, but of what I can not tell.

"It follows, for the reasons herein given, that the motion to strike out the matters alleged in paragraph 4 of the answer and annexes A, B, C, and D should be granted and an order may be submitted accordingly."

On January 8, 1930, formal order was entered by the court striking portions of claimant's answer in accordance with the memorandum decision above.

On June 24, 1930, a jury having been waived, the case came on for hearing before the court on the issues presented by claimant's remaining defense, a general denial that the product was misbranded. Having heard the evidence and arguments of counsel for the Government and claimant, the court took the case under advisement, and on October 17, 1930, handed down the following opinion sustaining claimant's prayer to dismiss the libel (Thomas, J.):

"This is a proceeding in rem against a certain drug preparation, known as 'Lee's Save The Baby,' which name is and has been registered in the United States Patent Office for many years. The United States filed its libel for condemnation against certain bottles and their contents, shipped in interstate commerce, and prayed that the same be condemned upon the ground that they were misbranded within the meaning of the food and drugs act of June 30, 1906 (34 Stat. 768), as amended by the act of August 23, 1912 (37 Stat. 416).

"The libel charges that 'Said article of drugs * * * is and was * * * misbranded within the meaning of the act. * * * in that the following statements regarding the curative and therapeutic effects of the said article are false and fraudulent: (front bottle label) 'Save The Baby,' (back bottle label) 'For Croup—apply with the hand or by saturating * * * cloth and laying it over the throat and chest; also apply over the nose. In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. * * * For Sore Throat apply on the throat; also take one-half a teaspoonful internally. For coughs * * * apply on the chest, also take one teaspoonful morning and night. For ague in breast, apply to the parts affected,' (carton, small) 'Save The Baby * * * Croup Mixture * * * For Croup, * * * Coughs and Sore Throat * * * used in cases of Grippe, Bronchitis, Laryngitis, Tonsillitis, Pneumonia, etc.,' (carton, large) 'Save The Baby for Croup, Coughs, * * * Etc.,' (circular) 'Save The Baby * * * For Croup * * * Coughs, Tonsillitis, Bronchitis, Sore Throat and similar ailments. * * * What Mother or Father has not been alarmed when awakened in the night by the childish cry of pain and the dread sound of croup? Or who of us has not shuddered when whooping cough, pneumonia or a hard cold has racked our children with pain and coughing spasms. It was because of a child's suffering that 'Save the Baby' came into being * * * a wee girl lay seriously sick with croup * * * he administered a remedy of his own compounding * * * found * * * child completely out of danger. This physician prescribed the remedy * * * in other cases, always with gratifying results. * * * 'Save the Baby,' * * * by that name it had come to be known. * * * 'Save the Baby' for use in * * * croup, tonsillitis, bronchitis, sore throat and all similar ailments in children and adults. * * * Use It * * * The results will be beneficial. For Adults—'Save the Baby' works * * * with as good results for adults as it does for children. The * * * relief given in coughs, bronchitis, pneumonia and other congested conditions of the head, throat or lungs * * * 'Save the Baby' * * * effective when used Hot. For Croup: * * * In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. * * * For Coughs * * * Apply on chest and throat; also take one teaspoonful morning and night. Influenza, Grippe and Pneumonia: * * * use 'Save the Baby' * * * In severe cases give a half teaspoonful internally every half hour. * * * Use 'Save the Baby' * * * For Sore Throat and Tonsillitis: Apply on the throat and along the cord that runs from behind the ear down the neck; also take one half teaspoonful internally. Take from one half to one teaspoonful internally

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for all chest congestions and gathering of phlegm," in this, that the article contains no ingredient or combination of ingredients capable of producing the effects claimed, and that the same were applied to the said article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of the purchasers thereof, the impression and belief, that the article was, in whole or in part, composed of, or contained ingredients or medicinal agents effective in the diseases and conditions named therein.'

"The jurisdictional allegations as well as the shipment in interstate commerce are admitted, but the essential and last quoted allegations of the libel as to the product are denied. Certain stipulations were filed eliminating the necessity of proving certain facts as to which it is unnecessary to make reference except as to the ingredients of the product. One of the stipulations sets forth that an analysis was made by an analyst of the United States Department of Agriculture of a sample of the shipment seized in these proceedings which shows that the composition and ingredients of the preparation are: Lard (approximately 70 per cent), alcohol (approximately 6 per cent), Canada balsam (approximately 10 per cent), volatile oils including camphor, rosemary oil, and origanum oil (approximately 15 per cent).

"To establish the fact that this preparation is misbranded within the meaning of the food and drugs act, the Government must prove by a preponderance of the evidence: First, that the label, carton, or circular carries some statement, design, or device regarding the contents of the package or the ingredients in the mixture which is false and misleading in some particular, and second; that the statement made or the design or device carried on the label or carton or in the circular regarding the curative or therapeutic effects of the same are false and fraudulent. Such being the case the fraud alleged must be established by competent proof and by credible and convincing evidence.

"The sections of the act here applicable provide as follows:

"(Sec. 9, Title 21, U. S. C.) 'Misbranded;' meaning and application. The term 'Misbranded' * * * shall apply to all drugs, * * * the package or label of which shall bear any statement, design, or device regarding an article, or the ingredients or substances contained therein which shall be false or misleading in any particular."

"(Sec. 10., Title 21, U. S. C.) 'an article shall be deemed to be misbranded; * * * In case of drugs: Imitation or use of name of other article, first, * * * removal, and substitution of contents of package, or failure to state on label quantity or proportion of narcotics therein; second, * * * False statement of curative or therapeutic effect; third, if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.'

"It appears that the Government contends that this product contains no ingredients or combination of ingredients capable of producing the effects claimed for it and that the claims that are made for it are false and fraudulent and were applied by the manufacturers knowingly and in disregard of their truth or falsity, so as to falsely and fraudulently represent to the purchasers and create in their minds the impression and belief that the article was in whole or in part composed of or contained ingredients effective in the diseases mentioned in the carton and circular.

"The claimant denies misbranding within the purview of the food and drugs act and particularly denies that the statements regarding the curative and therapeutic effects of this product are false and fraudulent or were made in wanton disregard of their truth. It then affirmatively alleges that this product is capable of producing and has actually produced the curative or therapeutic effects claimed for it, and has offered credible evidence in support of his contentions.

"From the quoted allegations of the libel it appears that certain words and directions contained in the circular were omitted from the libel. Under familiar rules of pleading and evidence the Government is precluded from complaining of the omitted words, but it is only fair, in order to reach a proper conclusion respecting the issues presented, that we consider the entire label and all that is contained in the so-called literature and directions which accompany the bottle as bearing upon the good faith of the manufacturer of the product, because if it appears from all the evidence, and I conclude that the claims made for this remedy are true, then it necessarily follows that they cannot be false or fraudulent.

"In the use of the words 'therapeutic' and 'curative,' as set forth in the statute, it seems clear that these words were intended by the Congress to be given their ordinarily accepted meaning and while they have a certain meaning to the expert doctor, nevertheless they are a part of the vocabulary of any intelligent person. Therapeutic to the medical world means to heal; to make well; to restore to health. It is that branch of medicine dealing with the proper use of the right medicines in the treatment of diseases. The medical student studies 'Therapeutics' for the purpose of learning about different medicines to prescribe for the many ills to which the flesh is heir, in order to assist nature to make a sick patient well. The ordinary definitions found in the dictionaries are as follows: 'Having healing qualities; curative; alleviative; a medicine efficacious in curing or alleviating disease.' Webster defines therapeutics as 'that part of medical science which treats of the discovery and application of remedies for diseases.' The word 'curative' is not found in the medical dictionaries. The regular dictionaries define the word as 'possessing power or tending to cure; relating to the cure of disease; relating to or employed in the cure of disease; tending to cure.' In none of the definitions is there a suggestion that the words 'therapeutic' or 'curative' convey the meaning of absolute cure. The testimony of the experts shows that a therapeutic or curative agent is something which alleviates or tends to cure a disease, and that, except in a few instances, there is no medicine which, of itself, is an absolute cure for disease.

"With these definitions in mind we turn to section 7 of the act which defines 'drug' as follows: 'The term "drug" as used in * * * this title, shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of * * * man.'

"Therefore, 'Lee's Save the Baby' is a drug within the provisions of the statute, which is intended by its manufacturers for use in the 'cure, mitigation, or prevention of diseases in man.'

"Before analyzing the testimony it is important to note what the Supreme Court has held as to what are and what are not false and fraudulent statements within the purview of the act. In *Seven Cases v. United States*, 239 U. S. 510, Mr. Justice Hughes said, page 517: 'Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. Cong. Rec. 62d Cong. 2d Sess., Vol. 48, Part 12, App., p. 675. It was, plainly, to leave no doubt upon this point that the words 'false and fraudulent' were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive—an intent which may be derived from the facts and circumstances, but which must be established. Id. 676. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. * * * It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purposes.'

"In the light of this decision it seems clear that if a drug mixture contains certain ingredients which the evidence shows have a therapeutic or curative value in the treatment of the diseases for which it is recommended, then there is no misbranding within the purview of the statute.

"Before beginning an examination of the evidence it is important to note that one of the claims made and the arguments advanced by counsel for the Government, both in their opening statement at the trial and subsequently in their brief, are predicated upon a wrong premise. Whether by mistake or design I do not say, but the result must be the same in either instance. If by mistake, it only shows that the preparation of the case was not careful, and the argument set forth in the brief was advanced only after a cursory examination of the evidence and the carton which is in evidence, the wording of which formed part of the basis for the libel. Attention is now directed to what is actually and fully printed in the literature accompanying each bottle.

"On the face of the carton we find the words, 'Lee's Save the Baby contains 8 per cent Alcohol U. S. P.' On the back of it are the words: 'Lee's Save the Baby. An Invaluable Croup Mixture Made of Pure Simple Ingredients. Can Be Used Internally Or Externally. Use It Hot.' On one side we find the words: 'For Croup, Snuffles, Colds, Coughs and Sore Throat. Frequently Used In Cases of Grippe, Bronchitis, Laryngitis, Tonsillitis, Pneumonia, Etc. Absolutely Safe For Children and Adults.' While the word 'Invaluable' was left out of the libel, the record shows that counsel for the Government, in his opening statement as to what he expected to prove said, *inter alia*: 'The rear label again has the word or the name, "Lee's Save The Baby" and a pictorial design of a woman holding a baby and following are the words, an "infallible" croup mixture, etc.'

"In their brief, on page 3, counsel again quote as follows: 'Rear panel: an infallible croup mixture.' Further on, in urging the argument, they say: 'The sense of the entire labeling "sounds" the curative idea and is augmented by the use of such terms as "infallible," "miraculous," "remedy," etc., which are to be found in the general language of the circular.'

"The label shows clearly that the word used by the proprietors is 'invaluable' and not as Government counsel asserted 'infallible.' Invaluable means of great value, very useful, inestimable, and the testimony of the experts leads to no other conclusion than that this mixture is 'an invaluable croup mixture.' Infallible, as defined by Webster, means indubitable, sure, certain, not capable of erring, entirely exempt from liability to mistake. If that word was used in the literature the Government's argument on this point would be sound, but, as pointed out, 'invaluable' is the word actually used and there is nothing synonymous about the two words.

"The testimony is conclusive that thyme, Canada balsam, commonly known as turpentine, camphor, and lard used hot, are comforting and beneficial and that they alleviate the pain and the suffering incidental to the diseases mentioned, and that these ingredients do have therapeutic and curative properties which aid nature in overcoming the disease. While it is true that the act was intended to protect the public from deception and fraud in connection with the sale of proprietary medicines, and while it is true that when a preparation is put upon the market which it is claimed has therapeutic and curative value it is equally true that it must appear from the evidence that the product has some beneficial action upon the disease mentioned. The great weight of the testimony of the medical experts shows that each one of the ingredients in this mixture exerts some beneficial influence upon each one of the diseases specified.

"It is generally known and the evidence shows that with very few exceptions there is no known cure, using that word strictly, for any disease. Nature, supplemented and aided by proper medicines, careful nursing, and proper diet does the work of curing. It has been clearly established that camphor, thyme, Canada balsam in a base of lard are remedial agents of value in the treatment of croup, coughs, colds, snuffles, sore throat, tonsillitis, bronchitis, and pneumonia and are used by reputable physicians in the treatment of these diseases. All the experts testify and the counsel for the Government concede that 'Save the Baby,' when applied externally acts as a rubefacient or counter-irritant, bringing an increased blood supply to the particular area of application, thereby soothing the patient and making him feel more comfortable; and that a further soothing effect, a symptomatic relief is produced by the inhalation of camphor fumes given off by the preparation; that when taken internally it acts as a carminative, giving a feeling of warmth and well being to the stomach, and the camphor present acts as a slight cardiac stimulant.'

"The labels, cartons, and circulars in evidence recommend the use of this compound in the treatment of diseases of the respiratory system—indicate how it is to be used and assert that its use has been found beneficial. Nowhere is there any claim made that it will cure. There is no language anywhere which could possibly be understood to convey the idea that it will cure. And what to my mind completely refutes the Government's claim of fraud and falsity is the language used by the manufacturer which is directory to the person disposed to use the remedy and is found in that part of the circular, headed 'Directions for Use.' After giving directions as to its use in cases of croup, snuffles, coughs, and colds it says: 'Influenza, Grippe and Pneumonia. For these serious illnesses it is wise to call a doctor soon as possible. Pending his arrival use "Save the Baby," and then follow the directions as to the use of the remedy pending the doctor's arrival.' Also the words, 'Keep a bottle of "Lee's Save the Baby" handy for Emergencies.'

"The proof in this case shows that this compound is beneficial and has therapeutic and curative value in cases of croup, coughs, colds, and snuffles. On direct examination one of the medical experts for the libellant testified as follows:

Q. Prior to being asked to appear as a witness in this case, have you ever heard of the preparation known as "Lee's Save The Baby"?

A. I have.

Q. Did you ever administer it to a child that you have been called upon to treat?

A. I have been asked by mothers whether I would give them permission to use it and I have consented.

Q. Do you know in a general way or specifically, the constituent ingredients of "Lee's Save The Baby"?

A. I do.

Q. Do you have any objection to the use of "Lee's Save The Baby" in your own mind?

A. No.

Q. Are preparations containing camphor, Canada balsam, and volatile oils on a greasy base used by physicians in the treatment of pathological conditions of the respiratory system?

A. They are used in the treatment as a soothing treatment, not as a curative treatment.

"In other words, conceded as it is by all that there is no cure for these respiratory diseases, the best the doctors can do to restore normal health is to aid nature with nursing, diet, and medication, because it is nature that effects the cure. If the above mentioned medicines are those, or some of those used by doctors in the treatment of respiratory diseases, and they are the same ingredients as are found in the product under discussion, how can it fairly be asserted that there is anything false or fraudulent in the statements made by the manufacturer as appears in the labels, cartons, and circulars in evidence in this case? If a Government expert medical witness treating children with the afore-mentioned diseases allows mothers to use the remedy, knowing the ingredients, and has no objection in his own mind to the use of this product and testifies that camphor, Canada balsam, and volatile oils on a greasy base are used by him and other physicians in the treatment of these diseases, I conclude that the Government has utterly failed to sustain the allegations of its libel.

"As further enlightening let us turn to the testimony of one of the doctors who testified in behalf of the claimant and one who has had thirty years' experience as a specialist in children's diseases and an expert of learning and long experience in the treatment of the diseases under discussion. From his testimony it appears that practically all of the ingredients in this compound appear in the United States Pharmacopoeia and that camphor has a substantial standing in Materia Medica and is used quite universally; that balsam and thyme oil are used quite commonly in the treatment of the diseases of the respiratory tract; and that camphor is one of our very valuable therapeutic agents. With reference to the value of camphor it appears from the evidence that its action both internally and externally is beneficial. Externally it is rubefacient and produces, when applied to the skin, congestion, redness, and is like a counter-irritant bringing the blood to the surface and gives relief from pain as it has the effect of an anesthetic and such is the recognized action of the drug. Internally, it is used as a stimulant for the heart and it is also used a great deal in nose syringes with a base of mineral oil which gives relief. When used externally according to the directions, i. e., put on hot, the volatile part of thyme oil, camphor, and turpentine are inhaled and this action soothes the mucous membrane of the throat and nose. It is difficult to reach the mucous membrane of the larynx when the symptom of cold or croup originates and by inhaling the volatile oils that are accumulated from the external application of this remedy congestion and irritation are relieved and the patient derives a benefit.

"After dividing croup into two classes, true and false, we find that cases of true membranous croup are now rare because of the introduction of anti-toxin, so that false croup is a common complaint among children and the evidence abundantly justifies the conclusion that the compound complained of is in use by doctors, and in the case of one doctor of wide experience and learning who testified here that it is used in his own household.

"Dr. Shaw for the claimant, a witness of extended experience in the treatment of children's diseases, testified as follows:

Q. Now, I have the impression from the Government witnesses that there was some distinction, some distinction in the professional vocabulary, between the cure so-called, the specific for a disease and the things that alleviated the thing, and tended to recover from it; has this compound here any therapeutic property which would be of value in cases of false croup?

A. Yes, sir.

Q. What are they?

A. The camphor, the turpentine, the hot application of the lard, which is very penetrating, the fumes that come from it.

- Q. Have you ever seen or heard of this being used as an emetic in case of false croup?
- A. I have.
- Q. What was the reaction there?
- A. The child would promptly vomit after two or three doses of an internal dose.
- Q. And that would be the combination of hot lard and thyme oil and the turpentine, and all that?
- A. Yes.
- Q. And that vomit tends to bring that gathering or phlegm from around the throat?
- A. It relaxes the muscular spasm.
- Q. And then the croup is over?
- A. Yes.
- Q. About the use of this in snuffles in small children, it is recommended for snuffles, I think that is one of the words that are on there. Have you ever had any experience with the product in that way?
- A. I never have, although I prescribe a preparation that contains a little menthol and camphor and a little iodine for the inhalation in the nose. It is something I have used for years and years.
- Q. And camphor, for instance, rubbed on has a certain therapeutic value for the treatment of colds in the head?
- A. Yes.
- Q. Not only from the fumes that it gives, but the direct action of the drug on the membrane; is not that true?
- A. Yes, sir.
- Q. And thyme oil and some combinations of turpentine products are recognized in the United States Pharmacopoeia, are they not, as therapeutic agents for whooping cough?
- A. Yes, sir.
- Q. Also for the common cold?
- A. Yes, sir.
- Q. Taking up the question of pneumonia, pneumonia appears on that. What do you say as to the value of this particular product in the treatment of pneumonia, in the kind of pneumonia 1, 2, 3, and 4?
- A. I will answer that negatively. It can do absolutely no harm. It is a self-limiting disease.
- Q. And it would not do any harm to put a hot pack on the chest?
- A. No.
- Q. And that tends to relieve the patient's suffering; is that true?
- A. If there is pain, and pleurisy is associated with pneumonia, the use of the counter-irritants, such as mustard or turpentine applied externally, produces this redness of the skin that is spoken of, and that does give decided relief.
- Q. Of course, if you can relieve the painful symptoms, you are helping the patient to fight the disease, are you not?
- A. Yes, sir.
- Q. Influenza and grippe are two of the claims here. Does anybody know what influenza is?
- A. I do not.
- Q. Does anybody know what grippe is?
- A. I do not.
- Q. But in cases of influenza and grippe, would the turpentine products, Canada balsam, for instance, would that have a tendency to relieve the congested condition of the lungs or the throat or the nose, as the case may be?
- A. I believe it would.
- Q. Would you call that a therapeutic action or a mechanical action?
- A. Therapeutic.
- Q. You think it would be therapeutic?
- A. Yes.
- Q. What do you say in that regard as to camphor, in those diseases; has that any therapeutic value on the painful symptoms which accompany what we call influenza and grippe?
- A. It would.
- Q. Am I right in saying that when I say a thing has a therapeutic value, it means that it relieves some present inward condition?
- A. Or symptom, yes.
- Q. I want to get straight on the word. Now, what is the usually accepted treatment in pediatrics, for, we will say, a child who shows symptoms of discomfort, which, when you arrive there, you diagnose and say, "I think this child has an attack of the grippe, or 'flu,'" or something of that kind. What is the usual treatment in such cases as that?
- A. That was outlined very well this morning by—absolute rest in bed, drinking fluids and treating any symptoms as they arise, giving comfort and inhalations and the use of other remedies that are not to be considered here.
- Q. And in your opinion, would the use of this compound here tend to mitigate the conditions that are present in these cases?
- A. I believe it would.
- Q. Or any similar compound or drug?
- A. Yes, sir.
- Q. Have you ever seen it used when you get to a patient, when you are called; have you ever found this product having been used in cases of "flu"?
- A. Very frequently.
- Q. What do you find the condition to be when you get there? That is, how were they using it?
- A. Usually heavily rubbing on the chest, I think usually the external use is more prevalent than the internal use of it. That has been my experience; that they rub the preparation on the chest or else put a little on a flannel and put it on the upper part of the chest, and put it around the throat and other places.
- Q. If they have used this preparation internally, of course a certain amount of camphor has been absorbed into the patient's system?
- A. A small amount.
- Q. What effect does camphor have on a child's condition; what is the effect of the drug itself; does it stimulate?
- A. It is a stimulant. The word as used this morning is a carminative, and relieves intestinal conditions.

Q. What about thyme oil present in the origanum oil; is that indicated as a therapeutic agent in some cases?

A. Thyme oil is an antiseptic. It is rather soothing if taken internally and inhaling it relieves the congestion of the mucous membrane on account of its soothing effects.

Q. Now, the Canada balsam, we will call it turpentine for short; has that a certain well-recognized therapeutic value in cases of that kind?

A. Yes, that comes under the term of turpentine. There are two classes of that, and that is recognized, and it is the basis of a good many remedies.

"Dr. Schroeder of New York City, who prior to this case had never heard of this remedy, has had a large and extended practice for many years in the treatment of children's diseases and occupies a prominent place in the medical profession. After learning of the ingredients and the proportions he testified that it 'Is a very good remedy * * * there is not a substance in it which is not used in medicine or which is not recognized, and you not only find it in the American Pharmacopœia, but find most of them in the French and Italian and German. The Canada balsam or turpentine has long been recognized as being distinctly helpful in all respiratory infections * * * A great many cough expectorants have Canada balsam in them and it is distinctly useful as an expectorant. So far as camphor is concerned, everybody knows it is valuable. It depends chiefly on this fact, that it is volatile, and everything that can diminish the choking up of the nose so that you breathe more easily, makes you feel better and when you feel better you cure your disease faster.' Regarding the therapeutic effect of this remedy the doctor testified as follows:

Q. Of course this compound herein and of itself is not a cure for anything, there is no such claim; but I want to know from you whether it has the ingredients in it which will have some curative effect and some therapeutic effect on the condition that you describe as the inflammation of the larynx?

A. There is not a single solitary thing in that mixture that does not serve a useful purpose, so far as I can judge from its make-up, and everything in there seems to have been worked out with a nicety. Since I have learned how long this stuff has been used, that is quite amazing to me. I think it is an unusually nice preparation; and I am particularly pleased to see lard used as a base, because most people use petroleum, which is the basis of Vick's, and lard is the best emollient we have. You have gone all over various substances which have in them thyme; and of course so far as whooping cough is concerned, I do not believe anybody in New York City at least has not used or uses mixtures for whooping cough, diatussin pertussin, and both of these are extracts from thyme or oil of origanum; so nobody claims that thyme is a specific for whooping cough; but so far as anybody can judge, it will serve a very useful purpose, and I have been absolutely amazed at some cases that were very much helped.

"Doctor Mullins, another expert, confirms the views expressed by Doctors Shaw and Schroeder and testified that he has used this product in his own family, and on his own children for fourteen years and that in his opinion, 'Its use shortens the course of some of the respiratory diseases,' and that 'It might shorten the course even of pneumonia by using the per cent of thyme oil, being a respiratory antiseptic; by its carminative action and the sterling effect of the camphor.'

"In addition to all this a number of nurses testified to its use over a period of years with successful results.

"I see no merit in the attack on the trade name. There is nothing misleading about it. The title is 'Lee's Save the Baby.' Its use is not limited to babies. Reading the labels and circulars and directions it is clear that the remedy is equally beneficial for adults as for children or babies. The descriptive matter says so. Its use is recommended for any person young or old who may be afflicted with any of the diseases of the respiratory tract. The picture on the label and the carton offend no Federal statute. While it is true that the mere fact of trade mark does not take the product out of the operation of the act, nevertheless, when it appears that the product does not in any way violate any of the provisions of the statute, the rights of the owners of the trade mark must have consideration and they may not be deprived of their property rights in order to meet some untenable position taken by some one in authority to whom is delegated the power to invoke the aid of the statute.

"In conclusion we revert to the allegations of the libel. They charge that there is a misbranding in that this article 'contains no ingredient or combination of ingredients capable of producing the effects claimed, and that the same were applied to the said article knowingly and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to the purchasers thereof, and create in the minds of the purchasers thereof, the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective in the diseases and conditions named therein.'

"The Government has failed to prove that the allegations of its libel are true. On the other hand the evidence abundantly shows that every ingredient

in this mixture has some therapeutic or curative value in connection with the treatment or mitigation of the ailments and diseases in which the use of this remedy is indicated or recommended on the label and in the circular contained within the package. Nor is there proof that the package or circular contains any statement, design, or device regarding the curative or therapeutic effect either of the compound itself or any ingredients therein contained which is false or fraudulent. As the name is distinctive and not descriptive it does not offend the statute.

"While not exactly in point, the opinion written by Judge Denison, speaking for the Circuit Court of Appeals of the Sixth Circuit in *Raladam Co. v. Federal Trade Commission*, decided June 28, 1930, is interesting and bears out in a general way the argument herein advanced and the conclusions reached.

"The libel is dismissed and the seized goods are ordered returned.

"Submit decree accordingly.

On February 21, 1931, a decree was entered by the court ordering the libel dismissed. On April 19, 1931, the court made the following findings of fact and conclusions of law (Thomas, J.):

"After filing the opinion deciding this case adversely to the plaintiff both sides submitted requests for Special Findings of Fact and Conclusions of Law in accordance with the new Admiralty Rule 46½.

"On February 6, 1931, this court filed a Memorandum of Decision denying the requests for Special Findings of Fact and Conclusions of Law for the reasons therein stated.

"While this court was sitting in New York City in March, 1931, counsel for the Government, together with Special Counsel for the Department of Agriculture, appeared ex parte, before the court and strenuously urged that this court file Special Findings of Fact and Conclusions of Law because of the importance of the case and assured the court at that hearing, that the plaintiff intended in good faith to appeal to the Circuit Court of Appeals from the decision of this court handed down on October 17, 1930.

"Therefore the court has consented to file Special Findings of Fact and Conclusions of Law and they are as follows:

"1. That the subject matter of this proceeding is a number of bottles of a preparation known as 'Lee's Save The Baby,' which is a mixture or compound manufactured, sold, and distributed by William W. Lee & Co., a copartnership composed of Samuel C. Ulcher and Carrie L. Ulcher, residing and doing business in Watervliet, Albany County, N. Y., all of whom intervened as claimant of the seized goods and defended against the libel.

"2. That said bottles were, on or about the 15th day of January, 1929, shipped by William W. Lee & Co., from Troy, State of New York, to New Haven, State of Connecticut, and while they remained unsold and in the original unbroken packages in the possession of the Charles W. Whittlesey Co., at New Haven, Conn., 31½ dozen small size bottles and 12½ dozen large size bottles were seized by the United States marshal pursuant to a libel filed by the United States of America and process duly issued out of this court.

"3. That the preparation or substance contained in said bottles, seized as aforesaid, consisted of the following ingredients in the following proportions: Lard (approximately 70 per cent), alcohol (approximately 6 per cent), Canada balsam (approximately 10 per cent), volatile oils including camphor, oil of rosemary, and oil of origanum (approximately 15 per cent).

"4. This product is packed, sold, and shipped in interstate commerce in bottles to which is affixed a label composed of two printed sheets. The front sheet of the label reads: 'Lee's Save The Baby. Reg'd U. S. Patent Office. Trade Mark. Contains 8% Alcohol U. S. P.—Size. Copyright 1914 by William W. Lee & Co. N. Y. C. R. No. 297, Troy, N. Y., and this sheet of the label also contains the facsimile signature of William W. Lee, together with a picture of a woman with a baby in her arms.

"The rear sheet of the label on the bottle reads as follows: 'Directions. For croup, apply with the hand, or better, by saturating a flannel cloth and laying it over the throat and chest; also apply over the nose. In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. For snuffles, apply over the nose. For sore throat, apply on the throat; also take one-half a teaspoonful internally. For Coughs and colds, apply on the chest, also take one teaspoon morning and night. For ague in breast, apply to the parts affected. Shake well before using, and keep in a warm place, as it solidifies when cold. In all cases apply hot.'

"5. This bottle is wrapped in a circular containing directions for use of the mixture or compound in English as well as in six foreign languages, and reads as follows: 'Lee's Save The Baby' Reg'd U. S. Patent Office Trade Mark For Croup, Colds, Coughs, Tonsillitis, Bronchitis, Snuffles, Sore Throat and similar ailments. [Facsimile signature of William W. Lee, together with a picture of a woman with a child in her arms]. * * * Dear Parent: What Mother or Father has not been alarmed when awakened in the night by the childish cry of pain and the dread sound of croup? Or who of us has not shuddered when whooping cough, pneumonia or a hard cold has racked our children with pain and coughing spasms. It was because of a child's suffering that 'Save The Baby' came into being more than fifty years ago. In a village near Troy, N. Y., a wee girl lay seriously sick with croup. The doctor, who had done his best to relieve her, had given up hope for her recovery. The father, Mr. William W. Lee, refused to admit defeat. In desperation, he administered a remedy of his own compounding * * * the doctor on his morning call to his surprise found a happy child completely out of danger. This physician prescribed the remedy for both children and adults in other cases, always with gratifying results. Soon its reputation spread through the community. Neighbors came repeatedly to Mr. Lee for 'some of that medicine to save the baby.' He gave it freely to all comers. Soon it became necessary to mix it in larger quantities to supply the demand. In a short time the calls became so many and from such distant points that Mr. Lee made up a quantity and bottled it, placing it in a few drug stores in convenient locations. The bottles bore only a handwritten label with just the words 'Save The Baby,' for by that name it had come to be known. Such was the beginning of 'Save The Baby.' By sheer force of merit alone, just by one mother telling another, has the business grown so that thousands of bottles are used each year by mothers to help their suffering children. 'Save The Baby' is now sold in every state of the Union and exported to foreign countries. The voluntary testimonials Mr. William W. Lee received during his life, and which the present manufacturers (his children) continue to receive, fully warrant us in recommending 'Save The Baby' for use in cases of colds, croup, 'snuffles,' tonsillitis, bronchitis, sore throat and all similar ailments in children and adults. 'Save The Baby' always has been a family product. For more than half a century it has been compounded and still is being made by members of Mr. Lee's family from his original formula, the ingredients are simple and the purest and best money can buy. 'Save The Baby' is harmless. It can be used externally and internally. Use It Freely And Use It Hot. The results will be beneficial. For Adults—'Save The Baby' works just as fast and with as good results for adults as it does for children. The quick relief given in coughs, colds, bronchitis, pneumonia and other congested conditions of the head, throat, or lungs often seem miraculous. Use it freely as directed and always Use It Hot. Directions for use. Shake well before using and keep in a warm place as 'Save The Baby' solidifies when cold. This does not impair it but 'Save The Baby' is most effective when used Hot. For Croup: Heat a flannel cloth, saturate it with hot 'Save The Baby' and lay over throat and chest or rub the remedy in with the hand. Also apply over nose and back. In severe cases, where relief does not follow in half an hour, give a half teaspoonful internally every half hour. Keep patient warm and away from drafts. For Snuffles: Apply over nose and sniff a little into nostrils. For Coughs and Colds: Apply on chest and throat; also take one teaspoonful morning and night. Influenza, Grippe and Pneumonia: For these serious illnesses it is wise to call a doctor as soon as possible. Pending his arrival use 'Save The Baby.' Heat a flannel cloth, saturate it with hot 'Save The Baby,' and lay over chest and back, or rub the hot remedy in by hand. In severe cases give a half teaspoonful internally every half hour. Keep patient warm and protected from drafts. After doctor arrives use 'Save The Baby' as directed by him. For Sore Throat and Tonsillitis: Apply on the throat and along the cord that runs from behind the ear down the neck; also take one half teaspoonful internally. Take from one half to one teaspoonful internally for all chest congestions and gathering of phlegm. Keep a bottle of 'Save The Baby' handy for emergencies. Use it freely and use it Hot. Made only by William W. Lee & Company, Troy, N. Y. For Sale at All Retail Drug and Country Stores. Small Size, 35 Cents Per Bottle. Large Size, 70 Cents Per Bottle. The 70¢-size is more economical to buy, as it contains 2½ times as much as the

35¢-size. Beware of Imitations: The genuine 'Save The Baby' is always sold in bottles with labels bearing the facsimile signature of William W. Lee across the face. Accept No Substitute. Any infringement of the copyrighted label or our trade mark will be vigorously prosecuted. Contains 8 Per Cent Alcohol By Volume As a Solvent and Preservative.'

"6. The bottle is wrapped in the circular and packed in a carton upon the front panel of which appears a facsimile of the front label on the bottle.

"On the left side panel of the carton the following words appear: 'For Croup, Snuffles, Colds, Coughs and Sore Throat. Frequently Used in Cases of Grippe, Bronchitis, Laryngitis, Tonsillitis, Pneumonia, Etc. Absolutely Safe for Children and Adults.'

"On the right side panel of the carton the following words appear: 'The Genuine "Save The Baby" Bears the Facsimile Signature of William W. Lee across the face of the label. Accept no substitutes.'

"The rear panel of the carton bears a facsimile of the label described above, with the following words: 'Established 1875. An invaluable Croup Mixture made of Pure Simple Ingredients. Can be used Internally or Externally. Use it Hot.'

"The top panel of the carton bears the words: 'Save The Baby. For Children and Adults.'

"The bottom panel bears the words: 'Announcement. We knew of no way to improve "Save The Baby" itself, but we have adopted this new form of packing to make our package more attractive, and for the convenience of our dealers. Wm. W. Lee & Co.'

"7. The single bottles containing the mixture or compound after being packed in the circular and carton just described, are placed in larger cartons containing 1 dozen bottles each, and the four side panels of this container read: 'One Dozen Lee's Save The Baby. For Croup, Coughs, Colds, Etc. William W. Lee & Company, Troy, N. Y. Large Size [or 'Small Size,' as the case may be].'

"8. The cartons containing a dozen bottles are then inclosed in a larger carton, the front and rear panels of which read as follows: '12 Dozen Large Size [or 'Small Size,' as the case may be], Save The Baby, Manfd. By Wm. W. Lee & Co., Troy, N. Y.'

"One side panel reads: 'Glass, Handle With Care.'

"The other side panel reads: 'Samson Sixty Five. Buffalo Box Factory, Buffalo, N. Y. Certificate of Box Maker. This Box Conforms to all Construction Requirements of Consolidated Freight Classification. Resistance 200 pounds per Square Inch (Bursting Test) Dimension Limit 65 inches. Gross weight Limit 65 pounds. This Box exceeds 250 lbs. test.'

"9. The name 'Lee's Save The Baby' is and has been registered and copyrighted in the United States Patent Office for many years last past, and that trade mark and trade name is a property right belonging to these claimants.

"10. The mixture or compound itself is an article of drugs within the purview of the food and drugs act, and all the ingredients contained in it have some curative and therapeutic effect in the treatment or mitigation of the diseases and ailments mentioned on the label and on the carton or cartons and in the circular wherein the product is packed for shipment and sale.

"11. The labels on the bottle itself, the circular wherein it is wrapped, and the cartons wherein it is packed, and shipped, contain no statement, design, or device regarding the curative or therapeutic effect either of the compound itself or any ingredient therein contained, which is false or fraudulent.

"Conclusions of law. 1. The product contained in the bottles seized as aforesaid is a drug within the meaning of the act of Congress of June 30, 1906, as amended by the act of August 23, 1912.

"2. The bottles seized in this proceeding are not misbranded within the purview of the act of Congress mentioned in paragraph 1.

"3. The name 'Lee's Save The Baby' is a distinctive and not a descriptive name and offends no Federal statute.

"4. The statements appearing on the carton, bottle label, and circular accompanying each of the bottles of 'Save The Baby,' seized as aforesaid, concerning the curative or therapeutic effect of the article, are not false and fraudulent within the meaning of the act of Congress of June 30, 1906, known as the food and drugs act, as amended by the act of August 23, 1912.

"5. The libel is dismissed and the seized goods are ordered returned to claimant."

No appeal having been perfected by the Government, the case is now closed.

ARTHUR M. HYDE, *Secretary of Agriculture.*