

# United States Department of Agriculture,

OFFICE OF THE SECRETARY.

## NOTICE OF JUDGMENT NO. 300, FOOD AND DRUGS ACT.

### ALLEGED ADULTERATION AND MISBRANDING OF CALCIUM ACID PHOSPHATE.

On or about April 6, 1909, the Provident Chemical Company, of St. Louis, Mo., shipped from the State of Missouri to the State of California one hundred barrels of a product labeled "Provident Chemical Co. St. Louis, 300 lbs. C. A. P. guaranteed under the Food and Drugs Act." Analyses of samples of this product, made by the Bureau of Chemistry, United States Department of Agriculture, indicated that it was adulterated and misbranded within the meaning of the Food and Drugs Act of June 30, 1906. As it appeared from the findings of the analyst and report thereon that the said shipment was made in violation of section 10 of the act, the Secretary of Agriculture reported the facts to the United States attorney for the Northern District of California. In due course a libel was filed against the said one hundred barrels, in substance and form as follows:

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

THE UNITED STATES OF AMERICA, *Libellant*,  
vs.  
ONE HUNDRED BARRELS OF CALCIUM ACID PHOSPHATE, *Defendant*.

To the Honorable District Court above named:

The United States of America, through Robert T. Devlin, United States attorney for the Northern District of California, respectfully show:

That complainant above named in its own right prays for seizure and condemnation of certain articles of food and articles used for the preparation of food described, as follows: one hundred barrels, each containing three hundred pounds of so-called calcium acid phosphate;

That the substance last referred to was shipped on April 6th, 1909 by the Provident Chemical Company of St. Louis, Missouri, via the Missouri-Pacific, The Union Pacific, and the Southern Pacific Railroads, from the State of Missouri to the State of California, in interstate commerce, and is now held in the State of California at Whittel Warehouse, in the State and Northern District of California, subject to the orders of the Del Monte Milling Company, a corporation, organized and existing and doing business under the laws of the State of California;

That said shipment was made directly to the said Del Monte Milling Company, and was through and continuous from point of origin to destination in the State of California;

That each of said barrels is labeled as follows: "Provident Chemical Co., St. Louis, 300 lbs. C. A. P. guaranteed under the Food and Drugs Act."

That the said substance above referred to and so branded and so barrelled was shipped under the representation by the said consignor and the same at all times has been so branded by said consignor as falsely to appear as pure calcium acid phosphate without any adulteration; that the said branding of the said substance aforesaid was and is wholly false; that the said substance has at all times been and is adulterated with approximately fifty per cent corn starch; that said adulteration has been mixed and packed with the said calcium acid phosphate so as to reduce and lower and injuriously affect the quality and strength thereof; that said corn starch is of far less value than the said calcium acid phosphate; that the mixing of the same with the said calcium acid phosphate does greatly damage the same and does conceal the inferiority of the entire substance made by the said mixture;

That the said substance hereinbefore referred to and the whole thereof is a part of an interstate shipment, and the same was shipped to the said Del Monte Milling Company and to its order aforesaid, for the purpose of sale, and for use in its said adulterated condition, and as branded as aforesaid for food and in the preparation of foods;

That there is no marking of any kind on the substance heretofore referred to contained in the said barrels which indicates in any way the adulteration aforesaid.

Wherefore in consideration of the premises, your libellant prays that the said article of food, consisting of one hundred barrels of so called calcium acid phosphate hereinbefore more specifically described may be proceeded against and seized for condemnation in accordance with the Act of Congress approved June 30, 1906, and to this end this Honorable Court may issue process of attachment in due process of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, so far as practicable in this case, and that the said Del Monte Milling Company and the said Provident Chemical Company, and all other persons having or pretending to have any right, title or claim in and to the said articles of food above mentioned may be cited to appear herein and answer all and singular the premises aforesaid, and that if the said Del Monte Milling Company and the said Provident Chemical Company cannot be found that they be cited by process of publication in the manner provided by law.

That by an appropriate order this Honorable Court may adjudge and decree that the said articles of food hereinbefore particularly described be condemned at the suit of this libellant according to the provisions of the Act of Congress hereinbefore set forth; that this Honorable Court may pass all such orders and decrees and judgments as may be necessary in the premises and may grant your libellant a decree for the costs of this proceeding against the said Del Monte Milling Company and the said Provident Chemical Company or the owners or holders of said articles condemned, should such costs not be satisfied out of the proceeds of the sale, and that your libellant may have such other and further relief as the nature of the case may require.

On May 25, 1909, the Provident Chemical Company, St. Louis, Mo., entered an appearance and filed its answer to the above mentioned libel, in substance and form as follows:

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE NORTHERN  
DISTRICT OF CALIFORNIA.

THE UNITED STATES OF AMERICA, *Libellant*,  
*vs.*

ONE HUNDRED BARRELS OF CALCIUM ACID PHOSPHATE, *Defendant*.

The Provident Chemical Works of St. Louis, Missouri, a corporation, answering the libel filed herein by the above named libellant, alleges and denies as follows:

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#### I.

Alleges that it is, and at all the times in said libel and this answer mentioned, was a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, with its principal place of business in the City of St. Louis, State of Missouri, and is, and at all the times in said libel mentioned, was, a citizen of the said State of West Virginia.

#### II.

It is, and at all the times in said libel and in this answer set forth, was the owner of the articles referred to as "one hundred barrels of calcium acid phosphate," which the libellant seeks to condemn as articles of food and articles used in the preparation of food.

#### III.

Denies that the said substance above referred to as "one hundred barrels of calcium acid phosphate" is, or is represented to be, or ever was represented to be, or is known, or ever was known, as "calcium acid phosphate;" denies that said substance is, or is used, or was, or was used, as either a "drug" or "food" or in the preparation of "food" within the meaning of the "food and drug" Act of Congress, approved June 30th, 1906; denies that each of the barrels which contain said substance is branded other than "Provident Chemical Works, St. Louis, 300 lbs. C. A. P. guaranteed under the food and drug Act;" denies that the said substance was ever represented as, or shipped as pure calcium acid phosphate, or as pure calcium acid phosphate without any adulteration; denies that the said substance is, or ever was, either barrelled or branded to appear as pure calcium acid phosphate without adulteration, or to appear as pure calcium acid phosphate; denies that the branding of said substance as "C. A. P." is wholly, or at all false; denies that said substance has at all times, or is now adulterated with fifty per centum of corn starch, or approximately fifty per cent of corn starch; denies that said, or any, adulteration has been mixed or packed with said substance, or with "calcium acid phosphate" to reduce and lower or injuriously affect the quality and strength of said substance; denies that the mixing of corn starch with calcium acid phosphate greatly or at all damages the same, or conceals the inferiority of the entire substance made by said mixture, or that said mixture is inferior; denies that the substance seized is, or is represented, or ever was represented, as pure calcium acid phosphate. Denies that the said substance seized and sought to be condemned was shipped for the purpose of sale as, or to be used as, food, or to be used in the preparation of food; denies that it was ever branded, represented or sold, in a false or misleading way, or as a food or as a substance to be used in the preparation of foods, or as a component part of a food; denies that there is no marking of any kind on the said substance seized as aforesaid which indicates in any way the adulteration of said substance; denies that said substance has ever been represented to be other than it is or was, or that it is inferior to what it is, or was represented to be.

And for a further and separate answer and defense to said libel this claimant, Provident Chemical Works of St. Louis, Missouri, a corporation, alleges:

#### I.

Provident Chemical Works of St. Louis, Missouri, is and at all the times in said libel and in this answer mentioned, and for more than ten years prior thereto, was, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, and a citizen of said State, with its principal place of business in the said City of St. Louis, State of Missouri.

## II.

Ever since the year 1885, said claimant and its predecessors in interest were, and it still is, engaged, at the said City of St. Louis, in the manufacture and production of various kinds and qualities of acid phosphates and other chemicals. Among the chemicals so produced was the substance seized, said substance from about 1884 to 1890, was known and represented as, and sold as, "Cream Acid Phosphate" which substance was known to contain about one-third starch; said name was soon condensed to the arbitrary letters "C. A. P." which letters were known to represent the said "Cream Acid Phosphate," and became and were known with and applied to this particular product to distinguish it from others, and identify it with this claimant as the producer and manufacturer of it. Thereupon said claimant adopted said letters "C. A. P." as its trade-mark and appropriated said trade-mark to chemicals of its manufacture and particularly described the substance seized as the class of chemicals upon which said trade-mark would be and has been used, and the use of said trade-mark on said substance has been sustained; neither said letters "C. A. P." nor said trade-mark stand for, or are understood by any one to stand for or represent pure calcium acid phosphate, or any other substance other than said "cream acid phosphate," which is neither a drug nor food, nor used in the composition of food.

And for a further, second and separate answer and defense to said libel this claimant alleges that calcium acid phosphate has no recognized nor accepted standard of strength, quality or purity, and is not mentioned in the United States Pharmacopœia or the National Formulary.

And for a further, third and separate answer and defense to this libel this claimant alleges that said substance seized at the time of its introduction unto the said State of California, was neither a drug nor food, nor a part or element of food, and it was not, is not and never has been misbranded and was not and is not an adulterated or misbranded food; but said substance is a chemical mixture now and at all times known under its distinctive trade-mark "C. A. P.," and its label and brand is the statement that it is produced in St. Louis, Missouri.

And for a further, fourth and separate answer and defense to this libel said claimant alleges that said chemical may not be used even in the preparation of food except in combination with bicarbonate of soda and moisture which produces a chemical action which essentially and substantially changes said substance to phosphate of soda; that said phosphate of soda is produced after said "C. A. P." has been delivered in said State of California and therefore does not come within the provisions of the Act of Congress, dated June 30th, 1906, and this Court has no jurisdiction in this proceeding.

Wherefore, this claimant prays that libellant take nothing in the above entitled action; that said libel be dismissed and that claimant recover costs and charges herein incurred, and for such other relief as may be just.

LENT AND HUMPHREYS,  
*Proctors for Claimant.*

On June 22, 1909, the case came on for hearing on libel and answer, and the court rendered its decree, in substance and form as follows:

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF CALIFORNIA.

THE UNITED STATES OF AMERICA, *Libellant*,  
*vs.*  
 ONE HUNDRED BARRELS OF CALCIUM ACID PHOSPHATE, *Defendant*. } No. 14015.

DE HAVEN, *District Judge*.

It is provided in subdivision 4, section 8 of the Act of June 30th, 1906 (34 Stat., 768), under which this action is prosecuted, that "an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. . . . It clearly appears from the evidence that the substance referred to in the libel, and sought to be condemned in this action, is compounded of calcium acid phosphate and corn starch, the mixture containing about 33½ per cent of corn starch.

It also appears that the addition of corn starch does not render the mixture deleterious or in any way dangerous to the health of persons eating food in the proportions in which said compound is used.

It further appears that said compound when first manufactured was known as and sold as "Cream Acid Phosphate;" that said name was thereafter condensed to the use of the arbitrary letters "C. A. P." and applied particularly to the substance or product referred to in the libel for the purpose of distinguishing it from other products; that the claimant herein adopted said letters C. A. P. as its trade-mark. In other words, the substance referred to is manufactured and sold under the distinctive name of "C. A. P."

It follows from the foregoing that the plaintiff is not entitled to recover in this proceeding; that while the article sold, under the trade name of "C. A. P." may be classed as an article of food, it does not contain any poisonous or deleterious ingredients, within the meaning of the statute above quoted, and the libel must therefore be dismissed.

So ordered.

In accordance with the provisions of this decree the goods were released to the claimant.

This notice is given pursuant to section 4 of the Food and Drugs Act of June 30, 1906.

Decisions of the United States District Courts and United States Circuit Courts of Appeal adverse to the Government will not be accepted as final until acquiescence shall have been published.

JAMES WILSON,  
*Secretary of Agriculture.*

WASHINGTON, D. C., *April 26, 1910.*