

INDEX

	PAGE
Complaint	1
Answer and Counter-Claim	3
Reply and Answer to Counter-Claim	7
Defendants' Reply to Answer to Counter-Claim	8
Order of Amendment	8
Answer to Amended Complaint	10

Plaintiffs' Testimony:

George B. M. Schiller—Direct	13
Cross	17
Jacob N. Sapp—Direct	28
Cross	34
Clara Garrison—Direct	36
Cross	37

Defendants' Testimony:

Charles G. Richards—Direct	38
Cross	49
Recalled—Cross	66
Recalled—Direct	85
Isaac H. Hinchman—Direct	54
Cross	57
Thomas Langley—Direct	59
J. W. Lloyd—Direct	61
Cross	63
W. F. Richards—Direct	65

	PAGE
Simon Milner—Direct	67
Cross	70
Samuel Milner—Direct	73
Cross	74
Recalled—Direct	80
Recalled—Cross	80
Charles Silver—Direct	75
Cross	78
Recalled—Direct	85
Jacob B. Sapp—Direct	81
Cross	82
Recalled—Direct	86
Motion for Direction	87
Memorandum	91
Notice of Appeal	93

COMPLAINT.

SUPREME COURT OF NEW JERSEY.

RICHARD M. MORE, BLOOM- FIELD H. MINCH and GEORGE E. DIAMENT, Re- ceivers of B. S. AYARS & SONS COMPANY, An In- solvent Corporation, <i>Plaintiffs,</i>	}	CUMBERLAND	10
vs. CHARLES G. RICHARDS, <i>Defendant.</i>		COUNTY.	
		ACTION AT LAW.	
		COMPLAINT.	

20

Plaintiffs, residing at Bridgeton, New Jersey, say that:

(1) The plaintiffs were appointed receivers for B. S. Ayars & Sons Company, an insolvent corporation of the state of New Jersey, by an order of Hon. Edmund B. Leaming, Vice-Chancellor, dated July 28, 1913, entered on proceedings had in the Court of Chancery of New Jersey. 30

(2) They sue for the price of goods sold and delivered by said B. S. Ayars & Sons Company to the defendant upon book account, of which a copy is annexed hereto, upon which there is a balance due of \$439.33 and interest from December 15, 1913.

(3) Defendant has not paid same and plaintiffs demand as damages the amount due thereon \$439.33, with interest from December 15, 1913.

A copy of said book account is attached hereto. Plaintiffs demand, as damages \$439.33 with interest thereon from December 15, 1913.

JAS. S. WARE,
Attorney for Plaintiffs.

10

Items of Charles G. Richards—Complaint

	1913		
	Mar. 20	To Balance	137.33
		To Mdse.	
	19	2 tons G. Edge-26-	52.
		4 " H. Grade-34-	136.
		2 " Early Truck	60.
		2 " Tomato Fert.	54.
			————— 439.33
20			

Complaint in Charles Silver's case the same as in the complaint above set forth against Charles G. Richards excepting that the amount demanded is \$189.37, and the items are as follows:

		1913	
	Mar. 20	To Balance	1.10
		To Mdse.	
	19	2½ Tons Fert. at \$26	65.
		1 " High Grade	34.
30	15	1 " Potato G.	32.
		1 " Tomato Fert.	27.
	May 14	Protest	1.54
	June 2	Discount	1.73
	Mar. 15	1 Ton Tomato Fert.	27.
			————— 189.37

Complaint against Simon Milner is the same as the complaint against Charles G. Richards above set forth, excepting that the amount claimed is \$291.00.

The items are as follows:

1913

Mar. 15	4 Tons	Tomato Fert.	108.	
	4 "	Potato Guano	128.	
	1½ Tons	High Grade	51.	
	1 lb.	Tomato Seed	4.00	
			————	291.00 10

ANSWER AND COUNTER-CLAIM.

The defendant, Charles G. Richards, who resides at Porchtown, Gloucester County, New Jersey, says that:

1. He neither admits nor denies the allegations set forth in section 1 of the complaint and leaves the plaintiffs to make such proof as they may deem necessary. 20

2. The defendant denies that he owes either the said firm of B. S. Ayres & Sons Co., or the said plaintiffs as receivers of said company, any moneys for goods, wares and merchandise, sold and delivered as set forth in paragraph 2 of the complaint, but in defense of the same says, that the fertilizers for which the plaintiffs complain, were purchased by this defendant, not to be paid for in cash by this defendant, but were expressly to be paid for in tomatoes to be raised by the said defendant with the fertilizers furnished by the said firm of B. S. Ayres & Sons Co., under the express agreement that the 30

said defendant should not have the right to sell his crop of tomatoes to any other person excepting the firm of B. S. Ayres & Sons Co., at the price of \$8.25 per ton; and this defendant says that he agreed to plant and raise for the said firm of B. S. Ayres & Sons Co., and for their exclusive use and benefit, seven acres of tomatoes and this defendant avers that he did raise seven acres of tomatoes amounting to not less than seventy tons, in the season of nine-
10 teen hundred and thirteen; and this defendant avers that before the time for the delivery of the said tomatoes the said firm of B. S. Ayres & Sons Co. failed and became insolvent and in consequence thereof, refused to take and did not take the tomatoes raised by this defendant and this defendant avers that he was not able to dispose of more than ten tons of the tomatoes which he raised as aforesaid, under contract with the said firm of B. S. Ayres & Sons Co., and that very much more of the said tomatoes raised
20 as aforesaid, by this defendant, than were sufficient to pay the said bill of B. S. Ayres & Sons Co. against this defendant, spoiled, decayed and were lost to this defendant on account of the failure of the said firm of B. S. Ayres & Sons Co. either to take the said tomatoes or to find some other person to take the same.

This defendant further says that the contract between the said firm of B. S. Ayres & Sons Co. and this defendant for the raising and payment for the
30 said tomatoes was in writing and that the said firm of B. S. Ayres & Sons Co. kept the said writing and that only one copy of the said writing was made and executed between the parties and that said contract was kept by the said firm of B. S. Ayres & Sons Co., and is now in the possession of the plaintiffs.

And this defendant demands of the plaintiffs the

production of the said contract at the trial of the cause.

The defendant further says that the contract hereinbefore set forth, as to the fertilizers, was not in writing. The defendant avers that the dealings hereinbefore set forth between the said firm of B. S. Ayres & Sons Co. and this defendant, were what are properly termed, mutual dealings between the parties.

3. The defendant denies any indebtedness to the 10
plaintiffs.

By way of counter-claim against the plaintiffs, defendant says that:

1. He repeats the statements set forth in paragraph 2 of the answer and in addition avers:

2. That the defendant, in consequence of the failure of the firm of B. S. Ayres & Sons Co. to perform its contract with this defendant, to receive and accept the seven acres of tomatoes to be raised in the year nineteen hundred and thirteen by this defendant, for the said firm of B. S. Ayres & Sons Co., has lost, over and above the fertilizers purchased by this defendant, to be paid for in tomatoes, the payment for the work and labor of this defendant in producing the plants necessary to set out the said crop of tomatoes and the work and labor of putting in the fertilizers to aid the said crop of tomatoes and also the work and labor of putting in and caring for the said crop of tomatoes and the work and labor in endeavoring to dispose of the same and also the profits which this defendant should have realized and would have realized had it not been for the fail- 20
30

ure of the said firm of B. S. Ayres & Sons Co. to perform its contract. And this defendant avers that he would have received the sum of \$8.25 per ton, according to the contract made between the said firm of B. S. Ayres & Sons Co. and this defendant, for the said tomatoes if the said firm had performed its contract, and in consequence of the failure of the said firm of B. S. Ayres & Sons Co. and its refusal to take the said tomatoes of this defendant, this de-
10 fendant lost not less than sixty tons of tomatoes, amounting to the sum of four hundred and ninety-five dollars (\$495.00), which after deducting the amount claimed by the plaintiffs, to wit, the sum of four hundred and thirty-nine dollars and thirty-three cents (\$439.33), leaves a balance of fifty-five dollars and sixty-seven cents (\$55.67) due from the said firm of B. S. Ayres & Sons Co. or from the plaintiffs, as receivers thereof, to this defendant.

This defendant claims, by way of counter-claim,
20 fifty-five dollars and sixty-seven cents (\$55.67) over and above the claim of the plaintiffs.

HENRY S. ALVORD,
Attorney for Defendant.

The answer and counter-claims filed for Charles Silver and Simon Milner are practically the same as in Charles G. Richards' case.

REPLY, AND ANSWER TO COUNTER-CLAIM.

Reply.

1. Plaintiffs will object that the answer discloses no defense to their complaint. Defendant's demand accrued after the appointment of plaintiffs as receivers of the B. S. Ayres & Sons Company.

10

2. Plaintiffs deny that there was any contract between defendant and B. S. Ayars & Sons Company, to accept anything other than money in payment for the merchandise sold and delivered by B. S. Ayars & Sons Company to defendant, for the price of which this action is brought.

Answer to Counter-Claim.

20

FIRST DEFENSE:

1. Plaintiffs will object that the counter-claim discloses no cause of action. It fails to show any claim accruing before plaintiffs' appointment as receivers of the B. S. Ayars & Sons Company.

SECOND DEFENSE:

1. Plaintiffs will object that the counter-claim discloses no cause of action. It fails to show any claim for damages which may be lawfully set off or counter-claimed against plaintiffs' claim for the price and value of merchandise sold and delivered by the insolvent corporation to the defendant.

30

THIRD DEFENSE:

1. As to all the matters set up in the counter-

8 *Defendant's Reply to Answer to Counter-Claim*
Order of Amendment

claim plaintiffs have not any knowledge or information thereof sufficient to form a belief.

JAMES S. WARE,
Attorney for Plaintiffs.

(This pleading is the same in each of the three
10 cases.)

**DEFENDANT'S REPLY TO ANSWER TO
COUNTER-CLAIM.**

The defendant denies the whole of plaintiffs' answer to counter-claim.

20 HENRY S. ALVORD,
Attorney for Defendant.

(Same in each case.)

ORDER OF AMENDMENT.

On motion of James S. Ware, attorney for plaintiffs, and on good cause shown, it is, on this twenty-
30 ninth day of December, nineteen hundred and fourteen, ORDERED:

1. That J. E. Tygert Company, a corporation of the state of West Virginia, with office at No. 28 South Delaware Avenue, Philadelphia, Pennsylvania, be added as a party plaintiff.

2. That the complaint be amended by inserting a new paragraph as follows:

“1A. Plaintiffs, J. E. Tygert Company, under the terms of a decree of the Court of Chancery of New Jersey, entered since the commencement of this suit, were the owners of all fertilizer sold by the B. S. Ayars & Sons Company to defendant during the year nineteen hundred and thirteen, and are entitled to the proceeds of the sale thereof, the said B. S. Ayars & Sons Company being a trustee for the said J. E. Tygert Company in collecting the proceeds of said sales of fertilizer.” 10

3. That upon filing this order the summons and complaint shall be deemed to be amended accordingly, and defendant shall have twenty days from the date of service of a true but uncertified copy of this order, to file answer to said amended complaint. 20

HOWARD CARROW,
Judge.

(The same in each case.)

ANSWER TO AMENDED COMPLAINT.

The answer of Charles G. Richards to the amended complaint, introducing the J. E. Tygert Co. as a party plaintiff:

1. The said defendant has no knowledge as to the facts set forth in the new paragraph, 1A, but leaves
10 the plaintiffs to make such proof as they may be advised.

2. This defendant is satisfied that in case the Court shall determine that this defendant owes the said firm of B. S. Ayars & Sons Co. anything on the adjustment of the differences between the plaintiff, B. S. Ayars & Sons Co. and the defendant, that the proceeds should be paid to the J. E. Tygert Co., but
20 this defendant respectfully insists that the J. E. Tygert Co. was unknown to the defendant in the transaction and that this defendant is entitled to the full benefit of its defense, as well against the J. E. Tygert Co. as against the firm of B. S. Ayars & Sons Co., or the receivers as representing the said B. S. Ayars & Sons Co.

HENRY S. ALVORD,
Attorney of Defendant.

30 (The same in each case.)

TESTIMONY.

NEW JERSEY SUPREME COURT,
CUMBERLAND COUNTY.

RICHARD M. MORE, <i>et al.</i> , Receivers, etc.,	}	ACTION AT LAW.	10
vs.			
CHARLES G. RICHARDS. RICHARD M. MORE, <i>et al.</i> , Receivers, etc.,	}	ACTION AT LAW. (3 Cases)	
vs.			
SIMON MILNER. RICHARD M. MORE, <i>et al.</i> , Receivers, etc.,	}	ACTION AT LAW.	20
vs.			
CHARLES SILVER.			

Bridgeton, N. J., April 25, 1916.

TESTIMONY.

Before Hon. HOWARD CARROW, Judge, and jury. 30

APPEARANCES:

For Plaintiffs: JAMES S. WARE, ESQ.; WALTER H. BACON, ESQ.; WILLIAM A. LOGUE, ESQ.
For Defendants: HENRY S. ALVORD, ESQ.

Mr. Bacon: If your Honor please, I offer in evidence a certified copy of order continuing appointment of receivers in the case of the Cumberland Trust Company of Bridgeton, complainant, and the B. S. Ayars and Sons Company, defendant, which order was made by the Chancellor on July twenty-eighth, 1913. This order continues the appointment of Richard M. More, Bloomfield H. Minch and Charles E. Diament as receivers, and directs that an
10 injunction be issued according to the prayer of the bill, and in the meantime the defendant corporation is ordered to refrain and desist from doing or attempting to do any of the acts above mentioned, which are carrying on business to restrain which the injunction is ordered to be issued.

(Paper marked Exhibit P1.)

Mr. Alvord: I have agreed to permit these papers
20 of this nature to be put in evidence without the files of the court.

Mr. Bacon: I also offer in evidence certified copy of the opinion of the Court of Errors and Appeals in the case of Cumberland Trust Company of Bridgeton, complainant, appellant, and B. S. Ayars and Sons Company and J. E. Tygert Company, petitioners, respondents.

30 The Court: The Court will take judicial notice of that.

Mr. Bacon: Then we will leave that out. I also offer certified copies of the amended decree of modification and affirmance of the decree of the Court of Chancery in accordance with the opinion of the

Court of Errors and Appeals in each of these cases. There were two appeals. One was an appeal by the Cumberland Trust Company, Trustee, mortgagee, and the other appeal was by the receivers, and there are two opinions here. I offer the two.

(Papers marked Exhibits P2 and P3.)

Mr. Bacon: I also offer in evidence amended decree of the Court of Chancery dated February four- 10
teenth, 1916, which amended decree of the Court of Chancery is in accordance with the mandate of the Court of Errors and Appeals, evidenced by the two orders marked Exhibit 2 and 3.

(Paper marked Exhibit P4.)

GEORGE B. M. SCHILLER, SWORN.

20

Direct examination.

By Mr. Bacon:

Q. Where do you live, Mr. Schiller?

A. No. 90 North Pearl Street.

Q. In Bridgeton?

A. Yes.

Q. Were you formerly bookkeeper for the B. S. Ayars and Sons Company? 30

A. Office man.

Q. Did you have general charge of the books?

A. Yes.

Q. Is this book which I show you one of the books that was kept in the office of the B. S. Ayars and Sons Company while you were there?

A. Yes, sir; that is the book.

Q. What was that book called?

A. That was called the "Farmers' Ledger."

Q. What accounts were kept in that book?

A. Accounts with customers who bought fertilizer and who in turn brought tomatoes in payment, with our strawberry men and with others who brought various products, farm products.

10 Q. As fertilizers were sold to the farmers, were they entered in this book?

A. Yes, sir.

Q. Is there an account in this book against Charles G. Richards?

Mr. Alvord: That has not been qualified as yet, as I understand it, as the original book of entry. Is it? I do not know whether it is or not. I object to it on that ground.

20 Q. Is this the place where these fertilizers were charged when they were sold?

A. This is the place. This is the book.

Q. And is Charles Richards charged with an account here?

Mr. Alvord: That is objected to.

A. Yes, sir; Charles G. Richards.

30 Mr. Alvord: I object that the book has not yet been properly proven.

The Court: Go ahead and prove the book. Did he keep the book?

Mr. Bacon: He is the man who had charge of the

office. I asked him if this is the book in which these charges for fertilizers were made and he said yes. It is an itemized entry. It is not a ledger.

Q. Is this the book of original entry?

A. This is the book of original entry, yes, sir.

Mr. Bacon: Any further objection?

Mr. Alvord: I do not object to that question. 10

Q. It was kept under your supervision, was it?

A. Yes, sir.

Q. How long were you there?

A. I was there about two years and a half.

Q. Is there fastened in these covers the farmers' ledger for 1912 and 1913?

A. There should be.

Q. And this account to which I now direct your attention is a part of the farmers' ledger for what year? 20

A. For 1912.

Mr. Bacon: You do not want me to prove each one of these items, do you? There is no dispute about the items at all.

Mr. Ware: All of these accounts are admitted in the pleadings.

Mr. Alvord: I think if you will carefully read the pleadings you will change your mind, but I do not know that there is going to be any dispute along that exact line. 30

Q. Is there also an account against the same man in the 1913 ledger?

A. Yes, sir.

Q. What is the total amount that you have charged against Richards on this ledger?

A. Four hundred and thirty-nine dollars and thirty-three cents.

Q. Will you turn to Simon Milner's account? That is in the 1913 ledger only. 1913. You have
10 got 1912 there, haven't you?

A. I have it.

Q. What is the amount charged there?

A. Two hundred and ninety-one dollars.

Q. Is that all for fertilizer?

A. No, sir. One item for tomato seed.

Q. One pound of tomato seed and all the rest of it is fertilizer?

A. Yes, sir.

Q. What kind of fertilizer?

20 A. Tomato fertilizer, potato and a fertilizer called High Grade.

Q. Now, turn to the account of Charles Silver.

A. I have that.

Q. Read the items of the charges there against Silver in detail.

A. The 1913 account starts with a balance of a dollar and ten cents.

Q. Do you know what that balance was, that is, how it arose?

30 A. I don't recall.

Q. Would it show if you turned to the 1912 account?

Mr. Alvord: Never mind about that. It is only a dollar and ten cents.

Q. What is the first item on that account?

A. Ton and a half of potato guano, at thirty-two dollars. One ton of High Grade —

Q. Give the date.

A. March nineteenth, 1913, one ton and a half of potato guano, at thirty-two dollars. That is forty-eight dollars. One ton of High Grade fertilizer at thirty-four dollars. March fifteenth, one ton of potato guano, at thirty-two and one ton of tomato fertilizer at twenty-seven. On May fourteenth a protest of a dollar fifty-four cents is charged and on June second discount of one dollar and seventy-three cents. On March fifteenth one ton of tomato fertilizer at twenty-seven. 10

Q. There is something there in lead pencil, is there not, underneath what you have read?

A. This reads, "Bill sent according to Mr. Sapp's statement, two and one-half at twenty-six instead of one and one-half at thirty-two."

Q. Do you know who put that on there? 20

A. No, sir; I do not.

Q. Who is Mr. Sapp?

A. Mr. Sapp was our agent at Monroeville.

Q. Is he the man that had charge of the distribution up there of the fertilizer that was sold?

A. More or less, yes, sir.

Mr. Bacon: I offer that book.

(Book marked Exhibit P5.)

30

Cross-examination.

By Mr. Alvord:

Q. This book, Exhibit 5, what is it?

A. It is the farmers' ledger of the B. S. Ayars and Sons Company.

Q. Do you say that that is the first book in which these charges were made against the farmers?

A. Yes, sir.

Q. Did you make credits in the same book?

A. Yes, sir.

Q. Please refer to the account of 1912 against Charles G. Richards. On the left-hand side of this account on page one of Charles G. Richards' account, I find the charges against him for fertilizer.

10 Is that right?

A. That is right.

Q. Amounting in the first addition to two hundred and four dollars and fifty cents?

A. Yes, sir.

Q. And on the other side of the same account, on the same page, I find credits for tomatoes. Is that right?

A. That is right.

20 Q. Please refer in this book to the account against Charles G. Richards for 1913?

A. I have it.

Q. Were you working for the B. S. Ayars and Sons Canning Company in the year 1913?

A. I was.

Q. Were you working for this canning company at the time that it discontinued its active operations?

A. Yes, sir.

Q. Was that time after or before the maturity of the crop of tomatoes for the year 1913?

30

Mr. Bacon: I object to that as not proper cross-examination.

A. It was before the maturity of the tomato crop for 1913.

(Question repeated.)

(Question allowed. Exception noted for plaintiffs.)

A. That was before the time of maturity.

Q. After the failure of the firm B. S. Ayars and Sons Company they did not can any more tomatoes, did they?

Mr. Bacon: I object to that as not proper cross-examination.

10

The Court: I will allow that question.

A. No.

Q. Was there any other book kept in the office of the B. S. Ayars and Sons Company to show charges against the farmers for fertilizers except this book, Exhibit 5, which has been offered in evidence?

20

A. Yes; I think journal entries were made in some cases. That is the only other book.

Q. Have you got that book with you?

A. No, sir.

Q. Whose book was that, what firm? Who does that book belong to that you refer to as the journal?

A. The B. S. Ayars and Sons Company.

Q. Please refer to your account for 1912 against Simon Milner. This page number 3 refers to the page number of Simon Milner's account?

30

A. Yes, sir; ledger page.

Q. Referring to ledger page 3 of Simon Milner's account for the year 1912, the items appearing on the left-hand side of this page are charges against Simon Milner, are they not?

A. Yes, sir.

Q. And the items, about ten items, on the credit side of this page of his account refer to credits that were given to this defendant, Simon Milner, for tomatoes in 1912, do they not?

A. Yes, sir.

Q. Please refer to Simon Milner's account in 1913. Please refer to the account against Charles Silver on the ledger, Exhibit 5, for the account of Charles Silver for 1913. On page 8 of your ledger
10 of the account of Charles Silver I find several items of charge.

A. Yes, sir.

Q. And were these items of charge in this particular case on this page of this book the original entries, or were they taken from some other book?

A. I can't tell you. I didn't make these entries.

Q. Then you don't know whether these are the original entries against Charles Silver on the books of the firm of B. S. Ayars and Sons Company or
20 not?

A. I know they are the original entries.

Q. But you don't know whether this book in regard to this account is the original book of entry?

A. In regard to most of the items of accounts of that character they were charged from slips direct to the ledger, most of them.

Q. Where are those slips?

A. I don't know.

Q. You had a system of first keeping accounts on
30 slips with the farmers?

A. They were usually brought in on slips, on duplicate slips.

Q. And what was your system in the office in regard to the taking care of those slips?

A. They were filed.

Q. Do you know whether that file is here in court or not?

A. No, sir; I do not.

Q. How frequently were those accounts posted from the cards into the ledger, Exhibit 5?

A. They were supposed to be kept posted daily.

Q. Referring to the item at the foot of this account, being March fifteenth, one ton of tomato fertilizer, twenty-seven dollars, how do you explain that that item comes in after items charged in June and May and later in March? 10

A. I can't explain it, save to say that this may have been an item which may have been overlooked.

Q. It may have been?

A. It may have been.

Q. If so, you have with you no original entry to prove it?

A. No.

Q. Referring to page 8 of the ledger, Exhibit 5, on the account of Charles Silver, I find five items which appear to have been put on this account as a charge against Charles Silver, which are of a later date than the last charge under date of March fifteenth. 20

A. Three items. This is March fifteenth; those two are March fifteenth; there are three items later.

Q. Three items later. Referring to the first item, under date of March nineteenth, a ton and a half of potato guano at thirty-two, that is a later item, isn't it, than the fifteenth? 30

A. Yes, sir.

Q. And referring to the next line under it, under the same date, that is also for a later date, isn't it?

A. Later date.

Q. And charge of May fourteenth, is a later date?

A. Yes.

Q. And the charge of June second is a later date?

A. Yes, sir.

Q. And they all come in before the charge that I have referred to as March fifteenth, do they not?

A. Seem to, yes, sir.

Mr. Alvord: I object to the proof of the account on the claim against Charles Silver on the ground that we have not got the original entry against this
10 defendant.

Mr. Bacon: I read from the answer in this case filed by Mr. Alvord. He says he never purchased fertilizer to the extent claimed in the complaint, but did purchase from the said firm of B. S. Ayars and Sons Company fertilizer to the value of one hundred and forty-one dollars, which said fertilizers were not to be paid for, and so forth, but he admits one hundred and forty-one dollars. Now, the total claim in
20 the Silver case is one hundred and eighty-nine dollars. May I ask counsel to what items his admission of one hundred and forty-one dollars applies and what items he disputes?

Mr. Alvord: My admission only extends to the wording of that paper, and any benefit they can get out of that they are welcome to, but I am not prepared to admit anything further than I have already admitted.

30 The Court: You have the burden, Mr. Bacon, of proving your account.

Mr. Bacon: I am perfectly willing to assume that.

Recess taken until 1.30 P. M.

Afternoon session 1.30 P. M.

GEORGE B. M. SCHILLER, resumed.

Cross-examination continued.

By Mr. Alvord:

Q. This man Sapp that you refer to in your testimony, what was his first name? 10

A. Jacob.

Q. Where did he operate for the company?

A. At Monroeville.

Q. What did he do?

A. He acted as an agent for the sale of fertilizer and the furnishing through the farmers of tomatoes.

Q. For whom was he acting?

A. Acting for the B. S. Ayars and Sons Company.

20

By Mr. Bacon:

Q. Mr. Schiller, in response to questions asked you by Mr. Alvord you said that there were slips made of the fertilizer sales. I show you—what do you call this thing I show you?

A. Call that a file.

Q. And is that the file in which you kept those slips?

A. It looks like the order file in which those order slips were kept. 30

Q. Is it not true, Mr. Schiller, that this file, in which these order slips were kept was used for the sales that were made around Bridgeton, and not used for the sales that were made by Mr. Sapp?

A. They were used more largely for our Bridge-

ton sales than for the sales at Monroeville and other places.

Mr. Bacon: I may say that I have very carefully examined the slips in this envelope and I am unable to find any slips in it showing deliveries to Mr. Richards or Mr. Milner or Mr. Silver. I offer it to counsel and he can do the same thing.

10 Q. Mr. Schiller, I show you a red book with a label pasted on it, on which are the words, "Fertilizer sales, 1913." Who kept that book?

A. The book is kept principally by one of the office girls, but there are entries made by others of the office force in it.

Q. Did you make the entry on page 97?

A. Yes, sir; I did.

Q. That is in your handwriting?

A. My handwriting.

20 Q. Read it, please.

A. This reads, "S. Milner, Franklinville, New Jersey."

Mr. Alvord: I claim this book has not been sufficiently proven to be used as yet in evidence.

The Court: Prove it, Mr. Bacon.

Q. You say you made the entry on page 97?

30 A. Yes, sir.

Q. Where did you get the information from which you made that entry?

A. I don't recall exactly, but it must have come from our agent at Monroeville, through whom those orders came.

Q. And what is that entry? That is, without reading it, what does that entry represent?

A. It represents a sale of so many tons of various fertilizers to S. Milner.

Q. Then underneath the ink entry there is a lead pencil entry; who made that?

A. I made it.

Q. And what does that lead pencil entry indicate?

A. That means that this lot of fertilizer to this man was ordered shipped to him on that date. 10

Q. Ordered shipped by whom?

A. By the J. E. Tygert Fertilizer Company.

Mr. Alvord: I object to the use of this book until it appears what the general nature of this book is, as to whether it is a book of original entry or not, and the book of what company it is, and to show that it is proper to be used in evidence before it is used.

The Court: You may show the character of the 20 book.

Q. Was this book kept in the office of the B. S. Ayars and Sons Company?

A. Yes, sir.

Q. And you made those entries there from information furnished you in this particular instance by Mr. Sapp, did you?

A. Yes.

Q. And you had other sales people, did you, that 30 is you had people selling in the vicinity of Bridgeton?

A. Only at our plant.

Q. Did you make similar entries in this book when the orders for fertilizer were taken?

A. In this book?

Q. Yes.

A. Yes, sir.

Q. This is the book in which the orders were entered before they were delivered, is it not?

A. Yes, sir.

Q. And then this lead pencil entry here shows the date when the fertilizer was ordered shipped to the customer?

A. This shows the date when this particular lot
10 was ordered shipped to the buyer.

Mr. Bacon: I only want to say in explanation that an examination of page 97, which is the account of Milner, will show that the entry in this book corresponds precisely with the entries in the farmers' ledger, with this exception: that this one shows quantities and price per ton, without any extensions.

Q. Do you find a similar entry on page 138 of the
20 order given by Mr. Richards through Mr. Sapp?

A. Yes.

Q. And a similar entry on the same page of the order given by Charles Silver through Mr. Sapp?

A. Yes, sir.

Q. Is there a similar entry underneath the Richards account and the Silver account, showing the date when shipments were made?

A. That is right, yes, sir.

Q. And were all three of those orders given to
30 the J. E. Tygert Company?

A. So far as I can remember they were given to the J. E. Tygert Company direct for shipment to the buyer.

Q. Shipment direct to the buyer at Monroeville?

A. Yes, sir.

Q. So that this fertilizer never came into the hands of the B. S. Ayars and Sons Company?

A. Never came into our plant.

Q. And in all three cases this was the fertilizer of the J. E. Tygert Company?

A. Yes, sir.

By Mr. Alvord:

Q. This book which you have used to testify from, and which has not been offered in evidence —

10

Mr. Bacon: I offer it. I thought counsel wanted to cross-examine about it before I offered it. I offer it.

(Book marked Exhibit P6.)

Q. This book, Exhibit P6, was a book which was one of the books of account of the B. S. Ayars Canning Company?

A. Yes. Ayars and Sons Company.

20

Q. And was used in their office?

A. Yes, sir.

Q. The accounts you have referred to on page 138 refer to sales by your company, the Canning Company, to Richards and Silver, two of the defendants in this case, do they not?

A. They do.

Q. Of fertilizer?

A. Yes, sir.

Q. And the name of J. E. Tygert and Company 30 does not appear on the book, does it?

A. I don't see it anywhere.

Q. You don't find the name of J. E. Tygert and Company anywhere in this book?

A. No, sir.

JACOB N. SAPP, SWORN.

Direct examination.

By Mr. Bacon:

Q. Where do you live, Mr. Sapp?

A. Monroeville.

10 Q. In 1912 and 1913 did you sell fertilizer to farmers in your neighborhood for the B. S. Ayars and Sons Company?

A. Yes, sir.

Q. Who superintended the delivery of the fertilizer that was so sold?

A. Mr. Ayars.

Q. Well, who actually made the deliveries to the farmers up there?

A. They came and got it from the station.

20 Q. Was the fertilizer shipped to the station there at Monroeville?

A. Yes, sir.

Q. From where?

A. Most of it I guess from Tygert, Philadelphia.

Q. Did it come there in cars?

A. Yes, sir.

Q. Who saw to it that the farmers got what they had ordered?

A. They had it on the contracts.

30 Q. I know, but if a man came there after his fertilizer, who delivered it to him?

A. They delivered their own. I had to notify him when it was there.

Q. That is, you notified each farmer his stuff was there?

A. Yes, sir.

Q. And he came and got it out of the car?

A. Yes, sir.

Q. Did you take the orders yourself from these people?

A. When they got the contract for tomatoes it went right on the back part of the contract, what fertilizer they wanted.

Q. And did you in 1912 and 1913 sell to C. W. Richards?

A. Yes, sir.

10

Q. Did you sell to Mr. Milner?

A. Yes, sir.

Q. And sell to a man named Silver?

A. I sold him part of his and the rest he come down here and got.

Q. Did you go over the Silver's account with Mr. James Ware, who was looking after the collection of these fertilizer bills?

A. Yes, sir.

Q. Did you go over the accounts that Mr. Ware 20 showed you on that ledger?

A. I think I did.

Q. Then did you also go over your books and accounts to see if it was correct?

A. Yes, sir.

Mr. Alvord: I object.

Q. What did you find?

30

Mr. Alvord: I object to that question. This witness is now asked if he went over the books of the canning company and compared them with his own books, and found them correct. I object to that testimony. I object to this witness confirming the books in that manner.

The Court: Has he his own records?

Q. What did you do to ascertain whether the account on that ledger was correct?

Mr. Alvord: I object to that.

The Court: The objection is overruled.

10 (Exception noted for defendants.)

The Court: He may say how he did it, but he cannot tell us about his books until we know something more about them.

Q. Just tell what you did.

Mr. Alvord: Is that objection overruled?

20 The Court: Yes.

A. Well, I went over Mr. Silver's contract. He got either two or three ton off of me, and the rest he come down here and got, and the girls give me an account of what he got, and they had a ton and a half, I think, too much on it.

30 Mr. Alvord: I object to this testimony as not responsive to the question and as being improper for this man to testify to, what the girls did in the office.

The Court: The objection is overruled.

(Exception noted for defendants.)

Q. Have you got any memorandum to show just what deliveries you made?

A. Yes, sir. I haven't got them here. When I contract, you know, the man took so many acres of tomatoes and so much fertilizer. The fertilizer was right on the back part of his contract, just what he got and the kind he got and the price, and that was sent down here to us.

Q. Have you got anything to show that transaction?

10

A. Why, I burned all the contracts up. I supposed Mr. Ayars had the contracts.

Q. Was fertilizer delivered to Silver that wasn't on that order?

A. Wasn't on my order?

Q. Wasn't on your order.

A. No.

Q. Well, now, what fertilizer was delivered to him that was not on your order, if you know?

20

Mr. Alvord: I object to this question, because this witness has no right to refer to the contents of his order, it being a written document, without having it here.

The Court: He is not doing that, as I understand it. He is not being asked the contents of any paper. He is being asked now about his independent recollection of the transaction, if he knows anything about it.

30

Q. You say that you took the contract with Mr. Silver for tomatoes, and that on the back of it you took an order for fertilizer?

A. There is one ton at thirty-two and one ton at thirty

Q. Look at the paper I have just handed you and say what fertilizer you find on the back of that that was ordered by Silver at that time?

A. Only two ton he ordered off of me. The rest he come here to Bridgeton and got.

Q. What was it he ordered from you?

A. What is on here. One ton of thirty-two and one ton of thirty.

Q. What kind?

10 A. One ton of twenty-seven.

Q. What kind, Mr. Sapp?

A. Tomato fertilizer.

Q. And what was the other?

A. Potato.

Q. Now, did Mr. Silver get fertilizer other than those two tons that are on the back of that paper?

A. He got it here at Bridgeton. He didn't get no more off of me.

20 Q. How much did he get from Bridgeton, to your knowlege?

A. I have got it on a little book at home. I told Ware what it was. I don't know what it was there.

Q. Did you furnish Mr. Ware with a memorandum of it?

A. I sent it to him.

Q. Look at that piece of paper pinned to the ledger there and see if that is what you told him?

A. One ton of thirty-two —

30 Mr. Alvord: I object to this question on the ground that as far as it appears it is not proper evidence.

The Court: The best evidence is his book. I think the rule of law is that a witness may refresh his recollection from the original entry. He has not that book here, as I understand it.

A. No; I have not.

The Court: It is a matter of delay. We will give them time to get it here. If there is such a book, it should be produced.

Q. What does that book that you have home show?

Mr. Alvord: I object to testimony here to prove what some book shows he has at home. I certainly 10 object to that.

The Court: The objection is overruled.

(Exception noted for defendants.)

Q. That is, what kind of a book is this that you have got?

A. One of Tygert's fertilizer books.

Q. What have you got set down in it? I am not 20 asking about this man's account or any other man's account.

A. I have got the two tons down that Mr. Silver bought off of me.

The Court: What else?

A. I got the rest down what they told me he got down here.

Q. Then the only thing you have got in that book 30 that you know about is the same thing that is on the back of that paper; is that right?

A. Yes.

Q. The rest you have got in the book is what they told you about down here?

A. I put that in that book at the time they told me. That is what I done with it.

The Court: The book, so far as it relates to information which he got second-handed, would not be evidence anyhow.

Q. Do you know that Silver got more than those two tons that is on the back of that paper?

A. All I know is what Mr. Ayars' clerks there told me.

Q. Who told you?

10 A. The girls in Mr. Ayars' office.

Q. Which girl?

A. I don't know what their names are.

Q. Don't you know that some of this fertilizer was actually delivered to Silver?

Mr. Alvord: I object to the form of that question.

Q. Do you know whether any fertilizer was delivered to Silver?

20 A. He carted it himself.

Q. How much was delivered to him?

A. Whatever is down to him. I don't know what is down to him. Whatever he got.

Mr. Bacon: I offer that paper.

(Paper marked Exhibit P7.)

Cross-examination.

30

By Mr. Alvord:

Q. Referring to the agreement between Charles Silver and the B. S. Ayars and Sons Company of Bridgeton, marked Exhibit P7, did you obtain this contract and furnish a copy of this contract to Charles Silver?

A. Charles Silver got one and I sent one down to Mr. Ayars.

Q. Well, this is evidently the one you sent to Mr. Ayars?

A. I suppose it is. I suppose Charlie has his.

Q. In obtaining from Charles Silver this contract, Exhibit P7, for the furnishing of tomatoes for the year 1913, and on the back of it for furnishing the two tons of fertilizer, was while you were in the employ of this B. S. Ayars and Sons Company? 10

A. Yes, sir.

Q. And in making your contracts with the farmers, you generally used a paper of a similar nature to this one, which has been offered in evidence?

A. Yes, sir.

Q. And most of them had their fertilizer order right on the back —

A. On the back.

Q. — of the tomato contracts?

A. Yes, sir. 20

By Mr. Bacon:

Q. You had a similar contract with Milner for 1912, did you?

A. I did, sir.

Q. Is that it?

Mr. Alvord: 1912, did you mean?

30

Mr. Bacon: 1913. It is dated 1912. I am showing the witness papers which are identical in form with Exhibit P7, one signed by Milner dated December sixth, 1912, which the witness identifies, and which I offer.

(Paper marked Exhibit P8.)

Q. I show you a similar paper signed by Richards. Did you get his signature to that?

A. Yes, sir.

Mr. Bacon: I offer that paper in evidence.

(Paper marked Exhibit P9.)

10

CLARA GARRISON, SWORN.

Direct examination.

By Mr. Bacon:

Q. Miss Garrison, you now are employed in the county clerk's office?

A. Yes, sir.

20 Q. Were you formerly a bookkeeper for B. S. Ayars and Sons Company?

A. Yes, sir.

Q. I show you the entry in the farmers' ledger for 1912, under the title Charles Silver. Did you make those entries?

A. I did not.

Q. Who did make them?

A. Miss Fort.

30 Q. Was she another bookkeeper in the employ of the B. S. Ayars and Sons Company?

A. Yes.

Q. Where does she live?

A. Bridgeton Avenue.

Q. In this city?

A. Yes, sir.

Q. Is her health such that she is able to be out?

A. No; it is not.

Q. You say she is not able to come to court?

A. She is not.

Q. Are those entries all in her handwriting?

A. All but the discount and the protest.

Q. In whose handwriting is the lead pencil entry?

A. Miss Fort's, I think.

Q. It is the same as the others, is it not?

A. Yes.

Q. Did you also make entries in this book?

A. No, sir.

Q. Did she make the entries that were made in this book? 10

A. She did unless it was something like the discount.

Q. Was that a book that was regularly kept there in the office?

A. Yes.

Q. Were entries made in it from day to day as fertilizers were shipped?

A. Yes, sir.

Q. And as far as your knowledge goes, were they correctly made? 20

A. I think so.

Q. And correctly made at the time that the shipments went out?

A. Yes, sir.

Cross-examination.

By Mr. Alvord:

30

Q. Referring to the account of Charles Silver, page 8, under his account in the ledger, Exhibit 5, do you know why items of March fifteenth in this ledger are put in here after items of later dates on the same account?

A. I do not.

Q. You don't know why that is?

A. No.

Q. Now, from what book do you suppose this ledger account was made up, or do you know?

A. I don't think it was taken from a book. I think it was taken from slips. It used to come in the office on slips and put them on a file until they were posted in there.

10 Q. Well, this account, the one I have just referred to of Charles Silver on page 8 seems to be all mixed up as to the dates of the recording of these items in this ledger, does it not?

A. It looks that way.

Q. And you are unable to explain that, how that occurred?

A. Couldn't tell you.

PLAINTIFFS REST.

20

DEFENDANTS' TESTIMONY.

CHARLES G. RICHARDS, SWORN.

Direct examination.

By Mr. Alvord:

30 Q. In 1912 and 1913 where did you reside?

A. Near—a mile and a half west of Iona, between there and Monroeville.

Q. How far from Monroeville?

A. About three miles, I should judge, two mile and a half or three miles.

Q. At that time what was your business?

A. Farmer.

Q. For how long a period of time did you have dealings with B. S. Ayars and Sons Company, one of the plaintiffs in this suit?

A. Three years, I think.

Q. Three successive years?

A. Yes.

Q. In a general way what business did you have with this company?

A. Well, I contracted to deliver them tomatoes to Monroeville station, and they give me fertilizer 10 to grow them with on the account, to come off of the tomatoes.

Q. For how many years did you do that?

Mr. Bacon: I object to that unless it is confined to the year in question, the account in question.

The Court: Confine the testimony to 1912 and 1913.

Q. What dealings did you have with this plaintiff company, the Ayars Canning Company, during 1912 and 1913? 20

Mr. Bacon: I object to that on the ground that the written contract is in evidence, and speaks for itself.

The Court: The objection is overruled. He can say generally, but he cannot testify specifically. I think both sides are going to rely upon the written 30 contract, are you not?

Mr. Alvord: Principally.

The Court: Plus any oral arrangement consistent with it.

(Question repeated.)

A. Mr. Sapp came and brought a contract, a contract to take tomatoes to Monroeville station, and to deliver fertilizer to grow the same, to come off of the tomato crop.

Mr. Bacon: I move that the latter part of that answer be stricken out on the ground that the contract must speak for itself.

By the Court:

Q. The contract was in writing?

A. The contract was in writing on the back.

Q. And that embodies the arrangement between the parties?

A. Yes, sir.

20 The Court: Strike that out as inconsistent with the contract. That is as far as you can go, Mr. Alvord.

By Mr. Alvord:

(Witness is shown the agreement purporting to be between C. W. Richards of Porchtown and B. S. Ayars and Sons Company, marked Exhibit P9, and is asked if that is his signature.)

30 A. That is my signature.

Q. In the year 1913, did you raise a crop of tomatoes?

A. I did.

Mr. Bacon: I object to that on the ground it has no relevancy to the matters here at issue.

The Court: Somebody ought to read the contract to the jury so the jury will understand.

(Mr. Bacon reads agreement between C. W. Richards and B. S. Ayars and Sons Company to the jury.)

(Question repeated. Objection overruled. Exception noted for plaintiffs.)

10

(Question repeated.)

A. I did.

Q. Did you raise as much as four acres?

A. I raised eight acres, as I agreed upon, and can prove by Sapp.

Mr. Bacon: I object to that on the ground that the contract speaks for itself. I move to strike it out.

20

(Question and answer repeated.)

The Court: There is a better way to get at it than that.

Mr. Alvord: His answer covered more than my question.

The Court: You are entitled to show, if you can, 30 that there was an oral contract made after this contract was made, between the witness and the Ayars Company.

Q. You say that you actually did raise eight acres?

A. I raised eight acres and got fertilizer on the second contract to raise them. Also —

The Court: Just wait a minute. Will you be kind enough to enlighten the jury as to the second contract, if there was ever one?

Q. What other contracts in 1913 did you make with the B. S. Ayars and Sons Company besides the
10 one which has been offered in evidence here, and which you have admitted you signed?

A. I contracted for four additional acres and got tomato fertilizer on the crop. Also 1912, the same.

Q. With whom did you make this contract?

A. Mr. Sapp.

Q. As agent for the same company?

A. Yes, sir.

Q. The canning company?

20 Mr. Bacon: I object to that. He said he made it with Mr. Sapp. Agency is something else.

Mr. Alvord: Sapp and your other witness both swore to that.

The Court: Do you mean to say that after you signed this agreement in writing that Sapp and you agreed verbally that you should raise four more acres?

30

A. Yes, sir. He came around a little later and he wanted me to put in more and take more fertilizer, and I did so.

Q. And did you sign anything the second time?

A. We didn't sign it. The same as we did in 1912. Verbal. We always done it.

Q. About what season of the year did you get this fertilizer in 1913?

A. Well, I couldn't say that, Mr. Alvord.

Q. In time to use for your crop?

A. Yes, sir.

Q. For instance, for the tomato crop of 1913?

A. Yes, sir.

Q. What kind of soil did you have up at your farm there on which to raise these eight acres of tomatoes?

10

A. Heavy.

Mr. Bacon: I object to that on the ground that that has no bearing on the issue.

The Court: Well, it is harmless.

Q. Heavy grain and tomato and potato, corn, wheat ground, heavy.

Q. How was it in regard to productiveness?

20

A. It was good.

Q. At what season or time of the year did you first become acquainted with the fact that B. S. Ayars and Sons Canning Company had failed?

A. Why, something like July, I think it was, they notified us.

Q. Was it before your crop of tomatoes had matured that year ready to send to the canning factory?

A. Yes. We was about done cultivating them, ready for picking them.

30

Q. On the eight acres that you raised in 1913 of tomatoes, how many tons to the acre did you raise?

Mr. Bacon: I make the same objection.

The Court: The objection is overruled.

A. Eight and a half to ten tons.

Q. What were your tomatoes as to quality in 1913?

A. They was very fine.

Mr. Bacon: Will your Honor give me the benefit of an exception to all of this line of testimony, so as not to interrupt?

The Court: Yes.

10

(Exception noted for plaintiffs.)

Q. Did you know what were considered to be merchantable tomatoes as you had dealt with this company in other years?

A. Yes, sir.

Q. And when you say that your crop of tomatoes for the year 1913 produced from eight and a half to ten tons per acre, do you refer to marketable tomatoes —

20

Mr. Bacon: That is objected to as leading.

(Objection overruled.)

Q. —or not?

A. To take to Sapp.

The Court: That is, they were good marketable tomatoes such as the canning company had been in the habit of receiving?

30

A. Yes, sir.

Q. Were you notified in any way by any one pretending to act for the canning company or for the receiver for the canning company previous to the

maturity of your crop that you would be at liberty to sell and dispose of your crop any way you saw fit for that year?

A. Yes, sir; the Ayars Company said they couldn't take them.

The Court: When was that?

A. About somewhere the first of July, I think. We was all done cultivating, I think. They was all laid up ready to pick. About that time. It might have been the last of June. 10

The Court: When was the decree of insolvency?

Mr. Bacon: Twenty-eighth of July, and I object to anything that may have been said by anybody pretending to represent the Ayars Company prior to that time. They cannot be bound. I move to strike out the answer, the Ayars Company said they could not take them, on the ground it does not bind the receivers. 20

The Court: The objection is overruled.

Q. What did you ascertain in regard to whether or not the canning company, the B. S. Ayars and Sons Canning Company was or was not accepting tomatoes for canning in 1913?

A. Mr. Lloyd wrote for him and me and they answered—the receivers answered that they couldn't receive them or something like them words. I think Mr. Lloyd could tell you. 30

Mr. Bacon: I object to that. If there is any writing about it we ought to have it. I move to strike that out.

The Court: Is there any doubt about the fact that the receivers were not receiving any tomatoes?

Mr. Bacon: I think there is very grave doubt as to whether any tender was ever made to the receivers.

By the Court:

10 Q. Was this communication from the receivers to you and Mr. Lloyd in writing?

A. Yes, sir.

Q. Have you the writing?

A. Mr. Lloyd has had it—I couldn't say—and Mr. Hinchman has it also. They have the writing, some of them. They wrote to some of them.

By Mr. Alvord:

20 Q. Did you find out yourself whether the B. S. Ayars and Sons Company were canning tomatoes in 1913?

A. I did. I went over to Sapp's right away and he said they refused to take them, as their agent.

Q. You went personally to Mr. Sapp?

A. Yes, personally, with Mr. Dixon, twice or three times.

30 Mr. Bacon: I object to that. Mr. Sapp certainly was not the agent of the receivers. Here are three officers of the court. They cannot be bound by somebody in the employ of the B. S. Ayars and Sons Company.

The Court: I know, but there must be a fact in relation to the matter, and it is quite apparent that

these receivers were carrying on no canning business. They were appointed to receive the assets.

Mr. Alvord: They put in evidence that they had an injunction against doing business.

The Court: I do not think I should exclude the evidence if it is a fact, and if this proof is questionable I will permit the receivers to be called themselves to see whether or not they were receiving tomatoes or in any condition to perform this contract. 10

Q. How was the market for tomatoes in 1913?

Mr. Bacon: That is objected to on the ground that this witness has not shown any expert qualifications to testify as to the state of the market.

The Court: You may qualify him, show whether he is a tomato grower or not, and what he knows about that. I do not suppose it requires any very great expert knowledge. 20

Q. What actual efforts did you make in the year 1913 to sell the tomatoes, these eight acres of tomatoes that you raised?

A. Mr. Lloyd, Mr. Hinchman, and men went to Norma, Elmer, Camden, and Rio Grande, Williamstown and Glassboro to sell our tomatoes.

The Court: Because there were canning factories there? 30

A. Because there were canning factories there to dispose of them, and see if we couldn't get something.

Q. They were canning factories where they were buying them?

A. Yes. Of course, they was filled up with contracts and we couldn't get them in.

Q. How did you make out at these places?

A. We couldn't sell a tomato.

Q. What appeared to be the reason why you couldn't sell?

A. Well, it seemed to be that Ayars was a big
10 firm —

Mr. Bacon: I object to that on the ground it is entirely hearsay. Why he did not have any luck I submit is not material.

The Court: Yes; he may show why. That goes to the condition of the market. What was the trouble with the market?

20 A. Seems as though Mr. Ayars had failed, several hundred acres and that left all of our tomatoes on the market, and there was a glut and there was a big crop of tomatoes, and they wouldn't bring nothing in town. I picked them and took them to town and brought them and dumped them home, dumped them out along the road and home. Couldn't give them away.

Q. How much time did you spend in trying to dispose of this crop of tomatoes?

30 A. Good many days, because it seemed a shame to have them wasted.

Q. How much of your crop of tomatoes off of this eight acres in 1913 did you succeed in selling and disposing of?

A. Well, about eight hundred baskets.

Q. And how much did you receive from them, about?

A. Eight cents a basket.

Q. That means that sixty-four dollars was all that you got out of them?

A. That is all I got out of them besides lots of expense to try to get rid of them, dollars and dollars. Two dollars and eighty cents to go to Rio Grande to try to get rid of them.

Q. Did you work steadily on your crop to mature the whole crop of tomatoes? 10

A. I did.

Q. This contract that you made for the second four acres of tomatoes in 1913, at what price was that contract?

A. Eight dollars and twenty-five cents; and the fertilizer was the same price.

The Court: Eight dollars and a quarter a ton?

20

A. Yes, sir.

Q. The same price as the first time?

A. Same price, and the same price for the fertilizer I got on them.

Cross-examination.

By Mr. Bacon:

Q. You owed a balance to B. S. Ayars and Sons Company of a hundred and thirty-five dollars and thirty-three cents from your 1912 account, didn't you? 30

A. Yes, sir.

Q. Have the same kind of a contract in 1912 as you did in 1913?

A. Yes, sir; and there was a storm came and tore my crop to pieces.

Q. I didn't ask you about that. In the answer that you filed in this cause you say that you had a contract for the growing of seven acres of tomatoes in 1913; is that correct?

A. Seven?

Q. That is what you say in your answer here that I am reading from.

10 A. Eight acres.

Q. Your statement here that it was seven acres is not correct, is it?

A. Eight acres, to the best of my knowledge.

Q. You say here in your answer that your contract for the seven acres was in writing. Where is that contract?

A. I think Mr. Alvord has it.

Mr. Bacon: Please produce it.

20

Mr. Alvord: The only contract in writing we have is the one you have offered in evidence.

Q. The statement here is that you had a contract in writing for seven acres. I want to know where that contract is.

A. Well, I couldn't say. That is as near as I can tell by memory.

30 The Court: Was it seven acres or eight acres?

A. I couldn't say positive. It has been three years, I think, and I can't keep such things in my head.

Q. You say in your answer here that it was in writing, that you only had one contract and that

that contract was in writing and that it was for seven acres. Now, is your statement here that you filed with the court true or not?

A. I had a contract for four acres in 1913 and an extra contract with Sapp, verbal, both years. You can call Mr. Sapp and he can tell you.

The Court: Was the verbal contract for three acres or for four acres or don't you know?

10

A. I couldn't say positive.

Q. How many orders for fertilizer did you give in 1913?

A. I couldn't say.

Q. Don't know whether you gave more than one? one?

A. Yes; I gave two, I know.

Q. You gave two you know?

A. Yes.

Q. How many tons did you order the first time? 20

A. I couldn't say.

Q. Was all the fertilizer that you ordered the first time put on the back of the contract that you made with Sapp?

A. The first time?

Q. Yes.

A. It probably—there was.

Q. That is, when you made the contract with Sapp, that was in writing, you gave an order for fertilizer, did you?

30

A. Yes.

Q. And that was entered on the back?

A. Yes.

Q. Is that right?

A. Yes.

Q. You ordered two tons of Gold Edge potato, did you?

- A. I suppose so.
- Q. Did you use that for tomatoes?
- A. Sometimes I used a better grade on them, yes.
- Q. You ordered four tons of High Grade, did you?
- A. Yes.
- Q. You ordered two tons of Early Truck?
- A. I couldn't say. Whatever is there.
- Q. Well, take a look at it and say what it was that you ordered at the time that you entered into
- 10 that contract with Sapp?
- A. That looks as though that is what it is.
- Q. That is what it is?
- A. Yes.
- Q. Now, you say that after this contract was made that you then made another contract with Sapp, do you?
- A. Yes, sir.
- Q. And at the same time you ordered more fertilizer?
- 20 A. I ordered more fertilizer of him, yes.
- Q. Now, what did you order that time?
- A. I couldn't say.
- Q. Well, what is your best judgment about what you ordered then?
- A. I couldn't say; can't remember that long.
- Q. Did you order any fertilizer?
- A. I ordered fertilizer, yes.
- Q. The second time?
- A. Yes, sir.
- 30 Q. You are sure about that, are you?
- A. Yes.
- Q. Well, is there any way that you can tell how much you ordered?
- A. I can bring Mr. Sapp up and he is supposed to have his book.
- Q. But as far as you are concerned you can't tell?

A. I have Ayars Company's bill to me, B. S. Ayars and Sons' bill to me of their fertilizer, or Mr. Alvord has it right there.

Mr. Bacon: Will you let us have it, please?

Mr. Alvord: Here is one of their bills. I do not know that I have any other, but if I have I will be pleased to show it to you.

Q. Where do you live now, Mr. Richards?

10

A. Same place.

Q. Well, where is that?

A. Mile and a half from Iona, between Iona and Elmer.

Q. What are you doing now?

A. I am farming.

Q. Have you sold your farm?

A. No, sir. I sold one.

Q. Got another one?

20

A. Yes, sir.

Q. That is where you live now?

A. That is where I live, yes, sir.

Q. Mr. Richards, I call your attention to the fact that the charge against you is for ten tons, that is, the charge against you in this suit is for ten tons of fertilizer, and that the order on the back there of that contract is for ten tons of fertilizer?

A. Yes.

Q. And that the figures are precisely the same in the book account as they are there. Now, won't you say what fertilizer you got in addition to what you are charged with?

30

A. I couldn't say. I can bring up Mr. Sapp. He has it on his book and I have the bills home if Mr. Alvord hasn't got them. I can present them tomorrow.

ISAAC H. HINCHMAN, SWORN.

Direct examination.

By Mr. Alvord:

Q. Mr. Hinchman, do you live somewhere near Monroeville?

10 A. No, sir; I live near Iona.

Q. Is that somewhere near Mr. Richards' farm, the last witness?

A. Yes; adjoining his farm.

Q. Did you go with him in 1913 to see about selling tomatoes?

A. I went to see about it and I am not positive about going with Mr. Richards, but in all probability I did, but I, like he, sought a market for —

20 Mr. Bacon: I object to that on the ground that it is irresponsive.

The Court: He can tell anything he knows about the condition of the tomato market in 1913.

Q. Tell what you know about the tomato market in 1913.

30 A. Well, our tomatoes were left on our hands, and, as has been said, we sought a market for them, at different canning houses and at different places who we thought would buy. Sent some to Philadelphia and found the markets very poor there. I sent one load up and I realized two dollars out of a two-horse load.

Q. Was that enough to pay for your expenses of sending them up?

A. That was net. Two dollars on the load. That was net.

Q. How much did you have on the load?

A. I think somewhere near a hundred baskets.

Q. Did you take out for the fair price for the work of the horses in taking the load up there?

A. I didn't take an account of the picking and labor in getting ready. I charged the expenses of commission and carriage.

10

The Court: Was the yield of tomatoes pretty good, the quality?

A. It was a good year for tomatoes, an average crop, as a rule.

Q. Those tomatoes that you sent to Philadelphia, if you had deducted a fair price for the picking and for the cartage, would there have been anything left at all?

A. If I had charged the picking and the preparation there wouldn't have been anything left. I just charged —

20

Mr. Bacon: I object to that as an element of damage. He had to pick the tomatoes for anybody.

The Court: That is so. It is a very small matter. Do you doubt but what that was a poor year for the tomato growers, Mr. Bacon?

30

Mr. Bacon: Well, I am not a tomato grower on a sufficiently large scale to qualify as an expert, if your Honor please.

Q. What success did you have in visiting the various canning companies that you went to in 1915 to dispose of your crop?

A. Well, they all declined except the one at Elmer, and I hauled a load over there and they allowed me eight cents a basket for it, so that I didn't go there any more, and I didn't succeed any better anywhere else. So there seemed to be a disposition to decline the tomato crop outside of the contracts and the Philadelphia market wasn't there for the hauling there.

10 Q. What other places did you try besides Elmer in New Jersey?

A. Glassboro and Williamstown, Philadelphia commission houses. I don't think of any others.

Q. Did you try Rio Grande?

A. Mr. Richards represented me at Rio Grande. I didn't go with him.

Q. Did you sell any there?

A. No, sir.

Q. Did you try Vineland?

A. I tried Vineland, yes, sir.

20 Q. Could you do anything with them?

A. No, sir; they didn't want them.

Q. Did you see Mr. Richards' crop of tomatoes for the year 1913?

A. Yes, sir.

Q. About how large an acreage did he have in 1913?

A. The acreage I couldn't give. I didn't go into the details as much as that. I saw the crop.

Q. How was his crop?

30 A. His crop was very good.

Q. Have you had any experience in estimating the number of tons that a yield of tomatoes is?

A. I have been raising tomatoes quite a good while.

Q. Have you often estimated on a yield?

A. We generally do when we begin picking.

Q. In your opinion about how many tons to the acre was Mr. Richards' crop for the year 1913?

A. I would be safe in saying five to seven tons. They looked good.

Q. What is a full crop of tomatoes generally considered?

A. Well, a gentleman told me yesterday he had raised twenty tons to the acre some time past, but I never raised over nine tons. I know some people here by me have raised ten and twelve tons.

10

Cross-examination.

By Mr. Bacon:

Q. When did you see Richards' crop?

A. While they were bearing.

Q. Are you sure about that?

A. Oh, yes, sir.

Q. You said awhile ago on your direct examination you were not sure you saw Richards' crop. Are you sure about it now?

A. I beg your pardon. I wasn't sure of the acreage.

Q. Oh, you are sure you saw his crop?

A. I saw the crop as he was picking and as they were growing.

Q. How is that?

A. I saw the crop while they were growing and while he was picking.

30

Q. You went up and looked them over, did you?

A. Well, Mr. Richards and I has very close communication and we view each other's crops to see which was beating the other. Rather a contest between us as neighbors.

Q. And your estimate of his crop was that it would run from five to seven tons to the acre?

A. Yes, sir.

The Court: And yours would be a little better.

A. I try to make it so.

Q. Did you deliver any tomatoes in the season of 1913 to Mr. Sapp?

10 A. No, sir.

Q. You didn't take any down to Monroeville to him at all?

A. No, sir.

Q. Did you offer him any tomatoes?

A. I think he came around, if I remember right, and wanted to buy or brought somebody around there and wanted to buy on the market price, which I declined.

Q. Yet he came to see you, didn't he?

20 A. Mr. Sapp came to see me with a gentleman who was buying, if I remember right.

Q. Did Mr. Sapp go and see Mr. Richards?

A. Can't tell you about that.

Q. Don't know whether he did or not, but you know that Sapp was around in the neighborhood that year trying to take the tomatoes that had been contracted for to Ayars, don't you?

A. He was around with this gentleman from the market or wanted to buy on market price.

30 Q. You know he went around to see the people he had had these contracts with to take tomatoes for Ayars, don't you?

A. He brought a man around with him to buy.

Q. That man offered to buy these tomatoes, didn't he?

A. At market price, and I just told you what the market price is.

By Mr. Alvord:

Q. Who is this that offered to buy the tomatoes?

A. I don't know who he was. Mr. Sapp brought him around to buy at market price, and my experience with the market price wouldn't justify me in —

Q. Was he financially sound, this man he brought around?

A. I didn't know him.

10

Q. You don't know whether he had failed at that time or not, do you?

(Question objected to.)

A. I didn't know the man. I didn't know whether we could get our money or not after it was delivered.

Q. You don't know whether he failed or not, do you?

A. No, sir.

20

THOMAS LANGLEY, SWORN.

Direct examination.

By Mr. Alvord:

Q. What is your occupation?

30

A. Laborer.

Q. Did you see Mr. Richards' crop of tomatoes in the year 1913?

A. Yes, sir.

Q. Did you go over the whole piece to know where they were and what they were?

A. Yes, sir.

Q. Are you accustomed to calculating or estimating the acreage of pieces in a farming way?

A. Well, no, not very good calculation. I knowed he had quite a large field in. I wouldn't like to say about the acres.

Q. You couldn't say about how many acres he had?

A. I wouldn't like to, no. I know it was a large
10 field.

Q. Do you know whether he had a good crop of tomatoes or poor crop or how they were?

A. Well, I thought he had a right fair crop of tomatoes according to the season.

Q. Well, how was the season?

A. Well, the season wasn't as good as some seasons, but he had a fairly good crop of tomatoes.

Q. Well, do you mean he had about an average crop?

20 A. Yes, sir.

Q. Do you know about how many tons they would run to the acre?

A. Well, no, sir; I couldn't say just how many tons they would run to an acre.

Q. Did you help pick the tomatoes?

A. I did.

Q. Some of them?

A. Yes, sir.

30 No cross-examination.

J. W. LLOYD, sworn.

Direct examination.

By Mr. Alvord:

Q. Did you see Mr. Charles G. Richards' crop of tomatoes in 1913?

A. I did.

Q. Are you able to form any estimate about the acreage that he had in that year? 10

A. I think I am capable of forming a fairly good judgment.

Q. What is your judgment on that subject?

A. I would judge Mr. Richards' crop of tomatoes would yield from six to eight tons to the acre.

Q. And about how many acres did he have in?

A. I noticed one field containing at least three acres, probably more, and another field in another section that contained five acres. 20

Q. Did you know anything about whether the B. S. Ayars and Sons Canning Company of Bridgeton or the receiver for the company accepted tomatoes for canning from the farmers in 1913?

A. We heard rumors towards the latter part of June that the company, the B. S. Ayars and Sons Company, were not in a strong financial condition, and that caused the farmers in that neighborhood to discuss the matter, and the result of rumors was that several of the farmers, or I myself, called upon Mr. Sapp, Jacob Sapp, the company's representative at Monroeville, stating to him — 20

Mr. Bacon: I object to the conversation with Mr. Sapp as any attempt to bind the receivers.

Q. Where was this plant of the B. S. Ayars and Sons Company located?

A. In Bridgeton, New Jersey.

Q. Did you see that plant at any time during the canning season of 1913?

A. I never saw the plant. I couldn't find it here in Bridgeton today. Someone would have to take me to it.

Q. Did you make any effort in 1913 to ascertain
10 what the market was for tomatoes?

A. I made several attempts. I accompanied Mr. Richards, as he testified, to Williamstown one morning as there was a canning factory located at that town, and we were informed that the crop was so good that year and that the farmers who contracted would bring a sufficient supply to keep the factories running, and the manager said he didn't possibly see his way clear to take any tomatoes excepting those
20 for which he had contracted. On that afternoon Mr. Richards and I—rather we turned at noon. On that afternoon we drove to Norma, a distance of nine or ten miles, and I thought I had found a market for my tomatoes and Mr. Richards' as well. I sent my hired man to this factory with a load one morning —

Mr. Bacon: I object to this as certainly having no bearing on the issue, what the hired man did up in Norma.

30 The Court: The general effect of this witness' testimony, if I understand it, is that there was a bad market and good crop. Do you want to go any further than that, Mr. Alvord?

Mr. Alvord: I am ready to drop it. That is all.

Cross-examination.

By Mr. Bacon:

Q. In this trip of yours with Mr. Richards when you were trying to sell tomatoes, did you go to Mr. Sapp's?

A. I called upon Mr. Sapp on several occasions before the receivers were appointed, while the rumors were —

Q. I didn't ask you that. I said on this trip when you and Mr. Richards were trying to sell tomatoes did you go and see Mr. Sapp? 10

A. We did not.

Q. You know that Mr. Sapp is a buyer of tomatoes, do you not?

A. I did not know that Mr. Sapp represented any canning firm excepting the B. S. Ayars and Sons Company at the time Mr. Richards and I made the trip to Williamstown. 20

Q. Don't you know as a matter of fact that Mr. Sapp did buy tomatoes in the late summer and fall of 1913? 20

A. I do.

Q. And you know that he bought large quantities of tomatoes, don't you?

A. Well, it may be necessary that I correct my answer. Mr. Sapp did not to my knowledge buy tomatoes for himself. Mr. Sapp brought a gentleman around our neighborhood asking the farmers to sell their tomatoes to him on the market price. I wasn't at home at the time. My wife and daughter — 30

Q. Never mind about that. Do you know that Sapp did take tomatoes either for himself or somebody else that season?

A. I am not positive that Mr. Sapp took tomatoes

for anyone else. When we took some tomatoes to Monroeville there was a gentleman there other than Mr. Sapp who seemed to have entire charge of the business. Mr. Sapp helped to load the tomatoes on the car the same as any other laborer.

Q. Did this man that was there with Sapp take tomatoes?

A. Yes, sir.

Q. And did he not take tomatoes in large quantities?

10 A. He seemed to take all the tomatoes that were brought there.

Q. What did he pay for tomatoes? What was he offering for tomatoes?

A. Some days ten cents, some days eight cents.

Q. What do you mean by ten cents?

A. Ten cents a basket.

Q. How many baskets are there in a ton?

A. About sixty. Fifty-eight to sixty.

20 Q. Do you know whether Richards sold any of his tomatoes to this man who was taking them at Monroeville?

A. I am not positive.

Q. Did you sell any to him?

A. I did.

Q. How much did you get for yours?

A. I don't remember.

Q. Don't you know that he paid as high as fifteen cents a basket?

30 A. The first trip or two that we made to Monroeville, the price was fifteen cents a basket, I think, and yet I won't be positive of that.

The Court: Let me ask you this question. Mr. Lloyd, do tomato growers as a rule make contracts in the spring for the sale of their product or when do they make them?

A. It is the custom, if your Honor please, to make a contract with tomato growers in the spring. The acreage is agreed upon, the price per ton, the days upon which they are to be delivered and the hours of the day, the contract price per ton, and the date on which final settlement is made. Those matters are usually adjusted in the spring during the month of March, we will say.

10

W. F. RICHARDS, SWORN.

Direct examination.

By Mr. Alvord:

Q. You are a son of Charles G. Richards?

A. I am.

Q. Did you help pick tomatoes in the year 1913? 20

A. Yes, sir.

Q. Did you cart any of them to the city of Philadelphia?

A. Yes, sir.

Q. How did you make out selling them there?

A. Why, they brought a very low price and we brought most of them home and dumped them.

Q. Brought more than half of your load home and dumped it?

A. Yes. 30

Q. Because you couldn't sell them?

A. Yes, sir.

No cross-examination.

CHARLES G. RICHARDS, recalled.

Further cross-examination.

By Mr. Bacon:

Q. Did you know that Sapp was taking tomatoes in the season of 1913?

10 A. I did.

Q. He was taking tomatoes at the Monroeville station?

A. No, he wasn't.

Q. Well, he had something to do with it?

A. He had a man around there wouldn't agree to give us nothing. He would agree to give us the market price. If it was one cent, take it; if it was fifteen, take it, and the most of the time he gave about seven or eight.

20 Q. Mr. Sapp did have a man there who was buying tomatoes at the market price?

A. At the market price. There was a man there and some of them ain't got all their money yet. He failed.

Q. They were paying fifteen cents a basket sometimes?

A. They started fifteen and dropped in one or two days to about seven.

Q. Sometimes they paid ten cents a basket?

30 A. They paid ten, I understand. I didn't go there, because they wouldn't offer me five cents.

Q. Don't you know as a matter of fact that Mr. Sapp and this man did take all the tomatoes anybody offered them there?

A. All that would give them to them, yes.

Q. Don't you know that he took over a hundred

carloads of tomatoes from the farmers around in that neighborhood?

A. I couldn't say. I didn't go there because he wouldn't offer nothing, wouldn't offer nothing.

By Mr. Alvord:

Q. You say some of them haven't got their money yet?

A. That is what they told me. I got some baskets 10 that Mr. Langley borrowed of me that I ain't got yet. They was in partners and they failed.

SIMON MILNER, SWORN.

Direct examination.

By Mr. Alvord:

20

Q. Did you sign this agreement, Exhibit P8?

A. Yes.

Q. And you knew that this agreement called for you to raise fifteen acres of tomatoes in 1913?

A. Yes, sir.

Q. Did you do it? Did you raise fifteen acres in 1913?

A. Well, I can't tell you exactly. Maybe it was a little more and maybe a little less.

30

Q. Did you have a good crop of tomatoes in 1913?

A. Yes, sir.

Q. About how many tons did they run to the acre?

A. Well, I can't tell you exactly. I got between nine and ten, maybe.

Q. Did you deliver any of these tomatoes to the

B. S. Ayars and Sons Canning Company as called for in the contract?

A. No, sir.

Q. Why not?

A. Because I received a letter from the receivers. The company busted, and then I seen Mr. Sapp and Sapp told me no more the company in Bridgeton. Well, Mr. Alvord, excuse me, I couldn't talk so much English, you know.

10 Q. We can understand your English. Were your tomatoes of good quality in 1913?

A. Yes, sir.

By the Court:

Q. You had a good crop, did you?

A. Yes, sir.

Q. As to quality?

A. Yes, sir.

20 Q. And kind?

A. Yes.

By Mr. Alvord:

Q. And when you say that you had perhaps nine or ten tons to the acre, do you mean such tomatoes as were usually accepted by the canning company?

A. Yes, sir.

Q. Good marketable tomato?

30 A. Yes.

Q. How did you make out in disposing of your crop of tomatoes for 1913? What did you do with them?

A. Well, I lose them. I lose them in the field.

Q. Why didn't you sell them, and send them to Monroeville?

A. Well, I tried to send them and Mr. Sapp was in Monroeville and there was some buyer there and he bought from me two times, I can't tell you exactly how many baskets, but one time he paid me fifteen cents and the other time he paid me fifteen cents, and the third time he told me eight cents, and then he told me he got no cars, to wait. Well, I can't wait, because the tomatoes —

Q. He had no car?

A. No, he had no cars.

Q. Where else did you try to dispose of your tomatoes ?

A. Well, I try in Elmer.

Q. Could you sell them there?

A. Yes, seven cents a basket one time, and he wouldn't take any more.

Q. Where else did you try?

A. There was another buyer in Elmer and he bought three or four times, and he paid me different prices, too, but the highest price he would pay me was ten and twelve cents, and it was one time seven cents, too.

Q. Well, could you sell your crop?

A. No, I can't sell.

Q. How many of them did you sell altogether, did you succeed in selling?

A. Well, I sell maybe twelve, about fifteen hundred baskets.

Q. And about how many tons is that?

A. Well, I can't tell you exactly, but the farmer counts a ton about sixty baskets or fifty-eight baskets.

Q. How many tons do you calculate that you lost in the year 1913 by not being able to sell them?

A. Well, I guess—I can't tell you exactly, but I know what I sell and the other is lost. That is all

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30

what I know. I guess maybe I lost—well, I can't tell you exactly?

Q. Well, what proportion of your crop did you market? Half of them? Quarter of them?

Mr. Bacon: I object to that as leading. The witness has said he does not know.

A. I don't understand what you ask me.

10

The Court: He told you the number of baskets he sold.

By the Court:

Q. Did you lose all the other crop?

A. Yes, sir.

Q. Except what you sold?

A. Yes, sir.

20

Q. Sold fifteen hundred baskets?

A. About that.

By Mr. Alvord:

Q. You say they run about sixty baskets to the ton?

A. About fifty-eight or sixty.

Cross-examination.

30

By Mr. Bacon:

Q. How many acres did you have in?

A. Fifteen.

Q. How many?

A. About fifteen.

Q. Fifteen acres?

A. You asked me how much I raise?

The Court: He said maybe a little more, maybe a little less, about fifteen acres.

Q. You got this fertilizer, did you?

A. Yes, sir.

Q. Didn't pay for it?

A. No.

Q. You say that this man at Monroeville that was there with Sapp paid you fifteen cents a basket?

A. Yes; two times he pay me fifteen cents. 10

Q. That is nine dollars a ton, isn't it?

A. I can't tell you.

The Court: How much do you say this man's claim is?

Mr. Alvord: His claim is eleven hundred and fifty-five dollars, less the fertilizer bill, leaving a net balance claimed by him of eight hundred sixty-four dollars. 20

Q. How many tomatoes did you sell to the man at Monroeville?

A. Well, I was there three times, but I can't exactly tell you how many baskets there was in the three times.

Q. Was he taking tomatoes at the same place that you would have carted your tomatoes if the Ayars Company had been in business?

A. I don't know what you ask me. 30

Q. Where did you take your tomatoes for Ayars in 1912?

A. To Monroeville.

Q. To Monroeville?

A. Yes, sir.

Q. And this man that was there in 1913 was at Monroeville at the same place, was he?

A. Which man?

Q. The man that you sold to in 1913.

A. No.

Q. Where was he?

A. It was another man.

Q. It was another man, but he was at the same railroad station, wasn't he?

10 A. Yes.

Q. You went to the same place both years?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. And when he gave you fifteen cents a basket, that was more than Ayars agreed to give you, wasn't it?

A. I don't know. Ayars agreed to pay eight dollars and a quarter, I guess.

20 Q. If there are sixty baskets in a ton, and you got fifteen cents a basket that is nine dollars, isn't it?

A. Well —

Q. You can figure that much, can't you?

A. Well, you can figure it up. He paid me eight cents and seven cents too.

Q. That is the best you can do with figuring, is it? You can't figure how much that is?

30 A. Well, I got nothing to figure, because I am not sure how much baskets there was there.

Q. All right. If you don't know any more about your tomatoes than that, that is all.

SAMUEL MILNER, SWORN.

Direct examination.

By Mr. Alvord:

Q. You are a son of Simon Milner?

A. I am.

Q. In 1913 did you live on the farm?

10

A. I did.

Q. With your father?

A. I did.

Q. Do you know about how many acres of tomatoes your father had in for 1913?

A. I do.

Q. How many?

A. Between fourteen and fifteen acres.

Q. What kind of a crop did you have?

A. Very good crop.

20

Q. How much of this crop did you market and sell in 1913?

A. We sold about fifteen hundred baskets.

Q. Did you keep any account of it?

A. We did at the time. I haven't it with me now.

Q. And about how many tons to the acre did your crop run in 1913?

A. Well, from my previous experience, I should think there was about between eight and ten ton there.

30

Q. And how did you make out in disposing of your crop in 1913?

A. You can see that for yourself. We only sold about fifteen hundred baskets. We couldn't sell the rest.

Q. What was the trouble?

A. Why, the market was glutted. You couldn't sell them.

Q. Did you personally try to sell them?

A. I did.

Q. Just tell the jury what efforts you made to try to sell them, and how you made out.

A. Well, I went to Glassboro with a neighbor of mine to the canning company there and I tried to get a contract there, but they were all filled up. They
10 says they don't know whether they can handle their own, the contracts were all filled up; and then we went to Williamstown, Mr. Silver and I and they couldn't take any. The markets in Philadelphia wasn't worth taking them there. We did try to ship once to a commission man and he sent us a bill saying that he lost money.

Q. He lost money on them?

A. Yes.

Q. What other efforts did you make? Any?

A. Well, those that we sold, we could have sold
20 them at Monroeville if they would have taken them, but they had no cars. I had to take a load of tomatoes there in Mr. Sapp's yard and leave it there. There were no baskets. If they had taken them we could have sold them.

Q. They wouldn't take them?

A. They couldn't take them.

Cross-examination.

30

By Mr. Bacon:

Q. But you did take some there?

A. Yes, we took some there.

Q. And you got fifteen cents a basket for them?

A. For the first few loads.

Q. That is nine dollars a ton?

A. About.

Q. That is more than Ayars agreed to pay you?

A. It is.

By the Court:

Q. Why didn't you sell more at that rate?

A. They wouldn't pay any more.

Q. Would they pay fifteen cents a basket? 10

A. No. They did for the first two loads. Then they soon dropped.

CHARLES SILVER, SWORN.

Direct examination.

By Mr. Alvord: 20

Q. You are one of the defendants in these suits?

A. Yes, sir.

Q. And in 1913 you were farming near Monroe-ville?

A. Yes, sir.

(Witness is shown Exhibit P7 and asked):

Q. Did you sign that contract? 30

A. Yes, sir.

Q. And did you know that this contract called for you to raise ten acres of tomatoes in 1913?

A. Yes, sir.

Q. How many acres did you raise in 1913?

A. About ten, more or less.

- Q. How close to that?
A. Oh, it wasn't surveyed. About ten acres.
Q. Did you have a good crop of tomatoes in 1913?
A. Yes, sir.
Q. How good? About how many tons to the acre?
A. I will be safe in saying about eight tons to the acre, and maybe more.
Q. Did you deliver these tomatoes to the B. S. Ayars and Sons Canning Company?
10 A. No, sir.
Q. Why not?
A. Because they wouldn't take them.
Q. What did you do with your tomatoes in 1913?
A. I tried to sell as much as I could, and the rest rotted.
Q. How many did you succeed in selling?
A. I think there were about nine hundred baskets that I sold.
Q. What did you get for them?
20 A. The first load that we took down the first day at Monroeville, they paid fifteen cents, and then the second day it dropped to ten and eight and as low as seven.
Q. Would they always take them when you brought them there?
A. No, later on they wouldn't take them at all. They had no cars, had no baskets, they took our baskets and never returned any baskets.
Q. Did you get them all back?
30 A. Some of them we haven't up to the present time.
Q. Some you never got yet?
A. No.
Q. Did you do the best you could to get rid of your crop of tomatoes in 1913?
A. Yes, sir.

Q. How much money did you receive from your crop of tomatoes in 1913?

A. Well, figuring from eight to fifteen cents, or rather from eight to ten for nine hundred baskets, figure it easily out.

Q. Did you get over ninety dollars?

A. Oh, I can't tell exactly.

Q. Did you say about an average of ten, what you did sell?

A. Well, from eight to ten, because they paid fifteen cents the first day. 10

Q. How much did the baskets cost you?

A. From four to six and a half cents a basket.

Q. A lot of them you didn't get back?

A. Yes. Just took them and never sent them back.

Q. So when you sold a basket at ten cents for the tomatoes and then didn't get back the basket you didn't make much?

A. No. 20

Q. In regard to the bill claimed against you for fertilizers in this case, you admit receiving one hundred and forty-one dollars' worth of fertilizer?

A. I do.

Q. How many tons, or how many bags did that amount to?

A. Four and one-half tons or fifty-four bags.

Q. Four and one-half tons?

A. Yes. 30

The Court: Did you get any more than one hundred and forty-one dollars' worth?

A. No, sir.

Q. Do you know what this fertilizer consisted of, what kinds of fertilizer?

A. Yes, sir.

Q. Just tell the jury what it was, as near as you know.

A. Two and one-half tons potato guano; one ton tomato fertilizer; and one ton of potato High Grade fertilizer.

Q. In how many bags was this?

A. Fifty-four.

Q. Is that all?

A. Yes.

10 Q. You are sure about that?

A. Yes.

Q. You have some other witness who knows about that?

A. Mr. Samuel Milner helped me bring it from the station.

Cross-examination.

By Mr. Bacon:

20 Q. Have you got a book in which you kept an account of what tomatoes you sold?

A. I did.

Q. Where is it?

A. Our house was destroyed by fire, so we lost everything.

Q. So that you have got no account of it at all now?

A. No, sir.

30 Q. How long since you saw this book?

A. Since September, 1913.

Q. Since September, 1913?

A. Yes.

Q. So that your statement about how many baskets of tomatoes you sold is entirely from memory, is it?

A. To a certain extent it is.

Q. You have no record of it at all now?

A. No; not at present.

Q. How many years have you been raising tomatoes?

A. Nine years.

Q. Where?

A. At Monroeville and Pennsylvania.

Q. How many years at Monroeville?

A. Not quite six.

Q. You knew that Mr. Sapp was there at the Monroeville station with a man buying tomatoes, didn't you? 10

A. Yes, sir.

Q. And you did sell to him?

A. Yes, sir.

Q. His proposition was to take them at market price, wasn't it?

A. Yes.

Q. And as long as the market price was at fifteen cents you were willing to sell to him? 20

A. I was willing to sell any time.

Q. And you have sold to him at fifteen cents a basket?

A. First day.

Q. That is nine dollars a ton, isn't it?

A. Yes; the first day.

Q. Which of these receivers did you ever have any talk with?

A. I came over to see Mr. More, I think it was, and he told me, "If you can raise your own money and run the factory for us we will be only too glad to do it, but we can't run the factory ourselves." 30

Q. He told you they were not running the factory?

A. No.

Q. And that was the conversation you had with him?

A. Yes, sir.

Q. He was the only one you saw?

A. I saw Mr. Ware.

Q. He wasn't one of the receivers?

A. He was their representative or their attorney. I also explained to him.

Q. Your conversation with Mr. Ware was about collecting this bill, wasn't it?

A. About a mistake, straightening it out, because the bill was one hundred and forty-one dollars and
10 they made it something like two hundred.

Q. That was the talk you had with Mr. Ware, about the bill?

A. Yes, sir.

SAMUEL MILNER, recalled.

Direct examination.

20

By Mr. Alvord:

Q. Did you know anything about the fertilizer that Mr. Silver got?

A. I know that he had four and a half tons.

Q. Do you know how many bags that was?

A. Well, that amounts to fifty-four bags. I helped him to cart them home.

30 Cross-examination.

By Mr. Bacon:

Q. Did you keep any book account of these tomatoes that you sold?

A. I didn't sell his tomatoes.

Q. No; your tomatoes that you sold?

A. We did.

Q. Where is it?

A. I haven't it with me.

Q. Have you got it?

A. No; not with me.

Q. Have you got it anywhere?

A. I believe I have.

Q. Whereabouts?

A. At home.

10

Q. Why didn't you bring it?

A. I didn't think of it in time.

Q. Have you got down in that book all the receipts that you got for these tomatoes?

A. Yes.

Q. And didn't bring it with you?

A. No.

Mr. Bacon: I move this witness' testimony be stricken out. He has a book account and did not bring it. 20

The Court: He is not suing on a book account. He is testifying from independent recollection, if I understand his testimony right.

JACOB B. SAPP, recalled.

30

Direct examination.

By Mr. Alvord:

Q. Mr. Sapp, you knew something about the dealings of somebody that was buying tomatoes at Monroeville in 1913, didn't you?

A. Yes, sir.

Q. That party didn't make out very well with some of the farmers, did he?

A. Bought everything that come there.

Q. Did he give back all the baskets?

A. No, sir. Twelve hundred and thirty-five baskets out, practically.

Q. Did he always have cars?

A. No. There was two or three times he had no
10 cars. He filled everything up.

Cross-examination.

By Mr. Bacon:

Q. How many cars of tomatoes did you take in 1913 from the people who came there?

A. I think it was forty some from Monroeville and seventy from Elmer.

Q. Did you refuse to take any tomatoes from Mr.
20 Silver?

A. Yes, sir.

Q. Why?

A. Wasn't marketable.

Q. His tomatoes were not marketable?

A. No, sir; we didn't buy anything only good to-
tomatoes.

Q. Did he offer you tomatoes? That is, did Silver
offer you tomatoes?

A. Yes; I think we taken some.

Q. You did take some?
30

A. I think so.

Q. Did he offer you some you wouldn't take?

A. Yes, sir.

Q. You wouldn't take them because they weren't
marketable?

A. Yes, sir.

Q. How about Mr. Richards?

Mr. Alvord: That is objected to as not proper cross-examination.

Mr. Bacon: I will make him my witness.

Q. Did you buy any tomatoes from Mr. Richards?

A. I think I did.

Q. Did you refuse at any time to take tomatoes from Richards? 10

A. Not from Richards.

By the Court:

Q. Were you buying these tomatoes on your own account?

A. No, sir; I got a man from Philadelphia to come here and take them.

Q. Who was the man? 20

A. Lewis Faulker.

Q. It has been represented that he was not financially responsible.

A. He paid for all the tomatoes. It was twelve hundred and thirty-five baskets, but that wasn't his lookout.

Q. How much did he pay?

A. I think the first two weeks was fifteen cents a basket, and I don't think he bought a basket for less than ten cents the season through. 30

Q. So there was a market there?

A. Everything come that was fit to sell we took.

By Mr. Bacon:

Q. Now, Mr. Sapp, you had made these contracts

with these different farmers around there for the Ayars Company, hadn't you?

A. Yes, sir.

Q. And when you knew they weren't going to be able to take the tomatoes, you then tried to make a market for the farmers, didn't you?

A. I drug every place I could find to get shut of them.

10 Q. You got a man to come down there to buy tomatoes?

A. I got one to come to Monroeville and one to come to Elmer.

Q. Did you take at Monroeville and at Elmer all the marketable tomatoes these fellows brought you?

A. Yes, sir; everything that was fit to take.

Q. Is that true as to Richards and Silver and Milner, all three of them?

A. Mr. Milner brought several loads there, but I couldn't say how many.

20 Q. Did you take all that Milner offered you?

A. Yes, sir.

Q. Did you take all that Silver offered you that was fit to take?

A. Yes, sir; all but one load, if I remember right.

Q. Did you take all that Richards offered you that was fit to take?

A. Yes, sir.

Q. And did you pay market price for all of them?

A. Yes. More than market price.

30 Q. Did you pay more to these people than the contract price to Ayars was?

A. We did the first two weeks.

CHARLES SILVER, recalled.

Direct examination.

By Mr. Alvord:

Q. Mr. Silver, you have heard the testimony of the last witness in which he said he had refused your tomatoes because they weren't marketable. Is that correct? 10

A. No, sir. If you will recollect it was in 1912 when he represented B. S. Ayars and Sons Company but not in 1913.

Q. Did he ever refuse on the ground that your tomatoes were not good and marketable in 1913?

A. No, sir.

Q. Not at any time?

A. No; he just made a mistake.

Q. Did they refuse to take your tomatoes at any time? 20

A. No. That is when they had what trouble there was, the shipment had to go so far, in Baltimore, and they never had enough cars to take them, and if they was ripe they rotted, and if they wanted them a little too ripe they couldn't stand shipping. To Bridgeton the distance was short and they could take them any time because they was making catsup.

CHARLES G. RICHARDS, recalled.

30

Direct examination.

By Mr. Alvord:

Q. This agent of the canning company, Mr. Sapp, has just testified that they agreed to take all the to-

tomatoes that you would bring at Monroeville or Elmer; is that correct?

A. Mr. Sapp never offered to take my tomatoes. He had a man there that wouldn't agree to give five cents for them, and Mr. Sapp will say so. There was two or three standing there right in the field. That is what Mr. Sapp will testify to, that he wouldn't offer me five cents for my tomatoes, he would offer me the market price and he never offered to take

10 none.

Q. You would have to bring them there and run the risk?

A. I would have to run the risk of not getting my baskets.

Q. And perhaps not get your baskets back?

JACOB B. SAPP, recalled.

20

Direct examination.

By Mr. Bacon:

Q. How many tons of tomatoes are there in a car-load?

A. Owing to the cars. Some cars have ten tons in them, some will have fifteen. When you get one of these big cars, they will hold twenty tons.

30 Q. Do you know how many tons of tomatoes you shipped from Monroeville and Elmer in 1913?

A. I don't know. I know how many cars went from Elmer.

Q. How many cars went from Elmer?

A. Seventy.

Q. How many from Monroeville?

A. I couldn't say positive, but I think somewhere from forty-five to fifty.

Q. You can't say how many tons that would be?

A. I couldn't say how many cars at Elmer. They took account of it there and I have got it in my pocket.

Q. I want to know how many tons. Can you tell that?

A. No.

10

Q. Ten, fifteen and twenty?

A. Cars are all sizes you know.

Q. How many baskets of tomatoes are there to a ton?

A. Good tomatoes, fifty-eight baskets. All owing to how the baskets give, you know.

Mr. Bacon: We will agree to the one hundred and forty-one dollars that is admitted in the Silver case. The other accounts are admitted, so that so far as the plaintiff's case goes we move for a direction. 20

The Court: Upon what ground?

Mr. Bacon: We move for a direction as far as we are concerned. There is no dispute about the account. When it comes to the question of whether the defense shall go to the jury, I have something I should like to talk about. These suits are brought in the first place by the receivers of the B. S. Ayars and Sons Company against these three defendants on book accounts. These accounts accrued and were on the books at the time of the appointment of the receivers. The defense undertakes no defense 30

against these accounts themselves, absolutely no defense against the accounts. The delivery is admitted, the price is admitted, the fact that they got the value is admitted. In the first place, they set up a contract by the pleadings. They set up a contract that they say was in writing that provides that this fertilizer was to be paid for in tomatoes and not in money. Your Honor has seen the contracts. It is not worth while to argue that there is no such thing
10 there. So that the defense is driven to this proposition, that they now counter-claim against these receivers for a cause of action that accrued after the receivers were appointed. We respectfully insist that the law does not permit such an off-set. There is nothing here to show that these gentlemen have filed claims with the receivers. They simply come in and try to get out of the payment of a fertilizer bill of which they got the benefit by a claim that because the B. S. Ayars and Sons Company did not keep a
20 contract to take tomatoes, that they can off-set their damages for the breach of their contract to the extent of the amount of this fertilizer. There is no case in this state that I have been able to find that covers this proposition, that is, as to whether a claim for unliquidated damages arising after the appointment of a receiver can be off-set.

The Court: What is the objection to letting the Court take this question? It is a pure question of
30 law. There is no dispute about your claim.

Mr. Alvord: I did not so understand it.

The Court: That is the understanding I have. The Court will accept your figures. I am satisfied these defendants have been damaged by the breach

of the contract to the extent of the claim which they make. If the Court takes it, the Court will resolve all the facts in favor of the defendants, and it is a pure question of law.

Mr. Alvord: Under that stipulation I am satisfied to leave it to the Court.

Mr. Bacon: I think that I would be justified in doing that, if your Honor will do this: that we enter a stipulation here in open court that a juror be withdrawn, that the case be considered as though it was tried before the Court without a jury upon the testimony that has already been taken in the cause, and that the Court shall then make findings of fact and law in the case so that it may be reviewed. We may be in the embarrassing situation of losing these cases. If we are, the Tygert Company may want to have them reviewed. We have no interest in reviewing them, but they would have, and I would want it in such shape that the case could properly be reviewed. If I may have it put in that way I would be willing to agree with this proposition.

The Court: Of course, I will find the facts.

Mr. Bacon: If you find the facts that gives us an opportunity to review it. If you will do that I will agree. We agree to that.

The Court: If the Court is in doubt about some of the facts and desires them cleared up, there is no difficulty about having a witness called.

Mr. Bacon: None whatever so far as we are concerned.

The Court: Then counsel agree to withdraw a juror and the case may be tried before the Court without a jury on the facts and law.

Mr. Bacon: Yes, upon the testimony already taken and such additional testimony as the Court may desire.

The Court: Is that satisfactory?

10

Mr. Alvord: I am depending now on the statement made by the Court that the Court will find the facts in favor of the defendant and this would be a finding of law.

The Court: Yes.

Mr. Alvord: With that understanding, yes.

20 Recess taken until Wednesday, April 26, 1916, at 10 A. M.

Bridgeton, N. J., April 26, 1916.

Trial of the cause resumed at 10 A. M.

30 The Court: Gentlemen, since this case involves no disputed questions of fact, but only a question of law, counsel for the respective parties have agreed that a juror may be withdrawn and the case disposed of upon the facts and law by the Judge. Therefore, a juror may be withdrawn.

MEMORANDUM.

NEW JERSEY SUPREME COURT,
CUMBERLAND COUNTY.

RICHARD M. MORE, *et al.*,
RECEIVERS OF B. S. AYARS
AND SONS COMPANY, and
J. E. TYGERT COMPANY,
A Corporation,
vs.
CHARLES G. RICHARDS,
SIMON MILNER, AND
CHARLES SILVER.

10

MEMORANDUM.

(3 Cases)

WALTER H. BACON, WILLIAM H. LOGUE AND JAMES
WARE for plaintiffs.
HENRY S. ALVORD for defendants.

20

CARROW, J.: The facts as I find them in these suits
are as follows:

B. S. Ayars and Sons Company, a corporation of
New Jersey, made contracts in writing with defend-
ants, as per the exhibits, in which it agreed to take
the product of certain acres of tomatoes from de-
fendants for the year 1913. Said canning company
also acted as agent in selling fertilizers for J. E. Ty-
gert Company, another corporation, and it sold to
the defendants the fertilizers in question, as shown
on the backs of the tomato contracts, and in the book
of accounts of said canning company, and defend-
ants have not paid for the same.

30

These are the figures of the amount due in each case:

Charles Silver	\$141.00
Charles G. Richards	439.33
Simon Milner	291.00

Interest to be added from December fifteenth, 1913.

10 Defendants grew the tomatoes according to the contracts, but before the crops matured said canning company was decreed to be insolvent and an injunction was issued restraining it from transacting any business, and receivers were appointed in July, 1913, to wind up its affairs. Defendants, however, did not tender the tomatoes after they had matured to said canning company, and their excuse for not doing so was that a tender would have been nugatory, nor did defendants tender the tomatoes to the receivers, because the receivers had not adopted said contracts.

20 The failure of the canning company caused a glut in the tomato market, so that defendants had no market worth mentioning for their tomatoes, and as a consequence they practically lost the whole value of their tomato crops for the year.

30 Defendants have, therefore, filed counter-claims in these suits against the receivers for the damages thus occasioned by the breaches of said contracts. But I do not see how the counter-claims, which are prosecuted without leave of the Court, can be made available for any purpose in these suits even if their prosecution had been properly allowed. The receivers had nothing to do with the contracts for defendants' tomatoes; besides, said contracts had not matured when the receiver took charge. The law applicable to this situation is well expressed in *Cyc.* Vol. 34, pp. 264.

The receivers are entitled to recover.

CERTIFICATE.

NEW JERSEY
COURT OF ERRORS AND APPEALS.

10 RICHARD M. MORE, *et al.*,
Receiver,

vs.

CHARLES G. RICHARDS,
Also

vs.

20 SIMON MILNER,
Also

vs.

CHARLES SILVER.

CERTIFICATE.

30 Exceptions are allowed defendants for the refusal of the Court to find as requested in open court, that the counter-claims be allowed to the extent of extinguishing the plaintiff's claims.

Exceptions are also allowed to the finding of the Court as shown in his memorandum.

HOWARD CARROW,
Circuit Judge.

Dated March 14th, 1917.

CHRISTMAS

1877

1877

Faint, illegible text, possibly bleed-through from the reverse side of the page.

Judgments were entered about October 5, 1916, as follows:

Against Charles G. Richards	\$588.23
Against Charles Silver	239.48
Against Simon Milner	414.30

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT,
CUMBERLAND COUNTY.

10

RICHARD M. MORE, *et al.*,
Receivers, &c.,

vs.

CHARLES SILVER.

ACTION AT LAW.

NOTICE OF APPEAL.

20

To James S. Ware, Esquire,
Attorney for Plaintiffs:

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this case.

HENRY S. ALVORD,
Attorney for Defendant-Appellant.

(Same form in each case.)

30

The appellant states the following grounds of appeal:

1. The Court below found that the counter-claim of defendant was prosecuted improperly and was not available as a defence in the action.
2. The Court held that the counter-claim of defendant was not available because prosecuted without leave of the Court.
3. The Court held that the receivers had nothing
10 to do with the contract for defendant's tomatoes.
4. The Court held that defendant could not sustain his defence or recover because the contract between the canning company and defendant for the purchase of defendant's tomatoes had not matured when the receivers took charge.
5. There was evidence to show that defendant
20 either tendered his tomatoes to the canning company and to the receivers or proved that a tender would have been useless and the Court had no right to find against the defendant on this point.
6. The Court should have found all the facts in favor of defendant.
7. The Court should have found that the counter-claim of the defendant was proven and constituted a good and valid defence to the action.
- 30 8. The Court should have decided the suit against the receivers and the J. E. Tygert Company as plaintiffs in favor of the defendant with costs.

ALVORD & TUSO,
Attorneys for Appellant.

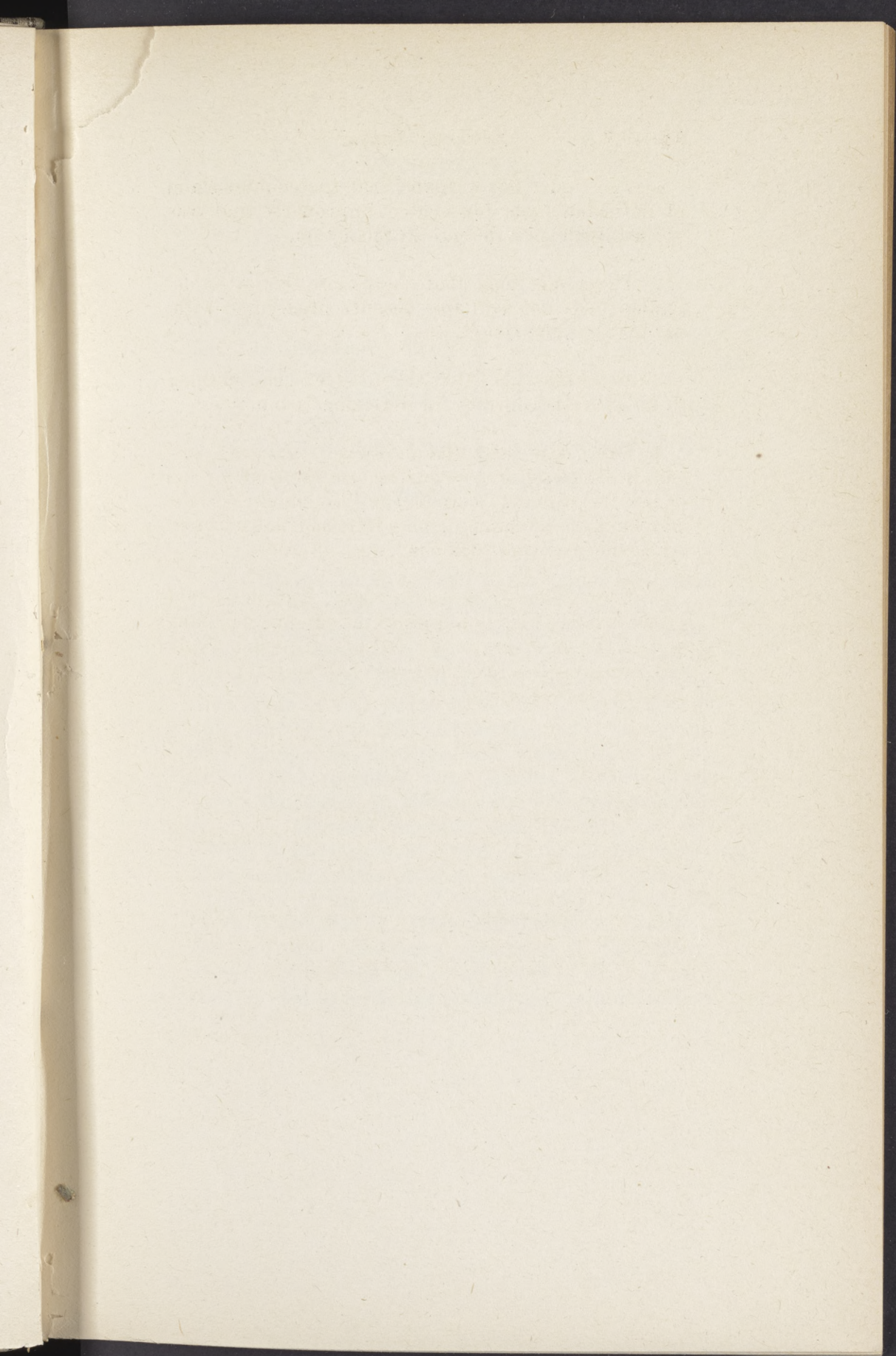




EXHIBIT P1.

4/25/16 M.

IN CHANCERY OF NEW JERSEY.

Between The Cumberland Trust Company of Bridgeton, Complainant, and B. S. Ayars & Sons Com- pany, Defendant.	}	On Bill for Receiver, etc. Order Continuing Appointment of Re- ceivers.	10
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This matter being opened to the Court by James S. Ware, Solicitor, and William A. Logue, of counsel with the above named complainant, and in the presence of Walter H. Bacon, Solicitor for and of counsel with the defendant, and an order having been made in this cause on the twenty-first day of July, nineteen hundred and thirteen, wherein, among other things, the creditors and stockholders of the defendant corporation were ordered to show cause before this Court on Monday, the twenty-eighth day of July, nineteen hundred and thirteen, at ten o'clock in the forenoon of that day, or as soon thereafter as this matter could be heard, at the Chancery Chambers in the City of Camden, why Richard M. More, Bloomfield H. Minch and George E. Diamant, the receivers heretofore appointed in this cause, should not be continued; and proof of mailing of a copy of said order to the creditors of said defendant

corporation being now presented to the Court, and being duly filed, and the defendant having admitted insolvency and consenting that the receivers aforesaid, be appointed, and no cause being shown to the contrary:

10 It is, on this Twenty-eighth day of July, nineteen hundred and thirteen, Ordered, that Richard M. More, Bloomfield H. Minch and George E. Diamant be and they are hereby continued as receivers of the
10 above-named defendant corporation, with all the powers and authorities incident thereto, and conferred upon them by the order heretofore made appointing them receivers, and especially by the act entitled "An act concerning corporations (Revision of 1906)" and acts supplemental thereto and amendatory thereof.

20 And it is further ordered that an injunction be issued pursuant to the prayer of said bill, according to law and the course and practice of this Court
20 and the statute in such case made and provided, restraining the defendant corporation and its officers and agents from exercising any of its privileges and franchises, and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to the receivers aforesaid, until this Court shall otherwise order, and the said defendant corporation is hereby ordered to refrain
30 and desist from doing or attempting to do any of the acts above mentioned, to restrain which the said writ of injunction is hereby ordered to issue as aforesaid.

By the Statute
John H. Backes,
Master.

Respectfully Advised
E. B. Leaming, V. C.

I, Robert H. McAdams, Clerk of the Court of Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the "Order Continuing Appointment of Receivers", filed Jul. 30, 1913, in the cause wherein The Cumberland Trust Company of Bridgeton is complainant and B. S. Ayars & Sons Company is defendant, now on the files of my office. 10

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Trenton, this thirteenth day of March, A. D. nineteen hundred and sixteen.

Robert H. McAdams,
Clerk. 20

(Documentary
Stamp)

EXHIBIT P2.

4/25/16 M.

NEW JERSEY COURT OF ERRORS AND
APPEALS.**10**

November Term, 1915.

<p>Between The Cumberland Trust Company of Bridgeton, Complainant-Appellant, and B. S. Ayars & Sons Com- pany, Defendant, J. E. Tygert Company, Petitioner-Respondent.</p>	}	<p>On Appeal From Chancery. Amended Decree of Modification and Af- firmance. No. 8 June Term, 1915.</p>
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30 This cause coming on to be heard at the June Term, one thousand nine hundred and fifteen, and being argued by Walter H. Bacon, counsel for the appellant, and by David O. Watkins, counsel for the petitioner-respondent, and the Court having taken time to consider the same, and being of the opinion that the decree of the Chancellor should be modified as hereinafter specified, and, as so modified, should be affirmed —

It Is Now, on this Thirty first day of January, in

the year of our Lord one thousand nine hundred and sixteen, Ordered, Adjudged And Decreed, that the decree of the Chancellor be modified as follows:

1. Eliminate the injunction order against the Receivers of the B. S. Ayars and Sons Company.

2. Provide that the Receivers shall be left free to collect all the accounts in the "Farmers' Ledger", and, under the further direction of the Court of Chancery segregate and pay to petitioner such part thereof as is covered by the contract of November, 1912. 10

3. As to mortgages, notes and similar securities or evidences of debt, petitioner will be entitled to have such of them from the Receivers as it may show to be covered by the contract.

And It Is Further Ordered that, with the modifications above specified, the said decree of the Chancellor be affirmed, the costs of the appeal to be divided, and that the record and proceedings be remitted to the Court of Chancery, to be therein proceeded on according to law and the practice of said Court. 20

On motion of

Walter H. Bacon,
Counsel for Appellant.

I consent to the entry of Remittitur in the above form.

David O. Watkins,
Solicitor and of Counsel for
Petitioner-Respondent. 30

Endorsed:

"Filed Feb 1 1916
Thomas F. Martin,
Clerk."

State of New Jersey

(Shield)

Department of State.

10 I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, Do Hereby Certify that the foregoing is a true copy of Amended Decree of Modification and Affirmance, Between:—The Cumberland Trust Company of Bridgeton, Complainant-Appellant,

—and—

B. S. Ayars and Sons Company, Defendant,

20

—and—

J. E. Tygert Company, Petitioner-Respondent, as the same, is taken from and compared with the original Filed Feb. 1, 1916, and now remaining on file in my office.

30

In Testimony Whereof, I have hereunto (Seal) set my hand and affixed the Official Seal of said Court at Trenton, this Second day of February A. D. 1916.

Thomas F. Martin,
Secretary of State.

EXHIBIT P3.

4/25/16 M.

NEW JERSEY COURT OF ERRORS AND APPEALS.

November Term, 1915.

10

<p>Between The Cumberland Trust Company of Bridgeton, Complainant-Appellant, and B. S. Ayars & Sons Com- pany, Defendant, J. E. Tygert Company, Petitioner-Respondent.</p>	}	<p>On Appeal From Chancery. Amended Decree of Modification and Af- firmance. No. 6 June Term, 1915.</p>	<p>20</p>
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This cause coming on to be heard at the June Term, one thousand nine hundred and fifteen, and being argued by Walter H. Bacon, counsel for the appellant, and by David O. Watkins, counsel for the petitioner-respondent, and the Court having taken time to consider the same, and being of the opinion that the decree of the Chancellor should be modified as hereinafter specified, and, as so modified, should be affirmed —

It Is Now, on this Fifteenth day of November, in

the year of our Lord one thousand nine hundred and fifteen, Ordered, Adjudged And Decreed, that the decree of the Chancellor be modified as follows:—

1. Eliminate the injunction order against the Receivers of the B. S. Ayars and Sons Company.

2. Provide that the Receivers shall be left free to collect all the accounts in the "Farmers' Ledger", and under the further direction of the Court of Chancery segregate and pay to petitioner such part thereof as is covered by the contract of November, 1912.

3. As to mortgages, notes and similar securities or evidences of debt, petitioner will be entitled to have such of them from the Receivers as it may show to be covered by the contract.

And It Is Further Ordered that, with the modifications above specified, the said decree of the Chancellor be affirmed, the costs of the appeal to be divided, and that the record and proceedings be remitted to the Court of Chancery, to be therein proceeded on according to law and the practice of said Court.

On motion of

Walter H. Bacon,
Counsel for Appellant.

I consent to the entry of Remittitur in the above form.

David O. Watkins,
Solicitor and of Counsel for
Petitioner-Respondent.

30 Endorsed:

"Filed Jan 29 1916
Thomas F. Martin,
Clerk."

State of New Jersey

(Shield)

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, 10
Do Hereby Certify that the foregoing is a true copy of Amended Decree of Modification and Affirmance, Between:—The Cumberland Trust Company of Bridgeton, Complainant-Appellant,
—and—

B. S. Ayars and Sons Company, Defendant,
J. E. Tygert Company, Petitioner-Respondent,
as the same, is taken from and compared with the original Filed Jan. 29th, 1916, and now remaining on file in my office. 20

In Testimony Whereof, I have hereunto
(Seal) set my hand and affixed the Official Seal of said Court at Trenton, this First day of February A. D. 1916.

Thomas F. Martin,
Secretary of State.

EXHIBIT P4.

4/25/16 M.

IN CHANCERY OF NEW JERSEY.

Between 10 The Cumberland Trust Company of Bridgeton, Complainant, and B. S. Ayars & Sons Com- pany, Defendant.	}	On Petition of The J. E. Tygert Com- pany. Amended Decree.
---	---	---

- 20** An appeal having been taken to the Court of Errors and Appeals from the decree entered in this cause, on the thirtieth day of July, nineteen hundred and fourteen, on petition of The J. E. Tygert Company, and the said appeal having been heard and considered, and the said Court of Errors and Appeals having directed that the said final decree be modified in certain particulars and as so modified that the same be affirmed, and the record having now been remitted to this Court, to the end that said
- 30** decree be modified in accordance with said remittitur.

It Is, on this 14th day of February, nineteen hundred and sixteen, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged And Decreed, and the said Chancellor by virtue of the power and authority of

this Court, doth hereby Order, Adjudge And Decree as follows:—

1. The Receivers heretofore appointed in this cause are left free to collect all the accounts in the "Farmers' Ledger", and the injunction order heretofore made against them is hereby revoked.

2. Said accounts shall be segregated by the Receivers, who shall pay to petitioner, The J. E. Tygert Company, such part thereof as is covered by the contract of November, 1912. 10

3. As to mortgages, notes and similar securities or evidences of debt, petitioner will be entitled to have such of them from the Receivers as it may show to be covered by the contract.

4. No costs shall be taxed by either party against the other.

5. Either party shall be at liberty to apply to this Court for further direction as occasion may require.

E. R. Walker,

C. 20

Respectfully advised,

E. B. Leaming, V. C.

We consent to the form of the foregoing decree.

Jas. S. Ware,

Solicitor for Complainant
and Receivers.

David O. Watkins,

Solicitor for Petitioner.

A True Copy

Robert H. McAdams,

Clerk

30

EXHIBIT P7.

4/25/16 M.

Agreement

—Made Between—

Charles Silver of Monroeville, N. J.

—and—

B. S. Ayars & Sons Company
of Bridgeton, N. J.

10

I the part..of first part, agree to plant and thoroughly cultivate Ten 10 acres of tomatoes and to deliver therefrom to above named Packing Company at Monroeville tons of sound, ripe, merchantable tomatoes free from soft, rotten, green or small fruit, said delivery to be made on any day of the week except Saturday or Sunday between the hours of seven A. M. and six P. M., and for all such tomatoes accepted by the company before the 10 day of Oct to

20

receive \$8 25cts dollars per net ton.
I also agree that the Company shall have the right to refuse said tomatoes after the date first above mentioned, Oct. the 10, 1913.

It is further agreed and made a part of this contract that should any of these tomatoes when delivered to the Packing Company be small, green, partly green or rotten, the said Company shall deduct, when receiving them, such amount in weight as in their judgment shall be just.

30

I also by this contract bind myself not to grow any tomatoes during the year nineteen hundred and 13, for shipment or sale for any other firm excepting (B. S. Ayars & Sons' Co.,) and it is also further agreed that party of second part is not held responsible for tomatoes contracted for if canning factory is destroyed by fire, or other unforeseen accident.

B. S. Ayars & Sons' Co., agree to receive the above mentioned number of tons of tomatoes from the undersigned, subject to the conditions herein specified, if delivered by the time above mentioned, and agree to pay in full for the same on the 15 day of December next.

It is mutually agreed that this contract is good only for the year in which it is dated and that no part of it can be transferred without the written consent of all parties. 10

In Witness whereof we have hereunto set our signatures this 22 day of Jan. 1913.

.....[Seal]
Charles Silver [Seal]
Contractors.

B. S. Ayars & Sons' Co.

.....
President.

.....Tons	Gold Edge Potato	\$26 00	
one "	Potato Guano	32 00	20
..... "	High Grade Potato	34 00	
..... "	Early Truck	30 00	
one "	Tomato Fertilizers	27 00	
..... "	Fish Bone and Potash	27 00	
..... "	Victor Grower	23 00	
..... "	Kainit	12 00	
..... "	Bone	30 00	
..... "	Sweet Potato (10 per cent.)	30 00	

Lima Beans at () per pound, free from white, merchantable and marketable. 30

Beets () Acres

Strawberry () Acres merchantable and marketable

Strawberry Terms: One-half end of each week. Balance end of season.

Terms of Settlement: Fertilizers, \$1.00 per ton allowed July 1, 1913, for cash.

EXHIBIT P8.

4/25/16 M.

Agreement

—Made Between—

Simon Milner Monroeville N. J.

—and—

B. S. Ayars & Sons Company
of Bridgeton, N. J.

10

I, the party of the first part, agree to plant and thoroughly cultivate Fifteen acres of tomatoes and to deliver therefrom to the above named Packing Companytons of sound, ripe, merchantable tomatoes free from soft, rotten, green or small fruit, said delivery to be made on any day of the week except Saturday and Sunday between the hours of seven A. M. and six P. M., and for all such tomatoes accepted by the company before the 10th day of Oct to receive Eight 25/100 dollars per net ton.

20

I also agree that the Company shall have the right to refuse said tomatoes after the date first above mentioned, Oct 10 1913

It is further agreed and made a part of this contract that should any of these tomatoes when delivered to the Packing Company be small, green, partly green or rotten, the said Company shall deduct, when receiving them, such amount in weight as in their judgment shall be just.

30

I also by this contract bind myself not to grow any tomatoes during the year nineteen hundred and 13, for shipment or sale for any other firm excepting (B. S. Ayars & Sons' Co.,) and it is also further agreed that party of second part is not held responsible for tomatoes contracted for if canning factory is destroyed by fire, or other unforeseen accident.

B. S. Ayars & Sons' Co., agree to receive the above mentioned number of tons of tomatoes from the undersigned, subject to the conditions herein specified, if delivered by the time above mentioned, and agree to pay in full for the same on the 15 day of December next.

It is mutually agreed that this contract is good only for the year in which it is dated and that no part of it can be transferred without the written consent of all parties.

10

In Witness whereof we have hereunto set our signatures this 16th day of December 1912

.....[Seal]

S. Milner [Seal]
Contractors.

B. S. Ayars & Sons' Co.
Arthur D Ayars.

To President.

.....Tons	Gold Edge Potato	\$26 00	
4 "	Potato Guano	32 00	20
..... "	Potato Special	33 00	
1½ "	High Grade Potato	35 00	
..... "	Early Truck	30 00	
4 "	Tomato Fertilizers	27 00	
..... "	Fish Bone and Potash	27 00	
..... "	Victor Grower	23 00	
..... "	Kainit	13 00	
..... "	Bone	30 00	
..... "	Sweet Potato (10 per cent.)	30 00	

Lima Beans at 4¼c. per pound, free from white, 30 merchantable and marketable.

Beets () Acres
Strawberry () Acres merchantable and marketable

Strawberry Terms: One-half end of each week.
Balance end of season.

Terms of Settlement: Fertilizers, \$1.00 per ton allowed July 1, 1911, for cash.

EXHIBIT P9.

4/25/16 M.

Agreement

—Made Between—

C. W. Richard of Porchtown N. J.

—and—

B. S. Ayars & Sons' Company
of Bridgeton, N. J.

10

I the part.. of first part, agree to plant and thoroughly cultivate 4 acres of tomatoes and to deliver therefrom to above named Packing Company at Monroeville. . . . tons of sound, ripe, merchantable tomatoes free from soft, rotten, green or small fruit, said delivery to be made on any day of the week except Saturday or Sunday between the hours of seven A. M. and six P. M., and for all such tomatoes accepted by the company before the 10 day of Oct. to receive 8 25cts dollars per net ton.

20

. . . also agree that the Company shall have the right to refuse said tomatoes after the date first above mentioned, Oct. the 10, 1913.

It is further agreed and made a part of this contract that should any of these tomatoes when delivered to the Packing Company be small, green, partly green or rotten, the said Company shall deduct, when receiving them, such amount in weight as in their judgment shall be just.

30

I also by this contract bind myself not to grow any tomatoes during the year nineteen hundred and 13, for shipment or sale for any other firm excepting (B. S. Ayars & Sons' Co.,) and it is also further agreed that party of second part is not held responsible for tomatoes contracted for if canning factory is destroyed by fire, or other unforeseen accident.

B. S. Ayars & Sons' Co., agree to receive the above mentioned number of tons of tomatoes from the undersigned, subject to the conditions herein specified, if delivered by the time above mentioned, and agree to pay in full for the same on the 15 day of December next.

It is mutually agreed that this contract is good only for the year in which it is dated and that no part of it can be transferred without the written consent of all parties.

In Witness whereof we have hereunto set our signatures this 31 day of Jan. 1913

C. W. Richards [Seal]

.....[Seal]

Contractors

B. S. Ayars & Sons' Co.

.....

President.

2 Tons Gold Edge Potato	\$26 00	
..... " Potato Guano	32 00	
4 " High Grade Potato	34 00	20
2 " Early Truck	30 00	
2 " Tomato Fertilizers	27 00	
..... " Fish Bone and Potash	27 00	
..... " Victor Grower	23 00	
..... " Kainit	12 00	
..... " Bone	30 00	
..... " Sweet Potato (10 per cent.)	30 00	

Lima Beans at () per pound, free from white, merchantable and marketable. 30

Beets () Acres

Strawberry () Acres merchantable and marketable

Strawberry Terms: One-half end of each week. Balance end of season.

Terms of Settlement: Fertilizers, \$1.00 per ton allowed July 1, 1913, for cash.

STIPULATION.

SUPREME COURT OF NEW JERSEY,
CUMBERLAND COUNTY.

10	RICHARD M. MORE, <i>et al.</i> , Receivers of B. S. Ayars & Sons Company, and J. E. Tygert Company, a Corporation, <div style="text-align: right;"><i>Plaintiffs,</i></div>	} ACTIONS AT LAW. THREE CASES. STIPULATION.
	vs. CHARLES SILVER, CHARLES G. RICHARDS, SIMON MIL- NER, <div style="text-align: right;"><i>Defendants.</i></div>	

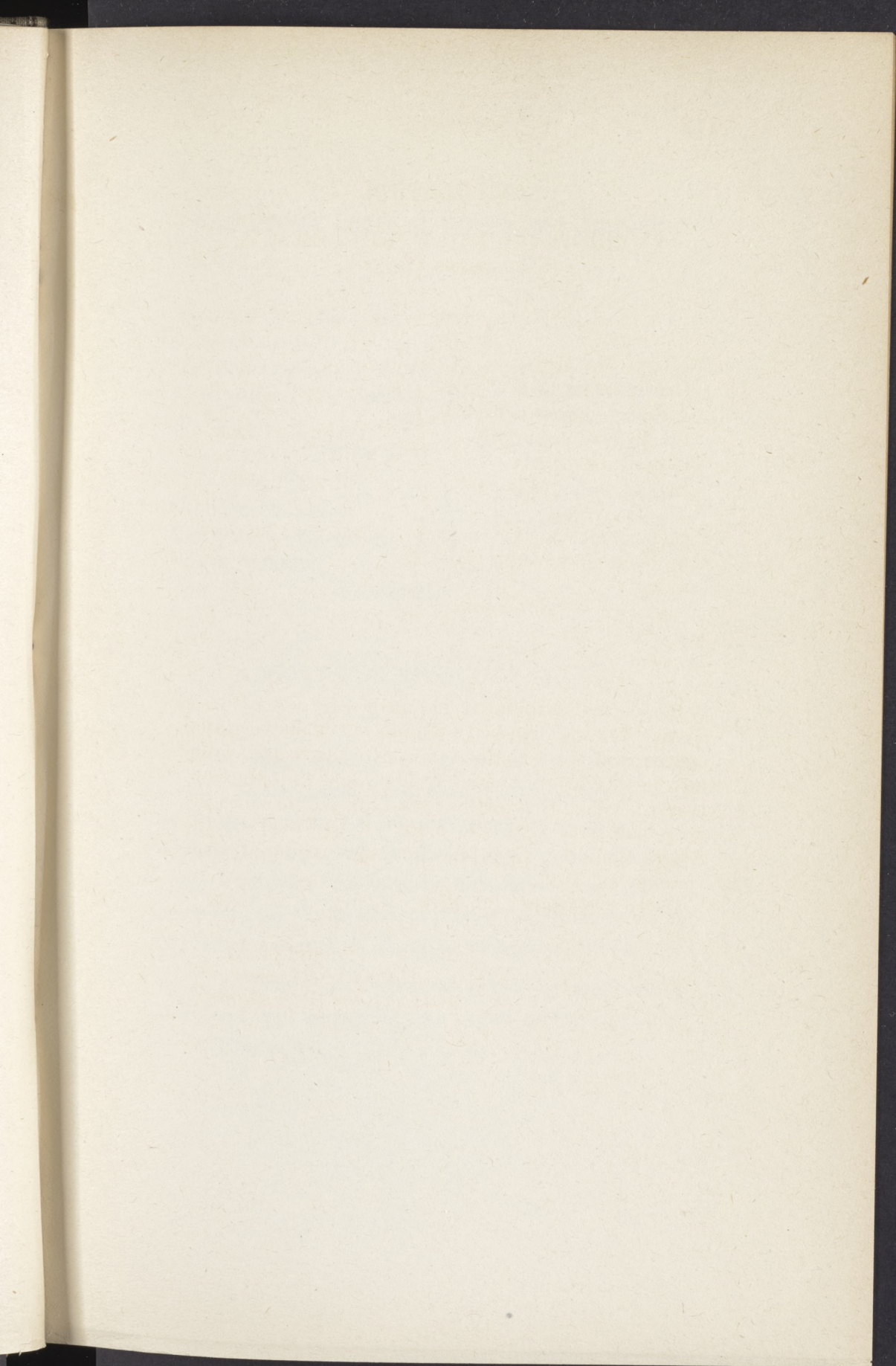
20

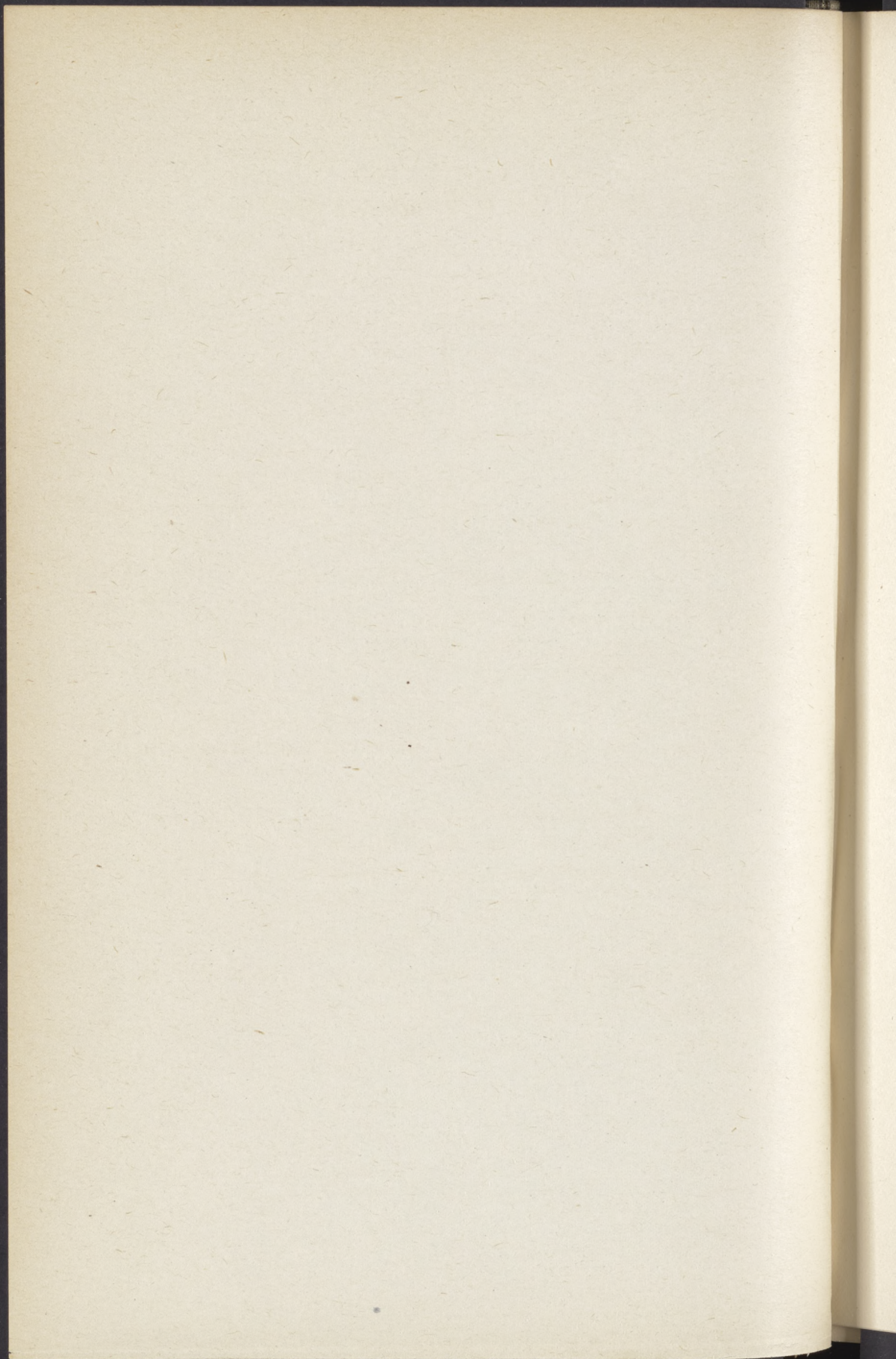
It is hereby stipulated and agreed by and between counsel for the respective parties in the above-stated causes that the tomatoes in question matured from day to day after August 1, 1913, and that the contracts between the parties called for deliveries as the crop matured, with the right on the part of the Ayars Company to refuse tomatoes tendered after

30 October 10, 1913.

Dated September 30, 1916.

JAS. S. WARE,
Attorney for Plaintiffs.
HENRY S. ALVORD,
Attorney for Defendants.





New Jersey Court of Errors and Appeals

RICHARD M. MORE, ET AL,
RECEIVERS OF B. S. AYARS &
SONS COMPANY, AND J. E. TY-
GERT COMPANY, A CORPORA-
TION,

Respondents,

vs.

CHARLES SILVER,
CHARLES G. RICHARDS,
SIMON MILNER,

Appellants

ON APPEAL FROM
SUPREME COURT
CUMBERLAND CIRCUIT

THREE CASES TRIED
TOGETHER AS ONE

BRIEF FOR RESPONDENTS.

These cases were tried together at the Cumberland Circuit. At the conclusion of the testimony, and in order that the questions of law involved might be more carefully considered, a juror was withdrawn and counsel stipulated in open Court that the cases be regarded as having been tried before the Court without a jury, on the evidence already taken, and such as should be thereafter offered.

No testimony was afterwards taken, but a stipulation was entered into concerning one aspect of the case (See State of Case p. 112.)

Judge Carrow found in favor of the plaintiffs (p. 91).

The record shows no requests for findings of law or fact on the part of appellants, and no objections or exceptions taken to the findings or rulings of the Court.

There is, therefore, no proper foundation in the record for any review by this Court.

Webster vs. Freeholders of Hudson, 86 N. J. L. 256.

Blanchard Brothers vs. Beveridge, 86 N. J. L. 561.

Porter vs. Neitling, 97 Atl. Rep. 264.

Ruggles vs. Ocean Accident & Guarantee Corp. 98 Atl. Rep. 318.

Counsel for appellants complains that the Court did not find the facts in favor of defendants.

Examination of the record will show that the Court did find all the essential facts in favor of the defendants as the case stood when the juror was withdrawn. At that time there was no evidence in the case showing whether the tomato crop of 1913 matured before or after the appointment of the Receivers.

The case was tried April 25, 1916.

On September 1, 1916, by direction of Judge Carrow, counsel appeared before the Court for oral argument. Thereafter the Court desired testimony to be offered showing definitely when the tomato crop of 1913 was ready for delivery. On September 30, 1916, a stipulation was signed by counsel for the respective parties to the effect that defendants' tomatoes matured from day to day after August

1, 1913, and that the contract between the Ayars Company and the defendants called for deliveries after the crop matured.

The Receivers were appointed July 21, 1913, and the restraining order was made July 28, 1913, (State of Case, p. 95).

This new fact, namely, that the Ayars Company was under no obligation to receive tomatoes on the day the Receivers were appointed and the restraining order was issued, may have had an effect upon the ultimate findings of the Court.

Counsel for appellants insisted that the testimony showed the Receivers were not operating the Ayars factory. The Court finds this fact in defendants' favor, and as a consequence finds, as a matter of law, that the Receivers, not having assumed the performance of these executory contracts, and the contracts not having matured at the time the restraining order was issued, the counter-claims for damages could not be sustained.

No exception or objection was made by counsel for defendants to this ruling.

ARGUMENT

Inspection of the record will disclose that these suits were brought to recover for fertilizer sold and delivered by the B. S. Ayars & Sons Company to defendants.

These claims were based upon the "Farmer's Ledger" which was before this Court in *Cumberland Trust Company of Bridgeton vs. B. S. Ayars & Sons Co. (J. E. Tygert Co., Intervenor)* 85 N. J. E. 177.

Before the decision in that case was announced and consequently before the decree of the Court of Chancery had been modified in accordance therewith, the J. E. Tygert Company had been joined with the Receivers as parties plaintiff (State of Case p 8).

At the trial there was no substantial dispute as to the correctness of the accounts on which the actions were brought. The only issue in the cases was whether the defendants were entitled to recover on their counter-claims.

These counter-claims were based upon contracts in writing, all being on printed forms, and being alike except names, dates and amounts.

(State of Case p. 106 and following).

The contract with Silver is the same as that printed in the record in the former case at p. 200.

By these contracts the Ayars Company agreed to purchase tomatoes from defendants. Before the crop matured (Stipulation p. 112) the Ayars Company had gone into the hands of Receivers, and the company had been enjoined from transacting any business. (Exhibit P 1 p. 95).

The counter-claims were for damages for breach of these contracts by the Ayars Company, and defendants sought to defeat the claims of the Receivers on the book

accounts for the Tygert fertilizer by setting up a claim for damages arising out of an independent transaction.

We respectfully insist that the judgments below should be affirmed for the following reasons:

1. The relations between the Receivers and the Tygert Company, who are joined as plaintiffs in these suits, have been established by the decision of this Court in the case of *Cumberland Trust Company of Bridgeton vs. B. S. Ayars & Sons Co. (J. E. Tygert Co., Intervenor)* 85 N. J. E. 177, 200. If the Receivers are mere agents of the Tygert Co. for the collection of these fertilizer accounts, it certainly follows that defendants' counter-claims for damages for breach of an independent contract cannot be sustained.

2. Section 76 of the Chancery act *C. S. of N. J. p. 1649* provides that

"Every claim against an insolvent corporation shall be presented to the Receiver in writing and upon oath."

Defendants did not pursue the statutory remedy. Instead, they undertook to make themselves preferred creditors by presenting in these suits claims which are neither set-off nor recoupment, but are, if anything, independent causes of action or claims against the insolvent corporation. This is contrary to the spirit of the provisions of the Chancery act respecting the winding up of insolvent corporations. All the cases hold that the primary object of these provisions is to secure to creditors an equal distribution of assets. In the former case the record showed (p. 101) that the Ayars Co. had 170 contracts with farmers, identical with

and including those offered in evidence in the case at bar. Presumably each of these 170 farmers had precisely the same kind of claims as these defendants. To allow the claims in suit would make these defendants preferred creditors.

This is contrary to law.

C. S. of N. J. p. 1652 Sec. 86.

Doane vs. Millville Ins. Co., 45 N. J. E. 274.

Hobart, Receiver vs. Gould, 4 N. J. L. J. 271.

Lehigh vs. Stevens, 63 N. J. E. 107.

3. Defendants' counter-claims are not set-off because for unliquidated damages (*Godkin vs. Bailey, 74 N. J. L. 655,*) nor recoupment because they do not grow out of the same transaction as that on which plaintiffs' cause of action is founded. (*Bozarth vs. Dudley, 44 N. J. L. 304; Bird vs. Magowan, 43 Atl. Rep. 278*), and further because defendants seek to recover from plaintiffs amounts in excess of those for which plaintiffs sue.

See, also,

McManus-Kelly Co. vs. Pope Mfg. Co., 70 Atl. Rep. 297.

Links vs. Mariowe, 83 N. J. L. 389.

Holcombe vs Trenton White City Co. 80 N. J. E. 122.

Massey vs. Camden & Trenton Ry. Co. 78 N. J. E. 539.

Spader vs Mural Decoration Mfg Co. 47 N. J. E. 18.

Morton vs. Stone Harbor Imp. Co., 22 N. J. L. J. 375.

34 Cyc. 643.

These claims are, therefore, counter-claims and are filed only by virtue of the Practice Act of 1912.

The pertinent provisions of this act and of the Rules of Court are as follows:—

“Sec. 12. Subject to rules, the defendant may counter-claim or set off any cause of action.”

“Rule 66 (47) A counter-claim is deemed to be a cross action, and the rules respecting the form and manner of pleading the complaint, apply to the counter-claim.”

“Rule 67 (48) If the amount found due on the counter-claim to the defendant exceeds the amount found due to the plaintiff, the defendant shall have judgment for the excess.”

Obviously, therefore, the statutory counter-claim is to be regarded as an independent and separate cause of action. In the cases at bar, the counter-claims are, in effect, suits instituted against these Receivers, without leave of the Court, and which, if defendants' contention prevails, must result in judgments against these officers of the Court of Chancery, rendered by a Court of law, in an action for damages growing out of a breach of contract by the insolvent corporation, occurring after the appointment of Receivers.

This is contrary to the practice in proceedings against insolvent corporations. No authority therefor can be found in the statute or the cases.

4. The contracts sued on in the counter-claims were not made by the Receivers. They were executory contracts, entered into by the Ayars Co. several months before the appointment of the Receivers. The time for performance did not arrive until after the Receivers had been ap-

pointed and the corporation restrained by the Court of Chancery from transacting business.

People vs. Globe M. L. Ins. Co. 91 N. Y. 174.

In *Rosenbaum vs. Credit System Co.*, 61 N. J. L. 543, it was held that the contract survived the receivership because there was no injunction or order restraining the defendant corporation from transacting its business, and the Court expressly distinguished the case from that of *People vs. Globe Mutual Life Ins. Co.*, above cited.

5. The contracts in suit, by their express terms, are not transferrable "without written consent of all parties". They were never transferred to the Receivers nor did the Receivers ever assume or recognize them in any way.

6. Defendants never tendered performance. Insolvency did not release defendants from offering to perform.

Florence Mining Co. vs. Brown, 124 U. S. 385.

7. The counter-claims were properly over-ruled.

"The rules recognizing such set-offs to actions brought by Receivers as might have been urged in defense of the action as between the original parties, does not extend to demands in defendants' favor accruing after the Receivers' appointment."

High on Receivers 3rd. Ed. Sec. 249, p. 218.

See, also, *Klein vs. Gavenesch Co.*, 64 N. J. E. 50.

34 Cyc. p. 264 and following.

Stipulation, State of Case, p. 112.

Respectfully submitted, March Term, 1917.

WALTER H. BACON,
Counsel for Respondents.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

RICHARD M. MORE, <i>et al.</i> , Receivers, &c., <i>Respondents,</i>	}	ON APPEAL FROM SUPREME COURT.
vs.		
CHARLES G. RICHARDS, Also		CUMBERLAND CIR- CUIT.
vs.		
SIMON MILNER, Also	}	THREE CASES TRIED TOGETHER AS ONE.
vs.		
CHARLES SILVER, <i>Appellants.</i>		

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

Plaintiffs bring suit to collect fertilizer bills against the defendants. The defendants admit the purchase of the fertilizers, but contend that the fertilizers were purchased from the B. S. Ayars & Sons Co. for the purpose of assisting the defendants

in raising tomatoes, which tomatoes the B. S. Ayars & Sons Co. agreed to purchase and that they only agreed to pay for the fertilizers in tomatoes; that before the crop of tomatoes for the year 1913 had matured, the canning company failed and the plaintiffs were appointed as receivers.

The defendants, in their answers, denied that they were indebted to the canning company or to the receivers, because they only agreed to pay for the fertilizers in tomatoes; that they raised the tomatoes; that the company failed and refused to take the tomatoes and that the market for tomatoes was so bad that they could not dispose of their tomatoes and therefore could not pay for the fertilizers as agreed.

The defendants also filed counter-claims to the same effect, alleging balances due from the said corporation or the receivers in the premises, but later only insisted upon the counter-claim to the extent of the claim of the plaintiffs; that is, the defendants did not insist upon any affirmative judgment in their favor against the receivers.

The J. E. Tygert Company was added as a party plaintiff in the cases in open court, when the cases came on for trial and after they had been listed for trial for two or three terms. No formal pleading for the Tygert Company was filed, but the Court made an order of amendment for the purpose, which appears on page 8 of the case. The defendants filed answers to these amended complaints as appears. (Case, page 10.)

At the conclusion of the trial, the Court suggested that it would settle the question and it was left to the Court, but only with the distinct understanding that the Court would resolve all the facts in favor of the defendants. (See Case, pages 88, 89 and 90.)

GROUND OF APPEAL.

1. The Court below found that the counter-claim of defendant was prosecuted improperly and was not available as a defense in the action. (Case, page 91.)
2. The Court held that the counter-claim of defendant was not available because prosecuted without leave of the Court. (Case, page 92.)
3. The Court held that the receivers had nothing to do with the contract for defendant's tomatoes. (Case, page 92.)
4. The Court held that defendant could not sustain his defense or recover because the contract between the canning company and defendant for the purchase of defendant's tomatoes had not matured when the receivers took charge. (Case, page 92.)
5. There was evidence to show that defendant either tendered his tomatoes to the canning company and to the receivers or proved that a tender would have been useless and the Court had no right to find against the defendant on this point.
6. The Court should have found all the facts in favor of defendant. (Case, page 89.)
7. The Court should have found that the counter-claim of the defendant was proven and constituted a good and valid defense to the action.
8. The Court should have decided the suit against the receivers and the J. E. Tygert Company as plaintiffs in favor of the defendant with costs.

ARGUMENT.

The Court suggested in its memorandum that the counter-claim or defense of the defendants was prosecuted without leave of the Court. The defendants insist that neither the plaintiffs in the pleadings or at the trial or the Court at the trial, made any such objection to the formality of the defense or counter-claim of the defendants and that such objection was frivolous and untimely and did not go to the merits of the case.

The Court below, in its memorandum, finds against the defendants, apparently for the reason, or partly for the reason that the defendants did not tender the tomatoes after they had matured, to the canning company.

It appears in the case, that the canning company failed before the maturity of the crop and that the company did not can the crop for 1913. This question is a question of fact and not a question of law and the Court bound itself to decide all the facts in favor of the defendants. (Case, pages 88, 89, 90.)

As to a tender, the answer of the defendants sets forth: "And this defendant avers that before the time for the delivery of the said tomatoes, the said firm of B. S. Ayars & Sons Co. failed and became insolvent and in consequence thereof, refused to take and did not take the tomatoes raised by this defendant."

Both the Court and the attorneys of the respective parties in the pleadings, recognize the plaintiffs, simply as representatives of the canning company. This part of the answers of the defendants was admitted by the reply of the plaintiffs, as it was in no way denied and therefore proof on this point was

rendered unnecessary. However, there was some proof on this point.

After the failure of B. S. Ayars & Sons Co. they did not can any more tomatoes. (Case, page 19.) They discontinued active operations before the maturity of the crop of 1913. (Case, page 18.) Richards testified that the receivers answered that they could not receive them, or something like that. (Case, page 45.)

“The Court: Is there any doubt about the fact that the receivers were not receiving any tomatoes?” (Case, page 46.)

Richards testified:

“Q. Did you find out yourself whether the B. S. Ayars & Sons Co. were canning tomatoes in 1913?

A. I did. I went over to Sapp’s right away and he said they refused to take them, as their agent.

Q. You went personally to Mr. Sapp?

A. Yes, personally, with Mr. Dixon, twice or three times.

Mr. Bacon: I object to that. Mr. Sapp certainly was not the agent of the receivers. Here are three officers of the Court. They cannot be bound by somebody in the employ of the B. S. Ayars & Sons Company.

The Court: I know, but there must be a fact in relation to the matter, and it is quite apparent that these receivers were carrying on no canning business. They were appointed to receive the assets.

Mr. Alvord: They put in evidence that they had an injunction against doing business.

The Court: I do not think I should exclude

the evidence if it is a fact, and if this proof is questionable I will permit the receivers to be called themselves to see whether or not they were receiving tomatoes or in any condition to perform this contract." (Case, page 46, lines 20 to 47, line 12.)

Charles Silver testified on this point, that he went to Mr. More, one of the receivers, on this point, and that he, one of the plaintiffs in this case, told Silver,—“If you can raise your own money and run the factory for us, we will be only too glad to do it, but we can't run the factory ourselves.”

Counsel for defendants insist that this was clearly a question of fact and if there was any doubt about it, the Court could have required more evidence but as he agreed to resolve all questions of fact in favor of the defendants, he had no right to decide this fact against the defendants.

As to the **J. E. Tygert Company**, the defendants insist that as the defendants simply claim the benefit of their defense or counter-claim for the purpose of operating as a denial of the right of recovery on the part of the plaintiffs and not for the purpose of trying to obtain an affirmative judgment against the receivers, that whatever defense or counter-claim the defendants have is equally applicable as against the Tygert Company as it is against the receivers of the canning company, as the **Tygert Company was unknown to the defendant when the contracts were made** and no proof whatever was introduced to show that the defendants did know that the Tygert Company was interested in the transaction when the contracts were made.

The only pleading which was used on the part of the plaintiffs to introduce this **J. E. Tygert Company**

as a co-plaintiff in the case, appears on pages 8 and 9 of the case as an order of amendment made by the trial Judge.

The only justification for the introduction of this plaintiff as shown by this order is because the **terms** of a **decree** in the Court of Chancery provided that **the Tygert Company** was the **owner of the fertilizer sold by Ayars & Sons Co. to the defendants** and that they are entitled to the **proceeds of the sale thereof** and that B. S. Ayars & Sons Co. has been held to be a trustee for the J. E. Tygert Company in **collecting the proceeds of said sales**. **No allegation** is made of any **contractural relations** between the **Tygert Company** and the **defendants** and no **allegation** is made which will **warrant a conclusion** that the **defense** or **counter-claim** of the defendants should not be used in the action **to defeat the claim** as well of the J. E. Tygert Co. as of the plaintiff, the B. S. Ayars & Sons Co. or the receivers. The **receivers** of the **B. S. Ayars & Sons Co.** are not **mentioned** or referred to **in this order**.

The **answer** of the **defendants** to this amended pleading appears on page 10 of the case and **particularly sets forth** and insists that the **J. E. Tygert Company** was **unknown to the defendants** in the transactions and claims the **defendants** to be **entitled to the full benefit** of their respective defenses, as well against the J. E. Tygert Company as against the firm of B. S. Ayars & Sons Co., or the receivers as representing the said B. S. Ayars & Sons Co. This answer was in no way denied or replied to by the plaintiffs or either of them.

Is the defense or counter-claim a proper defense to the action?

Section 66 of the act concerning corporations, (Compiled Statutes, Vol. 2, page 1643), provides for the appointment of receivers of insolvent corporations and defines the powers and duties of the receiver and particularly, "In case of mutual dealings between the corporation and any person, to allow just set-offs in favor of such person in all cases in which the same ought to be allowed according to law and equity."

The decisions in our state have amply covered the question as to whether or not a claim for damages can be used as a foundation for a claim against a receiver, not only as a defense to a suit brought by the receiver, but to secure an affirmative judgment against the receiver, on which a dividend could be declared, the same as other claims against the insolvent corporation.

In the case of **Rosenbaum vs. Credit System Co.** (32 Vroom, 61 Law, 543), in which case plaintiff brought suit to recover damages for breach of a contract of agency, this Court, speaking through Chancellor McGill, said:

"Everyone who deals with such a corporation does so in view of the trust fund, its capital, profits and the security that fund is intended to afford. The stockholders who provide the fund invite confidence because of it, that through such confidence their venture may be profitable to them. The mere statement of this situation makes conspicuous the injustice of any course of reasoning which will return to the stockholders their capital before satisfaction of all losses induced by faith in it shall be made." (Ibid, page 548.)

"By the terms of the decree which favors the defendant's charter, the corporation is not dead,

so far as the ascertainment of its obligations and their satisfaction are concerned." (Ibid, page 549.)

In the case of **Spader vs. the Mural Decoration Mfg. Co.**, the Court of Chancery, speaking through Chancellor McGill, in a case in which a claim was filed against a receiver for damages for breach of a contract on the part of the insolvent corporation to pay a salary for a term of years,—

"The general scheme of the act contemplates the ascertainment and payment of all just liabilities. The terms 'creditor' and 'debt' are not used in a narrow, restricted or technical sense. It could hardly have been the intention of the law-makers to distribute the surplus of assets or, in other words, return capital to the stockholders of the company (that is, to those who deliberately venture for gain and pledge their capital for the security of those who were induced to deal with them) and at the same time disregard those who, dealing with those stockholders upon the faith of that security, became justly entitled to damages for breaches of contracts occasioned by an insolvency and suspension that the very capital relied upon was intended to ward off. Such distribution would be the protection of capital against its just liability. The receiver is bound in duty and clothed with power to reach out and take in every conceivable asset due or hereafter to accrue to the corporation. A complete collection of assets is contemplated, and a full and final distribution of them is made possible. Such being the situation, natural justice demands that those who suffer from breaches of contract

should be included in the distribution, even though the breaches and consequent damages follow the insolvency, and I think that it is in consonance with the scope and design of the legislation considered, to give to the statute a broad and liberal interpretation which will admit of that justice being done." (47 N. J. Equity, page 18.)

In the case of **VanWagoner, et al., Receivers of the Peoples' Bank at Paterson, vs. the Paterson Gas Light Co.** (23 N. J. Law, 283), the Court held that the receivers are not regarded as purchasers for a valuable consideration, but as the voluntary assignees and personal representatives of the corporation and that in an action at law by the receivers, the defendant will be permitted under the statute, to prevent frauds by incorporated companies, to avail himself of any just defense, legal or equitable, which he has.

The defendants respectfully insist that the judgments appealed from should be reversed and new trials ordered.

Respectfully submitted,

ALVORD & TUSO,
For Appellants.

