

INDEX

	PAGE
Notice of Appeal	I
Complaint	4
Answer	7
Judgment on Verdict	10
Rule Reversing Judgment	11
<i>Testimony :</i>	
John C. Stuart—Direct	14
Cross	32
Re-direct	51
Re-called	105
Re-called	127
Louis A. Page—Direct	53
Cross	54
Re-direct	58
Charles S. Cathcart—Direct	58
Cross	59
Re-direct	70
Re-cross	71
Bayard H. Morrison—Direct	75
Cross	78
Howard Russ—Direct	79
Cross	82
Re-direct	85
Re-called	94
Re-cross	95
Re-direct	95
Re-cross	96
John C. Hookstra—Direct	86

	PAGE
Cross	91
Earl Blyler—Direct	98
Cross	100
Leonard Kimball—Direct	103
Howard Wills—Direct	103
Cross	104
Motion for Non-suit	108

Defendant's Testimony:

Charles H. Robertson—Direct	110
Cross	113
Re-direct	117
Joel E. Strauss—Direct	119
Cross	120
Frank S. Herr—Direct	122
Cross	124
Re-direct	125
Henry B. Wright—Direct	125
Cross	126
Charge of the Court	127
Exhibits	133

(Filed January 4, 1917)

BURLINGTON COUNTY CIRCUIT COURT.

JOHN C. STUART,
 Plaintiff,
 vs.
BURLINGTON COUNTY FARM-
ERS' EXCHANGE,
 Defendant.

} ACTION AT LAW.
} NOTICE OF APPEAL.

10

To John G. Horner,
 Attorney of Plaintiff.

20

Take notice that the defendant appeals to the court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The witness John C. Stuart was permitted to testify as to a conversation had between him and one Lewis A. Page. The following questions were admitted.

30

2. To the witness John C. Stuart. "Who did you speak to at the Farmers' Exchange?"

3. To the witness John C. Stuart. "What did you say to Mr. Embree and what did he say to you?"

4. To the witness John C. Stuart. "Now Mr. Stuart what was it that was said by Mr. Page at the time this order was placed that induced you to place this order for the fertilizer?"

5. To the witness Howard Russ. "From your experience as a practical farmer what would be the yield or yield per acre of sugar corn and early corn when planted and fertilized with crude fish on an average season?"

10

6. The Court refused to strike out the following answer of the witness John C. Stuart. "I said the crude fish was not right. That it could not have been as represented and he said that if it was not right they would make it right and one occasion I said to him probably I should not have purchased so much until I tried it out in a small way. He said it did not make any difference whether it was one ton or a thousand. We stand behind what we sell. It must be as represented."

20

7. The court refused to strike out from the testimony of the witness John C. Stuart all statements with reference to the sales and losses.

8. The court refused the motion of plaintiff to non-suit defendant.

G. M. HILLMAN,
Attorney of Defendant.

30

Dated December 28, 1916.

Notice of Appeal.

3

[ENDORSED]
Burlington County Circuit Court.
John C. Stuart.

Plaintiff.

vs.

Burlington County Farmers'
Exchange,

Defendant.

ACTION AT LAW.
NOTICE OF APPEAL.

10

G. M. Hillman, Atty.
Service of the within notice is
hereby acknowledged.
December 30, 1916.
John G. Horner, Atty.
Filed January 4, 1917,
Harry L. Knight,
County Clerk.

20

State of New Jersey, }
County of Burlington. } SS.

I, HARRY L. KNIGHT, Clerk of the Circuit Court, Do
Hereby Certify that the foregoing is a full and complete
copy of the Notice of Appeal in the case of John C.
Stuart against Burlington County Farmers' Exchange, as
the same is now on file in my office. 30

(SEAL) WITNESS my hand and seal of said Court
at Mount Holly, this Ninth day of January,
A. D. 1917.

HARRY L. KNIGHT,
Clerk.

Filed May 5, 1915.

BURLINGTON COUNTY CIRCUIT COURT

	JOHN C. STUART,	
	<i>Plaintiff,</i>	
10	vs.	} ACTION AT LAW
	BURLINGTON COUNTY FARM-	
	ERS' EXCHANGE, a corporation,	
	<i>Defendant.</i>	

20 Burlington County Farmers' Exchange, the Defendant in this cause, was summoned to answer unto John C. Stuart, the Plaintiff therein, in an action at law upon the following complaint:

Plaintiff, residing at Beverly, in the County of Burlington and State of New Jersey, says that:

FIRST COUNT

1. On September 22, 1913, plaintiff bargained with defendant for the purchase, by plaintiff of defendant, of ten tons of crude fish, at \$28.00 per ton; said crude fish
30 to be delivered by defendant to plaintiff on or about February 1, 1914, and plaintiff to pay therefor on or about September 1, 1914.

2. Defendant delivered to plaintiff a base and worthless substitute for crude fish, but plaintiff was deceived

thereby and accepted the same, believing it to be crude fish, used it and paid therefor.

3. Defendant did not deliver to plaintiff crude fish, as bargained for by plaintiff, and agreed to be delivered to plaintiff by defendant.

4. Plaintiff used the substance delivered by defendant, believing the same to be crude fish.

10

5. Plaintiff did not receive any value whatever for the money paid, and besides, suffered and sustained large losses, by reason of the substance furnished by defendant not being crude fish, as agreed, in that said crude fish was intended as a fertilizer, to aid in the growing of plaintiff's crops, while said base and worthless substitute was of no value whatever, but, on the contrary, was a detriment to plaintiff's crops.

Plaintiff demands of the defendant \$500.00 damages. 20

SECOND COUNT.

1. On September 22, 1913, plaintiff bargained with defendant for the purchase, by plaintiff of defendant, of ten tons of crude fish, and made known to defendant that he required the same for the particular purpose of fertilizing his fields, upon which to grow sweet or sugar corn.

2. Defendant represented to plaintiff that said crude 30
fish, proposed to be sold by defendant to plaintiff, was reasonably fit for the particular purpose for which plaintiff required the same, and warranted the said crude fish as particularly good for the purposes of plaintiff.

3. Plaintiff, relying upon defendant's skill and judgment in the matter, and also relying upon its statements and warranties, purchased of defendant ten tons of crude fish, at \$28.00 per ton, to be delivered by defendant to plaintiff on or about February 1, 1914, and payment therefor to be made by plaintiff on or about September 1, 1914.

10 4. Defendant did not deliver to plaintiff, crude fish, but on the contrary, delivered to plaintiff a base and worthless substitute therefor, which base and worthless substitute was not reasonably fit for the particular purposes for which plaintiff required crude fish; nor was it as warranted by defendant.

5. Plaintiff was deceived thereby, but accepted said base and worthless substitute, believing the same to be crude fish, and used the same for fertilizing his fields for the raising of sweet or sugar corn.

20

6. The said base and worthless substitute was of no value whatever, but on the contrary, was a detriment to plaintiff's fields in the growing of sweet or sugar corn, and plaintiff thereby lost the crop and profit which he would have had, had the defendant delivered to plaintiff crude fish, as bargained for by plaintiff.

Plaintiff demands of the defendant \$2000.00 damages.

30

JOHN G. HORNER,
Attorney of Plaintiff.

(Filed May 19, 1915.)

The defendant answered as follows:

The defendant, a corporation of the State of New Jersey having its principal office at Mount Holly, in the County of Burlington and State of New Jersey, says that:

10

1. It denies the truth of the matters contained in the complaint.

Defendant says by way of counter-claim against the plaintiff:

FIRST COUNT.

1. It counter-claims for the price of goods sold and delivered to the plaintiff, upon a book account of which 20 a copy is attached hereto, the whole of which is due and unpaid.

2. Defendant counter-claims as damages the amount due thereon, being one hundred and ten dollars and forty-nine cents, (\$110.49) with interest thereon from April 9, 1915.

SECOND COUNT.

1. The said plaintiff received from the County of 30 Burlington on or about December 1, 1914, for the use of the said defendant, the sum of thirty dollars (\$30.) as and for the rent of a certain building of said defendant, situate in the township of Beverly, in the County of Burlington and State of New Jersey rented to and used by

said County for election purposes in the year 1914.

2. Said plaintiff neglected and refused to pay said sum of thirty dollars (\$30.00) to defendant. The same is still due and unpaid. Defendant counter claims as damages, the amount so collected and due as aforesaid, to wit, the sum of \$30.00 with interest from December 1, 1914.

10

G. M. HILLMAN,

Attorney of Defendant.

The following is a bill of particulars of the foregoing counter-claim of defendant against plaintiff, and a copy of the account whereon the said is founded.

John C. Stuart

20

to

Burlington County Farmers' Exchange, Dr.

1915

March 22

To 20 sacks potatoes cobbles at \$2.65 \$79.50

10 sacks potatoes Green mountain \$2.45 \$24.50

April 9

1 bbl. lime and sulphur solution 55 gals

at .11 4-5 \$6.49

Rent of Beverly office for election purposes \$30.00

30

Interest from December 1, 1914

G. M. HILLMAN,

Attorney for Defendant.

(Filed June 11, 1915.)

Plaintiff answers the counter claim of defendant, as follows :

1. He admits that there was sold and delivered to him, by the defendant, goods of the price of \$110.49, and admits that the same is unpaid, as alleged in the first count of defendant's counter claim, but denies that the same is due, and says that under the terms and conditions 10
under which said goods were sold and delivered, the purchase price thereof was not due and payable until September 1st, 1915.

2. He admits the allegations contained in the second count, of defendant's counter claim, but says that since the institution of this suit the sum due, of \$30.00 has been paid.

JOHN G. HORNER,
Attorney for Plaintiff.

20

(Filed August 14, 1917)

Defendant replies to answer of plaintiff to its counter claim as follows :

1. It denies that the goods of the price of \$110.49 sold and delivered by it to the plaintiff, were sold under the terms and conditions whereby the purchase price thereof was not due and payable until September 1, 1915 as set forth in said answer. 30

2. It admits that since the execution of this suit, the sum of thirty dollar (\$30.00) has been paid it by the plaintiff.

G. M. HILLMAN,
Attorney of Defendant.

JUDGMENT ON VERDICT

BURLINGTON COUNTY CIRCUIT COURT

10	JOHN C. STUART,	} Plaintiff,	ACTION AT LAW
	VS		
	BURLINGTON COUNTY FARM- ERS' EXCHANGE,		} JUDGMENT ON VERDICT
	<i>Defendant.</i>		

JOHN G. HORNER, *Atty.*

20 This action was tried before Judge Howard Carrow, with a jury, in the presence of the counsel of the respective parties, on December 30th, 1915.

The cause having been heard and submitted to the jury, they returned their verdict as follows: They say they find in favor of the plaintiff for the sum of \$1,095.31.

Whereupon it is adjudged that the plaintiff John C. Stuart recover of the defendant Burlington County Farmers' Exchange the sum of \$1,095.31, and his costs, which are taxed at the sum of \$54.47, making in the
 30 whole the sum of one thousand one hundred and forty-nine dollars and seventy-eight cents, \$1,149.78.)

Judgment entered January 7th, 1916.

RULE REVERSING JUDGMENT

(Filed July 21, 1916.)

NEW JERSEY SUPREME COURT

10

JOHN C. STUART,

Plaintiff,

vs.

BURLINGTON COUNTY FARM-
ERS' EXCHANGE,

Defendant.

RULE REVERSING
JUDGMENT

The plaintiff in the above cause, having recovered a 20
judgment in the Burlington County Circuit Court against
defendant on January 7, 1916, for the sum of one
thousand and ninety-five dollars and thirty-one cents,
damages, and fifty four dollars and forty-seven cents,
costs of suit, and the defendant having appealed from
said judgment, in this Court and the case having been
duly argued by George M. Hillman, of counsel for the
defendant and John G. Horner, of counsel for the plain-
tiff, and the Court having inspected the record and judg-
ment below, and considered the grounds of appeal; 30

It is, thereupon, on this nineteenth day A. D.
1916, ordered that the said judgment of the said Burling-
ton County Circuit Court be in all things, reversed, set
aside and for nothing holden, and that a *venire de nova*
do issue and the record and proceedings in said cause, be

remitted to the said Burlington County Circuit Court, to be there proceeded with, in accordance with this judgment and the practice of said Court.

Entered July 19, 1916.

On Motion of

G. M. HILLMAN, *Attorney.*

10

A True Copy.

Wm. C. Gebhardt, Clerk.

This action was tried before Judge Howard Carrow, with a jury, in the presence of the counsel of the respective parties, on November 2nd, 1916.

20

The cause having been heard and submitted to the jury, they returned their verdict as follows: They say they find in favor of the plaintiff for the sum of \$1000.

Whereupon it is adjudged that the plaintiff John C. Stuart recover of the defendant Burlington County Farmers' Exchange, the sum of \$1000. and his costs, which are taxed at the sum of \$70.04, making in the whole the sum of one thousand and seventy dollars and
30 four cents (\$1,070.04).

Judgment entered November 21st, 1916.

BURLINGTON COUNTY CIRCUIT COURT

JOHN C. STUART,	}	ACTION AT LAW
<i>Plaintiff,</i>		
VS.		
BURLINGTON COUNTY FARM- ERS' EXCHANGE,		
<i>Defendant.</i>		10

Mount Holly, N. J., November 2, 1916.

(Mr. Horner opens for the plaintiff.) 20

Mr. Gaskill: With permission of the court, gentlemen of the jury: on behalf of the Farmers' Exchange, the defendant in this suit, I would say that we admit that the Farmers' Exchange sold the fertilizer in question to Mr. Stuart; no question of agency involved at all. We deny, however, that there was any warranty as a matter of law in connection with the sale. There were representations, opinions, but no warranty. We deny that there was any breach of any warranty and we deny that there was any loss to the plaintiff in this case occasioned from the use of the fertilizer in question. There was quite a lot of fertilizer sold to the plaintiff, part of which does not come into this controversy at all. The controversy grows out of the sale of ten tons at \$28 a ton, or \$280. We 30

admit that Mr. Stuart paid for that fertilizer, so that that question is out of the case. We can simplify it.

Mr. Horner: Judge, will you admit that the payment was made to the Beverly National Bank, which was the holder by endorsement of the note?

Mr. Gaskill: I do not think it is material at all. We admit that the plaintiff paid for this fertilizer the \$280
10 that he says he paid for it, and he says it was worthless. The pleading admits that Mr. Stuart is indebted to the Farmers' Exchange in the sum of \$110.30 for seed potatoes and various things of that kind which have not been paid, and the plaintiff admits that if he is entitled to a verdict at your hands, when you determine, if you do reach that point, what the amount of damages is that he is entitled to, that the \$110.30 is to be deducted from those damages.

20 Mr. Horner: Yes, sir.

Mr. Gaskill: The defense in the case practically comes down to this, gentlemen: that we sold Mr. Stuart exactly what he wanted and what he asked for and we furnished him with that material.

30 JOHN C. STUART, sworn for plaintiff.

Direct Examination by Mr. Horner:

Q. Mr. Stuart, you are the plaintiff in this cause?

A. Yes, sir.

Q. Where do you live?

A. Beverly.

Q. In what township?

A. Beverly Township.

Q. What is your business?

A. Farming.

Q. How long have you been farming?

A. All my life; never did anything else.

Q. And how old are you?

A. Forty-nine.

Q. Were you a farmer in the years 1913 and 1914? ¹⁰

A. Yes, sir; I was.

Q. How long had you then operated the same farm?

A. The farm that this fish was used on?

Q. Yes.

A. About fifteen years.

Q. Are you still a farmer operating a farm?

A. Still operating a farm.

By the Court:

20

Q. Near Beverly?

A. That farm is in Willingboro Township.

By Mr. Horner:

Q. But near Beverly?

A. Yes.

Q. Beverly is your post office address?

A. Post office, yes.

30

Q. In the fall of 1913 did you have any dealing with the Burlington County Farmers' Exchange?

A. Yes.

Q. Did you purchase anything from them?

A. Purchased fertilizer from them.

Q. From whom did you make the purchase?

A. From Louis A. Page.

Q. And who and what was Mr. Page?

A. He was the general agent, as I understood it.

Q. And of whom?

A. Of the Burlington County Farmers' Exchange.

Q. Do you recall the date when you gave the order?

A. No.

Q. Did you receive a memorandum or slip when you
10 gave the order?

A. Yes.

(Witness shown a pink slip headed "Burlington County Farmers' Exchange, salesman's order," and is asked :)

Q. Is this the memorandum that you received when
you gave the order?

A. Yes, that is it.

Q. And what is the date of that?

20 A. September 22, 1913.

Q. Was that the date when you gave the order for
this fertilizer?

A. Yes, the day that I received that slip.

Q. Who was that signed or purported to be signed
by?

A. L. A. Page.

Q. Was that given to you by Mr. Page?

A. Yes.

30 Mr. Horner: I offer it in evidence.

Mr. Gaskill: No objection.

The Court: Read it.

Mr. Horner: (Reads) "Burlington County Salesman's Order, date, September 22, 1913.

Dear Sir: Deliver to John C. Stuart, Beverly, via (I don't know what it means, but it looks like "railroad" or something) delivery point Beverly; articles, ten ton crude fish, ten tons crude fish, \$28; five tons 5-8 at \$29.75. Three tons 4-8-7."

Q. Was it all crude fish?

A. No, sir; there was only ten tons. The other was 10 8-5 fertilizer.

Q. Do you find any fault with the other?

A. Not the slightest.

Q. Then this refers to ten tons of crude fish?

A. Yes, sir; solely.

(Paper marked Exhibit P 1.)

Q. Mr. Stuart when, where and under what circumstances did you give this order?

20

A. I was coming out from Beverly to our place afoot and I met Mr. Page on the road. He was in an automobile. He called to me if I had given any one my order —

Mr. Gaskill: I object to any conversation between the witness and Mr. Page. I submit that the contract between these parties is in writing, evidenced by this slip, and that no oral testimony is admissible to vary it in any respect, and that this slip as a matter of law is assumed to contain the whole of the contract between the parties, 30 and that no representation, no warranty that is to be implied from any conversation between the parties is admissible in this case, in view of the fact that they have a written agreement concerning this purchase.

(Mr. Horner replies.)

The Court: The objection is overruled.

(Objection noted for defendant as ground of appeal.)

Q. Proceed.

A. I told him no, I hadn't given any one my order yet; and he says, "Why not give it to the Farmers' Exchange?" I told him I would just as soon give it to the Farmers' Exchange as any one if he had what I wanted. I stepped out to the automobile and we talked about fertilizers and he wanted to know what I wanted and I told him the first thing would be my fertilizer for early corn, and I preferred fish; that I had been using fish—

Q. What did he say?

A. He said — I asked him if they had any dried and ground fish and he said no, he didn't, he had an extra good quality of crude fish. And I made the remark that it might be a little damp and wouldn't drill; and he assured me that this would be dry enough to drill. Then I told him that if that stuff was as recommended I would give him an order for ten tons. Then we talked about fertilizer for potatoes, and I gave him the order for the balance, that is, I ordered phosphate for potatoes.

Q. Did you tell him for what purpose you wanted the crude fish or this fertilizer?

A. I did.

Q. What did you tell him?

30 A. I told him I wanted it for my early corn crop.

Q. What did he say if anything with respect to that?

A. He recommended this fish highly for that purpose.

Q. Did you subsequently receive the goods?

A. Yes, in February.

Q. Did you subsequently pay for them?

A. Yes, sir.

Q. To whom did you make payment?

(Objected to as immaterial and irrelevant.)

The Court: It is admitted that he paid for the goods.

Mr. Horner: I just wanted to show —

Mr. Gaskill: I object to any remarks.

10

Mr. Horner: I am not going to make any remarks, Judge, that will influence or hurt any one.

Q. Mr. Stuart, did you use this fertilizer with respect to the raising of your seed corn in the year 1914?

A. I did.

Q. How many acres of corn did you prepare for planting of sweet or sugar corn?

A. Twenty-four.

20

Q. Tell the court and jury just what preparation was made with respect to that ground for the planting and raising of corn.

A. Well, in the winter we spread six or seven carloads of manure on that ground.

Q. Broadcasted?

A. Broadcasted, gave it a good coat. That was plowed under in the spring, early in the spring, and along the fore part of April we prepared the ground by harrowing it and marking it out and drilling in fertilizer with 30 the seed.

Q. Is that the way you had theretofore prepared your ground for the raising of corn?

A. Exactly.

Q. And is that the way that you have done since?

A. Yes.

Q. Did you use this crude fish at the time of the planting of the corn?

A. I did.

Q. Approximately how many pounds did you use to the acre?

A. Seven hundred pounds to the acre, as near as I could get the drill.

Q. Is that what you had thereofer used?

10 A. About that. Sometimes —

Q. And is that about what you have used since?

A. Yes.

Q. Now what sort of a season was 1914, so far as growing corn was concerned?

A. 1914 was rather dry.

Q. Did your neighbors have good crops?

A. They did.

Q. Is your land such that dry weather affects it or does not affect it?

20 A. Does not affect it to a very great extent. It is underdrained, sandy loam, will stand dry weather better than most any land around there.

Q. Did you use good seed?

A. I did; it came up well.

Q. Did you have any rain at about the time the plant was coming through?

A. Had two nice showers. I think every seed came up, had no replanting to do at all.

Q. Came up well?

30 A. Yes; had every appearance of a good crop, had the appearance of a good start.

Q. When was the first that you discovered that there was anything wrong with the corn?

A. Well, the corn when it first came through the ground was a little yellow-bladed and it generally takes

on a green color when it gets two or three inches high if there is fertilizer enough there to push it on. But it didn't take on any color; it looked sickly, and it stayed that way, and I kept waiting to see it start and it wouldn't start, and it grew along very slowly.

Q. What was its color?

A. That yellow color still stuck to it. It came out in tassel when it was twelve or fifteen inches high, when it should have been up to my waist.

Q. Go on.

10

A. And the stalk was spindling. When it got to that height it came out in tassel. I supposed if the roots got down to the manure which was under, it would do pretty well, but it opened up in short ears and I didn't have a third of a crop. I never saw such a failure of corn in my life. It was very noticeable.

Q. Did you cultivate this corn?

A. Cultivated the same as I always cultivate it, and hoed it and kept it clean.

Q. Did you market the corn from this field?

20

A. Yes.

Q. What was the total yield?

A. Well, I sold \$885 worth of corn from the twenty-four acres.

Q. Did it cost you as much to cultivate and prepare this as it would if you had had a good crop?

A. Just the same.

Q. You have raised corn how many years before?

A. Raised corn since I was old enough to work in a cornfield and my father before me.

30

Q. Have you raised corn since that time?

A. Yes.

Q. Have you raised corn on this same ground.

A. Yes.

Q. What has been your average yield per acre from the ground?

A. Our average yield is \$100 or a little more per acre.

Q. And you had how many acres?

A. Twenty-four.

Q. What did you receive from this crop, did you say?

A. \$885.

Q. When you found that your corn was not doing very well what did you do with respect to the fertilizer
10 if anything?

A. I sent a sample to New Brunswick along in the summer time.

Q. Do you recall when you sent that?

A. It must have been ear the 1st of July.

Q. To Mr. Cathcart, the chemist?

A. Yes.

Q. Did you do anything with respect to the Farmers' Exchange?

A. After I got the letter from Mr. Cathcart I took
20 the letter to the Farmers' Exchange.

Mr. Gaskill: I object.

Q. Who did you see at the Farmers' Exchange?

Mr. Gaskill: I object to anything that occurred between the witness and the Farmers' Exchange or any representative of it after this contract was made.

30 Mr. Horner: If your Honor please, it would appear to me here were the principals, and this gentleman, I think, is in duty bound to make a prompt complaint of any failure or deficiency, and if he made a complaint the court and jury are entitled to know when he made a com-

plaint and what the complaint was and what reply he received.

The Court: Well, now, has the reply anything to do with it?

Mr. Horner: I think so, to show that he was diligent, that he made his prompt complaint.

(Objection overruled.)

10

Mr. Gaskill: Will your Honor allow me to state the ground of my objection?

The Court: Yes.

Mr. Gaskill: On the ground that it is immaterial and irrelevant and that any representations or conversations between the plaintiff and the defendant or any representative of the defendant after the so-called warranty was made are absolutely without any force and illegal and incompetent.

The Court: Who is he talking with now?

Mr. Horner: I am going to find out. He said he made a complaint to the Farmers' Exchange and I asked him the question who at the Farmers' Exchange and the objection came.

30

Q. Mr. Stuart, who did you speak to at the Farmers' Exchange?

(Objected to. Objection overruled. Objection noted for defendant as ground of appeal.)

A. Mr. Embree, the manager. I was referred to him when I —

Mr. Gaskill: I object to any conversation between the plaintiff and any agent of the defendant, which is a corporation.

Q. Are you a member of the Farmers' Exchange?

A. I am a stockholder in a small way, yes.

10 Q. Do you know as a matter of fact that Mr. Embree is the manager of the Farmers' Exchange?

Mr. Gaskill: That is not the ground of my objection. I admit that Mr. Embree was the manager.

The Court: The objection is that no agent can bind a defendant by oral expression.

Mr. Horner: How can they bind it then?

20

The Court: They cannot bind it.

Mr. Horner: No agent of a corporation?

The Court: No, not after something has happened. I do not understand that it is the law that anybody employed by a corporation in any capacity can bind it by any statements, do you?

30 Mr. Horner: Yes, I think if it is within the purview of their employment.

The Court: I will hear you if you have any authority. It has been held repeatedly that employees of railroads cannot say anything.

Mr. Horner: But I should think the president of a railroad company could make a statement that would bind the railroad company.

The Court: Is it a matter of any consequence? The court will permit you to show that this man made a complaint to the Farmers' Exchange and you can then cross-examine the manager if he comes on the stand, and use him for that purpose.

10

Q. Did you make more than one complaint?

A. I was —

Mr. Gaskill: Just answer yes or no.

A. Yes.

Q. Were they all made to Mr. Embree?

A. Yes, sir.

Mr. Horner: I don't want to press anything that takes unnecessary time. That I may have the advantage, may I ask him this question, and your Honor will rule:

Q. What did you say to Mr. Embree and what did he say to you?

Mr. Gaskill: I object for the reasons already stated.

The Court: I will admit it.

30

(Objection noted for defendant as ground of appeal.)

The Court: I will admit any of it so far and then I will rule on the other. I want to find out what he said to Mr. Embree.

Mr. Gaskill. I think if your Honor wants to know what he said to Mr. Embree it should be at side bar and not in the presence of the jury, in view of your Honor's previous ruling.

The Court: I am not exactly clear on that. I want to find out what he complained about.

Mr. Gaskill: If that question was put it is different
10 from the one that is now pending. The one put now by Judge Horner, realizing that it is contrary to the ruling that your Honor made, is put in order that he may get it on the record or get the benefit of an objection.

The Court: He has that already.

Mr. Gaskill: But what I am calling the attention of the court to is the inconsistency of your ruling. Your Honor has ruled that it is improper.

20

The Court: I am not sure that I was right when I ruled that way and I want to find out the circumstances and what was said. I will rule on the matter as it develops.

Mr. Gaskill: Your Honor is aware of the fact that in making a statement before a jury it is not like writing something on a slate and blackboard and taking a sponge and wiping it out. There is an impression, perhaps, that
30 no ruling can erase. Your Honor may say to the jury afterwards that this talk to Mr. Embree is irrelevant and must be disregarded, but they are human and they cannot disregard it.

The Court: My idea is that this jury is composed of good honest men, sensible men.

Mr. Gaskill: Unquestionably. I would not say a word against a Burlington County jury.

The Court: And I have not the least doubt that any man on this jury will disregard the instructions of the court. However, I am not sure that my ruling was right, because I have not yet been shown any authorities on 10 the question, that there must be some little different ruling where one of the heads of a corporation, having in charge the specific business, makes a statement. I think there must be some difference. That is the reason that the court is taking this position. I do not feel that this jury would be led astray by what is happening here. I think the jury will be bound by the instructions of the court. If we cannot rely upon that then jury trials are a failure in this country.

Mr. Gaskill: Your Honor admits that question, do I 20 understand? Let me enter an objection there. I object to that question for the reasons heretofore stated and the court admits the question. I ask for an exception to be used upon appeal.

(Objection noted for defendant as ground of appeal.)

The Court: The conversation must relate to the quality of this— 30

Mr. Gaskill: I take exception to that ruling of your Honor and ask for an objection to be used on appeal, that the conversation must relate to the warranty, the question

of warranty here; and I ask for an exception to be used on appeal.

The Court: All right.

(Objection noted for defendant as ground of appeal.)

(Question repeated.)

- 10 Q. What did you say to Mr. Embree and what did he say to you with respect to your complaint that this fertilizer was failing to perform its duties and functions as you had anticipated and as had been assured you?

Mr. Gaskill: That is the question that I object to for the reasons stated.

The Court: I understood so, yes.

- 20 A. I made complaint—

The Court: Now that means nothing, you made complaint. What did you say? What did you say to him and what did he say to you?

- A. I said the crude fish was not right, that it could not have been as represented; and he said if it was not right they would make it right. And on one occasion I said to him probably I should not have purchased so much
30 until I tried it out in a small way. He said it didn't make any difference if it was one ton or a thousand, "We stand behind what we sell. It must be as represented."

Mr. Gaskill: I move to strike out that conversation.

The Court: Now then, Judge Horner, wherein is that reply—

Mr. Horner: With the permission of your Honor, it shows clearly that there was a warranty. His answer was this: that "we stand by what we sell you." Or, I do not want to misquote the witness, but "We stand by what we said or what we told you," if that is the exact words. Mr. Kelly has it in the notes. That is a reaffirmation of the warranty and it is merely evidential that there was a war- 10
ranty. It is not a new proposition.

The Court: Repeat the testimony.

(Previous testimony repeated.)

Mr. Gaskill: The warranty is complete when the sale is made, if there was any warranty, and nothing that happens afterwards changes or affects the warranty under which the sale was made. 20

Mr. Horner: I thoroughly agree with him, but this is the proposition which Judge Gaskill in his opening to the jury distinctly stated: that there was no warranty. Now this witness is testifying that there was a warranty, and this subsequent conversation between him and Mr. Embree, whom Judge Gaskill has been kind enough to admit was the general manager of the Farmers' Exchange is evidential of the warranty. 30

The Court: How is it evidential of the warranty?

Mr. Horner: Because if a man makes a subsequent statement to me, if I make a trade or deal with him and there is a controversy as to what actually transpired in our

conversation as between us, and a manufacturer sells me and I subsequently have a conversation about the same subject matter, and he makes statements evidential that there was a warranty, it surely is evidence in a court of law.

The Court: He does not say there was any warranty.

Mr. Horner: He did not use that express word but he
10 says, "We stand by what we sell."

Mr. Gaskill: Further than that, it is an entirely different man. It is not the man who sold the fertilizer. How could this man put in the mouth of the man who made the sale something entirely different from what was said at that time?

(After further argument:)

20 (Objection overruled. Objection noted for defendant as ground of appeal.)

Q. Mr. Stuart, what induced you to give the order to the Burlington County Farmers' Exchange for ten tons of crude fish?

Mr. Gaskill: I object on the ground that whatever inducement there was to give an order must have been expressed by Mr. Stuart. Anything that was within his
30 own breast and not made known to the agent as a matter of course cannot be relevant or binding.

The Court: The inducement usually does not flow from Stuart, it flows from the other. We must find out what it was.

Mr. Gaskill: There may be something secret in his breast which induced him.

The Court: What is the question?

Q. What induced you to give this order for ten tons of fertilizer called crude fish?

The Court: Do you mean that he relied on that? Well, ask him. 10

Q. When you placed the order for fertilizer did you or did you not rely upon the statement made by the agent of the Burlington County Farmers' Exchange as to its kind, quality and usefulness?

A. I did rely.

Q. Well, was or was not the statement made by Mr. Page, the general agent of the Farmers' Exchange, that which induced you to give them the order?

A. Why, certainly it was. 20

By the Court:

Q. Or did you take your own head for it, did you use your own judgment?

A. They told me that it was good crude fish.

Q. Did you rely wholly on what the agent said or did you take your own judgment?

A. I relied wholly on what he told me. 30

By Mr. Horner:

Q. Did he tell you anything about it being good for sugar corn?

A. He did.

Q. What did he say?

A. He said that it was as good as any fertilizer I could get for sugar corn.

Q. Mr. Stuart, do you know what the ordinary chemical component parts of true crude fish are?

A. No, I don't.

Q. You are not a chemist?

A. No.

Q. You had used crude fish before, Mr. Stuart?

10 A. Yes.

Q. On this same ground?

A. Yes, on the same ground.

Q. Did you or did you not get a good yield and good crops therefrom?

A. I always got a good crop when I used crude fish previous to this.

Cross Examination:

20 By Mr. Gaskill:

Q. Mr. Stuart, crude fish comes in lumps, pieces?

A. Sometimes.

Q. And the crude fish that you have used was of that character, that you have used heretofore?

A. Sometimes it was, sometimes it was pretty fine.

Q. But on this occasion when you were dealing with the Farmers' Exchange you wanted something dry and fine that would run through the drill nicely; that is so,
30 isn't it?

A. I asked them if they had any dried and ground fish, yes.

Q. And you asked the gentlemen that you were dealing with if they could furnish you with that kind of a fertilizer, did you not?

A. Yes.

Q. Along with Mr. Page in the carriage or automobile, whichever it was, was another gentleman by the name of Robertson, was there not?

A. Yes.

Q. From Baltimore?

A. Yes.

Q. Connected with a fertilizing company there, as you understood it?

A. I think he was introduced to me. 10

Q. Now didn't they tell you that they could take the crude fish and grind it up with tobacco stems and dry it so that it would run through a drill nicely?

A. No mention was ever made of grinding any fertilizer whatever.

Q. Was anything said about tobacco stems?

A. No, sir.

Q. There was a talk about wanting a fertilizer that would go through the drills?

A. Yes. 20

Q. And that is the way you planted your corn that year, by drilling it in and drilling the fertilizer over it?

A. They told me that they thought—

Q. No, I am asking you what you did, not what they told you.

(Question repeated.)

A. Yes.

Q. Now the crude fish that you have spoken of in 30 lumps and pieces would not drill, would it?

A. No, not if it came in lumps.

Q. And you also in this talk with these agents queried whether or not crude fish was not damp?

A. Yes.

Q. As a matter of course if it was damp it would not pass through the drill readily; that is true, isn't it?

A. Yes.

Q. And you wanted crude fish or you wanted a fish fertilizer that would pass through the drill as you drilled your ground in; that is right, isn't it?

A. Yes.

Q. Now, Mr. Stuart, when this case was tried before you put the warranty in a little different form from what
10 you do now, didn't you?

A. I don't remember.

Q. Well, listen to this and see if this isn't what you testified to then: "I told him (that is, one or the other of the parties in the carriage or automobile) that I wanted crude fish for my early corn crop and I preferred that and I asked him if he had any dried and ground fish." That is true, isn't it?

A. No, I think that word "crude" is a mistake of the printer. I am absolutely certain that I didn't ask them
20 for crude fish.

Q. But with the exception of that it was all right?

A. Yes.

Q. And that is the truth now, isn't it? What you said before is the truth today?

A. Yes.

Q. That is, that you told him that you wanted fish for your early corn crop?

A. Yes.

Q. And preferred that?

30 A. Yes.

Q. And asked him if he had any dried and ground fish?

A. Yes.

Q. Now then, listen to this. Didn't you say to him that the only objection you have to "it is often damp and

sometimes sticky and does not drill well”?

A. Yes.

Q. You said that?

A. Yes.

Q. And didn't you then in your reply state as follows: “He assured me that that was dry enough to drill and would give me as good results as any fish there was on the market”?

A. Yes, he assured me it was dry enough to drill.

Q. And that is the representation or the warranty 10 that was made to you at that time, isn't it?

A. Yes.

Q. And that is what you say now was the warranty made at the time that sale was made?

A. That it was dry enough to drill.

Q. And that it would give you as good results as any fish there was on the market?

A. Yes.

By the Court:

20

Q. How do you reconcile that with your statement a moment ago that he said it was an extra good quality crude fish? You said a moment ago that Page said it was an extra quality of crude fish.

A. Well, evidently in good mechanical condition. That is, it was dry enough to drill; that is the way I took it.

Mr Gaskill: I have no objection to stating at side 30 bar what my point is, if your honor wants to get it.

The Court. I see. I anticipate what is it.

By Mr. Gaskill:

Q. Now this contract was made, or this purchase, on the 22nd of September, 1913?

A. Yes.

Q. And was to be used in the cornfield that you were plowing and planting the following spring, 1914?

A. Yes.

Q. And the loss which you claim was the loss on the crop of 1914?

A. Yes.

10 Q. When was that fertilizer received at your place?

A. In February, I think.

Q. In February of 1914?

A. 1914.

Q. Where did you put it?

A. In a wagon-house on the farm in Willingboro Township.

Q. In a dry place?

A. Yes, good dry wagon-house.

Q. Any doors or windows open?

20 A. There is doors on it but no windows downstairs. There is windows upstairs.

Q. Were the windows upstairs open?

A. No, they are closed all the time.

Q. Was the wagon-house used much or not?

A. Not that part of it. It was stored in the center part of it and there is sheds on either side. We use the sheds for wagons and that part we used as a storage house for such things.

Q. Weren't you and your men going in and out of
30 that wagon-house frequently?

A. Occasionally, yes.

Q. During the months of February and March?

A. Yes, sir.

Q. And up till planting time?

A. Yes.

Q. Now the sample that you took to send to the experiment station at New Brunswick was taken in the month of August or July, wasn't it, July or August?

A. I think the latter part of June.

Q. The latter part of June?

A. Yes.

Q. Were the bags marked or tagged?

A. There were small tags hooked on them with wire.

Q. Have you those tags?

10

Mr. Horner: I think so. I have some of them.

(Produces tags.)

Q. Your counsel hands me three tags, having printed on them "From the Standard Guano Company, Fish, Bone and Potash Mixtures, Baltimore, Maryland," and then having printed, apparently with a typewriting machine, something underneath each one of them. These are three of the tags that were on those bags, are they not? 20

A. Yes, that is the tags.

Mr. Horner: With your permission, Judge, I will offer them.

Mr. Gaskill: I have no objection to your doing it at this time.

(Tags marked Exhibits P 2, P 3 and P 4.)

30

Q. Now those tags were on the fertilizer when it was delivered to him and accepted by him?

A. Yes.

The Court: They have an endorsement on the outside of what?

Mr. Horner: No, it has printed that which Judge Gaskill read, and then it has the words "Crude Fish," and then it has under it "Avil Phos. Acid", then a figure which looks like six per cent here, on some—it is very indistinct—then "Ammonia." I don't know what it is.

10 Mr. Gaskill: It looks like 66.

Mr. Horner: Well, it looks like something before it. Then it is, "Pounds Tp. Bag."

Mr. Gaskill: I take it that we can explain before we get through with the case exactly what it is that is on these tags.

Q. What was in the field of 24 acres the previous
20 year, Mr. Stuart? What did you grow there the year before?

A. Some part of it had been in corn the year before.

Q. In addition to the stable manure that you say you spread during the winter before plowing of the fertilizer that you purchased from the Farmers' Exchange, did you use any other fertilizer of any character on that field that year?

A. None whatever.

Q. After the corn came through the ground you at
30 once noticed its condition?

A. Yes, sir.

Q. And after a day or two necessary for sprouting corn to take on color this didn't take on the color that it should?

A. No, sir.

Q. And after the first two or three days it never did take on a color that you were accustomed to see from growing corn and which you naturally expected; that is right, isn't it?

A. That is right.

Q. Then it was a disappointment to you from the beginning?

A. Yes, it gradually—

Q. Now wait. You have answered my question, Mr. Stuart.

10 .

Mr. Horner: Let's be fair to the witness.

Mr. Gaskill: I want to be absolutely fair.

Mr. Horner: But let him answer the question in his own way. If it doesn't suit the court let the court stop him, not the counsel.

Mr. Gaskill: I make my objection to the court. He 20 has answered the question.

Mr. Horner: He was not permitted to answer his question.

(Previous testimony repeated.)

The Court: I think that was an answer, yes. You may give him a chance to explain.

30

Q. And from the time that you were first disappointed with the appearance of the corn it gradually got worse, did it not?

A. No, it didn't gradually get worse.

Q. Oh, it was so bad at the beginning it couldn't get any worse; is that it?

A. It gradually dawned on me there was something wrong.

Q. It couldn't get any worse than what is was in the first two or three days that you saw it?

A. Well, you can't tell very much about corn when it first comes through the ground.

10 Q. But after it came through, when the time was right for it to take on its natural color and so on and start to grow, from that time on it was a constant disappointment to you?

A. Yes.

Q. Now you took no steps whatever to substitute any crop for that crop of corn?

A. No.

Q. And you took no steps whatever outside of the ordinary cultivation in order to prevent a loss from the use of the fertilizer which you saw was not as repre-
20 sented?

A. No.

By the Court:

Q. Did you ever have your corn crop to go back on you before?

A. No, sir.

The Court: The reason I asked that question was
30 whether there was a regularity, a certainty, about corn crops, and which would distinguish a corn crop from an ordinary crop, other crops, I mean. It is a matter of common knowledge that crops do not always succeed, isn't it?

The Witness: Yes.

The Court: Well, go ahead.

Mr. Gaskill: That is just about what I was to take up, if your Honor please.

By Mr. Gaskill:

Q. Now, Mr. Stuart, you have been farming here, 10
you say you were born on a farm and always lived on a
farm and you are now forty-nine years old. Well, if
your father started you in at twelve or thirteen or four-
teen you have been farming something over thirty years,
working on a farm?

A. Yes, my father was dead much before I was
thirteen years old.

Q. Now during all that time have you ever known
any of your crops to fail?

A. I never knew a corn crop to fail. 20

Q. Have you ever known any of your crops to fail?

A. Yes, sir.

Q. And you are not always able to trace the reason of
the failure, are you?

A. I think so.

Q. You think so?

A. I do.

Q. You can bring it down to a reasonable certainty,
you think?

A. Yes, I can. 30

Q. What kind of corn was this that you were grow-
ing in this 24 acres?

A. That is what we call Booth corn.

Q. It is an early variety of corn?

A. That is an early variety, yes; not the earliest.

Q. For table use?

A. Not the earliest variety; what we call second early corn.

Q. It is not the kind that the Corn King of the Delaware River Valley gets in the New York market?

A. I don't know.

Q. Mr. Stuart, when did you plant your corn?

A. In the early part of April.

Q. What time in April?

10 A. I judge about the 10th.

Q. What was the weather?

A. The weather just after we planted it, we had two nice showers.

Q. And what was the weather after that?

A. After that it became pretty dry.

Q. And remained dry until the corn was marketed?

A. No, we had some rain but it was rather a dry season.

Q. Do you keep books?

20 A. Somewhat.

Q. Do you keep an account of what you raise and what you sell?

A. Yes.

Q. And what you put on the grounds in the shape of fertilizer and cost of feed?

A. Don't keep any account of the fertilizer I put on the ground, no.

Q. Do you keep a book account of what it costs you?

A. To grow a crop?

30 Q. To grow your crop, do you not?

A. No.

Q. Keep a book account of what you get off of your corn?

A. Yes.

Q. Sales?

A. Yes.

Q. Have you got your books with you?

A. No.

Mr. Gaskill: I move to strike out from the witness' testimony all statements with reference to the sales and the losses, on the ground that it is not the best evidence. The witness admits that he has books which show the sales and the books are not here; and that matter has been decided in the Supreme Court in Barto vs. the Erie Rail-¹⁰road.

The Court: What is it you desire to strike out?

Mr. Gaskill: His testimony with reference to his sales and the amount that he has received for his sales other seasons and what he received this season, on the ground that the books are the best evidence.

Mr. Horner: I didn't ask him that, so there is no use ²⁰wasting our time on it. I asked him what the average yield per acre of corn was in a reasonable season and he said \$100 an acre. He did not attempt to specify.

Mr. Gaskill: And then he testified how much he got this year.

Mr. Horner: Yes, he testified.

Mr. Gaskill: Now the books will show whether or not ³⁰he got that and whether or not that is gross or whether it is net.

The Court: You may ask him whether it is gross or net; but if I sell a horse for \$200, and if they say that I

have got to produce a book to prove it what is the use of the book? To refresh the memory and so on. If a man sells a horse for \$200 he can testify that on a certain day he sold that horse for \$200. If his mind is clear he doesn't have to carry that book around with him.

Q. Mr. Stuart, the success of a crop depends not only on the fertilizer that you use and the quantity of it but it depends upon the weather and the soil and the cultivation
10 and the market, does it not?

A. Yes, sir.

Q. Where did you ship your corn?

A. To New York.

Q. To New York market?

A. Most of it.

Q. Your corn was not the earliest corn that was in the market?

A. No.

Q. And consequently you didn't get the top price?

20 A. The earliest corn does not always bring the top price.

Q. Well, I say you didn't get the top price that year?

A. No.

Q. Now when you speak about the corn you raised the year before, did you raise this same variety?

A. Yes.

Q. Did you get it into market any earlier than you got it this year?

A. Just the same time.

30 Q. Sure of that?

A. The same variety varies very little.

Q. That is not what I asked you. I asked you are you sure when you got it into the market.

A. I am sure.

Q. This crop of 1914 you got in the market as early as the crop for the preceding year?

A. Yes.

Q. The price ran about the same?

A. Ran about the same.

Q. How did you ship to New York, by freight or by express?

A. By freight, mostly.

Q. How did you do it in 1914?

A. By freight.

10

Q. The freight charges have to be paid, do they not?

A. Yes.

Q. And then when you ship by freight there is the cartage from the railroad terminus to the comission house or wherever you deliver?

A. Yes.

Q. Now then, when you say that you got \$1,600, ought to have gotten \$1,600, you have not taken out the freight and the cartage for that, have you?

A. Yes.

20

Q. Sure?

A. Checks that come to me, the freight is already deducted, and the commission.

Q. Well, you haven't got your account here with you of those checks that came to you?

A. No.

The Court: What was it he said with regard to the yield?

30

Mr. Horner: For that year, if your Honor please?

The Court: Yes.

Mr. Horner: He said his receipts for the year were \$885.

The Court: What were his expenses?

Mr. Horner: He said that that was his net receipts from the sale of the produce. He has not been asked the expenses. Just a moment ago he testified in response to Judge Gaskill that he shipped——

10

The Court: His damages, of course, would have reference to his loss.

Mr. Horner: Exactly.

The Court: What it cost him and what he got per acre or otherwise for his corn crop is a matter of figures.

Mr. Horner: Exactly.

20

The Court: Now to say that he got \$100 an acre without giving the figures as to the expense, is that of any value?

Mr. Horner: Yes, if your Honor please, because if you will just take notice now, he testified to this; that he shipped his corn to New York and the man there deducted all the freight, cartage and commission charges and sent him a check for the net return.

30

The Court: And how much did he get?

Mr. Horner: \$885.

The Court: And how much had he been in the habit of getting?

Mr. Horner: In the average approximately \$100 an acre.

The Court: After deducting all the expenses?

Mr. Horner: Yes, exactly.

10

The Court: How much did it cost him to produce it?

Mr. Horner: It cost him just as much to produce this crop as it did a good crop.

The Court: How much is that?

Mr. Horner: I don't know. There is no testimony and it is immaterial, because he spends the same amount of hand-labor and cultivation and preparation and so on 20 as though it had been a bumper crop.

The Court: I will hear argument on that. This is a case which was disposed of in the Supreme Court on writ of error. (Reads citation.)

(After further argument.)

The Court: The objection is overruled.

30

(Objection noted for defendant as ground of appeal.)

Q. Going back a moment, Mr. Stuart, I ask you whether or not Mr. Charles H. Robertson on the day when the bargain was made about the fertilizer did not say to you, you first saying to him that you wanted some-

thing that would drill, and he then said to you, "I told him that to mix crude fish with tobacco stems we could give him a mixture that would certainly drill, and also stated to Mr. Stuart that the fish would drill or else it would not be shipped." Isn't that the conversation?

A. I remember him saying that he thought the fish would drill.

Q. I am asking you whether he didn't say this. Didn't he say to you that to mix crude fish with tobacco stems
10 would give a mixture that would certainly drill?

A. No, he never mentioned anything about a mixture.

Q. Now just one other question. How do you sell this corn, by the basket or sack or how?

A. Usually by the hundred in New York.

Q. By the hundred?

A. Yes.

Q. And how many hundred ears did you get off of this field in 1914, off this 24 acres?

A. How many hundred ears?

20 Q. Yes.

A. I couldn't tell you from memory.

Q. Your book would show, wouldn't it?

A. I don't know that I have any account of how many ears.

Q. Wouldn't that book show what you shipped to New York?

A. Shows how much money I received.

Q. Don't your book show how much you shipped to New York?

30 A. No, I think not.

Q. Are you sure?

A. I am not absolutely sure, but I think not.

Q. You can't tell us then how many hundred ears you shipped to New York in 1914 from this 24 acres?

A. I cannot.

Q. Can you tell us how many hundred ears you shipped from the 24 acres the preceding year, 1913?

A. I didn't have 24 acres in corn the preceding year.

Q. How many did you have?

A. Only about eight.

Q. Well, how many hundred ears did you ship in 1913 from the eight acres?

A. I don't know how many hundred ears.

Q. Well, your books would show, wouldn't they?

A. They might. I am not sure of that. 10

Q. And you received payment by the hundred, did you not?

A. Yes.

Q. What price did you get per hundred in 1914?

A. In 1914 it varied—

Q. No, I didn't ask you that; I asked what price you got for the corn you shipped from this twenty-four acres in 1914.

A. I could give you probably an average.

Q. Now, can't you tell us? Let me put it this way. 20
How many different shipments did you make?

A. We ship every day when we are cutting corn for probably three weeks.

Q. Eighteen or twenty days?

A. Yes.

Q. And your books would show how much you shipped each day, would they not?

A. They might.

By the Court:

30

Q. Will you tell me why you didn't bring your books, Mr. Stuart?

A. Well, I grow corn on other farms.

Q. I know, but why didn't you bring your books here?

A. It never came into my mind.

Q. How long would it take you to get it?

A. I don't really know whether I have got the book account now. It is generally set down, just little memorandum books, what I ship each day. I keep no regular set of books like a bookkeeper would keep.

10 By Mr. Gaskill:

Q. You sell through a commission merchant, don't you?

A. Yes.

Q. And your commission merchant sent you returns, did he not?

A. Yes.

Q. On slips?

A. Yes.

20 Q. Have you those slips?

A. I think I have.

Q. Have you got them with you?

A. No.

Q. Those slips would show just exactly what you shipped in 1913 and what you shipped in 1914, would they not?

A. But—

Q. No, answer the question. I say those slips—

A. Yes.

30 Q. And they would show the price that your corn was sold at and what the charges were against it?

A. Yes.

Mr. Gaskill: I renew my motion, if your Honor please.

The Court: The ruling will stand. My thought is that this gentleman ought to have produced his books.

Mr. Horner: If there is any question about it we will make an effort to get them, but most farmers don't keep books like a bookkeeper.

The Court: The other side are entitled to full data.

Mr. Horner: Well, we won't quarrel about that. 10

Q. Mr. Stuart, let me ask you one other question. How many ears to the acre did you grow, did you harvest or cut in 1913?

A. I couldn't tell you that.

Q. How many ears to the acre did you get in 1914?

A. I don't know.

Q. Well, how are you then enabled to make a comparison between 1913 and 1914 if you don't know the number of ears cut per acre in 1913 and don't know the number of ears cut in 1914? 20

A. I know the money I received.

Q. Do you know what you got per hundred in 1913?

A. No, because it varies. One day it might sell at one price and another another.

Q. You can't tell us?

A. No.

Q. Can you tell us what you got in 1914?

A. No.

30

Redirect Examination.

By Mr. Horner:

Q. Mr. Stuart, how were the weather conditions in 1914?

A. In 1914 it was rather dry for a good part of the season.

Q. Was that a good growing year for your corn?

A. Yes.

Q. It is the same soil in which you had raised other corn crops?

A. Yes.

Q. And you had always had successful crops?

A. Yes, good corn land.

10 Q. Do you know or do you not——

Mr. Gaskill: Are these matters that you inadvertently omitted?

Mr. Horner: Yes, you brought them out on cross-examination.

Q. Did you or did you not cultivate this corn as you had cultivated other ground?

20 A. Yes.

Q. Now as a matter of fact, generally speaking, were market conditions as good in 1914 as they were in 1913?

A. They were.

Q. Now, Mr. Stuart, what was it that was said by Mr. Page at the time this order was placed that induced you to place this order for the fertilizer?

Mr. Gaskill: I object, because he was examined on that on direct and also on cross.

30

(Objection overruled. Objection noted for defendant as ground of appeal.)

Q. Will you answer the question?

A. He assured me that it was good crude fish.

- Q. Did he tell you what it was good for?
A. Yes, good for a corn crop.
Q. Were those the controlling factors which induced you to buy it or give the order?
A. Yes, they were.
-

LOUIS A. PAGE, Sworn for plaintiff.

10

Direct Examination by Mr. Horner:

- Q. Mr. Page, where do you reside?
A. Palmyra.
Q. In the fall of 1913 with whom were you associated or employed?
A. Burlington County Farmers' Exchange.
Q. The defendant in this cause?
A. Yes.
Q. In what position? 20
A. As general agent.
Q. As general agent what were your duties?
A. Sell fertilizer and look after shipments.
Q. Did you or did you not on September 22, 1913, take an order from Mr. Stuart for ten tons of crude fish?
A. I did.
Q. I show you Exhibit P 1. Is that a sales slip or a memorandum that you gave Mr. Stuart at the time?
A. Yes.
Q. Will you state to the court and jury what you said 30 to Mr. Stuart and what he said to you with respect to that ten tons of crude fish and how you came to make him the sale?
A. Mr. Stuart made mention of the fact that he wanted fertilizer for corn.

Q. What did you say?

A. Asked if we had any fish, if I remember rightly.

Q. What did you say?

A. I told him we had, we had fish for \$28 a ton.

Q. What kind of fish?

A. Crude fish.

Q. Did you or did you not recommend it for corn?

A. Yes, sir.

Q. And he told you that he wanted to use it for corn?

10 A. Yes, sir.

Q. Go on. Anything else?

A. I don't know of anything else in connection with that sale, no.

Q. You also took another order for some other fertilizer?

A. That was at the same time.

By the Court:

20 Q. That is to say, you represented that it was a good quality of crude fish, did you?

A. As far as I knew; yes, sir. If it was crude fish it would have been good.

Cross Examination.

By Mr. Gaskill:

30 Q. Well, you didn't tell him that, did you, Mr. Page?

A. What is that?

Q. Just what you have replied to the judge.

A. If it was crude fish?

Q. Yes.

A. Why, crude fish—

Q. No, that is not what I asked you. I say you didn't

tell Mr. Stuart what you just replied to the judge?

A. If it was crude fish it was good?

Q. Yes.

A. Why, I didn't——

Q. That is not what I asked you. Did you tell Mr. Stuart that?

A. No, I don't know as I did.

By the Court:

10

Q. But you said in your examination that you told him you had good crude fish; is that so or not?

A. Yes.

Q. You told him that?

A. Yes, that is what the slip shows.

By Mr. Gaskill:

Q. Was the word "good" used by you or by Mr. Stuart, Mr. Page?

20

A. I wouldn't say which it was.

Q. Isn't this what took place: that Mr. Stuart told you he wanted some fertilizer and what he wanted it for?

A. Yes, sir.

Q. It was for corn and for potatoes and for various other things?

A. Yes.

Q. Different kinds of fertilizer?

A. Yes.

Q. And he told you that he wanted some fertilizer³⁰ for his pulling corn or green corn, didn't he?

A. Yes, sir.

Q. And you were asked what you would recommend for that purpose, weren't you? Mr. Stuart asked you, "Page, what will you recommend for that?"

A. Crude fish.

Q. That is what he asked you and that was your reply and you took the order for crude fish?

A. Yes.

Q. Now then, Mr. Robertson was along with you, wasn't he?

A. Yes, sir.

Q. And Mr. Robertson and you spoke to Stuart with reference to the drilling of the fertilizer?

10 A. Mechanical condition of it, yes.

Q. And Stuart wanted something that would drill?

A. Yes, sir.

Q. And from your experience you knew that ordinary crude fish doesn't pass through a drill readily?

A. If it was dry it would, and ground.

Q. If it is chemically treated and ground it will?

A. Yes.

Q. But not as crude fish without any treatment? You knew that?

20 A. It would be crude fish, wouldn't it?

Q. That is not what I asked you. I say that simply crude fish, not chemically treated and not prepared for passing through a drill, would not drill; you knew that?

A. I didn't know it had to be treated chemically. I was under the impression that if crude fish was dried that it could be ground so it would drill.

Q. And you and Mr. Robertson told Mr. Stuart that this fertilizer that you proposed to sell would be ground in such a way that it would pass through a drill, didn't
30 you?

A. Yes, sir.

Q. And Mr. Robertson told him that grinding it with tobacco stems would dry it so that it would pass through a drill, didn't he?

A. No, sir.

Q. What did he say about it?

A. He didn't tell Mr. Stuart about the tobacco stems.

Q. Was there anything said about tobacco stems there on that occasion?

A. Not to Mr. Stuart, not so far as my memory serves me.

Q. Wasn't there in the presence of Mr. Stuart?

A. No, sir.

Q. Any talk between you and Robertson about it?

A. Mr. Robertson and I had had that conversation. 10

Q. And you had that conversation while Stuart was there bargaining didn't you?

A. I was not a party to that conversation.

Q. That is not what I asked you. You had that conversation while Stuart was there bargaining, didn't you?

A. I wouldn't say so.

Q. Well, do you say that you didn't have? You won't deny it, will you?

A. What is that?

Q. That you and Robertson had a talk about tobacco 20 stems and grinding them so that it would drill.

A. Mr. Robertson and I had some conversation about the filler to make it drill.

Q. And that was while Stuart was there, wasn't it?

A. I don't think so.

Q. Well, you won't deny that Stuart was there?

A. I don't know.

Q. You don't recollect?

A. I don't remember that, no.

Q. Is it that you don't remember or don't want to re- 30 member?

A. Well —

Q. Now answer that.

A. I will. I can say something —

Q. Now one moment. Is it a fact that you don't re-

member or don't want to remember, which is it?

A. I don't remember that John Stuart was a party to the conversation.

Q. Now when were you discharged by the Farmers' Exchange as their agent?

A. Somewhere in July.

Q. In July of that year?

A. Yes, sir.

10 Re-Direct Examination.

By Mr. Horner.

Q. You were discharged or severed your connection about nine months after this, didn't you?

A. The 3rd of July.

Q. It was about nine months after this?

A. Yes.

Q. You don't work for Mr. Stuart?

20 A. No, sir.

CHARLES S. CATHCART, Sworn for plaintiff.

Direct Examination by Mr. Horner:

Q. Mr. Cathcart, where do you live?

A. New Brunswick.

30 Q. What is your business?

A. State chemist.

Mr. Horner: You will admit his qualifications?

Mr. Gaskill: Yes.

Q. In July, 1914, did you receive a sample from John C. Stuart sent you by express purporting to be crude fish?

A. I did.

Q. Did you analyze it?

A. I did.

Q. What was the result of your analysis?

A. From memory?

Q. Have you the paper? Have you a memorandum that you made at or about the time?

10

(Paper handed witness.)

A. Yes. Do you want the figures?

Q. Yes.

A. The total nitrogen 2.34 per cent; total phosphoric acid 9.35 per cent.

Q. Of that what part was soluble in water?

A. To which do you refer?

Q. Phosphoric acid.

A. Well, there was 3.42 per cent of it soluble in water.

20

Q. How much ammonia salts did you find?

A. .72 per cent.

Q. How much active insoluble organic matter?

A. Active insoluble .59.

Q. How about inactive insoluble organic matter?

A. .69.

Q. Mr. Cathcart, was or was not that which is generally at the experimental station known as crude fish?

A. It would be my opinion it was not a crude fish. It was not true to its name.

30

Cross Examination.

By Mr. Hillman.

Q. In what respect was it different from crude fish?

A. In the character of its organic nitrogen.

Q. Did it have less organic nitrogen than crude fish?

A. Crude fish has no definite amount in itself, but the character or availability of the organic nitrogen in fish would give about 69 to 76 per cent of availability, while the availability of the nitrogen in this mixture was 46 per cent; showing that it was not entirely, at least, a fish product.

Q. Do you say 46 per cent organic nitrogen?

10 A. Yes, 46 per cent of the nitrogen reported.

Q. Is there any other kind of nitrogen than organic nitrogen?

A. There is a nitrogen that may be derived from nitrates and may be derived from ammonia salts.

Q. And is the nitrogen just as available as a food product, whether it be organic nitrogen or whether it be derived from ammonia salts or something else?

A. From my information —

20 By Mr. Horner:

Q. Have you specialized on plant growth?

A. I was not going so far as that. If you had been I would just say that I would not be qualified to testify.

By Mr. Hillman:

Q. Well, it is nitrogen, isn't it?

A. It is nitrogen, yes.

30 Q. And do you know of any reason why the nitrogen derived from ammonia salts should not be just as available as a plant food as a nitrogen that you call organic nitrogen?

A. Well, that would depend upon its use.

Q. Well, for fertilizer.

A. Well, I mean for use as a fertilizer. I do not pose as an expert on soil fertility, but the difference in the organic salts of nitrate of soda and the inorganic salts, their action is different in certain ways than from the inorganic nitrogen.

Q. Then I understand this sample which you analyzed did not contain less nitrogen than crude fish?

A. Well, crude fish—

Q. Will you answer that question, please?

A. I don't know any standard for crude fish.

10

Q. Well, then, why do you say that this was deficient or was less than crude fish?

A. Because the character of the nitrogen contained was different than you would find from fish.

Q. What do you mean by contained?

A. Well, the availability. It is not the differing amount of nitrogen present, but it is the availability of that which is present.

Q. Did you see these tags which have been offered in evidence here, Professor? Have you ever seen these tags, Professor?

20

(Tags shown witness.)

A. I don't know that I have seen those particular tags. I have seen a large number of tags of different kinds.

Q. Do you remember whether or not there were any tags sent with this sample?

A. There were not.

30

Q. There was no tag sent with them?

A. No.

Q. Didn't you testify on the previous trial, Professor, that you did see one of the cards that came in a box?

A. When the sample was received there was no tag

attached. I received later a tag that was forwarded.

Q. And didn't you say that the sample which you analyzed was the same as the statement made upon those tags?

A. I don't recall that.

Q. Didn't you say that? Do you remember that question being asked you?

A. I do not, no.

Q. Do you remember this question being asked you:
10 'As I understand you, Professor, the sample which you analyzed was substantially the same as the statement made upon those tags?' Your answer was, "According to the guarantee given there, yes."

A. Well, that is true too, but I don't remember it the other time. The guarantee as stated in the tag would correspond to the result of the analysis.

Q. The analysis you made then was the same as what was contained on the tag?

A. Yes.

20 Q. Now have you in your department entered any different brands of crude fish registered there?

A. I have, yes. All registrations are made there.

Q. In those samples of crude fish registered with you have you any samples of crude fish containing less nitrogen than you found in the sample which you analyzed?

A. To the best of my knowledge, no. But I don't remember all the registrations. We have in the neighborhood of about two thousand registrations made.

Q. Will you say that you have never found crude fish
30 which contained less nitrogen than you found in the sample?

A. I wouldn't say that. I think in compiling — I made an average of our records for a number of years, and if my memory serves me we had one crude fish, mate-

rial called crude fish, which contained 2.18 per cent of nitrogen.

Q. 2.18?

A. 2.18, if the figures are correct. Of course that is just a trifle lower, but not enough to make any difference between those figures. It practically is the same.

Q. Then this sample had as much nitrogen or contained as much nitrogen as other samples of crude fish registered with you?

A. This sample had as much nitrogen as the lowest 10 sample—yes.

Q. It had more than the lowest sample, hadn't it?

A. .16. We would call that just a laboratory difference.

Q. Professor, did this sample which you analyzed contain less nitrogen than crude fish?

A. There are no standards for crude fish.

Q. It contained as much as some samples of crude fish submitted to you?

A. Contained at least as much as one sample that had 20 been analyzed there, yes.

Q. And you are not certain that it did not contain as much or more than other samples?

A. Yes, I couldn't say about that.

Q. So you are uncertain that it contained as much nitrogen as some samples of crude fish submitted to you and registered in your office?

A. Well, at that time.

Q. Won't you answer that question, please?

A. At least one sample, yes.

30

Q. Do you know whether or not the Standard Guano Company had registered with you a fertilizer known as crude chemically dried fish guano?

A. Not that year.

Q. In the year 1914?

A. They had registered such a brand, yes.

Q. And was the sample which you analyzed the same as called for by that registration?

A. It carried the same guarantee, according to the tag, but it was not branded as that.

Q. Well, I know, but it analyzed the same?

A. It carried the same guarantee.

Q. Did it analyze the same?

A. That I don't know, because I didn't analyze the
10 other.

Q. Is that the certificate which you issued? (Paper shown witness.)

A. Certificate of registration.

Q. That is a certificate of registration?

A. Yes.

Q. You didn't analyze that?

A. It is simply a registration of the guarantee.

Q. That is what you mean, the registration contained in this?

20 A. Yes, the guarantee of that chemically dried was the same as the guarantee on those tags.

Q. Now what are elements in fertilizer which are available as plant food?

A. Well, nitrogen and phosphoric acid and potash.

Q. Do you know whether or not potash is required for sugar corn?

A. I don't know.

Q. You don't know?

A. No.

30 Q. This sample contained no potash at all?

A. That I don't know. It was not tested for it any-way.

Q. Does crude fish contain potash?

A. Not ordinarily.

Q. The two elements of plant food found in crude

fish are nitrogen and phosphoric acid?

A. Should be, yes.

Q. And the sample which you analyzed, did that contain as much phosphoric acid as you found in other samples of crude fish analyzed by you?

A. Well, the various fish products are so variable. The percentage of phosphoric acid was in line with what you would find in fish products, nine per cent and over.

Q. Well, crude fish, what you call crude fish, did this sample contain as much phosphoric acid as any sample of 10 crude fish you analyzed?

A. As any sample?

Q. As any sample which you have had registered in your office.

A. I couldn't say that from memory, couldn't answer that question from memory, to the figures. I think there are other samples that have been received that contain, perhaps, a little more of phosphoric acid than this particular sample.

Q. And there are some that contained less?

20

A. Less.

Q. And they were registered as crude fish?

A. I don't know that they were registered. I think it was previous, most of them, at least, previous to the time of registration.

Q. Well, they were called crude fish?

A. Yes, they were called crude fish.

Q. And that is the proper name for it?

A. That I don't know.

Q. What is crude fish?

30

A. I don't know, with the exception that it is a fish product.

Q. You say you don't know what crude fish is?

A. No, with the exception that they should be derived from fish product.

By the Court:

Q. Why do you say this was not crude fish?

A. Because the analysis did not show that the materials contained were derived from fish as ordinarily found.

By Mr. Hillman:

10 Q. You mean that there was something else mixed with it?

A. That is according to the analysis.

Q. And what were those other substances?

A. They were not determined.

Q. Something possibly used as a drier?

A. Perhaps so.

Q. Tobacco stems?

A. I doubt whether tobacco stems. They had no indication of tobacco stems.

20 Q. You won't say it was not tobacco stems?

A. No.

Q. But the admixture of these other substances did not increase the amount of nitrogen below what you find in other samples of crude fish?

A. You are getting rather on that same thing now. I won't admit about the crude fish proposition at all. I will admit that we had one sample which we analyzed just a trifle lower than this.

30 (Question repeated.)

Mr. Gaskill: That question is put to you again. You didn't answer it.

A. Well, the only thing —

Q. Won't you answer that question?

A. Well, I can't answer it in one word. It is impossible.

Q. That is a question which calls for an answer yes or no.

The Court: Repeat the question.

(Question repeated.)

10

Q. Your answer is yes or no?

A. I hardly know the meaning of it, to answer it by answering yes or no; taking on the average analysis.

Q. Now won't you please answer that question?

By the Court:

Q. Can you answer it yes or no?

A. No, because I don't know what he means by it.

20

The Court: Well, then say so.

By Mr. Hillman:

Q. Now you say that you found in your analysis that there was some other substance besides fish?

A. Yes.

The Court: What he is trying to get at is whether what appeared in your analysis of the stuff interfered with its efficiency. 30

Mr. Gaskill: No, that is generally, but that is the conclusion to be drawn from it, but this is really the

point: he says that there was something mixed with this fish —

The Court: He says it was not crude fish because it had something else in it. Is that it?

The Witness: Yes.

Mr. Gaskill: Now Mr. Hillman says did that some-
10 thing else which was in there decrease the amount of nitrogen in the fish.

The Court: Well, that is a simple question.

Mr. Horner: No, your Honor, it is not a simple question, if you will pardon me for disagreeing with your Honor. This is a state's witness, he is not our witness.

Mr. Gaskill: No, he is called by you. He is not a
20 state's witness at all. He is here as a hired expert, and we ask him if it would decrease the nitrogen in the fish.

Mr. Horner: No, but you asked him whether it would decrease the nitrogen in the fertilizer, was the proposition. That is an entirely an different proposition.

By the Court:

Q. Is there any difficulty about answering that, Pro-
30 fessor?

A. If I only could get in my head just exactly what the meaning is I would answer it willingly.

Q. You are entitled to understand it before you answer it.

A. The admixture of a material would lower the quality of the fish.

By Mr. Hillman:

Q. That is not what I asked you.

A. I know you didn't, and that is the reason. I don't know the standard of crude fish.

Q. I want to know whether the admixture of these other substances, which you say were foreign substances, would decrease the percentage of nitrogen in the sample. 10

A. That I don't know.

Q. You don't know?

A. No.

Q. Professor, have you ever examined any samples of crude fish filed at your station to ascertain whether or not they would pass through a drill?

A. I have not, in my department, no.

Q. But you have examined samples, have you?

A. Chemically, yes, the material called crude fish. 20

Q. Well, now, describe their appearance and nature.

A. Oh, it is a variable product. Sometimes there would be large lumps and more moist, and other times they would be fairly dry and smaller pieces, and various portions of organic matter, with bone and various combinations that you might find.

Q. Have you ever seen crude fish which you thought could be used in an ordinary drill without being mixed with something else?

A. Well, that I don't recall. Of course the samples we have, you know, are necessarily comparatively small; at least they average a bout a pound sample; and I never made a study in that particular line, because it was the chemical examination we were after. 30

Re-Direct Examination.

By Mr. Horner :

Q. Professor, your analysis indicated that this sample had some adulterant in it, didn't it?

A. It did.

Q. Your analysis had approximately the same amount of nitrogen of the poorest sample you ever examined as
10 crude fish?

A. Yes.

Q. Did it not also show that there was an excess of insoluble phosphoric acid?

A. No.

Q. In other words, the amount of phosphoric acid was 9.35, was it not?

A. Yes.

Q. Of that only 3.42 was water soluble, wasn't it?

A. Yes.

20 Q. Well, doesn't that show an excess of phosphoric acid, as would be ordinarily expected to be found in crude fish?

A. No, not unless the fish had been treated. Phosphoric acid in fish would naturally be found from bone, which would be in an insoluble form. Those figures for water soluble phosphoric acid simply show that the material had been treated with acid and made it water soluble.

Q. The crude fish that had been submitted to you, according to your testimony as brought out on cross-ex-
30 amination, as I recall it, ran on an average of from 69 to 76 per cent of nitrogen; is that right?

A. No, the availability would be—

Q. Yes, the availability—pardon me—would be from 69 to 76 per cent. That is what they ran ?

A. Yes.

Q. This sample I understand only had 46 per cent?

A. Yes.

Q. And then it was about one-third off, as we would say?

A. Yes.

By the Court:

Q. Well, now, was the quality of the fertilizer affected by the adulterant of which you speak or had that anything to do with it? ¹⁰

A. It was undoubtedly affected by it. The value of the organic nitrogen depends upon its availability; that is, its value for fertilizer for growing crops. The percentage of availability shows the amount that would be available, particularly on the first year of use. There might possibly some of it become available later, but it is for the first year of use.

Re-Cross Examination.

20

By Mr. Hillman:

Q. You said on your direct examination that there was in this sample 2.34 per cent. of nitrogen. Now I understand you to say in response to a question of Judge Horner that you found 46 per cent.

A. Oh, no. The percentage of availability was 46 per cent, or 46 per cent of that 2.34.

Q. Now, then, Professor, you said that the percentage of organic nitrogen — ³⁰

A. Yes.

Q. Well, now there was some other nitrogen besides organic nitrogen, wasn't there?

A. A small amount, yes.

Q. Now what was the total amount of nitrogen, whether it is organic or anything else?

A. 2.34 per cent.

Q. And what was the percentage that was available, the whole thing?

A. No, the whole thing—it was all available with the exception of that amount marked as inactive insoluble organic nitrogen.

10 Q. Now Judge Horner puts a question to you in this way, and you say that the sample contained 46 per cent available organic nitrogen. That is your answer, is it?

A. Yes, the percentage of availability.

Q. And he says that there should have been 60 or 70 per cent?

A. Yes.

Q. Well, now then you say there was 46 per cent available organic nitrogen. Now what percentage was there of all kinds of nitrogen?

A. 2.34 per cent, that was the total nitrogen.

20 Q. What percentage of available nitrogen was there?

A. Well, you could figure that out from the figures. Of the organic nitrogen you subtract the amount of ammonia salts from 2.34. That would give you the organic nitrogen; and from that figure you could figure the percentage of available organic nitrogen.

Q. Now what I want to know is how much available nitrogen there was, whether it was organic or some other kind.

A. Well, I haven't figured that at all.

30 Q. Well, there was more available nitrogen than 46 per cent, wasn't there?

A. Oh, yes; that is —

Q. And you say that —

Mr. Horner: Let the witness answer.

Q. And you say that there was 46 per cent of available nitrogen, and you qualified that by saying that there was 46 per cent of available organic nitrogen?

A. Yes.

Q. But now the total amount of available nitrogen, eliminating your organic, was more than 46 per cent, wasn't it?

A. You don't understand.

Q. Won't you answer the question?

A. The ammonia salts was available—

10

Q. There was more available nitrogen?

A. Yes.

Q. How much more?

A. Plus the amount for ammonia salts there.

Q. How much of that?

A. Whatever the report says.

Q. Can you tell by looking at it?

A. Certainly, by looking at it. (Examines report.)

.72 per cent.

Q. Then the total amount of available nitrogen was 20 72 per cent, do I understand you?

A. I can't figure that way.

Q. No, I am not asking you to figure.

A. You said it was and then asked me if it was not. I said that I couldn't figure that way.

Q. Now, Professor, we will come right back. You say that there was 46 per cent of available organic nitrogen?

A. 46 per cent of organic nitrogen was available, yes.

Q. I want to know how much available nitrogen 30 there was, leaving out the word organic.

A. If you take the figures for organic nitrogen and multiply by 46 and add that .72 you would find it.

Q. Well, I asked you to do that.

A. No, you didn't.

Q. I thought I did. You said you could tell me.

A. That is the truth, you didn't.

(Witness calculates.)

Q. Now, Professor, are you ready to answer the question?

A. The question, please.

10

(Question repeated)

A. 1.47 per cent.

Q. Now awhile ago you said there was 46 per cent?

A. Of the organic nitrogen, yes.

Q. Now I want to know what percentage of all the nitrogen was available.

A. I just told you, 1.47 per cent.

20 Mr. Hillman: Well, I know I am dumb. The witness first said 46 per cent.

The Court: Well, that is for the jury.

Q. Well, Professor, I don't think you are trying to make a bigger fool of me than you have already.

A. I thought you had turned the compliment on me.

Q. You said first that 46 per cent of the organic nitrogen was available?

30 A. Yes.

Q. Now then, I asked you if you could tell me what percentage of all the nitrogen was available.

A. Yes, that is what I told you.

Q. Now I would naturally suppose that there would be a higher percentage of all the nitrogen than there

would be of the organic nitrogen.

A. So there is.

Q. And yet you say that one is 46 per cent and the other is 2.34?

A. You don't understand. It is 46 per cent of the organic nitrogen.

Q. Is available?

A. Yes.

Q. Now can you tell me how much of all the nitrogen is available? 10

A. Of all the nitrogen in that sample was 1.47. Now that is very readily calculated. If you take your percentage of 2.34 and subtract your .72, which you had for ammonia salts, it would leave 1.62 for organic nitrogen. Now 46 per cent of 1.62 is .75. Then add .72 for ammonia salts to the .75, gives 1.47.

By Mr. Horner:

Q. Now, Professor, the substance which you analyzed I understand was not in your opinion crude fish? 20

A. No.

Q. And if branded as crude fish it was misbranded?

A. It was misbranded.

BAYARD H. MORRISON, Sworn for plaintiff.

Direct Examination by Mr. Horner:

30

Q. Mr. Morrison, where do you reside?

A. Swarthmore.

Q. Pennsylvania?

A. Yes.

- Q. What is your business or profession?
A. Public chemist.
- Q. At what institution did you study chemistry?
A. Harvard.
- Q. Harvard University?
A. Yes.
- Q. How long have you been practicing?
A. Twenty-four years.
- Q. Have you in that time specialized in what might
10 be called agricultural chemistry, fertilizer chemistry?
A. Yes, I represent all the fertilizer manufacturers of Philadelphia.
- Q. How long have you been engaged?
A. Twenty-four years.
- Q. Is there a fertilizer or material known in the fertilizing trade and known to your profession as crude fish?
A. Yes.
- Q. Have you ever analyzed samples of such?
A. Yes, a good many.
- 20 Q. About how many?
A. Probably three or four hundred.
- Q. What would you say with respect to a substance which on analysis showed nitrogen from ammonia salts, .72 per cent; soluble organic matter, .34 per cent; active insoluble organic matter, .59; inactive insoluble organic matter, .69 per cent; or a total of nitrogen of 2.74; and a total of phosphoric acid, 9.35, of which 3.42 was soluble in water, and it had a percentage of availability of nitrogen of 46 per cent? Was it or was it not crude fish?
- 30 A. It was not pure crude fish?
Q. It was not pure crude fish?
A. No.
- Q. In what was it deficient?
A. Deficient in nitro $\acute{g}$ en. There ought to be twice as much nitrogen at least.

Q. Should be twice as much?

A. Yes.

Q. How many samples did you say you had analyzed?

A. Three or four hundred.

Q. Did it have an excess of anything?

A. Phosphoric acid.

Q. Was the proportion of phosphoric acid and nitrogen wrong?

A. Yes, the usual proportion, approximately, is the same nitrogen as phosphoric acid, generally a little less phosphoric acid. 10

Q. And how many times greater was the phosphoric acid than the nitrogen in this case?

A. Well, about four times.

Q. Professor, from your experience in chemistry, connected with the fertilizing business, would you say that there was any reason why crude fish should not be prepared so as to be used in a drill without in any way impairing or destroying the ordinary elements of crude fish?

A. It could be prepared. It has to be dried. 20

Q. From your experience in agricultural chemistry what would you say would be the effect if a material which upon analysis showed a deficiency of nitrogen and an excess of phosphoric acid was used as and for crude fish by a farmer in the same way as crude fish is usually used?

A. Well, if it only had half as much nitrogen in it he would only get half as much as he expected on the land.

Q. Would or would not that have an effect on the crop? 30

A. Well, of course it would make a deficiency of nitrogen, unless it was made up some other way.

Cross Examination.

By Mr. Gaskill:

Q. Professor, will you please look at those tags that were on the bags of the fertilizer in question? They have printed or stamped on them underneath the printed label, "Available phosphoric acid 6 per cent, ammonia 2.60 per cent." Please look at this analysis made by Prof. 10 Cathcart and tell me whether or not that analysis meets those two statements on the tags.

A. The ammonia would be—I should think it would be 2.60. You multiply it by 1.20.

Q. The ammonia in the analysis is the same as the ammonia on the tags?

A. Yes.

Q. Now, how about the phosphoric acid?

A. Well, it does not give the available phosphoric here. It is pretty near 6 per cent. I would say it would 20 be 6 per cent.

Q. You would say it would be 6 per cent, and that is on the tag?

A. Yes, sir.

Mr. Horner: It is in cross-examination but I am perfectly willing he should use our witness.

By Mr. Horner:

Q. Would you say that the fertilizer which analyzed 30 that available phosphoric acid of 6 per cent and of ammonia 2.61 was crude fish?

A. No.

Q. If it was branded as crude fish would it be a misbranding?

A. I should think so, yes.

HOWARD RUSS, Sworn for plaintiff.

Direct Examination by Mr. Horner:

Q. Where do you live, Mr. Russ?

A. Delanco, New Jersey.

Q. What is your business or profession?

A. Farming.

Q. How long have you been engaged in that business?

A. Fifty years. 10

Q. Do you raise sugar or sweet corn or pulling corn, as they call it?

A. I do.

Q. Make a specialty of that?

A. Yes, sir.

Q. Do you know Mr. Stuart?

A. I do.

Q. Do you know his farm?

A. Yes.

Q. Have you ever used a fertilizer known as crude 20
fish in the raising of sugar or sweet corn?

A. I have.

Q. From your experience as a practical farmer what
would be the yield or yield per acre of sugar corn or early
corn when planted and fertilized with crude fish on an
average season?

Mr. Gaskill: I object to that. We submit in the first
place that this must be limited to the year 1914. This is
not the plaintiff in the case, the gentleman on the wit- 30
ness-stand. That the plaintiff, as I understand the rule,
in the big seed case, made a comparison made by him of
the year in question with other years; but when it comes
to other witnesses, outside witnesses, their testimony must

be limited to the very year in question and not to any average.

The Court: What is the question?

(Question repeated.)

The Court: Let me see the case you have referred to. This man has shown himself to be an experienced farmer.

10

Mr. Horner: I think Judge Gaskill will admit that.

Mr. Gaskill: Oh, yes.

(Mr. Gaskill argues and cites authorities.)

The Court: I think the plaintiff is entitled to show this is almost a matter of common knowledge, I suppose, among farmers.

20

Mr. Gaskill: Yes, but to use other seasons, they differ one from another.

The Court: Well, the jury will know that. At least I suppose they do. Proceed.

Mr. Gaskill: I ask an exception.

The Court: Take your exception.

30

(Objection noted for defendant as ground of appeal.)

(Question repeated)

A. From 8,500 to 11,000.

- Q. That is the yield of ears of corn?
A. Per acre, yes.
Q. Do you recall the year 1914?
A. Yes, sir.
Q. Is your farm somewhat near Mr. Stuart's?
A. About two miles and a half.
Q. You are familiar with Mr. Stuart's farm?
A. Yes, sir.
Q. And his land?
A. Yes, sir. 10
Q. You have been on his farm?
A. Yes, sir.
Q. And you know the part of the farm where this attempt was made to raise sugar corn in 1914?
A. Yes.
Q. What would you say should have been the normal yield of Mr. Stuart's farm for that year under proper cultivation and fertilization?
A. 9, 500 ears to the acre.
Q. Did you sell corn that year? 20
A. Yes, sir.
Q. What was the average or market price for that year?
A. We got—do you know what time during the month it was?
Q. I do not. Just take it the regular corn season.
A. It was not less than \$2 up to the 1st of July.
Q. That would bring \$180 per acre?
A. Yes.
Q. Did you ever see this corn? 30
A. No, sir.
Q. Have you ever used crude fish for raising corn?
A. I have.
Q. Is it or not an effective fertilizer?
A. It is the best fertilizer that you can procure.

Q. Do you know what chemical elements are required to make it grow?

A. We need more ammonia than we do phosphoric acid or potash, lots more.

Q. By ammonia do you mean nitrogen?

A. Nitrogen, yes.

Q. Is that essential in the raising of sugar corn?

A. Yes.

Q. There must be more ammonia or nitrogen than
10 there is of phosphoric acid?

A. Yes, sir.

Cross Examination.

By Mr. Gaskill:

Q. Howard, you make a specialty of early corn for the New York market?

A. I do.

20 Q. And you are the earliest man in the market with corn, as a usual thing, are you not?

A. Generally.

Q. And get the top price?

A. Yes, sir.

Q. Do you know whether or not in the year 1913 Mr. Stuart marketed his corn as early as you did?

A. He may not have begun as early, but corn keeps
up—

Q. No, you have answered the question. He didn't
30 begin as early?

A. I couldn't say.

Q. You couldn't say?

A. No, sir.

Q. The price that you have given is the average price?

A. It is the price, it is the lowest price up to the 21st of July for any year for four years.

Q. The earlier you get into the market the higher the price?

A. Not necessarily so; no, sir.

Q. That is not necessarily?

A. No, sir; there is a lot of small corn, early corn, grown early, which will sell even lower than what the larger corn does, a week or ten days later.

Q. What variety of corn was that in 1913 and 1914 10 that you got in the market early?

A. Well, it is a variety we call Hubbs corn.

Q. Did you plant Booth corn?

A. Yes.

Q. That is, two years ago?

A. Yes.

Q. And did you get the same results from that that you did from the Hubbs?

A. We got more per hundred.

Q. You got more per hundred?

20

A. From the fact that it was larger.

Q. How about the quantity?

A. We cut more ears per acre. On the Hubbs corn we didn't get but 8,500 per acre.

Q. 8,500 per acre of the Hubbs?

A. Yes.

Q. And how many per acre did you get of the other variety?

A. It averaged 9,500 that year.

Q. Did you visit Mr. Stuart's farm at all that year, 30 1914?

A. I didn't see the corn growing.

Q. Didn't see the corn growing?

A. No, sir.

Q. Know nothing about its condition whatever?

A. No, only from hearsay.

Q. Only from hearsay?

A. Yes.

Q. How do you ship your corn, by freight or express?

A. Both ways, mainly by freight.

Q. The earliest, how do you ship it?

A. We ship it the same way. We ship all we can till three o'clock and after that we ship by express at five.

10 Q. Now this price that you have named, is that gross or net?

A. That is gross.

Q. What comes of it?

A. Freight and carting and commission.

Q. How much is that per hundred?

A. That depends on what it sells for. The freight those years cost twenty-five cents a bag to get it into market. It costs fifty-seven cents to get it there by express, or fifty cents, rather, that year.

20 Q. If it goes by express it is delivered direct, is it?

A. Yes.

Q. If it goes by freight you have to pay cartage in addition to freight?

A. Yes.

Q. How much is the cartage?

A. The cartage is ten cents per sack. Our sacks were called one hundred pounds at that time. The freight was fifteen cents a hundred.

Q. How many pounds are there in a sack?

30 A. Two hundred.

Q. Then for every hundred pounds of corn it is one-half the amount of freight, twenty-five cents, that you add for a sack of two hundred, and one-half of the ten cent cartage, or five cents?

A. Yes.

Q. Making seventeen cents that comes off, if it goes by freight?

A. Yes.

Q. Off of the \$2; is that right?

A. Yes, 20 cents commission.

Q. 20 cents commission in addition to that?

A. Yes.

Q. That is 37- $\frac{1}{2}$ cents; then if it was an average of \$2 gross, with the 37- $\frac{1}{2}$ cents off you have \$1.62- $\frac{1}{2}$ as net? 10

A. Yes.

Q. You said \$2 per hundred, didn't you?

A. Yes, sir; up till July 21st.

Q. Well, Howard, you generally have a little more success with your corn as to quantity and quality than the other folks around there, do you not?

A. Well, we have as good corn as anybody has.

Q. Got quite a reputation on that, haven't you?

A. Yes, sir.

20

Re-Direct Examination.

By Mr. Horner:

Q. Well, at that rate, Mr. Russ, in the year 1914, after all was said and done all the expenses were deducted, there was a net of about \$132 an acre of corn wasn't it?

A. My corn netted me \$135. After July 21st the price got down a little. Before July 21st it averaged more than that. 30

Q. Did you market your Booth corn before July 21st?

A. Oh, yes, we start in about the 6th of July.

Q. From your experience as a practical and experi-

enced farmer would you say that Mr. Stuart's crop could have been marketed before July 21st?

A. Yes, sir.

RECESS TILL 1.15 P. M.

10 (Trial of the cause resumed at 1.15 P. M.)

JOHN C. HOOKSTRA, Sworn for plaintiff.

Direct Examination by Mr. Horner

Q. Mr. Hookstra, where do you reside?

A. Beverly, or Charlestown.

20 Q. Near to the farm of Mr. Stuart?

A. Adjoining it.

Q. What is your business or profession?

A. Farming.

Q. How long have you been engaged as a farmer?

A. Sixteen years.

Q. Are you familiar with the raising of early sweet or sugar corn?

A. I am.

30 Q. Now calling your attention to the year 1914, did you raise any sugar corn that year?

A. Yes, sir.

Q. On your farm adjoining that of Mr. Stuart?

A. Yes, sir.

Q. By the way, Mr. Stuart operates two farms, doesn't he, one at his mother's on the road——

- A. No, three.
- Q. Where was this farm in question?
- A. Adjoining ours.
- Q. Up in Willingboro?
- A. Willingboro Township.
- Q. Did you raise corn in 1914?
- A. I did.
- Q. Did you have a good or a poor crop?
- A. Had a very good crop.
- Q. Was that on land adjacent to Mr. Stuart's 10
- A. Well, there may have been a field between it.
- Q. The same general character of soil?
- A. The same.
- Q. Did you examine Mr. Stuart's crop of corn in 1914? Did you see it?
- A. I saw it, yes.
- Q. What was its appearance if anything?
- A. Well, the color wasn't right.
- Q. What was the matter with it?
- A. Rather yellow. 20
- Q. How about the growth?
- A. Poor.
- Q. What do you mind as an experienced farmer would that indicate?
- A. Lack of nitrogen.
- Q. Have you seen other crops grow on Mr. Stuart's farm growing crops of corn?
- A. I have.
- Q. In this same territory? 30
- A. Yes.
- Q. Did he get good crops or poor crops?
- A. Well, you have good and poor all over.
- Q. In the year 1914 what was the yield in dollars and cents per acre, net yield in your section?

Mr. Hillman: I object. It doesn't appear that this witness knows what the net yield was in his section.

Q. Well, on your farm then, what was the net yield in dollars and cents?

A. The gross sales were around \$106 per acre.

Q. What would that mean net?

A. Why, that I couldn't give you.

Q. Well, couldn't give it to exact cents, but can't you
10 give an approximation?

A. Well, the net, that would be somewhere around \$70 per acre, that is, taking in the cost of the fertilizer, manure and labor.

Q. And sales?

A. And sales.

Q. Did this corn of Mr. Stuart's grow to maturity, the stalks grow up to any size?

A. Well, it matured.

Q. Well, I mean did they grow as is usual? Did it
20 give the same height and color and the same ears?

A. It was rather a poor crop.

Q. Rather a poor crop?

A. Rather a poor crop.

Q. You don't know what the yield was?

A. I do not.

Q. Would you care to approximate the yield, whether it was 50 per cent or 25 per cent or what?

Mr. Hillman: I object. It seems to me the witness
30 has shown that he is not competent to make an estimate in this case.

Q. You have made a sort of specialty of analyzing soils and fertilizers, haven't you?

A. Somewhat.

Q. Is your soil approximately the same sort and kind as Mr. Stuart's?

Mr. Hillman: I object. It does not appear that he has ever analyzed Mr. Stuart's soil.

Q. Well, have you ever analyzed Mr. Stuart's soil?

A. I have not. It was practically in the same condition.

10

Mr. Hillman:: I ask that the latter part of his answer be stricken out.

The Court: Strike it out.

Q. From your observation and experience as a farmer would you say that the soil on Mr. Stuart's farm was of the same general character as yours?

Mr. Hillman: I object. It doesn't appear that he has 20 ever examined any farm there.

Q. Have you ever observed as a farmer—not as a chemist—have you ever observed as a farmer the soil on Mr. Stuart's farm?

A. It runs about the same.

Mr. Hillman: I object to that and ask that it be stricken out.

30

Q. Answer yes or no. How does it compare with the soil on your farm?

A. It is a sandy loam.

Q. Well, how is it in comparison with yours, about the same or different or what?

A. About the same at that time.

Q. Now in the raising of corn would you as an experienced farmer say that if 24 acres of ground was broad-casted with seven or eight carloads of manure in the fall, then in the spring turned under, the field then harrowed, the rows marked out and the corn planted with seven hundred pounds of crude fish to the acre, would you say that was a proper and sufficient fertilizer?

A. How many tons?

10 Q. I said seven hundred pounds to the acre.

A. I know, the fertilizer; how many tons of manure?

Q. Seven carloads.

A. I know.

Q. They have a uniform car, don't they, approximately a uniform car?

A. That would be about ten tons to the acre.

Q. Would you say that was sufficient?

A. It would raise a crop of corn.

Q. And you say that your observations of that field
20 of corn and your examination of it indicated that it was lacking in what, did you say?

A. Plant food.

Q. Would crude fish, pure crude fish, have been in your opinion a proper and sufficient plant food?

A. It would.

Q. You have used crude fish?

A. I have used pure fish.

Q. Well, pure crude fish.

A. I have never used crude fish.

30 Q. You know the chemical ingredients of crude fish though, generally, don't you?

A. The kind we used ran about 11 per cent——

(Objected to.)

Q. Answer the question. You know what the chemical ingredients of ordinary crude fish are, don't you, approximately?

A. Yes.

Q. Well, then you say with that knowledge that crude fish, good ordinary crude fish, would have supplied that which in your opinion was deficient with respect to Mr. Stuart's crop?

Mr. Hillman: I object to that as leading. Counsel 10 puts the entire answer in the witness' mouth.

The Court: Reframe the question.

Q. What in your opinion would have supplied the deficiency by way of fertilizer in the crop of Mr. Stuart?

A. You mean how he would have been able to make a crop?

Q. No, I didn't ask you that. I say what in your opinion as a farmer would have supplied the deficiency to 20 this corn crop of Mr. Stuart?

A. Well, that would be a hard matter to state.

Q. Well, would crude fish have done it?

A. Pure crude fish should have made a maximum crop of corn on that land.

Cross Examination.

By Mr. Hillman:

30

Q. Did you ever use crude fish?

A. I have used pure fish.

Q. Did you ever use crude fish?

A. I have not.

Q. How long have you been raising sugar corn?

A. Why, I have raised it off an on during sixteen years.

Q. Have you always had uniformly good crops?

A. Corn crops run about practically the same every year.

Q. Isn't there some variation?

A. Yes.

Q. The crop is better some years than it is other years?

10 A. Yes.

Q. Can you always account for a short crop?

A. Yes, I can.

Q. Always? There are a good many things which go to produce short crops, aren't there?

A. A good many of them.

Q. Difference of soil, difference in weather, seed?

A. Yes.

Q. And cultivation?

A. Yes.

20 Q. Is Mr. Stuart's farm as good a farm as yours?

Mr. Horner: That is an awful question.

A. Well, I would judge the soil would be as good, yes.

Q. No, but is it as good?

A. Well, all farms vary.

Q. Is Mr. Stuart's farm as good as your farm?

A. The land at that time was in as good shape.

Q. In 1914?

30 A. In 1914 Mr. Stuart's land was in every bit as good shape as our land.

Q. Is it naturally as good as yours?

A. It was.

Q. Capable of producing as good a crop as your land?

A. It was.

Q. Did you notice what care Mr. Stuart gave his corn crop that year?

A. Well, he kept it practically clean.

Q. Practically clean?

A. To my knowledge, yes.

Q. Did he keep it as clean as you kept yours?

A. He kept his——

Q. Did he keep it as clean as you kept yours?

A. Yes, he had it in good shape.

10

Q. Did he keep it as clean as you kept yours?

A. I think he did.

Q. You think so? Did he cultivate it as often as you cultivated yours?

A. I didn't keep tab on that.

Q. Do you know?

A. I don't know for a certainty.

Q. You don't know for a certainty, but you don't think he did?

A. Well, he may not. We cultivate a great deal oftener than most farmers around there. In fact, we keep our cultivator running right up to the day we cut our corn, and very few farmers do that.

Q. Some? Mr. Stuart doesn't?

A. I don't think he does.

Q. He hasn't that reputation, has he?

(Objected to.)

Q. Well, to your knowledge, does he?

30

A. Mr. Stuart cultivates his corn the same as farmers do as a rule. They let up at a certain time.

Q. But he doesn't as often as you cultivate yours?

A. No, he doesn't.

Q. How much stable manure do you put on your corn ground?

A. We manure at the rate of about ten tons to the acre.

Q. Do you know how many tons there are in a car?

A. A car will run, I presume, from twenty-five to forty tons.

Q. Twenty-five to forty tons?

A. Yes.

10

HOWARD RUSS, recalled for plaintiff.

Direct Examination by Mr. Horner:

Q. Mr. Russ, you are familiar with Mr. Stuart's farm?

A. Yes, sir.

20 Q. And with the soil of his farm?

A. Yes, sir.

Q. Would you say that spreading on 24 acres of ground seven carloads of manure in the fall, then turning that under, then harrowing it in the spring, marking it out and planting the corn with about 700 pounds of crude fish, was an effective fertilizer?

A. I do.

30 Q. Assume that corn planted after the ground having been treated and fertilized and stated, and it came up through the ground with a good setting, but was yellow, the stalks didn't grow to maturity; what would you say was the cause, in the year 1914?

A. Either lack of sufficient ammonia or something in it to injure the plants.

Q. There was nothing in the season that year to cause any shortage of crop?

A. No, sir.

Cross Examination.

By Mr. Gaskill:

Q. One question here. You have been asked certain things as a practical farmer. On that line I want to ask 10
you whether or not after your corn had sprouted and come up through the ground and been growing two or three days, or whatever time was necessary to determine that it was a successful planting and growth, and you found that it was not, and from that time on felt discouraged over the prospect of any reasonably profitable crop from it, would you have allowed your corn to have remained idle or would you have used it for some other purpose? Would you have plowed up that corn and planted it with something else, or planted over again? 20

A. Well, if it had the appearance of producing half a crop I would let it go on and gather the half crop.

Q. But if it did not have the appearance of producing at least a half a crop you would have plowed it up and replanted it?

A. Yes.

Re-Direct Examination.

By Mr. Horner:

30

Q. Would you be able to tell whether it was going to produce a half crop as soon as it came through the ground?

A. Not as soon as it came through the ground, but after it got knee-high.

Q. And if it was a good while getting knee-high it would probably be too late to change your mind, wouldn't it?

A. No, I said it would have to show that it would not produce half a crop before I would plow it up.

Q. You would always hope for——

A. Something better.

10

Cross Examination.

By Mr. Gaskill:

Q. Assume that you have to wait until it gets knee-high, ordinarily, with good soil such as yours, good seed, plenty of fertilizer and proper care, how long does it take to get knee-high?

A. It is not knee-high till the 20th of May, and
20 planted in March or the first of April.

Q. Now, then, how late can you plant sugar corn?

A. We wouldn't think of planting it anything after the 1st of May.

Q. No, I know, that is for the early market, but you can plant sweet corn and sugar corn until the latter part, can't you, and get a crop?

A. Yes.

By Mr. Horner:

30

Q. But in your neighborhood you don't plant that kind, do you?

A. No, we wouldn't get anything for it.

By Mr. Gaskill:

Q. Howard, would it be a practical thing in your judgment to help the corn along when you saw that it was not doing what you thought it ought to, by some additional fertilizer?

A. It is a practice with some people to put nitrate of soda on their seed, and I have done it once or twice, but I never saw where it did any good.

Q. Well, you didn't have the poor showing that Mr. 10 Stuart has described in this case. Now if you had a poor showing such as he describes would not the application of nitrate of soda, at comparatively small expense, have helped the crop along?

A. If there is anything affecting the root or the root don't branch out the application of nitrate of soda would not help at all. The roots must be over the ground so as to take up the nitrate as it is dropped down. If you will allow me to digress——

Q. No, we had better stick right to the one point. I 20 want to know whether nitrate of soda would not in your opinion have helped this corn which Mr. Stuart describes.

A. If the corn was vigorous enough to spread its roots out twelve inches or further from the row, then nitrate would have helped it.

Q. The probabilities are that the application of nitrate of soda or something else would have helped his crop; isn't that so?

A. If something was in that fertilizer which injured the root, for example, so the root would not get it, the ni- 30 trate of soda or anything else wouldn't help.

Q. Assume there wasn't anything there to affect the roots.

A. It would have probably helped.

By Mr. Horner :

Q. In the application of nitrate of soda you would have to be very careful not to burn the crop up, don't you?

A. You don't want it to get on the leaves, of course.

10 EARL BLYLER, Sworn for plaintiff.

Direct Examination by Mr. Horner :

Q. Mr. Blyler, where do you reside?

A. In Beverly.

Q. You have a farm near by that of Mr. Stuart?

A. Yes.

Q. Do you recall 1914?

A. I do.

20 Q. Do you raise sugar corn?

A. I do.

Q. In the year of 1914 did you or did you not have a good crop?

A. We had a good crop.

Q. And the prices, what were the prices?

A. Fair.

Q. Do you recall what per acre was the net yield from your sugar corn that year?

A. No, I can't give that.

30 Q. You can't give that?

A. No.

Q. Did you see the 24 acres of corn in Mr. Stuart's farm that year?

A. I did.

Q. How did it appear?

A. Well, just as has been stated; didn't seem to have any nourishment under it, from the way it grew. It was spindling in the stand and didn't look healthy.

Q. What about its color?

A. Yellow.

Q. And that to your mind indicated what?

A. That something was wrong, I didn't know what.

Q. You say it didn't have the stuff underneath it, you mean?

A. Yes.

10

Q. What do you mean by that?

A. Well, it didn't have the chemical or it didn't have the plant food to properly produce the crop.

Q. Does your experience as a farmer warrant you in saying anything as to the use of crude fish as plant food?

A. We have used crude fish.

Q. With good results?

A. With good results.

Q. Would you say whether Mr. Stuart that year from your observation of the crop of his field had approximately a quarter yield, a half yield or what?

20

A. I couldn't approximate that. It didn't look good. If he got a half a yield from the way the crop looked he got all that was coming to him.

Q. Would you say it would not be more than that?

A. No, if he got that he would be doing good.

Q. Would you say that the spreading of seven carloads of manure over twenty-four acres in the fall, then plowing in under, then harrowing the ground and marking it out and planting corn with about seven hundred pounds of crude fish to the acre, was a sufficient and proper cultivation?

30

A. I would think so.

Q. And fertilizer?

A. Yes.

Cross Examination.

By Mr. Hillman:

Q. How near is your farm to the farm occupied by Mr. Stuart?

A. Right across the road.

Q. How far is his cornfield from your house?

A. Right across the road.

10 Q. The cornfield is right along the road, is it?

A. Yes.

Q. How many times did you visit that cornfield during the year 1914?

A. I passed it two or three times a day, sometimes four times a day, every day during the growing season.

Q. Did you ever go through the corn? Did you ever walk through the corn?

A. No, I never walked through the corn.

Q. All that you know about the corn is what you observed in passing along the road?

A. The road is——

Q. Answer the question, please.

A. Yes.

Q. And you don't know how many acres there were in the field?

A. No.

Q. And there was nothing which particularly called your attention to that field, was there?

A. Yes.

30 Q. You had no interest in it, did you?

A. We all have interest in each other's crops.

Q. But you had no special interest in that, did you?

A. Yes, we have an interest in different crops that grow along the road. A crop that is successful, we want to know what grew that crop. If the crop goes back we

want to know what caused it to go back.

Q. You have simply the same interest in that that you would have in any other field that you would see along the road?

A. Yes.

Q. And you say that you noticed that the corn looked yellow?

A. Yes.

Q. And that indicated to you lack of nourishment?

A. Yes.

10

Q. Has your experience as a farmer taught you that that same appearance might have been caused by something else?

A. No.

Q. You have never known that to be caused by anything else?

A. I can't say that I have, no.

Q. Well, do you know?

A. No.

Q. How long did you say you had been farming?

20

A. About five years.

Q. Have you raised sugar corn every year?

A. Yes, sir.

Q. And how does your farm compare with Mr. Stuart's?

A. It is about the same as his.

Q. Your farm is better than his, isn't it?

A. I don't think so.

Q. You put more fertilizer and manure on it, don't you?

30

A. I think his ground is quite as good as mine.

Q. You put more fertilizer and manure on, don't you?

A. No, I think not.

Q. You cultivate your ground more than he cultivates his, do you not?

A. I can't answer that question.

Q. Do you think he cultivates his ground as much as you do yours?

A. I can't answer that question.

Q. You were passing along the road, along his cornfield; did his cornfield look as clean as your cornfield, as free of weeds?

10 A. I think it did.

Q. You think it did?

A. I think so, yes.

Q. In 1914?

A. I think so.

Q. You think so?

A. Yes, sir.

Q. You never walked through it; you just observed it from the road?

A. That is it.

20 Q. How many tons of manure are there in a carload of manure?

A. They run from thirty to forty tons.

Q. How much?

A. Twenty-five to forty tons.

Q. Then seven carloads of manure does not indicate a very definite amount, does it?

A. Well, you could strike an average there very easily.

Q. What would you say the average was?

30 A. Thirty to thirty-five.

LEONARD KIMBALL, Sworn for plaintiff.

Direct examination by Mr. Horner :

Q. Mr. Kimball, where do you reside?

A. Charleston.

Q. Near the farm of Mr. Stuart out there?

A. Not near it, no.

Q. Do you know the farm of Mr. Stuart?

10

A. Yes, I own a farm right across the road.

Q. Do you recall the year 1914?

A. No.

Q. You don't recall about the corn crop?

A. No.

Q. Did you live there then?

A. No.

Q. Oh, you didn't live there then? That is all then.

20

HOWARD WILLS, sworn for plaintiff.

Direct Examination by Mr. Horner :

Q. Mr. Wills, where do you reside?

A. Willingboro Township.

Q. Do you know the farm of Mr. Stuart?

A. I do.

Q. Do you recall the year 1914?

30

A. I do.

Q. Do you recall the cornfield on the farm on that year?

A. I do.

Q. Did you observe it?

A. I did, went by there nearly every day.

Q. What would you say to the court and jury with respect to your observation of that cornfield?

A. Well, in my opinion, if I passed my own opinion on it I think there was something the matter with John Stuart's corn, but I didn't know what was the matter with it.

Q. What was the color?

A. It was yellow.

Q. How about the growth of the stalk?

10 A. It didn't grow up like it ought to, like corn should grow.

Q. Are you a practical farmer?

A. Well, I have been on a farm for seventy-two years.

Q. What would you say in your opinion was the cause of that corn crop appearing as it did?

Mr. Gaskill: I object. It does not appear that the witness, in spite of his seventy-two years past, has been
20 engaged in the growing of sugar corn there.

Q. Did you ever grow sugar corn?

A. Not of late years. I did when I was younger.

Q. Did you ever use crude fish?

A. No.

Cross Examination:

By Mr. Hillman:

30

Q. Did you ever notice Mr. Stuart's cornfield any other year?

A. Yes.

Q. This year of 1914 did the field appear to have been cultivated well?

A. Yes, cultivated as well as ordinary farmers cultivate it.

Q. The same as ordinary farmers?

A. The same as I would cultivate it.

Q. Were there any weeds in it?

A. Well, I don't think there was any more weeds in it than any ordinary cornfield. It is a very hard matter to keep all the weeds out.

Q. All the weeds had not been kept out of it? And you never went through the field, I understand it? 10

A. Just drive by it. I had occasion to go by it every day.

Q. And casually noticed it?

A. Yes.

JOHN C. STUART, recalled for plaintiff.

Direct Examination by Mr. Horner: 20

Q. Mr. Stuart, since you were on the stand this morning have you gone home and tried to find your records of the corn crops for the different years?

A. Yes, got the statements of the commission men that sold the corn for me.

Q. Is that the only record that you have?

A. That is all.

Q. Now in 1913 how many acres of corn did you raise? 30

A. In 1913 I had eight acres.

Q. Was a part of this twenty-four acres in that eight?

A. Yes.

Q. Have you here your memoranda of sales slips for that year?

A. Yes.

Q. Well, what were the receipts from that year from eight acres?

A. \$1,214.67 in 1913.

Mr. Horner: Does the counsel want to examine these slips?

Mr. Gaskill: Yes, sir.

10

(Examines slips.)

Q. Have you examined your files for the sales of 1914?

A. 1914, yes.

Q. And do you know what they aggregate?

A. The New York sales are here but there was a little more corn sold in 1913 that are not on these slips.

Q. How much more?

20 A. They show 536—Is that slip here that I had?

(Slip handed witness.)

A. \$532.91, sold in New York, and there was some other sold nearer home that brought the amount up to \$885 that I testified here this morning.

Q. Have you searched for the data, for the additional data of the Philadelphia sales?

A. Yes, sir.

30 Q. Could you find it?

A. No, I didn't find it.

Q. You have no books of entry or anything other than those slips?

A. No, I don't have any books of entry. I simply put these on file.

Q. How many acres of corn did you have in sugar corn in 1915?

A. Ten acres.

Q. Are these the sales slips which you have been able to find?

A. I took them off the file. I didn't have time to compute what the amount was.

Q. We will let counsel do that. These are the ones, are they?

A. Yes, sir.

10

Mr. Gaskill: It is very kind of you. I think we will let the jury do it.

Mr. Horner: Cross examine.

Mr. Gaskill: I cannot cross-examine on these at this time. I reserve the right, if your Honor please, if I want to cross-examine on these, to do it. You were going to put them in evidence?

20

Mr. Horner: Yes. I offer them in evidence.

(Papers marked Exhibits P 5, P 6 and P 7.)

PLAINTIFF RESTS.

30

MOTION FOR NONSUIT

Mr. Gaskill: If your Honor please, it seems to me that this case must end right here as a matter of law, and I move to nonsuit the plaintiff on two grounds: first, because the evidence of the plaintiff establishes there was no warranty. There was nothing but an expression of
10 opinion or recommendation. Your Honor may, perhaps, under the decision feel constrained to send that question to the jury, but I will present that to the court and insist upon it as being a proper matter for disposition by the court, as I understand the law. But my second point I press strenuously and that is this: that they have not proved any breach of the so-called warranty. Now admitting for the sake of argument that the conversation that took place between these parties was a warranty,
20 have they shown a breach of it? The mere fact that the crop failed is not a breach of the warranty. The breach of the warranty must be an exhibition on the part of the plaintiff by testimony of facts contrary to that which was stated as the recommendation or as the warranty. Now what was the warranty? And have they negated that warranty? Unless they negative that, as a matter of course they have no standing.

The expressions of the plaintiff were somewhat general and vague. As a matter of course there is no written warranty at all, it is merely oral; and in order to reduce
30 it to a warranty I call your Honor's attention to that which he testified to on the former trial, and your Honor has one of those books. It is on page 15, and he testified that with the exception of the word "crude," which appears in the second line on this page, that what he said at the former trial was exactly what was stated at the time

the contract was made for the sale of the fertilizer, and that therefore that constitutes the warranty that was made at the time. And I submit when your Honor looks at that, that they have not proven any breach of that warranty. Now let's see what was the warranty. "I told him I wanted fish (omitting the word "crude") for my early corn crop and I preferred that and I asked him if he had any dried and ground fish." Now here comes the reply, and this is the so-called warranty, which I submit that they have not shown any breach of: "He assured 10 me that that (the stuff that we are talking about) was dry enough to drill and would give me as good results as any fish there was on the market." Now in order to show a breach of warranty they have got to show the character of fish which was on the market at that time and show that this did not give as good results as the other fish which was on the market at that time. That is the so-called warranty, and the breach of it is that this would not and did not or could not give as good results as other fish on the market at that time. Now there is not a 20 particle of testimony in the case as to other fish on the market at that time. These farmers have been asked as to whether or not they have used fish and whether or not fish was a suitable fertilizer for corn, but there has been absolutely no comparison between the fertilizer sold at this time by these parties with similar fertilizer or fish fertilizer on the market at that time, and there is no proof that other fish fertilizer used at this time, in the spring and early summer of 1914, produced any better results 30 than were produced by this fish fertilizer.

I submit therefore that there has been no breach of the so-called warranty and that there should be a nonsuit.

(Mr. Horner replies.)

The Court: The motion will be denied.

(Objection noted for defendant as ground of appeal.)

DEFENDANT'S TESTIMONY

10

CHARLES H. ROBERTSON, sworn for defendant.

Direct Examination by Mr. Gaskill:

Q. Mr. Robertson, where do you reside?

A. Baltimore.

Q. What is your business?

A. Manufacturer of fertilizers.

Q. Were you with Mr. Page the day that the sale of
20 the fertilizer in question was made to Mr. Stuart?

A. Yes, sir.

Q. Who conducted the negotiations?

A. I did.

Q. Did Mr. Page take any part?

A. No, not that I know of.

Q. What was it that Mr. Stuart asked you for in the
shape of fertilizer, or what conversation did he have in
reference to fertilizers?

A. I told him that I had the regular, the complete
30 goods, and then the crude fish dried with chemicals, and I
think he bought some of all.

Q. We don't care about any part except that which
relates to the controversy here in question. Now what
was it you said you told him about that?

A. That I had some crude fish dried with chemicals

and that would drill; and he wanted especially the fish to drill.

Q. And what guarantee or warranty if any did you make?

A. I didn't make any.

Q. What representation or expression of opinion did you give?

A. Not any.

Q. Was any question raised or anything said as to the manner in which this fish had been chemically treated? 10

A. Yes, I told him it was dried with tobacco stems. Ordinarily you can't drill—

(Objected to.)

A. That is my conversation.

Mr. Horner: That is all right, what he told him, but I don't want the philosophizing of the witness.

Q. What was it that you told Mr. Stuart on that occasion? 20

A. That I had the crude fish dried with chemicals.

Q. And what if anything about the tobacco stems?

A. That the tobacco stems were in the crude fish?

Q. And why were the tobacco stems ground up with the crude fish?

A. In order that it will drill.

Q. In order that it would drill?

A. Yes. 30

Q. Is it a drier?

A. Yes, it is a drier.

Q. What is the condition of crude fish not chemically treated and without any drier in it?

A. It is very wet and lumpy. You can't drill it, as a matter of fact.

Q. Is it necessary to mix something with it if it is to be drilled?

A. Yes.

Q. Now how had this fertilizer in question been chemically treated?

A. With tobacco stems.

Q. Is that the only treatment it had had?

10 A. So far as I know, sir.

Q. Do you remember whether or not on that occasion or that day you sold some of this same fertilizer to Mr. Strauss?

A. I sold other goods, I don't know whether it is that day or not, but I sold other goods of the same character to parties over on the riverfront.

Q. When you say other goods, you mean some of these same goods?

A. Some of the same goods to other parties on the
20 riverfront.

Q. Did you sell any of that same goods to a Mr. Strauss, near Baltimore?

A. I did, sir.

Q. That same season?

A. Yes, sir; that same season.

Q. For the season of 1914?

A. Yes, sir.

Q. Did the tags which were on the bags correctly represent the contents of the bags, the character of the
30 fertilizer?

A. I wouldn't say that. The stupid boy at the factory didn't follow out the instructions, you see. That is, he didn't put all on the tag that it should have contained.

Q. In other words, there is simply the word "Crude fish," instead of "Crude fish, chemically treated"?

A. Yes, and the order also should have been written the same way.

Q. But what you sold to Mr. Stuart was crude fish chemically treated ?

A. Chemically treated.

Q. So as to pass through the drill?

A. That is it.

Q. That is what he wanted?

A. That is what he wanted and that is what he got.

Q. And that is what he got?

10

A. Yes.

Q. Did he ask you whether or not it was good for corn?

A. I don't remember.

Q. What recommendation or commendation did you make if any in making this sale to Mr. Stuart on that day?

A. I didn't make any.

Q. He simply asked for a fish that would go through the drill and you sold him that?

20

A. I sold him that.

Cross Examination :

By Mr. Horner :

Q. Well, now, Mr. Robertson, you say you sold Mr. Stuart some fish chemically treated; is that right?

A. How is that, sir?

Q. You say that you sold to Mr. Stuart crude fish chemically treated?

30

A. Dried with chemicals.

Q. Crude fish dried with chemicals?

A. Chemicals.

Q. And that is what he bought of you?

A. Yes, sir.

Q. Now, Mr. Robertson, you as a matter of fact for Mr. Page made out this sales slip, did you not?

A. I did.

Q. And the initials with the name, "L. A. Page, C. H. R." is in your handwriting?

A. Yes.

Q. I call your attention to this exhibit and see if this entry is not, "10 tons crude fish, \$28."

10 A. You see you haven't enough room from here to there. (Indicating.)

Q. You hadn't enough to put "Chemicals," but you put only the words, "Crude fish," on there, there is nothing about chemically dried. Now on those tags you say that they were marked "Crude fish," weren't they? There was plenty of room on the tag to put "Chemically dried," wasn't there?

A. I don't know.

Q. Well, you said it was a stupid office boy that did
20 it?

A. Yes.

Q. He put exactly the same things on those tags that you had on the checks, didn't he? You have seen those tags?

A. What is it?

Q. He put the same name on those bags that you put on the sales slip, didn't he?

A. Yes, he did.

Q. And you say it was not crude fish?

30 A. What?

Q. This stuff that you sold Mr. Stuart was not crude fish, was it?

A. He understood—

Q. I didn't ask you what he understood; I ask you as a matter of fact whether you sold Mr. Stuart crude fish.

- A. No, I never sold him crude fish.
Q. But you charged him with crude fish?
A. No, I never charged him with crude fish.
Q. That sales slip says, "Crude fish," doesn't it?
A. It says crude fish, but that is not what I sold him.
Q. Your sales slip says "Crude fish," doesn't it?
A. Most positively it does.
Q. Suppose then you sell me apples and you put down peaches—

10

(Objected to.)

(Question withdrawn.)

- Q. This tag says, "Crude fish," does it not?
A. That tag says "Crude fish."
Q. Did you sell him crude fish?
A. No, I didn't.
Q. Did you ship him crude fish?
A. No, I didn't.
Q. The tags call for crude fish, don't they?
A. Yes.

20

Q. Now, Mr. Robertson, you said in response to a question from my friend Judge Gaskill, or several questions, that at the time this order was taken that you made no recommendations, no guarantees, no warranties, you expressed no opinion or made any commendation; is that true?

- A. I told the Judge that.
Q. Is that true?
A. I told the Judge that.
Q. Well, is it true?
A. Yes.
Q. Do you mean to say that ever in your life you ever sold a bag of fertilizer to a man in which you made no

30

recommendations, no guarantees, no warranties, expressed no opinions or made no commendations?

(Objected to as incompetent and not cross-examination.)

Q. Is it not a matter of fact, is it not an invariable custom with salesmen, fertilizer salesmen, when making a sale to tell the purchaser the good qualities of the fertilizer and what it is especially adaptable for?

(Objected to as incompetent.)

Mr. Horner: I think it is competent. Here is a man comes along and says, "I made no general representations." Now I may show it is a singular occurrence, because it is the universal custom.

The Court: Well, Judge Horner, custom would not be of any consequence, would it? It is what occurred on this occasion. Your client says there was and he says there was not a representation made, and let us keep it down to that issue, please. What might have happened to somebody else at some other time under other circumstances is not competent.

Q. Mr. Robertson, did Mr. Stuart tell you the purpose for which he wanted that fertilizer?

A. I don't recall.

30 Q. You don't recall?

A. Possibly he did.

Q. Now he having told you that he wanted a fertilizer for sweet corn or sugar corn, did you not as a matter of fact recommend this for that purpose?

A. I told him I had —I don't recall, but I told him I had a crude fish dried with chemicals that would raise any crop that he wanted.

Q. Oh, that is what you told him, that it would raise any crop that he wanted?

A. Yes.

Q. Was that true of this fertilizer you actually gave him?

A. Yes, that would raise it.

Q. Did you tell him that the stuff you sold him would raise any crop that he wanted? Did you tell him that? 10

A. Well, I don't know that it was just in those words; I can't recall.

Q. In substance did you tell him that?

A. I don't remember.

Q. Well, now, didn't you just say a moment ago that you told him?

A. So far as getting the exact words I can't recall that.

Q. Then I want to go back in the cross examination 20 and ask you if that was not a comment on your fertilizer. wasn't that a comment on your fertilizer?

The Court: Isn't that for the jury, Judge Horner?

Re-Direct Examination.

By Mr. Gaskill:

Q. Mr. Robertson, isn't it a fact that crude fish not chemically dried or prepared and not having any tobacco stems in with it or any other substance, is much higher in price than this material that you sold him? 30

A. Yes, very much higher.

(Objected to as immaterial and irrelevant.)

The Court: Well, what has that to do with it?

Mr. Horner: That is what I say, why take our time?

Mr. Gaskill: No crude fish, strictly speaking, not chemically prepared and without any tobacco stems or anything of that kind, is worth \$35 or \$40 a ton.

10

The Court: Does he say he didn't sell the man crude fish?

Mr. Gaskill: Yes, he sold him this other thing, which was delivered to him, so he says.

The Court: And not crude fish?

Mr. Gaskill; No. They are insisting on the crude
20 fish. I propose to show that crude fish was selling at \$35 or \$40 a ton and this was \$28 a ton.

The Witness: Pure crude fish was sold at about \$42 a ton.

The Court: Then if I understood, the position of the defence is that crude fish was not sold to the plaintiff and was not delivered?

30 Mr. Gaskill: No, sir; that is our position. We sold him something that would pass through the drill, as he asked us to. That is our position.

JOEL E. STRAUSS, Sworn for defendant.

Direct Examination by Mr. Hillman:

Q. Mr. Strauss, where do you live?

A. Baltimore.

Q. Where did you live in the year 1914?

A. Baltimore.

Q. Did you own a farm near Baltimore that year?

A. Yes.

10

Q. And about how far from Baltimore?

A. About two miles.

Q. Did you farm that place yourself?

A. Yes, sir.

Q. Did you do the manual labor yourself, I mean?

A. No, sir.

Q. You employed some one to do that but you superintended the farming?

A. Yes.

Q. During that year did you purchase from Mr. Robertson any fertilizer?

A. Yes, sir.

Q. And did you use that fertilizer on that farm?

A. Yes, sir.

Q. For the growing of what crop did you use that fertilizer?

A. Corn.

Q. Did you raise any sugar corn?

A. Yes, sir.

Q. How did you prepare the ground for the sugar corn?

30

A. Well, we put regular manure on the ground in the winter, plowed it under and harrowed it, and then we used this fertilizer with the drill.

Q. How much per acre did you put on?

A. Around six hundred pounds.

Q. And you put it in sugar corn that year?

A. Well, not all of it.

Q. About how many acres of sugar corn did you have?

A. Why, four acres of sugar corn and four acres of other corn.

Q. And what have you to say of the crop of sugar corn which you got that year?

10 A. Well, we thought it was the best we ever had on the farm.

Q. You had farmed this farm four years?

A. Four years.

Q. You had raised sugar corn there other years?

A. Yes, sir.

Q. And the crop that you got in 1914, how did that compare with the crop that you had obtained in former years?

A. Well, in former years if we got 6,500 ears to the
20 acre we thought we were doing wonderfully well, and in 1914 was got around 8,000.

Q. And what kind of soil is this naturally?

A. Well, it is good soil, loamy.

Q. Well, is it sandy?

A. Not very sandy.

Q. And that is the fertilizer that you used, the fertilizer that you purchased from Mr. Robertson?

A. Yes, sir.

30 Cross Examination.

By Mr. Horner:

Q. Are you a farmer?

A. No, sir.

- Q. What is your business?
A. Automobile business.
Q. Where is your place of business?
A. On the corner of Royal Avenue and McMichan.
Q. How far away from your business is this farm?
A. Oh, it is about, I guess, five miles.
Q. How often do you see the farm?
A. Well, I was in a different business then.
Q. What business were you in then?
A. I was a quarter of a mile away from the farm 10
then.
Q. How often did you see the farm then?
A. Three or four times a week.
Q. Did you plant the corn?
A. No, sir; not myself.
Q. Did you use the fertilizer?
A. No, sir.
Q. Then you don't know of your own personal know-
ledge that this fertilizer was used there at all, do you?
A. I do. 20
Q. How do you know?
A. Saw it put in.
Q. Did you see the tags on the bags?
A. No, sir.
Q. The bags were not tagged?
A. No, sir.
Q. Do you know what kind of fertilizer you bought?
A. I thought I knew.
Q. What did you buy?
A. A mixture of tobacco stems and fish. 30
Q. Did you buy any crude fish?
A. I don't know if it was crude or what it was.
Q. You don't know what you bought, do you?
A. Yes, I do.
Q. What did you buy?

A. A mixture of tobacco stems and fish.

Q. Was it so labeled?

A. I didn't get any label. I happened to know Mr. Wyant, and it was through Mr. Wyant I got it, and I asked for a good fertilizer and he told me he could give me something that would do the work and give me a good crop.

Q. Did you tell him what you wanted it for?

A. Yes.

10 Q. He gave you a fertilizer and you used it?

A. Yes.

Q. Do you know that it had tobacco stems in and fish?

A. Yes, he told me.

Q. I don't care what he told you. Do you know it?

A. Yes, he told me.

Q. Do you know that it had tobacco stems and fish in it?

A. I am not a chemist. I took his word for it.

20 Q. You don't know anything except what he told you? It might have had lots of things in it, might it not?

A. Possibly, yes.

FRANK S. HERR, Sworn for defendant.

Direct Examination by Mr. Hillman:

30 Q. Mr. Herr, where do you live?

A. I live in Moorestown.

Q. You are connected with the Burlington County Farmers' Exchange?

A. Secretary and treasurer.

Q. You have held that office for how long?

A. For four years.

Q. In the year 1914 did the Burlington County Farmers' Exchange engage in the sale of sugar corn for different people?

A. They did.

Q. Did you have charge of the receipts from those shipments?

A. I did. Well, you are speaking of charge of receipts. It sold on commission. The check is sent to them and we receive a rebate on them. 10

Q. But the accounts came under your supervision?

A. Yes.

Q. Where was that corn principally shipped by you?

A. From what station? At Beverly.

Q. To what station?

A. Newark and New York; New York principally.

Q. From what station was it shipped?

A. Well, from Edgewater Park, Beverly, and as far up as Stevens.

Q. Do you know what the average gross price of corn was that year? 20

A. Yes, sir; taken from our books the average gross price of 2,300 and some sacks that we shipped along there was \$1.11.

Q. \$1.11 per sack?

A. \$1.11 per sack of 100 ears, and some sacks had 125, but they called them 100, because there was no mark on it whether there was 125 or more.

Q. What was the net return?

A. The net return was 75- $\frac{1}{2}$. 30

Q. Per sack?

A. Per sack, per hundred, which is per sack.

Q. And in arriving at the net you deducted from the gross what expenses?

A. We deducted the expenses as given on our sales

sheet from the commission merchants, expenses for freight, for cartage and commission. The slip is made out and copied in our book from the commission man, how much it brought, what the gross was, so much cartage and so much freight, and the rest is net.

Q. What is the commission, how much is the commission?

A. Ten per cent.

Q. What is the express on a sack of corn or bag of
10 corn?

A. I don't know, I can't tell you. Around forty cents I think, a sack.

Q. What is the freight?

A. I can't tell you that. It is given in those sales sheets you have there.

Q. What is the freight?

A. The freight is around fifteen cents a hundred, and ten cents a sack or hundred for carting.

20 Cross Examination.

By Mr. Horner:

Q. Mr. Herr, was this early sugar corn throughout the whole season?

A. This was throughout the whole season. In making up this average some of it sold at \$3, so as to be square with you, and brought that down.

Q. Mr. Herr, you couldn't help but be square with
30 everybody.

A. That is right.

Q. Let's see. This corn of Mr. Stuart's was early sugar corn, running along in July. You ran along in August and September, didn't you?

A. Yes.

Q. Can you average what the price was from the beginning of the season up to July?

A. Our first shipment that we had was the 16th of July and from that up to the 21st of August.

Q. Then you only got the tail end of the season?

A. No, I beg pardon; we got corn that was pulled that year three times. It was early corn that year.

Q. So you there in this computation included the early and the late both?

A. Sure, I have.

10

Re-Direct Examination.

By Mr. Hillman:

Q. Was some of that corn shipped by Mr. Stuart?

A. It was.

Q. Do you know what his corn averaged?

A. In 1914 his average per sack—he only had one shipment of thirty sacks—his average net sack was 65 20 cents. We have the sales sheets to show.

HENRY B. WRIGHT, Sworn for defendant.

Direct Examination by Mr. Hillman:

Q. Mr. Wright, where do you live?

A. Near Mount Holly.

30

Q. And what is your business?

A. Farming.

Q. How long have you been engaged in farming?

A. Well, all my life.

Q. You are a director of the Burlington County Farmers' Exchange?

A. I am.

Q. Have you ever raised sugar corn, Mr. Wright?

A. I never raised sugar corn only for our own purposes.

Q. Have you raised sugar corn for your own purposes?

A. Yes.

10 Q. Have you seen other people raise sugar corn?

A. Yes.

Q. Of your own knowledge do you know whether there are any causes other than lack of fertilization which affect the growth of corn?

A. Yes.

Q. What other causes are there?

A. Well, I have seen fields attacked with lice.

Q. And when a field is attacked with lice what appearance does the corn have?

20 A. Well, it has the same appearance as has been spoken of here, of it turning yellow, as though the sap of the corn was being sucked from it, and consequently retarding it very much. Sometimes it recovers and sometimes you very often see stalks that really die, turn brown.

Cross Examination.

By Mr. Horner:

30

Q. Did Mr. Stuart's corn have lice?

A. I don't know. I didn't see Mr. Stuart's corn.

DEFENDANT RESTS.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

JOHN C. STUART, recalled for plaintiff.

Direct Examination by Mr. Horner:

Q. In 1914 did your corn have any lice?

A. No, I never heard of corn having an attack of lice 10
in my life before.

BOTH SIDES REST.

CHARGE OF THE COURT.

20

CARROW, J. Gentlemen, this is an important case, and it must be decided by you in strict accordance with the law and the proof, regardless of the consequences and regardless of who the parties are or what they are. The law has no favorites, both parties stand upon an equal footing, so that neither party has any superior rights over the other in this courthouse.

Plaintiff contends that defendant, the Farmers' Exchange, in the fall of 1913 sold him a fertilizer called crude fish, and that said fertilizer was either expressly 30
or impliedly warranted as to kind and quality. I have said that was the plaintiff's contention, but I have not said that that contention was sustained by a preponderance of evidence. For whether it is or not is a jury question which you must decide. It is a question calling for

careful investigation and a clear understanding of the evidence and sound judgment.

The law of New Jersey defines an express warranty, and I will read the statute to you:

“Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.” Now I will read that over
10 again. (Reads.) But bear in mind, “No affirmation of the value of the goods nor any statement purporting to be a statement of the seller’s opinion only, shall be construed as a warranty.”

What I have just read you relates to express warranty. Now warranties are of two kinds: either express or implied. The law of New Jersey defines an implied warranty, “Subject to the provisions of this act and of any statute in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of the goods supplied under a contract to sell or a
20 sale, except as follows: where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller’s skill or judgment (whether he be the grower or manufacturere or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.” I will again read that statute to you. (Reads.)

Now the defendant denies that it sold plaintiff crude
30 fish; but upon the contrary says it sold plaintiff exactly what he go, which, according to the admitted proof, was not crude fish. Of course if that is so, gentlemen of the jury, plaintiff cannot recover in this case. Therefore the first question of fact which you must take up and decide when you retire whether it was crude fish that the

plaintiff bought or whether it was the other sort of fertilizer which the defendant says it sold the plaintiff and which was delivered to him. That is the first question of fact, bear that in mind, when you go to the jury-room. Take that up and decide it. If, as I have said, you decide that the plaintiff never brought crude fish, then of course he cannot recover in this case.

But if it was crude fish that he bought, then you must decide whether in the light of the law which I have read and the proof which you have heard the fertilizer was 10 warranted, either expressly or impliedly; because whether it was warranted or not, either expressly or impliedly, is a question of fact under the law which the court has given you. It is a question which you must decide. The warranty was not required to be in express language, as you will observe from the statutes which I have read to you. It depends upon circumstances and must be the result of legitimate inference, an inference based on the proof of fact.

If you decide that there was no warranty—and in say- 20 ing no warranty I mean no warranty either express or implied—the plaintiff cannot recover; because his case is predicated upon the theory of a warranty, either express or implied. Plaintiff has the burden of proof and cannot succeed except by a preponderance of the evidence. Bear that in mind, gentlemen.

If you decide that there was a warranty, either express or implied, you will then take up and decide the next question, which is as important as the first question; and that question is whether any breach of warranty has been 30 shown in this case. Just as I said, the plaintiff has the burden of proof and must establish a warranty, either express or implied, by a preponderance of evidence, so must the plaintiff establish a breach of that warranty by a preponderance of evidence. It makes no difference, if

there was a warranty and no breach, the plaintiff cannot recover any substantial damages.

If you decide there was a warranty, either express or implied, after you have decided that the plaintiff was to get crude fish fertilizer, and you decide that there was a breach of that warranty—and you can only decide these questions when the proof by its preponderating force establishes plaintiff's contention—you will then take up and consider the question of damages. The damages are
10 not a matter about which you can guess; the damages must be proved in the same way as the other questions, by a preponderance of evidence. The plaintiff can get no damages that he has not proved. The damages, as I have said, must be proved by a preponderance of evidence. The damages must have been the natural, necessary and proximate consequence of the breach of warranty. Keep that fact in mind. The damages relate to the breach of the warranty. To be more specific, the law of the state has laid down the measure of damages: "The measure of
20 damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty."

Plaintiff contends that he had a poor crop of corn in 1914, which only netted him about \$885, and that if the fertilizer had been up to the warranty he would have netted considerably more. Plaintiff attributes his loss to the breach of warranty. But you as intelligent men must determine from the proof what the truth is in respect to that matter, because the alleged failure of the corn crop
30 may not have been due either in whole or in part to the breach of warranty relied on in this case, of quality of the fertilizer in question. It is a matter of common knowledge which you gentlemen of Burlington County know without my saying it, that many causes enter into the failure of agricultural crops. And defendant would

not be responsible for any cause not directly attributable to the breach of warranty. Therefore when you take up the question of damages you must in all fairness intelligently look into the situation and say how much of the failure of this crop is directly traceable to the breach of warranty relied upon in this case; in other words, to the kind and quality of that fertilizer. (To counsel:) Do you desire these requests of yours?

Mr. Gaskill: I think the second one had been practically covered, but the first, as to just what the definition of a warranty is. 10

The Court: Well, the statute —

Mr. Gaskill: The statute says what was a warranty, but what is meant by a warranty.

The Court: As I have been asked to charge you gentlemen, a warranty is an agreement to indemnify against loss. But as I said awhile ago, it does not have to be expressed in writing or in any formal words. You must determine from the testimony in this case the conversation between the buyer and seller in the light of the law which I have read to you, whether there was or was not a warranty, either express or implied. 20

There is a counterclaim here, I believe, of \$110, upon which there is no dispute. If you resolve all these questions that the court has propounded in favor of the defendant you will bring in a verdict of \$110 against the plaintiff. If, however, you resolve the questions which the court propounded in favor of the plaintiff and against the defendant, when you fix the amount of damages, if they exceed \$110.49 you will deduct \$110.49 from the amount. 30

Mr. Gaskill: The third request, Judge, I do not think you have touched upon that subject in your charge. I don't recall it.

The Court: I have been asked to charge you that plaintiff was bound as soon as he saw that the crop of corn was not going to be as profitable as usual, to take all practicable steps to minimize the loss in damages. That is true. The protecting power of prudence, which every
10 man has and which he must exercise for the protection of his property, requires him to look after his property the best way he can and keep down the damages; and if he could reasonably have kept the damages down and had a better crop it was his duty to do it and that you must take into consideration.

EXHIBIT P 1.

BURLINGTON COUNTY FARMERS' EXCHANGE.

SALESMAN'S ORDER

Date Sept. 22 | 13.
 Ship or,
 Deliver to John C. Stuart 10
 P. O. Beverly
 via Rail
 Delivery Point Beverly

ARTICLE

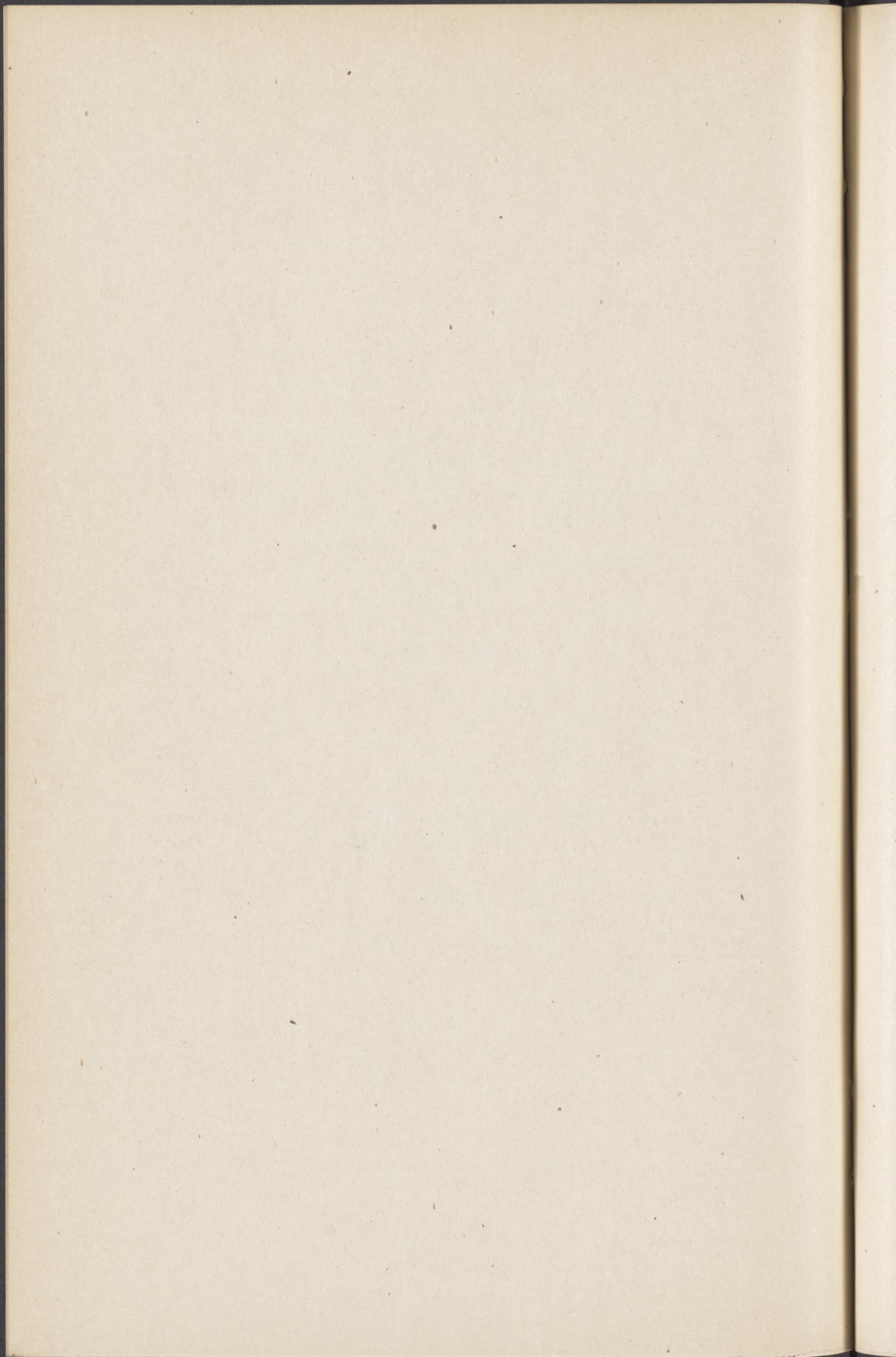
20

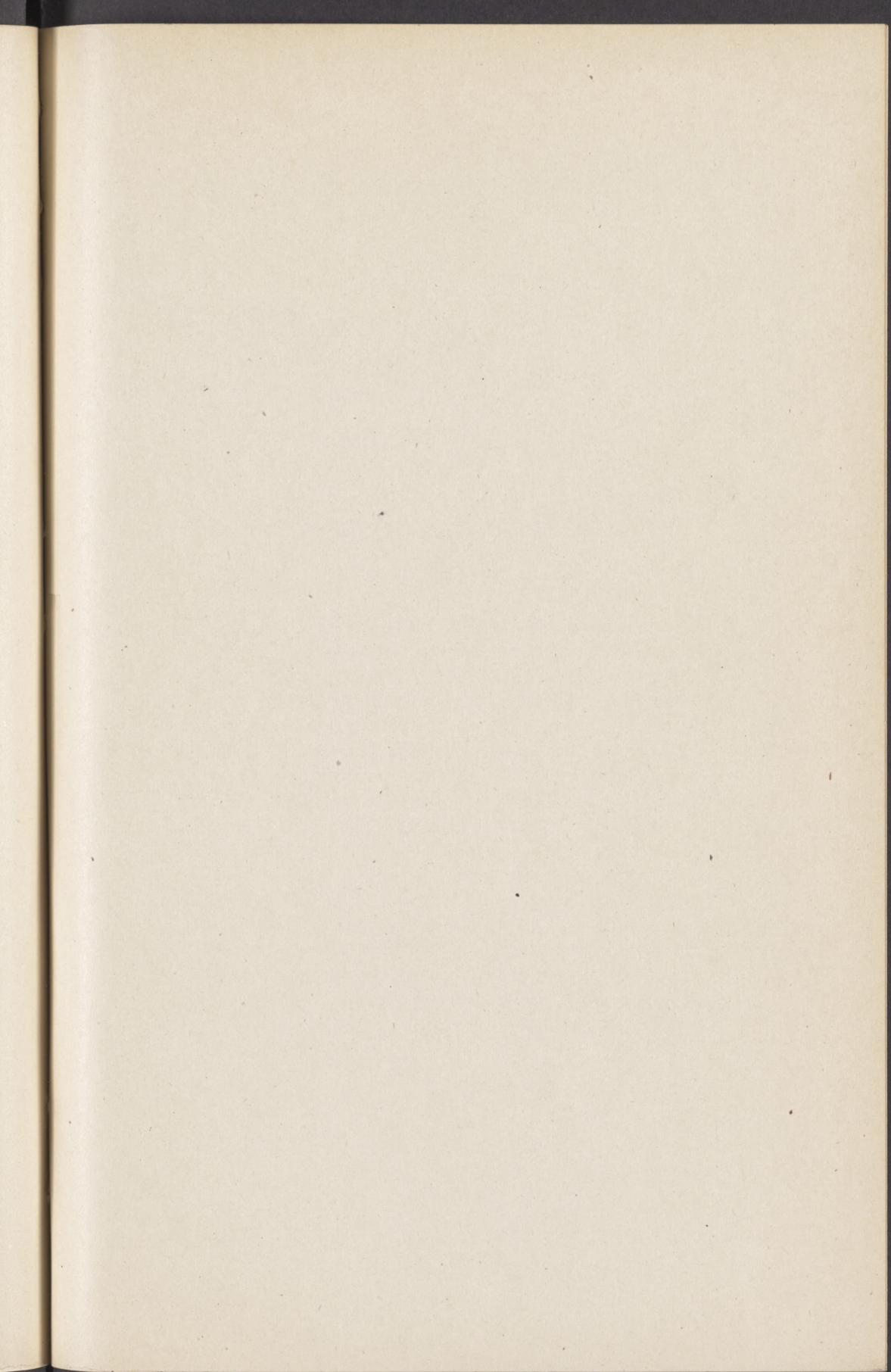
10 tons Crude Fish	\$28.00
5 " 5-8-8.	29.75
3 " 4-8-7	

Time Sept 1914
 Feby. 1st 1914 4

Signed L. A. Page Salesman
 C. H. R. 30

No. 26





120
Brt

NEW JERSEY COURT OF ERRORS AND APPEALS.

John C. Stuart,
Plaintiff and Respondent,
vs.
Burlington County Farmers' Exchange,
Defendant and Appellant.

On Appeal.

BRIEF OF DEFENDANT AND APPELLANT.

This is an appeal from a judgment recovered by the plaintiff against the defendant in the Burlington County Circuit Court. Plaintiff sued to recover damages which he alleged he had sustained because certain fertilizer purchased by him from defendant, and used in growing sugar corn was not as warranted, in consequence of which he obtained a smaller crop than he would had the fertilizer been as warranted. Plaintiff in his complaint (pages 4, 5 and 6, State of Case) set forth in the first count that he bargained with defendant for the purchase of ten tons of crude fish and that defendant did not deliver crude fish but delivered him a worthless substitute, by the use of which he was damaged; and in the second count, that defendant warranted the crude fish so sold to be good for the purpose of plaintiff, to wit: the growing of sugar corn; and that the

fertilizer so delivered was not as warranted by defendant, and was not good for the raising of sugar corn. The jury rendered a verdict against the defendant and in favor of the plaintiff for one thousand dollars and it is from this judgment which defendant appeals. There are eight grounds of appeal.

The first is that the plaintiff was permitted to testify over the objection of defendant as to a conversation had between him and one Lewis A. Page. This testimony is found on page 18, State of Case, lines 8 to 33. It was to the effect that Page, who was the agent of the defendant in making the sale of the fertilizer in question, had made certain representations concerning the quality of the same. Objection to the admission of this testimony was made on the ground that the contract for the sale of the fertilizer was in writing, evidenced by a paper just offered in evidence by plaintiff (page 17, lines 1 to 8). This testimony was inadmissible. "If the contract of sale is in writing, its terms are conclusive as to the existence and the extent of expressed warranties made before, or at the time of the sale, and evidence of prior or contemporaneous verbal agreements or representations is not admissible for the purpose of proving other or different warranties; the parties are presumed to have included in the written instrument all the terms of their agreement." *Am. and Eng. Enc. of Law*, 2nd Ed., volume 30, page 168. *Naumberg vs. Young*, 15 Vroom, 331. *Quemahoning Coal Company vs. San. Earth Spec. Co.*, 3 Gummere, 174, 175. The learned trial Judge erred in overruling defendant's objection and permitting this testimony.

The second and third grounds of appeal are that the plaintiff, John C. Stuart, was permitted to testify as to conversations had by him with Mr. Embree,

the agent of defendant corporation. The two questions admitted over defendant's objection being, "Who did you speak to at the Farmers' Exchange? (page 22, line 22) and "What did you say to Mr. Embree and what did he say to you? (page 25, lines 23 and 24). These questions were improper and it was error to admit them. They related to conversations had by plaintiff with an agent of the defendant, not the one who had made the sale in question, and at a time long after said sale, and the alleged statement of Mr. Embree was not made in pursuance of, and as a part of the business of defendant in selling the goods in question to the plaintiff. *Wigmore on Evidence*, volume 2, paragraph 1078, *Ashmore vs. Penna. Steam Towing and Trans. Co.*, 9 Vroom, 13. *Blackman vs. West Jersey and Seashore Railroad Company*, 39 Vroom, 1. *Hayes vs. Jersey City, &c., Railway Co.*, 44 Vroom, 639, 641, 642.

The fourth ground of appeal is that the following question was admitted, to the witness, John C. Stuart. "Now, Mr. Stuart, what was it that was "said by Mr. Page at the time this order was placed "that induced you to place this order for fertilizer?" (page 52, lines 24 to 35 and page 53, lines 1 to 5). Not only had the witness, Stuart, been previously examined fully both on direct and cross-examination, on this point, but the question was improper for the reasons already given concerning the first ground of appeal.

The fifth ground of appeal is that the following question to the witness, Howard Russ, was admitted. "From your experience as a practical farmer what "would be the yield or yield per acre of sugar corn "and early corn when planted and fertilized with "crude fish on an average season?" (Page 79, lines

28 to 35.) The inquiry in the case should have been limited to the year in question, 1914. It was immaterial what the average yield of corn was, or what the yield was in any year save the year 1914. Testimony as to what amount of sugar corn had been or might have been produced in any other year, was of no value and would only tend to confuse the jury. Plaintiff was seeking only to recover for the damages which he had sustained in 1914. Furthermore, the only warranty which plaintiff had shown (page 34, lines 12 to 35; page 35, lines 1 to 18) was that the fertilizer was dry enough to drill and would give as good results as any fish that was on the market. This, of course, meant any fertilizer then, in September, 1913, the date of the sale, on the market. *Amer. and Eng. Enc. of Law*, 2nd Ed., volume 30, page 176. Testimony therefore by the witness, Russ, as to the average production of corn per acre in other years was irrelevant. The inquiry was limited to the production of sugar corn in the year 1914, and by the use of fish on the market, in September, 1913.

The sixth ground of appeal is the refusal of the trial Court to strike out the following answer of the witness, John C. Stuart. "I said the crude fish was "not right, that it could not have been as represented; and he said if it was not right they would "make it right. And on one occasion I said to him "probably I should not have purchased so much "until I tried it out in a small way. He said it "didn't make any difference whether it was one ton "or a thousand, we stand behind what we sell. It "must be as represented." (Page 28, lines 25 to 33.) This testimony was irrelevant. It was as to a conversation with Mr. Embree, agent of defendant. As a new and independent warranty made long after

the sale and upon no new consideration it was of no validity. As a declaration of an agent of the defendant corporation, not made at the time of the transaction, nor forming a part of the same it was inadmissible. *Runk vs. Ten Eyck*, 4 Zab. 756. *Agricultural Ins. Co. vs. Potts*, 26 Vr. 158. *Ashmore vs. Penna. Steam Towing Co.*, 9 Vr. 13. *Blackman vs. West Jersey & Seashore Railroad Co.*, 39 Vr. 1, *Heuber vs. Erie Railroad Co.*, 40 Vr. 327; *Hayes vs. Jersey City Railway Co.*, 44 Vr. 639-641.

As evidential of an alleged warranty previously made at the time of sale, it was inadmissible because Mr. Embree was not present when the sale was made.

The action of the trial Judge in refusing to strike out this answer was error and worked injury to defendant.

The seventh ground of appeal is that the Court refused to strike from the testimony of the witness, John C. Stuart, all statements with reference to the sales and losses. The motion of defendant to strike out was made at the conclusion of Mr. Stuart's testimony (page 43, lines 5 to 10) and was after argument overruled (page 47, lines 22 to 30). The trial Judge erred in this ruling. The plaintiff, Stuart, had testified at length upon the subject of his profits from the sale of sugar corn raised by him. He admitted that he kept no book account of what it cost him to grow a crop (page 42, lines 29 to 32) but that he kept a book account of what he got from his corn, (page 42, lines 33 to 35) but that he did not have the books with him (page 43, lines 1 to 3) and he did not produce any. The case of *Bartow vs. Erie Railroad Co.*, 44 Vroom, page 12, and *East Jersey Water Company vs. Bigelow*, 31 Vroom 201, control, and this testimony should have been stricken out. The subsequent action of Stuart in producing certain

slips or statements received by him from commission merchants covering sales in the years 1913 and 1914 (pages 105, 106 and 107) did not supply this defect. At the conclusion of plaintiff's case defendant moved to non-suit the plaintiff (page 108). This motion the Court denied and such denial is the eighth ground of appeal. This motion was based on two grounds. First, because the evidence of the plaintiff established that there was no warranty. And, second, because the plaintiff had not shown any breach, on the part of defendant, of any warranty made by it. As to the first ground. The written agreement between the parties produced by plaintiff (page 17, lines 1 to 8) Exhibit P1, page 133, was for the sale by plaintiff to defendant of ten tons of crude fish. As a matter of course, this being a contract to sell a specified article (to wit: crude fish) under its trade name, there was no implied warranty as to its fitness for any particular purpose. Compiled Statutes of N. J., page 4651, paragraph 15, sub. div. 4. Plaintiff's contention as set forth in his complaint is that defendant did not deliver to him ten tons of crude fish. He signally failed to furnish proof in substantiation of this contention. There was no testimony offered by the plaintiff that the fertilizer sold him by defendant was not crude fish. The plaintiff saw the fertilizer when it was delivered to him, he accepted it and used it. If he knew it was not crude fish it was his duty to have rejected it then and there. The fact that he accepted and used it creates a presumption that it was crude fish, and he did not testify that it was not crude fish. The witness, Charles S. Cathcart, produced by plaintiff, testified that he made an analysis of a sample of the fertilizer delivered plaintiff and (page 59, lines 29 and 30) stated that in his opinion it was not crude

fish. He gave as his reason (page 60, lines 1 to 10) the character of the organic nitrogen found in the sample, but (page 61, line 10), he later testified that he did not know any standard for crude fish and he repeated this (page 63, line 17). He testified (page 62, lines 15 to 18), that the statement of the analysis on the tags shown to have been attached to the fertilizer in question, corresponded to the analysis which he made so that the fertilizer was not misbranded. He further testified (page 65, lines 30 to 35), that he did not know what crude fish was and (on page 62, lines 30 to 35) and (on page 63, lines 1 to 16) he testified that the sample of the fertilizer in question showed upon analysis as much and in fact more nitrogen than had been found in other samples of crude fish registered by him. Cathcart was the only witness who testified as to the character of the fertilizer in question. If the fertilizer in question therefore was sold as crude fish, and the warranty was, that it was crude fish, plaintiff had shown no breach of the warranty, and had failed to establish any case against the defendant. If the statements made by Page, the agent of defendant at the time of sale, were anything more than the mere expression of opinion, and did as plaintiff contends constitute a warranty by defendant, plaintiff failed to show any breach of such warranty.

What warranty did plaintiff prove, conceding for the sake of argument that Page's statement constituted one?

Plaintiff testified at length concerning the conversation had between him and Mr. Page, the agent and representative of the defendant at the time of the sale. He testified that Page told him he had an extra good quality of crude fish and that it would be dry enough to drill (page 18, lines 17 to 20). That

Page recommended this fish highly for that purpose (growing early corn) (page 18, line 32). That Page told him (page 31, line 20), it was good crude fish. That Page said it was as good as any fertilizer he could get for sugar corn (page 32, lines 2 and 3), and that he asked Page if defendant had any dried and ground fish and could furnish him with that kind of fertilizer (page 32, lines 31 and 32). The nature of the warranty of defendant did not very clearly appear from this testimony.

The full extent of any warranty made by defendant appears from the testimony of plaintiff on pages 34 and 35, where he testified as follows:

“Q. And you wanted crude fish or you wanted a fish fertilizer that would pass through the drill as you drilled your ground in; that is right, isn't it?

A. Yes.

Q. Now, Mr. Stuart, when this case was tried before you put the warranty in a little different form from what you do now, didn't you?

A. I don't remember.

Q. Well, listen to this and see if this isn't what you testified to then; 'I told him (that is, one or the other of the parties in the carriage or automobile) that I wanted crude fish for my early corn crop and I preferred that and I asked him if he had any dried and ground fish.' That is true, isn't it?

A. No, I think that word 'crude' is a mistake of the printer. I am absolutely certain that I didn't ask them for crude fish.

Q. But with the exception of that it was all right?

A. Yes.

Q. And that is the truth now, isn't it? What you said before is the truth today?

A. Yes.

Q. That is, that you told him that you wanted fish for your early corn crop?

A. Yes.

Q. And preferred that?

A. Yes.

Q. And asked him if he had any dried and ground fish?

A. Yes.

Q. Now, then, listen to this. Didn't you say to him that the only objection you have to 'it is often damp and sometimes sticky and does not drill well'?

A. Yes.

Q. You said that?

A. Yes.

Q. And didn't you then in your reply state as follows: 'He assured me that that was dry enough to drill and would give me as good results as any fish there was on the market'?

A. Yes, he assured me it was dry enough to drill.

Q. And that is the representation or the warranty that was made to you at that time, isn't it?

A. Yes.

Q. And that is what you say now was the warranty made at the time that sale was made?

A. That it was dry enough to drill.

Q. And that it would give you as good results as any fish there was on the market?

A. Yes.

By the Court:

Q. How do you reconcile that with your state-

ment a moment ago that he said it was an extra good quality crude fish? You said a moment ago that Page said it was an extra quality of crude fish.

A. Well, evidently in good mechanical condition. That is, it was dry enough to drill; that is the way I took it."

This was the testimony of the plaintiff. He says it was the warranty. It is upon that, which he must stand or fall. The witness, Lewis A. Page, who made the sale and who was called as a witness by the plaintiff, testified essentially the same. He said he told plaintiff that defendant had crude fish for twenty-eight dollars a ton. (Page 54, lines 3 to 6.) He stated however that the word "good" was not used either by him or Mr. Stuart (page 55, lines 19 to 21.) The only warranty then proved by the plaintiff was that the fertilizer sold *would be dry enough to drill and would give as good results as any fish then on the market*. There is no allegation or no testimony that the fertilizer was not dry enough to drill. It is admitted by plaintiff that it was, so that there was no breach by the defendant of the warranty in that respect. The rest of the warranty is that *it would give as good results as any fish there was then on the market*. Now, there is nothing appearing in the case as to any other fish on the market at that time so there could be comparison. There is no testimony that other fish fertilizers on the market in September, 1913, or in February, 1914, produced any better results in the summer of 1914, than were produced by the fish fertilizer in question. The witness, Russ, produced by the plaintiff did not testify that he used crude fish in the year 1914. The witness, Hookstra, testified that he had never used crude

fish (page 90, line 29). And no other witness testified as to using crude fish in the year 1914, and no witness testified what fertilizer he used in 1914.

It must be further borne in mind that it was nowhere alleged, and there was no testimony to the effect that defendant or its agents ever stated to the plaintiff the quantity of the fertilizer in question which should be used on a given area of land. If the fertilizer in question contained a smaller percentage of certain plant foods than other fertilizers, it is of course apparent that by the application of a greater quantity of the fertilizer in question, the same amount of plant food would have been secured, as by the use of some other fertilizer in less quantity. (Testimony Bayard H. Morrison, page 77, lines 27 to 35). Plaintiff did not contend that the fertilizer in question did not contain the several elements in the proportions stated on the tags attached to the bags in which it was shipped. On the contrary it appears from the testimony of the plaintiff's witness, that it did. (Testimony of Charles S. Cathcart, page 62, lines 10 to 19.) The plaintiff had therefore failed to show any breach of the warranty made by defendant, even adopting the plaintiff's own contention as to the extent of the warranty. The only warranty which the defendant could have made, of which a breach was shown, would have been a warranty that by the use of the fertilizer in question, in the quantity which plaintiff testified he did use, he would have secured a crop of corn equal to the bumper crops obtained by him in other years or by his neighbors in 1914. The case differs materially from the case of *Wolcott Johnson & Co., vs. Mount*, 9 Vroom, 496. In that case it was said, "Nor are the gains which have been lost subject to any uncertainty. The seed sold was planted and came to

“maturity; the seed stipulated for would have done
“the same, only the value of the produce would have
“been to a definite amount greater.” The present
case is different. The plaintiff’s proof was that he
purchased fertilizer, on a warranty that it was as
good as any other fish then on the market and was
dry enough to drill but without any statement as to
the amount which should be used. It is a matter of
common knowledge that some fertilizers are stronger
than others and a smaller quantity of one will pro-
duce the same results as a larger quantity of another.
Merely because plaintiff did not receive as good a
corn crop in the year in question as he had in
previous or succeeding years or as large a crop as his
neighbor obtained in the year in question, does not
constitute evidence of a breach of the warranty
alleged.

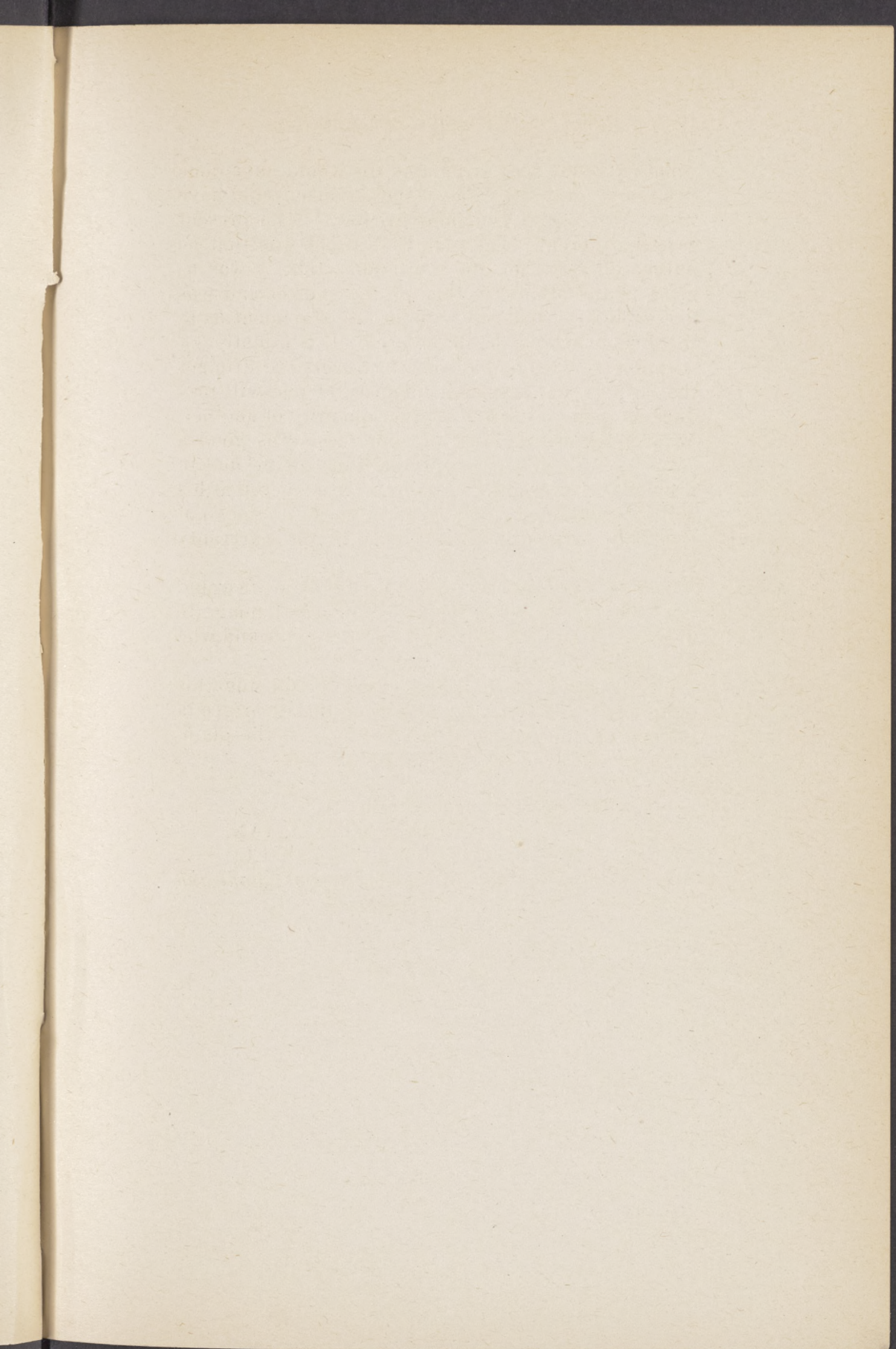
To adopt the rule contended for by plaintiff would
render every dealer in fertilizer liable in damage to
every farmer to whom he had sold his goods and who
had failed to secure large crops.

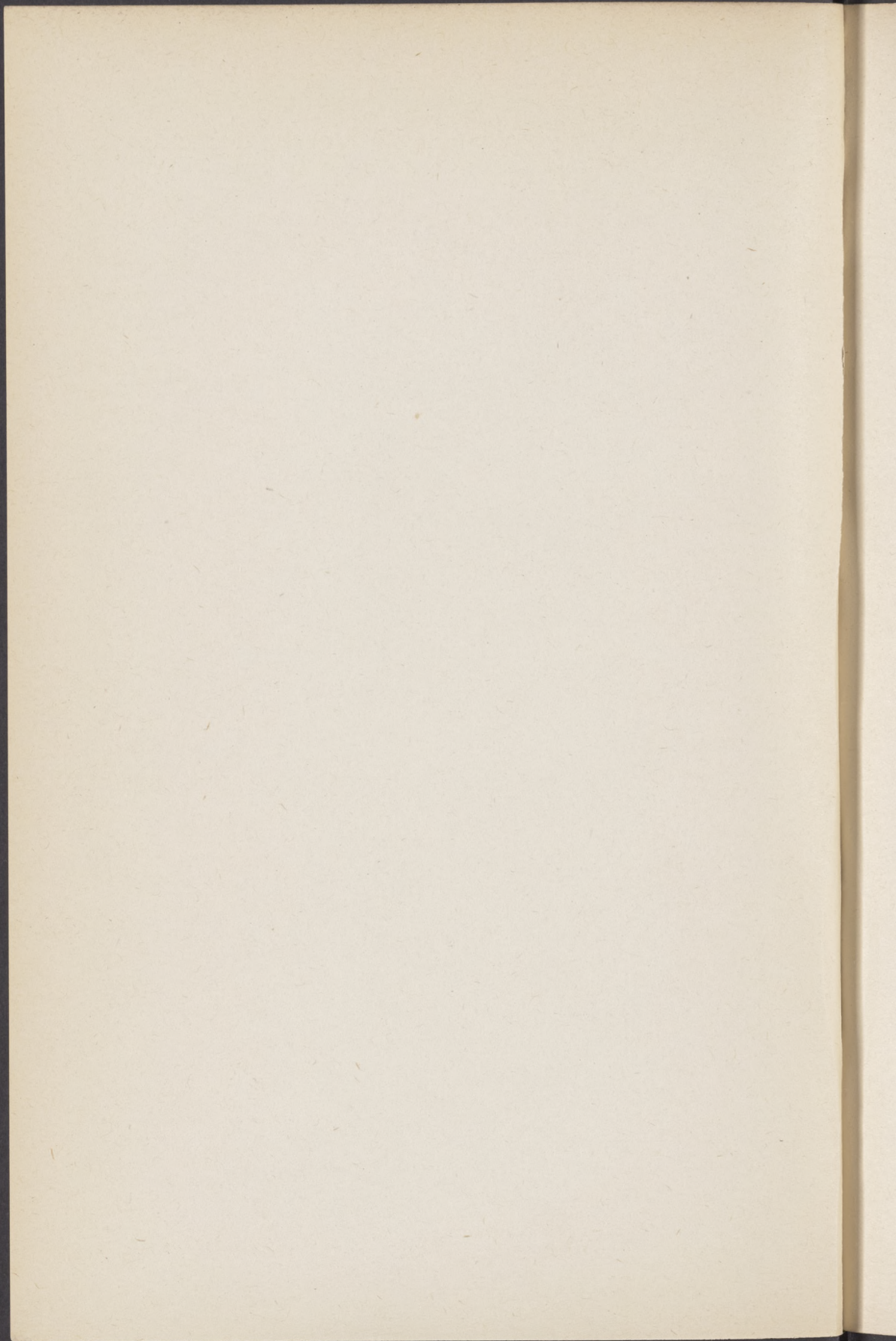
The learned trial Judge erred in refusing this
motion to non-suit. By reason of the errors com-
plained of, the judgment entered against the plain-
tiff was erroneous and should be reversed.

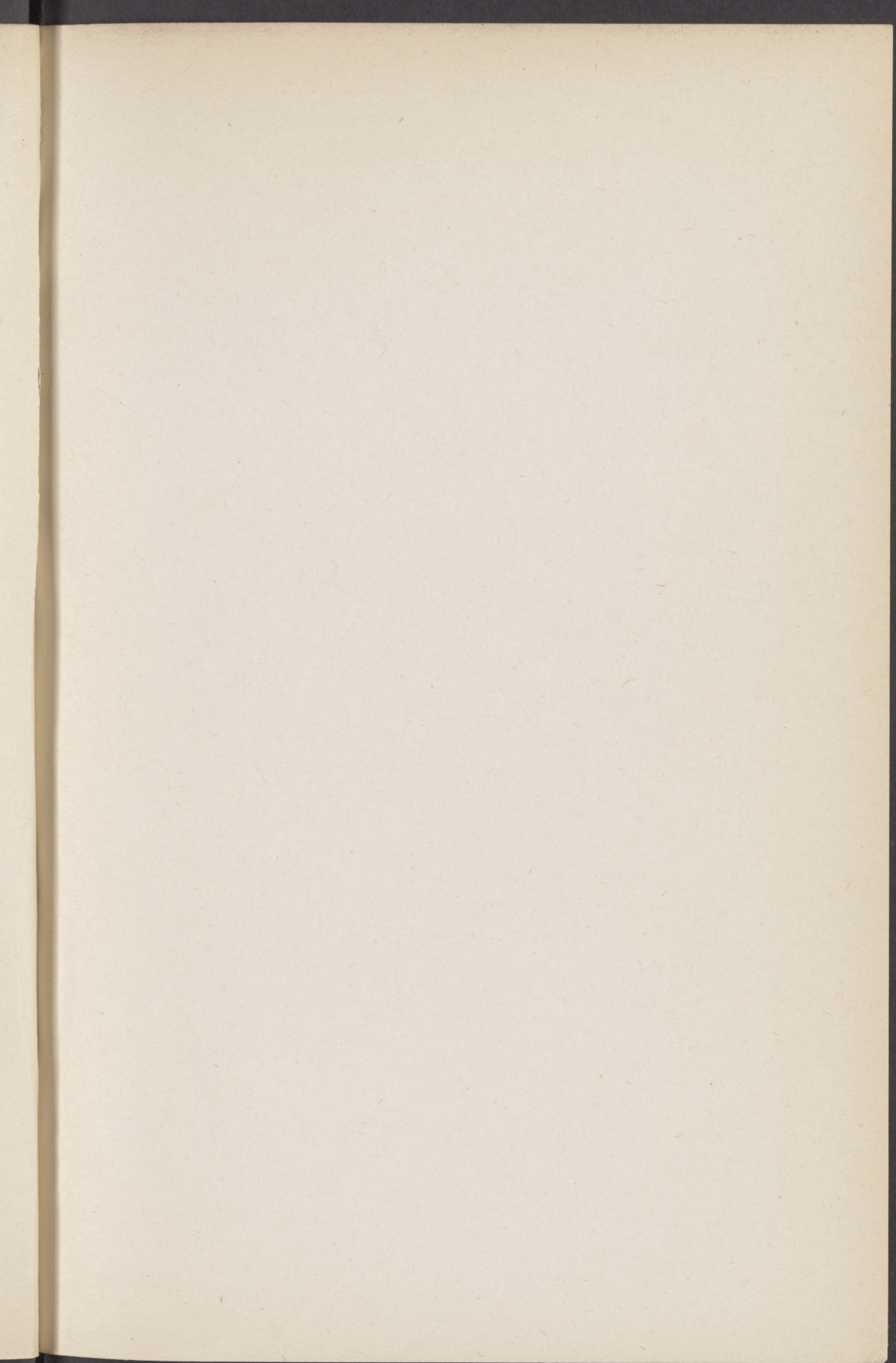
Respectfully submitted,

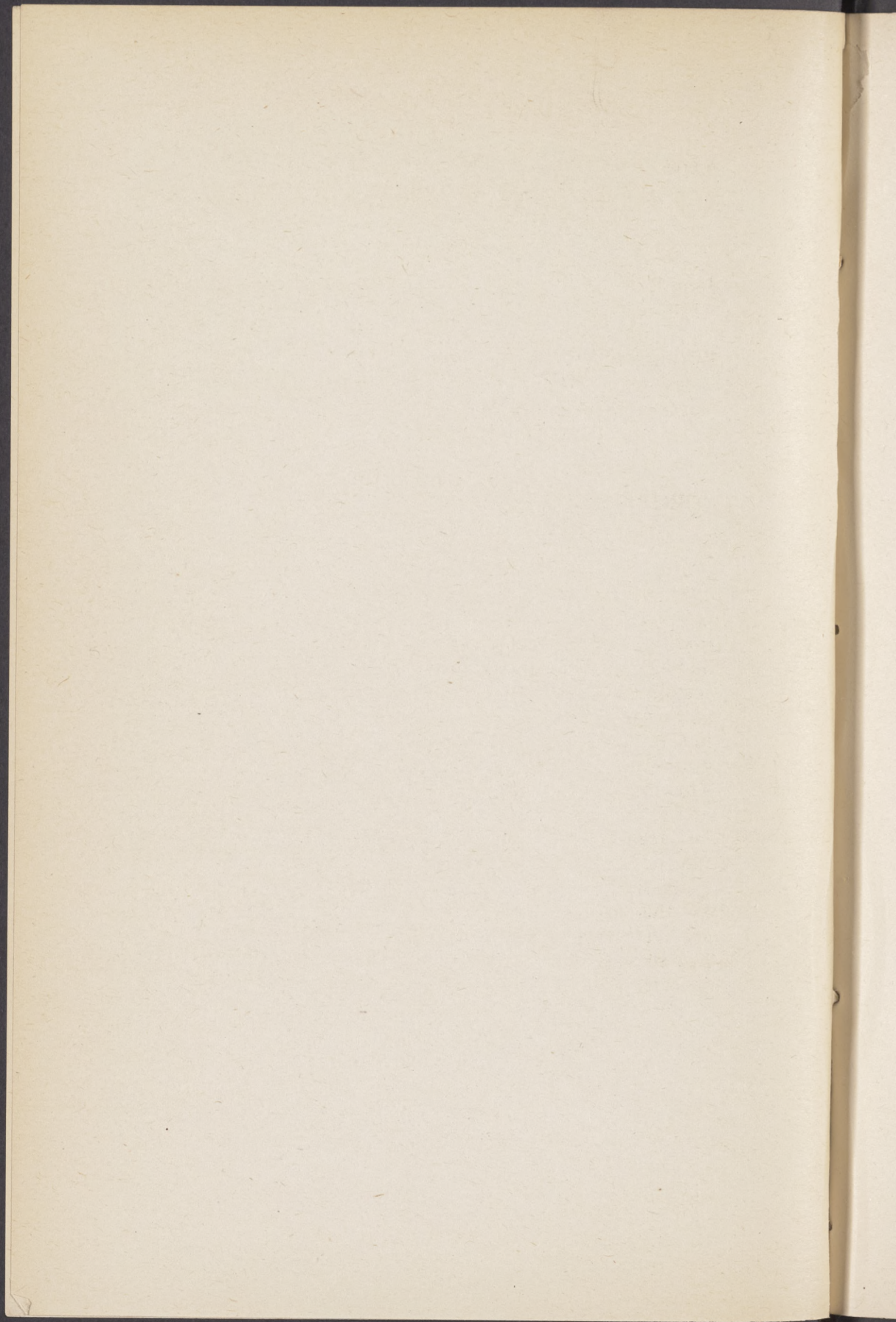
GEORGE M. HILLMAN,
GASKILL & GASKILL,

*Attorneys of Defendant and
Appellant.*









NEW JERSEY COURT OF ERRORS AND APPEALS.

March Term, 1917.

JOHN C. STUART, Plaintiff and Appellee, vs. BURLINGTON COUNTY FARMERS' EXCHANGE, Defendant and Appellant.	} ACTION AT LAW. ON APPEAL.
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BRIEF FOR PLAINTIFF-APPELLEE.

STATEMENT OF CASE.

Plaintiff is a farmer. In the Fall of 1913, he ordered of defendant 10 tons of "crude fish," a fertilizer, explaining to the defendant's salesman the purpose for which he wanted it and it was suggested and recommended to him by defendant's agent. The fertilizer arrived in the Spring of 1914, and was used by plaintiff in the usual and customary way, but the crop attempted to be raised therefrom was a failure, and experts attributed the failure entirely to the fertilizer. On analysis of a sample of the fertilizer by the State Chemist, it proved not to be "crude fish." On the basis of the analysis made by the State Chemist, the expert called by

plaintiff said it was not "crude fish," and in fact defendant, at the trial, admitted that it was not "crude fish," although the sales slip called for "crude fish," and the bags containing the substance were tagged "crude fish."

Plaintiff brought suit and the complaint contained two counts; the first for the price paid for the substance, and the second for the damages sustained by reason of failure of crops and breach of warranty. The case was first tried in the Burlington County Circuit on December 30, 1915, and the verdict was for the plaintiff for \$1,095.31. At this trial, evidence was offered by the plaintiff in support of both counts. Defendant appealed to the New Jersey Supreme Court, where, because of *lapsus linguae* by the Trial Judge in his charge, the verdict was set aside. (See opinion, 97 *Atl. Rep.*, page 775). The second trial was on November 2, 1916, before the same Trial Judge, but of course a different jury, and the verdict was for the plaintiff for \$1,000.00. At this trial, the evidence for the plaintiff was entirely in support of the second count: for damages sustained by reason of failure of crops by reason of the fertilizer not being as ordered, tagged and warranted. The defendant appeals.

The suit was brought and tried under the law of this State as set forth in *Walcott vs. Mount*, 36 *N. J. L.*, 262, and 38 *N. J. L.*, 496, and the Sales Act (*Compiled Statutes*, Vol. 4, page 4645, *et seq*). The judgment should not be reversed.

EVIDENCE.

An examination of the evidence, as presented at the trial, will disclose that the testimony in behalf of the plaintiff was legal and brought the case within the ruling of the case of *Walcott vs. Mount*, *supra*, and the pro-

visions of the Sales Act. The testimony will be here briefly reviewed:

JOHN STUART, the plaintiff, testified (C., p. 14, l. 30) that he was a farmer; had been a farmer all of his life (49 years); had been farming the land upon which the fertilizer was used for 15 years, and was farming it at the time of trial, December, 1916. In the fall of 1913, purchased from the defendant, through Louis A. Page, the general agent of the defendant, and at the time of the transaction received a memorandum or slip (see Ex., p. 1, C., p. 133) which was given to him by the general agent. Plaintiff told the agent that he wanted the fertilizer for early corn (C., p. 18, l. 30) and the general agent recommended the substance to him for that purpose; it was received the following February and paid for. (This was admitted). It was used for the raising of sweet corn in the year 1914, twenty-four acres of ground being prepared, as was customary and usual, and the so-called "crude fish" was used as a fertilizer. The season was a good season, being rather dry and particularly favorable to the kind of land used by the plaintiff. The seed, when planted, sprouted and came up well. There were nice showers, but when the corn first came through the ground, it was little and yellow-bladed, and did not take on any color, and looked sickly and stayed that way. It came out in tassel when it was twelve or fifteen inches high, when it should have been up to a man's waist, and the stalks were spindling. It was a failure and very noticeable (C., p. 21, l. 12). The total yield from the twenty-four acres was but \$885, notwithstanding that it cost just as much to prepare as if it had been a good crop. Good crops were raised before and since on the same

land, the average yield being a little more than one hundred dollars per acre (C., p. 22, l. 3). The plaintiff sent samples of the fertilizer to the State Chemist at the New Jersey Experimental Station and made complaint to the general manager of the defendant upon receiving a report that it was not "crude fish." When the plaintiff placed his order for fertilizer, he relied upon the statements made by the agent of the defendant as to its kind, quality and usefulness, and these statements induced him to give the order. (C., p. 31, l. 12). He relied wholly on what the agent told him. (C., p. 31, l. 29). The agent recommended it for sugar corn. The plaintiff had used crude fish before and had always gotten a good crop. The stuff delivered by defendant to plaintiff was marked and tagged (C., p. 37, l. 38) as "crude fish." These tags were offered in evidence and admitted, but they are not printed in the State of the Case. I have had photographs thereof made and the same are attached to this brief.

LOUIS A. PAGE testified (C., p. 53, l. 10) that in the fall of 1913, he was associated with the defendant as General Agent, selling fertilizers and looking after shipments, and took an order from plaintiff on September 22, 1913, for 10 tons of crude fish, and made a sales slip (Exhibit P-1). The plaintiff told the witness that he wanted fertilizer for corn. The salesman (C., p. 54, l. 8) recommended this "crude fish" for corn. All this was also disclosed on the cross-examination of the defendant's salesman. (C., p. 55, l. 30, *et seq.*)

CHARLES S. CATHCART testified (C., p. 58) that he was a State Chemist. His qualifications were admitted. In July of 1914 he received samples of fertilizer from the

plaintiff and analyzed them. It contained 2.34 per cent. of nitrogen and 9.35 per cent. of phosphoric acid, of which 3.42 was soluble in water. He testified (C., p. 59, l. 27) that in his opinion it was not crude fish and not true to its name; and further (C., p. 70, l. 5), that his analysis indicated that there was some adulterant in it, and (C., p. 75, l. 20) that it was mis-branded crude fish.

BAYARD H. MORRISON testified (C., p. 75, *et seq.*) he was a public chemist and had specialized in agricultural or fertilizer chemistry and represented the fertilizer manufacturers of Philadelphia over twenty-four years. He has analyzed 300 or 400 samples of crude fish. He unqualifiedly said (C., p. 76, l. 22) that a substance which, on analysis, showed the different ingredients in the proportions and quantities as had the substance received by the plaintiff from the defendant as "crude fish," was not "crude fish," in that it was deficient in nitrogen and had an excess of phosphoric acid; that such deficiencies and excesses would affect the crop. He further testified (C., p. 78, l. 33) that if the substance was branded as crude fish, it would be mis-branded.

HOWARD RUSS testified (C., p. 79, *et seq.*) that he had been raising sugar corn and had been making a specialty of it for fifty years; that he knew the Stuart farm; that the average yield per acre would be from 8,500 to 11,000 ears, and that the normal yield on Mr. Stuart's farm should have been about 9,500 ears and which would have produced the gross income of about \$180.00 per acre. On his own farm that year his corn crop netted him about \$135.00 per acre.

JOHN C. HOOKSTRA testified (C., p. 86, *et seq.*) that he was a practical farmer and familiar with the raising of early sweet or sugar corn; that his farm adjoined that of the plaintiff, and that the plaintiff had a very poor crop in 1914, while the witness's was very good; that it was not right in color and poor in growth and indicated that there was a lack of nitrogen, just the essential thing for which crude fish is bought and which the State Chemist and the Chemical Expert testified was deficient in the substance furnished. His net yield on the adjoining farm was \$70.00 an acre, after deducting cost of fertilizer, manure and labor. He testified (C., p. 91, l. 22, *et seq.*) that pure crude fish should have made a maximum crop of corn on plaintiff's land.

EARL BLYLER testified (C., p. 98, *et seq.*) that he was a farmer and had a farm near that of the plaintiff, and in 1914 had a good crop with fair prices. He observed the corn field of the plaintiff and saw that it did not seem to have any nourishment; it was spindling in the stand and did not look healthy and had a yellow color; that it did not have the chemical or did not have the plant food to properly produce the crop; that he had used crude fish with good results.

HOWARD WILLS testified (C., p. 103, *et seq.*) that he observed the corn field of the plaintiff in 1914 and saw it nearly every day; that it was yellow; that the stalks did not grow as they ought to; that plaintiff well cultivated his field.

CHARLES H. ROBERTSON (C., p. 110, *et seq.*) testified for the defendant. He was with the witness, Page, the General Agent of the defendant, at the time plaintiff gave

his order for fertilizer. He admits (C., p. 112, l. 32) that the bags were mis-branded and blamed it upon some boy at the factory. He admits (C., p. 115, l. 18) that the material supplied was not the material called for by the sales slip. He admits (C., p. 115, l. 7) that the sales slip called for crude fish, but contended that he did not sell him crude fish. He admits that the tags said "crude fish." He admits that they did not ship him crude fish. (C., p. 114, l. 18.)

The defendant's testimony, without going into detail, was an attempt to show that it sold to the plaintiff something other than "crude fish," notwithstanding that the sales slip called for "crude fish" and the bags were tagged "crude fish." It depended upon witness Robertson for this, but a reading of his testimony will show its own absurdity, and the fact is that he was contradicted by every other witness on these points, including the defendant's General Agent, and especially contradicted by the written evidence, namely, the sales slip and the tags which were placed upon the bags.

ARGUMENT.

The defendant, on appeal, assigns eight reasons. They will be considered in order.

I and IV.

The first and fourth grounds of appeal are because the Trial Court allowed testimony of conversation between the plaintiff and Page, the general sales agent of the de-

fendant, at the time the plaintiff gave him the order for the fertilizer. It is argued that the contract was in writing, and hence all parol representations should be excluded. The reply to this is that the contract was *not* in writing. Exhibit P-1 (C., p. 133) was merely a carbon copy of the salesman's memorandum, order, sales slip or sales check made by the salesman of the defendant, signed by him alone and not signed by the plaintiff. It was not the contract. It was merely a sales slip or a sales memorandum.

The cases cited in defendant's brief are not in point, because the contract was not in writing; a sales slip is not such writing or contract as will exclude parol testimony.

Where a contract is a mere informal memorandum or bill of parcels, parol evidence of warranties is admissible.

30 *A. & E. Ency. of Law, 2nd Edition, page 169*
(b), and cases cited on page 170.

The rule excluding parol testimony has no application, if the writing does not purport to be the actual contract of sale, such as an order for the goods, a note for the price, a receipt, a guaranty attached to a bill of goods, an ordinary bill of parcels of goods sold receipted by the seller or a memorandum insufficient to satisfy the requirements of the statute of frauds. (It will be noted that in this case the order given by plaintiff to Page, the general sales agent of the defendant, was for goods of the price of more than \$500.00.)

35 *Cyc.*, p. 380, and cases cited.

The case of *Perrine vs. Cooley*, 39 N. J. Law, 449, is exactly in point.

See Vol. 19 of *A. & E. Anno cases*, p. 544, under head of "receipt or bill of parcels."

See also *Chase vs. Evarts*, 19 N. Y. Sup., 937.

Grand Rapids Veneer Works vs. Forsythe, 31 N. Y. Sup., 601.

Routledge vs. Worthington Co., 23 N. E. Rep., 1111.

Boynton Furnace Co. vs. Clark, 44 N. W. Rep., 121.

In many of the cases cited, the slip or memorandum was actually signed by the vendee, and yet parol testimony was admitted. In the case at bar the slip was *not* signed by the vendee, Stuart.

II, III and VI.

The second, third and sixth grounds of appeal, as assigned, were because of the admission of testimony of conversation between the plaintiff and Embree, the general manager of the defendant. The evidence at the most is unimportant and could not possibly have had any influence on the case or injured the defendant. Embree was admitted to have been the general manager of the defendant and in charge of the defendant's office. It was the duty of the plaintiff to make complaint promptly and to the defendant; the defendant was a corporation; the complaint must have necessarily been made to some officer or agent and the testimony merely showed this and possibly a voluntary declaration on the part of the general manager of the defendant as to the custom of the defendant as to sales made by it. The cases cited by

the defendant all relate to declarations by agents, entirely disassociated with their employment and are not in point.

If the testimony of Stuart as to conversation with Embree, the general manager of the defendant, at the office of the defendant, had any relevancy or importance it was competent under the decision in *Agricultural Insurance Company vs. Potts, 26 Vroom, 158*, cited in appellant's brief, because the declarations of Embree were made at the place of business of the defendant and within the course of his employment; "A statement made by the general agent of a corporation, in the course of his employment, of a fact within his official knowledge, touching the status of a matter entrusted to him is admissible in evidence in behalf of the party with whom the corporation was dealing at the time."

V.

The fifth ground of appeal is because of the admission of the question to the witness Russ as to the average yield of corn per acre in the neighborhood when fertilized with crude fish. Russ was called as an expert. It was certainly proper for the Trial Judge to admit general questions tending to show the witness' knowledge of the subject and his qualification generally before he was asked the specific question applicable to the case on trial.

VII.

The seventh ground of appeal assigned is because of the refusal of the Trial Judge to strike out the testimony of the plaintiff when *first* testifying, because he did not

produce books. An examination of the case (C., p. 51, l. 1) will show that at the suggestion of the Trial Judge, the plaintiff went home during the trial and returned with his so-called books (which were merely memorandums or statements of sales), repeated his testimony on the points in controversy (C., p. 105, l. 20, *et. seq.*) and the so-called books were offered and admitted in evidence without objection. The only books of the plaintiff were the sales slips which he received from the merchants who sold his produce (C., p. 106, l. 135). The indulgence of the Trial Judge was certainly discretionary and it would have been immaterial, under the circumstances, whether he did or did not strike out the testimony first given, because subsequently and before the close of the plaintiff's case, the witness was recalled, the so-called books (sales slips) were produced, the witness repeated his testimony without objection, was cross-examined and the so-called books (sales slips) were admitted in evidence without any objection.

As the written evidence of the sales made by Stuart were subsequently produced, he repeated his testimony and the sales slips were admitted without objection. The failure of the Trial Judge to strike out the testimony first given is not cause for reversal.

Lyons vs. Davis, 30 N. J. Law, 301.

VIII.

A considerable portion of the defendant's brief is devoted to the eighth ground of appeal, being the refusal of the Trial Judge to non-suit. The defendant argued that there was no warranty and that, if there was a war-

ranty, it was that the material would be dry enough to drill.

The argument of plaintiff's attorney on the motion for the non-suit is entirely omitted from the printed case.

There are in the law two kinds of warranties—expressed and implied.

In this case there were both implied and expressed warranties.

There was a warranty by the defendant that the material should be reasonably fit for the purpose of the plaintiff, because plaintiff distinctly told the defendant the particular purpose for which the same was required and relied upon the statements of the defendant.

Sales Act, Comp. Stat., Vol. 4, p. 4650, Sec. 15, Sub. Div. 1.

There was a warranty that the material delivered was crude fish.

The affirmations of fact by the defendant's general agent were express warranties.

Sales Act, Comp. Stat., Vol 4, p. 4650, Sec. 12.

The plaintiff testified:

(C., p. 18, l. 26.)

"Ques. Did you tell him for what purpose you wanted the crude fish or this fertilizer?

Ans. I did.

Ques. What did you tell him?

Ans. I told him I wanted it for my early corn crop.

Ques. What did he say, if anything, with respect to that?

Ans. He recommended this fish highly for that purpose."

(C., p. 31, l. 10.)

"Ques. When you placed the order for fertilizer did you or did you not rely upon the statement made by the agent of the Burlington County Farmers' Exchange as to its kind, quality and usefulness?

Ans. I did rely.

Ques. Well, was or was not the statement made by Mr. Page, the general agent of the Farmers' Exchange, that which induced you to give them the order?

Ans. Why, certainly it was.

By the Court:

Ques. Or did you take your own head for it; did you use your own judgment?

Ans. They told me that it was good crude fish.

Ques. Did you rely wholly on what the agent said, or did you take your own judgment?

Ans. I relied wholly on what he told me.

By Mr. Horner:

Ques. Did he tell you anything about it being good for sugar corn?

Ans. He did."

(C., p. 52, l. 24.)

"Ques. Now, Mr. Stuart, what was it that was said by Mr. Page at the time this order was placed that induced you to place this order for the fertilizer?

Mr. Gaskill: I object, because he was examined on that on direct and also on cross.

(Objection overruled. Exception noted for defendant as ground for appeal.)

Ques. Will you answer the question?

Ans. He assured me that it was good crude fish.

Ques. Did he tell you what it was good for?

Ans. Yes, good for a corn crop.

Ques. Were those the controlling factors which induced you to buy it or give the order?

Ans. Yes, they were."

Page, the general agent of the defendant, testified:
(C., p. 53, l. 30.)

"Ques. Will you state to the Court and jury what you said to Mr. Stuart and what he said to you with respect to that ten tons of crude fish and how you came to make him the sale?

Ans. Mr. Stuart made mention of the fact that he wanted fertilizer for corn.

Ques. What did you say?

Ans. Asked if we had any fish, if I remember rightly.

Ques. What did you say?

Ans. I told him we had; we had fish for \$28 a ton.

Ques. What kind of fish?

Ans. Crude fish.

Ques. Did you or did you not recommend it for corn?

Ans. Yes, sir.

Ques. And he told you that he wanted to use it for corn?

Ans. Yes, sir."

The same witness, on cross-examination, testified:
(C., p. 55, l. 21.)

"Ques. Isn't this what took place: that Mr. Stuart told you he wanted some fertilizer and what he wanted it for?

Ans. Yes, sir.

Ques. It was for corn and for potatoes and for various other things?

Ans. Yes.

Ques. Different kinds of fertilizer?

Ans. Yes.

Ques. And he told you that he wanted some fertilizer for his pulling corn, or green corn, didn't he?

Ans. Yes, sir.

Ques. And you were asked what you would recommend for that purpose, weren't you? Mr. Stuart asked you, 'Page, what will you recommend for that?'

Ans. Crude fish.

Ques. That is what he asked you and that was your reply, and you took the order for crude fish?

Ans. Yes."

Surely these declarations by the general agent of the defendant clearly bring the case within the Sales Act, cited above.

On the question of the material being dry enough to drill, it is admitted that this representation was made by the defendant's sales agent to the plaintiff, but this was merely another express warranty or a statement of the condition of the material and in no wise inconsistent with other warranties, and does not, under the law, negative even an implied warranty.

Sales Act, Comp. Stat., Vol. 4, page 4651, Sec. 15, Sub. Div. 6.

The fact that crude fish can be so prepared as to drill was proven by the testimony of the witness Page, the general agent of the defendant, who testified (C., p. 56, l. 24): "I was under the impression that if crude fish

was dried that it could be ground so it would drill," and the expert, Morrison, testified (C., p. 77, l. 20): "It could be prepared. It has to be dried."

Subdivision 4 of Section 15 of the Sales Act does not apply, as argued in defendant's brief, because "crude fish" is not a material sold under a patent or trade name; it is merely the name of a substance like wheat flour, loaf sugar, sweet potatoes or stove coal, and besides, in the case at bar, as has been heretofore pointed out, there were absolute express warranties, and it was not "crude fish" which defendant received, although he ordered it and the bags were so tagged.

Even if there was error in the Trial Judge refusing to non-suit, which it was respectfully submitted there was not, on appeal the defendant is not entitled to have the judgment reversed because it will be observed, on examination of the case, that the plaintiff ordered and thought he was buying of the defendant "crude fish." This is proven by the sales slip, Exhibit P-1 (C., p. 133), the tags on the bags, Exhibits P-2, 3 and 4, photographs of which are hereunto attached, and the testimony of plaintiff and of Page. The defendant's own witness, Robinson, (C., p. 115, l. 18), testified that the substance shipped to the plaintiff was not "crude fish," and the proof, if it had been previously lacking, was then supplied.

"A judgment will not be reversed because the Court improperly refused to non-suit, if, on the trial, evidence subsequently adduced is sufficient to maintain plaintiff's case."

Meershon vs. Hobensack, 23 N. J. L., 580; 22 N. J. L., 372.

"If, after denial of a motion for non-suit for failure of proof, the defect was supplied in the evidence afterward adduced, the error of refusal will not lead to a reversal."

Carey vs. Hamburg-American Packet Co., 72 N. J. L., 56, and cases therein cited.

"The refusal of a non-suit for failure of proofs is not reversible error if such proofs were afterwards supplied by either party in the progress of the trial.

Bostwick vs. Willett, 72 N. J. L., 21, and cases therein cited.

HARMLESS ERROR.

Even if this Court, on review of the whole case, should find any technical errors, the Court should not reverse or set aside the verdict, because these technical errors were harmless and in no wise injured the defendant. If any such technical errors are discovered, it is clearly a time for the application of Section 27 of the Practice Act of 1912. This case has been tried twice before the same Trial Judge, but with different juries, of course, with substantially the same result. The first trial, as before stated, was reversed by the Supreme Court because of a mere slip of the tongue by the Trial Judge, but on the second trial there was no objection taken whatever of the charge of the Judge. The questions in dispute, if any there were, were questions of fact for the jury, and the jury, upon legal evidence, and under the law stated to them by the Trial Judge, resolved these in favor of the plaintiff.

If there was any error at the trial, it was certainly harmless, because on a review of the whole case it will

be readily seen it certainly could not have injured the defendant; harmless error is not a cause for reversal.

Freeman vs. Bartlett, 47 N. J. L., 33.

Humphreys vs. Woodstown, 48 Law, 588.

Smith vs. Clayton, 29 Law, 357.

Schenck vs. Cuttrell, 21 Law, 5.

Graham vs. Whitely, 26 Law, 254.

Bellis vs. Phillips, 28 Law, 125.

CONCLUSION.

The uncontradicted facts of the case in brief are: Plaintiff, on the recommendation of defendant, ordered "crude fish" as a fertilizer, having told defendant that he wanted it for his sugar, sweet, early or pulling corn (it was variously named); the substance delivered by defendant was not crude fish; plaintiff's crop was a failure and experts attribute it entirely to the fertilizer or rather the lack of fertilizer; plaintiff's loss was estimated at from about \$1,400 to \$2,000. The jury gave a verdict for \$1,000.

It is respectfully submitted that the testimony amply warranted the verdict and that there was no reversible error.

The law of the State, as declared in the Sales Act, above cited, and the adjudications by the Courts on the facts proven and admitted, justify the recovery by plaintiff.

See *Walcott vs. Mount*, 36 N. J. L., 262; 38 N. J. L., 496 (affirmed).

The case at bar and the case of *Walcott vs. Mount* are similar. In one the vendee ordered "Early strap-leaf red-

top turnip seed;" he received seed of another kind and lost his crop. He was allowed the damages sustained. In the case at bar, plaintiff ordered, upon the recommendation of defendant, "crude fish" for a fertilizer to be used for a particular purpose which was made known to defendant; the substance was tagged "crude fish;" it was not crude fish; this is admitted. Plaintiff used the worthless stuff and sustained a loss of crop. The Trial Court has allowed him at least partial damages. This Court should not disturb the verdict. There was no reversible error at the trial; the verdict should be affirmed.

Respectfully submitted,

JOHN G. HORNER,
Attorney for Plaintiff-Appellee.

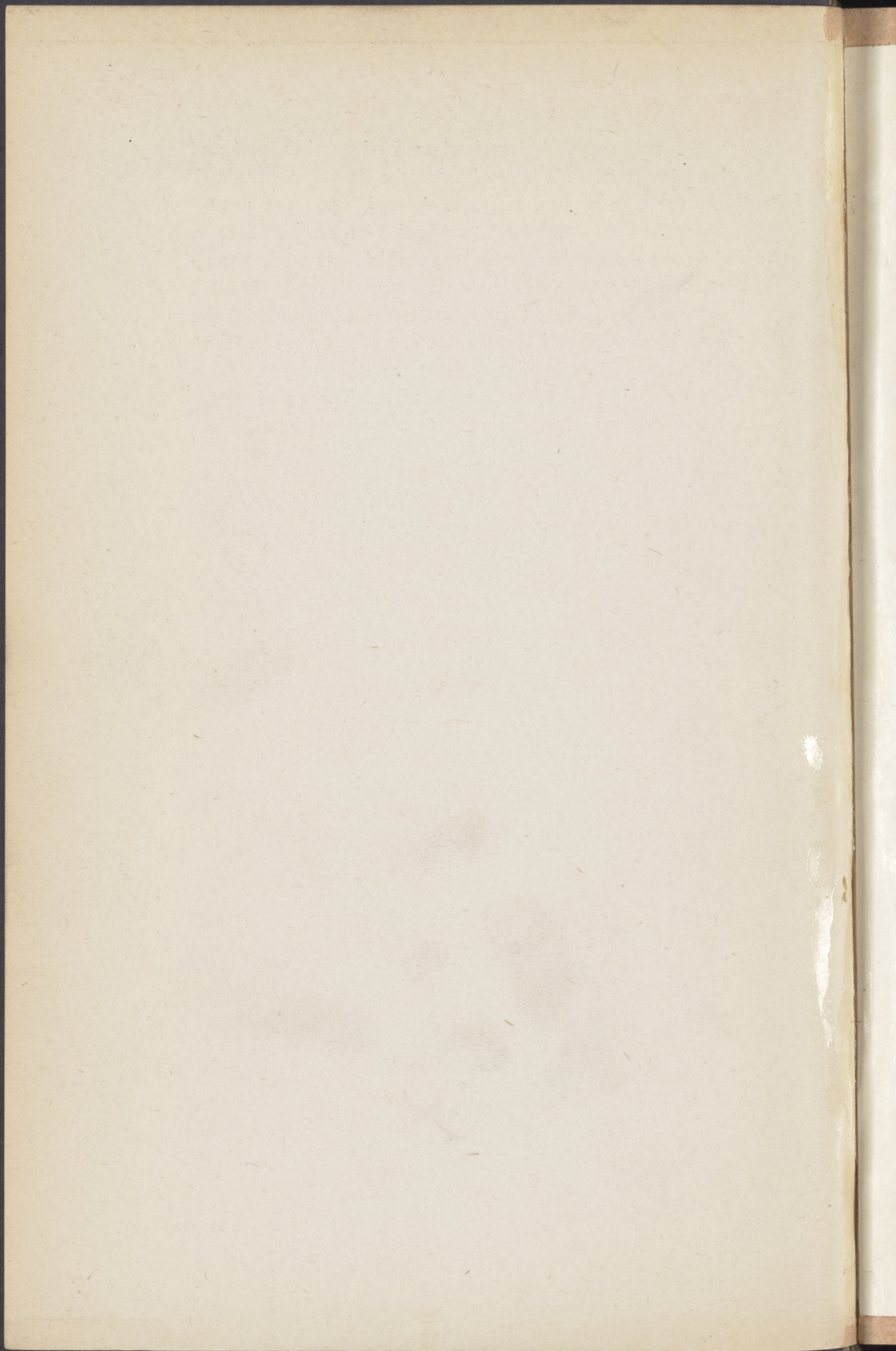


Photo Copies of Exhibits P2, P3 and P4.

FROM
Standard Guano Company
FISH, BONE AND POTASH MIXTURES,
BALTIMORE, MD.

CRUDE FISH

AVAIL PHOS ACID

6%

AMMONIA

POUNDS TP BAG

187

FROM
Standard Guano Company
FISH, BONE AND POTASH MIXTURES,
BALTIMORE, MD.

CRUDE FISH

AVAIL PHOS ACID

6%

AMMONIA

POUNDS TP BAG

250

187

FROM
Standard Guano Company
FISH, BONE AND POTASH MIXTURES,
BALTIMORE, MD.

CRUDE FISH

AVAIL PHOS ACID

6%

AMMONIA

POUNDS TP BAG

187

